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

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

Date: May 8, 2009

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met in San Francisco on February 2 and 3, 2009, and in Chicago on April 20 and 21, 2009. Draft Minutes of these meetings are attached.

Proposed amendments of Civil Rules 26 and 56 were published for comment in August 2008. The first of three scheduled hearings on these proposals was held through the morning on November 17, before the Committee's November meeting began. The remaining hearings were held on January 14, 2009, following the Standing Committee meeting in San Antonio, and on February 2 in San Francisco.

Four action items are presented in this report. Part I A recommends approval of a recommendation to adopt the amendments to Rule 26, with revisions from the proposal as published. Part I B recommends approval of a recommendation to adopt the amendments to Rule 56, with revisions of the proposal as published. Part I C recommends approval of a recommendation to delete "discharge in bankruptcy" from the list of affirmative defenses in Rule 8(c) as published in August 2007. Part II recommends publishing a revision of Supplemental Rule E(4)(f), deferring publication until a suitable time for publication along with other proposals.

Part III presents for discussion several items that will occupy the Committee in the near future.

I ACTION ITEMS FOR ADOPTION

A. Rule 26: Expert Trial Witnesses

The Committee recommends approval for adoption of the provisions for disclosure and discovery of expert trial witness testimony that were published last August. Small drafting changes are proposed, but the purpose and content carry on.

These proposals divide into two parts. Both stem from the aftermath of extensive changes adopted in 1993 to address disclosure and discovery with respect to trial-witness experts. One part creates a new requirement to disclose a summary of the facts and opinions to be addressed by an expert witness who is not required to provide a disclosure report under Rule 26(a)(2)(B). The other part extends work-product protection to drafts of the new disclosure and also to drafts of 26(a)(2)(B) reports. It also extends work-product protection to communications between attorney and trial-witness expert, but withholds that protection from three categories of communications. The work-product protection does not apply to communications that relate to compensation for the expert's study or testimony; identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

These two parts are described separately. Each applies only to experts who are expected to testify as trial witnesses. No change is made with respect to the provisions that severely limit discovery as to an expert employed only for trial preparation.

New Rule 26(a)(2)(C): Disclosure of "No-Report" Expert Witnesses

The 1993 overhaul of expert witness discovery distinguished between two categories of trial-witness experts. Rule 26(a)(2)(A) requires a party to disclose the identity of any witness it may use to present expert testimony at trial. Rule 26(a)(2)(B) requires that the witness must prepare and sign an extensive written report describing the expected opinions and the basis for them, but only "if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." It was hoped that the report might obviate the need to depose the expert, and in any event would improve conduct of the deposition. To protect these advantages, Rule 26(b)(4)(A) provides that an expert required to provide the report can be deposed "only after the report is provided."

The advantages hoped to be gained from Rule 26(a)(2)(B) reports so impressed several courts that they have ruled that experts not described in Rule 26(a)(2)(B) must provide (a)(2)(B) reports. The problem is that attorneys may find it difficult or impossible to obtain an (a)(2)(B) report from many of these experts, and there may be good reason for an expert's resistance. Common examples of experts in this category include treating physicians and government accident investigators. They are busy people whose careers are devoted to causes other than giving expert testimony. On the other hand, it is useful to have advance notice of the expert's testimony.

Proposed Rule 26(a)(2)(C) balances these competing concerns by requiring that if the expert witness is not required to provide a written report under (a)(2)(B), the (a)(2)(A) disclosure must state the subject matter on which the witness is expected to present evidence under Evidence Rule 702, 703, or 705, and "a summary of the facts and opinions to which the witness is expected to testify." It is intended that the summary of facts include only the facts that support the opinions; if the witness is expected to testify as a "hybrid" witness to other facts, those facts need not be

summarized. The sufficiency of this summary to prepare for deposition and trial has been accepted by practicing lawyers throughout the process of developing the proposal.

As noted below, drafts of the Rule 26(a)(2)(C) disclosure are protected by the work-product provisions of proposed Rule 26(b)(4)(B).

Rule 26(b)(4): Work-Product Protects Drafts and Communications

The Rule 26(a)(2)(B) expert witness report is to include “(ii) the data or other information considered by the witness in forming” the opinions to be expressed. The 1993 Committee Note notes this requirement and continues: “Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions — whether or not ultimately relied upon by the expert — are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.” Whatever may have been intended, this passage has influenced development of a widespread practice permitting discovery of all communications between attorney and expert witness, and of all drafts of the (a)(2)(B) report.

Discovery of attorney-expert communications and of draft disclosure reports can be defended by arguing that judge or jury need to know the extent to which the expert’s opinions have been shaped to accommodate the lawyer’s influence. This position has been advanced by a few practicing lawyers and by many academics during the development of the present proposal to curtail such discovery.

The argument for extending work-product protection to some attorney-expert communications and to all drafts of Rule 26(a)(2) disclosures or reports is profoundly practical. It begins with the shared experience that attempted discovery on these subjects almost never reveals useful information about the development of the expert’s opinions. Draft reports somehow do not exist. Communications with the attorney are conducted in ways that do not yield discoverable events. Despite this experience, most attorneys agree that so long as the attempt is permitted, much time is wasted by making the attempt in expert depositions, reducing the time available for more useful discovery inquiries. Many experienced attorneys recognize the costs and stipulate at the outset that they will not engage in such discovery.

The losses incurred by present discovery practices are not limited to the waste of futile inquiry. The fear of discovery inhibits robust communications between attorney and expert trial witness, jeopardizing the quality of the expert’s opinion. This disadvantage may be offset, when the party can afford it, by retaining consulting experts who, because they will not be offered as trial witnesses, are virtually immune from discovery. A party who cannot afford this expense may be put at a disadvantage.

Proposed Rules 26(a)(4)(B) and (C) address these problems by extending work-product protection to drafts of (a)(2)(B) and (C) disclosures or reports and to many forms of attorney-expert communications. The proposed amendment of Rule 26(a)(2)(B)(ii) complements these provisions by amending the reference to “information” that has supported broad interpretation of the 1993 Committee Note: the expert’s report is to include “the facts or data or other information considered by the witness” in forming the opinions. The proposals rest not on high theory but on the realities of actual experience with present discovery practices. The American Bar Association Litigation Section took an active role in proposing these protections, drawing in part from the success of similar protections adopted in New Jersey. The published proposals drew support from a wide array of organized bar groups, including The American Bar Association, the Council of the ABA Litigation Section, The American Association for Justice, The American College of Trial Lawyers

Federal Rules Committee, the American Institute of Certified Public Accountants, the Association of the Federal Bar of New Jersey Rules Committee, the Defense Research Institute, the Federal Bar Council of the Second Circuit, the Federal Magistrate Judges' Association, the Federation of Defense & Corporate Counsel, the International Association of Defense Council, the Lawyers for Civil Justice, the State Bar of Michigan U.S. Courts Committee, and the United States Department of Justice.

Support for these proposals has been so broad and deep that discussion can focus on just two proposed changes, one made and one not made. Otherwise it suffices to recall the three categories of attorney-expert communications excepted from the work-product protection: those that

- (i) relate to compensation for the expert's study or testimony;
- (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
- (iii) identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

The change made adds a few words to the published text of Rule 26(b)(4)(B):

(B) * * * Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a), regardless of the form in which ~~of~~ the draft is recorded.

The published Committee Note elaborated the “regardless of form” language by stating that protection extends to a draft “whether oral, written, electronic, or otherwise.” Comments and testimony expressed uncertainty as to the meaning of an “oral draft.” The comments and testimony also reflected the drafting dilemma that has confronted this provision from the beginning. Rule 26(b)(3) by itself extends work-product protection only to “documents and tangible things.” Information that does not qualify as a document or tangible thing is remitted to the common-law work-product protection stemming from *Hickman v. Taylor*. As amended to reflect discovery of electronically stored information, moreover, Rule 34(a)(1) may be ambiguous on the question whether electronically stored information qualifies as a “document” in a rule — such as Rule 26(b)(3) — that does not also refer to electronically stored information. Responding to these concerns, the Discovery Subcommittee recommended that the “regardless of form” language be deleted, substituting “protect written or electronic drafts” of the report or disclosure. Lengthy discussion by the Committee, however, concluded that it is better to retain the open-ended “regardless of form” formula, but also to emphasize the requirement that the draft be “recorded.” The Committee Note has been changed accordingly.

The change not made would have expanded the range of experts included in the protection for communications with the attorney. The invitation for comment pointed out that proposed Rule 26(b)(4)(C) protects communications only when the expert is required to provide a disclosure report under Rule 26(a)(2)(B). Communications with an expert who is not required to give a report fall outside this protection. (The Committee Note observes that Rule 26(b)(4)(C) “does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.”) The invitation asked whether the protection should be extended further. Responding to this invitation, several comments suggested that the rule text either should protect attorney communications with any expert witness disclosed under Rule 26(a)(2)(A), or — and this was the dominant mode — should protect attorney communications with an expert who is an employee of a party whose duties do not regularly involve giving expert testimony. These comments argued that communications with these employee experts involve the same problems as communications with other experts.

Both the Subcommittee and the Committee concluded that the time has not come to extend the protection for attorney-expert communications beyond experts required to give an (a)(2)(B) report. The potential need for such protection was not raised in the extensive discussions and meetings held before the invitation for public comment on this question. There are reasonable grounds to believe that broad discovery may be appropriate as to some “no-report” experts, such as treating physicians who are readily available to one side but not the other. Drafting an extension that applies only to expert employees of a party might be tricky, and might seem to favor parties large enough to have on the regular payroll experts qualified to give testimony. Still more troubling, employee experts often will also be “fact” witnesses by virtue of involvement in the events giving rise to the litigation. An employee expert, for example, may have participated in designing the product now claimed to embody a design defect. Discovery limited to attorney-expert communications falling within the enumerated exceptions might not be adequate to show the ways in which the expert’s fact testimony may have been influenced.

Three aspects of the Committee Note deserve attention. An explicit but carefully limited sentence has been added to state that these discovery changes “do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc.* * * *.” The next-to-last paragraph, which expressed an expectation that “the same limitations will ordinarily be honored at trial,” has been deleted as the result of discussions in the Advisory Committee, in this Committee, and with the Evidence Rules Committee. And the Note has been significantly compressed without sacrificing its utility in directing future application of the new rules.

17 duties as the party's employee regularly
18 involve giving expert testimony. The report
19 must contain:

- 20 **(i)** a complete statement of all opinions the
21 witness will express and the basis and
22 reasons for them;
- 23 **(ii)** the facts or data considered by the
24 witness in forming them;
- 25 **(iii)** any exhibits that will be used to
26 summarize or support them;
- 27 **(iv)** the witness's qualifications, including a
28 list of all publications authored in the
29 previous 10 years;
- 30 **(v)** a list of all other cases in which, during
31 the previous 4 years, the witness
32 testified as an expert at trial or by
33 deposition; and
- 34 **(vi)** a statement of the compensation to be
35 paid for the study and testimony in the
36 case.

- 37 **(C) *Witnesses Who Do Not Provide a Written***
38 ***Report.*** Unless otherwise stipulated or
39 ordered by the court, if the witness is not
40 required to provide a written report, this
41 disclosure must state:
- 42 **(i)** the subject matter on which the witness
43 is expected to present evidence under
44 Federal Rule of Evidence 702, 703, or
45 705; and
 - 46 **(ii)** a summary of the facts and opinions to
47 which the witness is expected to testify.
- 48 **(D) *Time to Disclose Expert Testimony.*** A party
49 must make these disclosures at the times and
50 in the sequence that the court orders. Absent
51 a stipulation or a court order, the disclosures
52 must be made:
- 53 **(i)** at least 90 days before the date set for
54 trial or for the case to be ready for trial;
55 or

56 (ii) if evidence is intended solely to
57 contradict or rebut evidence on the
58 same subject matter identified by
59 another party under Rule 26(a)(2)(B) or
60 (C), within 30 days after the other
61 party's disclosure.

62 (E) *Supplementing the Disclosure.* The parties
63 must supplement these disclosures when
64 required under Rule 26(e).

65 * * * * *

66 (b) **Discovery Scope and Limits.**

67 * * * * *

68 (4) **Trial Preparation: Experts.**

69 (A) *Deposition of an Expert Who May Testify.*
70 A party may depose any person who has been
71 identified as an expert whose opinions may
72 be presented at trial. If Rule 26(a)(2)(B)
73 requires a report from the expert, the
74 deposition may be conducted only after the
75 report is provided.

- 76 **(B) *Trial-Preparation Protection for Draft***
77 ***Reports or Disclosures.*** Rules 26(b)(3)(A)
78 and (B) protect drafts of any report or
79 disclosure required under Rule 26(a)(2),
80 regardless of the form in which the draft is
81 recorded.
- 82 **(C) *Trial-Preparation Protection for***
83 ***Communications Between a Party’s***
84 ***Attorney and Expert Witnesses.*** Rules
85 26(b)(3)(A) and (B) protect communications
86 between the party’s attorney and any witness
87 required to provide a report under Rule
88 26(a)(2)(B), regardless of the form of the
89 communications, except to the extent that the
90 communications:
91 **(i)** relate to compensation for the expert’s
92 study or testimony;
93 **(ii)** identify facts or data that the party’s
94 attorney provided and that the expert

- 115 **(E) *Payment.*** Unless manifest injustice would
116 result, the court must require that the party
117 seeking discovery:
- 118 **(i)** pay the expert a reasonable fee for time
119 spent in responding to discovery under
120 Rule 26(b)(4)(A) or (D); and
- 121 **(ii)** for discovery under (D), also pay the
122 other party a fair portion of the fees and
123 expenses it reasonably incurred in
124 obtaining the expert’s facts and
125 opinions.
- 126 * * * * *

COMMITTEE NOTE

Rule 26. Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than “data or other information,” as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and — with three specific exceptions — communications between expert witnesses and counsel. ~~Together, these changes provide broadened disclosure regarding some expert testimony and require justifications for disclosure and discovery that have proven counterproductive.~~

~~The rules first addressed discovery as to trial-witness experts when Rule 26(b)(4) was added in 1970, permitting an interrogatory about expert testimony. In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including — for many experts — an extensive report. Influenced by the Committee Note to Rule 26(a)(2), mMany courts read the disclosure provision for disclosure in the report of “data or other information considered by the expert in forming the opinions” to authorize call for disclosure or discovery of all communications between counsel and expert witnesses and all draft reports. The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts — one for purposes of consultation and another to testify at trial — because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses, often called “core” or “opinion” work product. The cost of retaining a second set of experts gives an advantage to those litigants who can afford this practice over those who cannot. At the same time, attorneys often feel compelled to adopt an excessively guarded attitude toward their interaction with testifying experts that impedes effective communication, and: eExperts might adopt strategies that protect against discovery but also interfere with their effective work; such as not taking any notes, never preparing draft reports, or using sophisticated software to scrub their computers’ memories of all remnants of such drafts. In some instances, outstanding potential expert witnesses may simply refuse to be involved because they would have to operate under these constraints.~~

~~Rule 26(a)(2)(B) is amended to specify that disclosure is only required regarding “facts or data” considered by the expert witness, deleting the “or other information” phrase that has caused difficulties. Rule 26(a)(2)(C) is added to mandate disclosures regarding testimony of expert witnesses not required to provide expert reports. Rule 26(b)(4) is amended to provide work-product protection for draft reports and attorney-expert communications, although this protection does not extend to communications about three specified topics.~~

Rule 26(a)(2)(B). Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all “facts or data considered by the witness in forming” the opinions to be offered, rather than the “data or other information” disclosure prescribed in 1993. This amendment to ~~Rule 26(a)(2)(B)~~ is intended to alter the outcome in cases that have relied on the 1993 formulation ~~in as one ground for~~ requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.

The refocus of disclosure on “facts or data” is meant to limit the disclosure requirement to material of a factual nature by excluding; ~~as opposed to~~ theories or mental impressions of counsel. At the same time, the intention is that “facts or data” be interpreted broadly to require disclosure of any material considered received by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data “considered” by the expert in forming the opinions to be expressed, not only those relied upon by the expert.

Rule 26(a)(2)(C). Rule 26(a)(2)(C) is added to mandate summary disclosures of regarding the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions. ~~It requires disclosure of information that could have been obtained by a simple interrogatory under the 1970 rule, but now depends on more cumbersome discovery methods. This disclosure will enable parties to determine whether to take depositions of these witnesses, and to prepare to question them in deposition or at trial. It is considerably less extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.~~

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B). ~~Reasoning that having a report before the deposition or trial testimony of all~~

expert witnesses is desirable. *See Minnesota Min. & Manuf. Co. v. Signtech USA, Ltd.*, 177 F.R.D. 459, 461 (D. Minn. 1998) (requiring written reports from employee experts who do not regularly provide expert testimony on the theory that doing so is “consistent with the spirit of Rule 26(a)(2)(B)” because it would eliminate the element of surprise); *compare Duluth Lighthouse for the Blind v. C.B. Bretting Manuf. Co.*, 199 F.R.D. 320, 325 (D. Minn. 2000) (declining to impose a report requirement because “we are not empowered to modify the plain language of the Federal Rules so as to secure a result we think is correct”). With the addition of Rule 26(a)(2)(C) disclosure for expert witnesses exempted from the report requirement, courts should no longer be tempted to overlook Rule 26(a)(2)(B)’s limitations on the full report requirement.

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)(2)(A) and provide the disclosure required under Rule 26(a)(2)(C) with regard to their expert opinions. This The (a)(2)(C) disclosure obligation does not include facts unrelated to the expert opinions the witness will present.

Rule 26(a)(2)(D). This provision (formerly Rule 26(a)(2)(C)) is amended slightly to specify that the time limits for disclosure of contradictory or rebuttal evidence apply with regard to disclosures under new Rule 26(a)(2)(C), just as they do with regard to reports under Rule 26(a)(2)(B).

Rule 26(b)(4). Rule 26(b)(4)(B) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form in which of the draft is recorded, whether oral, written, electronic, or otherwise. It also applies to drafts of any supplementation under Rule 26(e); *see* Rule 26(a)(2)(E).

Rule 26(b)(4)(C) is added to provide ~~comparable~~ work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery routine ~~wholesale discovery~~. The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any "preliminary" expert opinions. Protected "communications" include those between the party's attorney and assistants of the expert witness. The rule ~~does not itself protect~~ provides no protection for communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). ~~The rule~~ It does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

The most frequent method for discovering the work of expert witnesses is by deposition, but Rules 26(b)(4)(B) and (C) apply to all discovery regarding the work of expert witnesses. ~~The most frequent method is by deposition of the expert, as authorized by Rule 26(b)(4)(A), but the protections of (B) and (C) apply to all forms of discovery.~~

Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed. These discovery changes therefore do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and related cases.

The protection for communications between the retained expert and “the party’s attorney” should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, ~~it may happen that~~ a party may be is involved in a number of suits about a given product or service, and may retain that a particular expert witness ~~to will~~ testify on that party’s behalf in several of the cases. In such a situation, ~~the a court should recognize that this~~ protection applies to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the “party’s attorney” concept.

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.

First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert’s study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result ~~in of~~ the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert ~~the expert witness personally or by another person associated with the expert in providing study or testimony in relation to the action.~~ Compensation paid to an organization affiliated with the expert is included as compensation

for the expert's study or testimony. The objective is to permit full inquiry into such potential sources of bias.

Second, ~~consistent with Rule 26(a)(2)(B)(ii),~~ under Rule 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed. ~~In applying this exception, courts should recognize that the word "considered" is a broad one, but this exception is limited to those facts or data that bear on the opinions the expert will be expressing, not all facts or data that may have been discussed by the expert and counsel. And t~~The exception applies only to communications "identifying" the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party's attorney may tell the expert ~~witness to assume the truth of that certain testimony or evidence is true, or the correctness of another expert's conclusions that certain facts are true, for purposes of forming the opinions they will express. Similarly, counsel may direct the expert witness to assume that the conclusions of another expert are correct in forming opinions to be expressed.~~ This exception is limited to those assumptions that the expert actually did rely upon in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.

~~Under t~~The amended rule, ~~does not absolutely prohibit discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures. But such discovery is permitted regarding attorney-expert communications or draft reports only in limited circumstances and by court order. A party seeking No such discovery must may be obtained unless the party seeking it can make the showing specified in Rule 26(b)(3)(A)(ii) — that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be~~

able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. A party's failure to provide required disclosure or discovery does not show the need and hardship required by Rule 26(b)(3)(A); remedies are provided by Rule 37. ~~A contention that required disclosure or discovery has not been provided is not a ground for broaching the protection provided by Rule 26(b)(4)(B) or (C), although it may provide grounds for a motion under Rule 37(a).~~

In the rare case in which a party does make this a showing of ~~such a substantial need for further discovery and undue hardship~~, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection does not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial.

~~Rules 26(b)(4)(B) and (C) focus only on discovery. But because they are designed to protect the lawyer's work product, and in light of the manifold disclosure and discovery opportunities available for challenging the testimony of adverse expert witnesses, it is expected that the same limitations will ordinarily be honored at trial. Cf. *United States v. Nobles*, 422 U.S. 225, 238-39 (1975) (work-product protection applies at trial as well as during pretrial discovery).~~

Former Rules 26(b)(4)(B) and (C) have been renumbered (D) and (E), and a slight revision has been made in (E) to take account of the renumbering of former (B).

B. Rule 56

The Advisory Committee recommends approval for adoption, with changes, of the proposal to revise Rule 56 that was published last August. This proposal has been considered extensively by this Committee in January and June 2008 and again in January 2009. As requested by this Committee, the invitation for public comment was more detailed than the usual invitation. Pointed questions were addressed not only to broad aspects of the proposal but also to fine details. This strategy worked well. The written comments and testimony at three hearings were sharply focused and responded well to the questions that had been presented. Substantial changes were made in response to this complex and often conflicting advice. The result is a leaner and stronger summary-judgment procedure. Everything that remains in the proposed rule was included in the published proposal. Everything that was deleted or modified was addressed by the invitation for comments. The Advisory Committee agreed unanimously that there is no need to republish the proposal for another round of comments addressed to the issues that were so successfully raised and addressed in the first round.

The two issues that figured most prominently in the comments and testimony will be discussed first. The first is restoration of “shall,” replacing the Style Project’s “should” as the direction to grant summary judgment when there is no genuine dispute as to any material fact. The second is deletion of the “point-counterpoint” procedure that figured prominently in subdivision (c). Other significant changes will be discussed by summarizing each subdivision.

“Shall” Restored

The conventions adopted by the Style Project prohibited any use of “shall” because it is inherently ambiguous. The permitted alternatives were “must,” “should,” and — although infrequently — “may.” Faced with these choices, the Style Project adopted “should.” The Committee Note cited a Supreme Court decision and a well-known treatise for the proposition that “should” better reflects the trial court’s seldom-exercised discretion to deny summary judgment even when there is no genuine dispute as to any material fact and the movant seems entitled to judgment as a matter of law. This change drew virtually no reaction during the extended comment period provided for the Style Project. But it drew extensive comment during the present project.

Studying these comments persuaded the Committee that “shall” must be restored as a matter of substance. From the beginning and throughout, the Rule 56 project was shaped by the premise that it would be a mistake to attempt to revise the summary-judgment standard that has evolved through case-law interpretations. There is a great risk — indeed a virtual certainty — that adoption of either “must” or “should” will gradually cause the summary-judgment standard to evolve in directions different from those that have been charted under the “shall” direction. The Style Project convention must yield here, even if nowhere else in any of the Enabling Act rules.

The divisions between the comments favoring “should” and those favoring “must” are described at length in the summary of comments and testimony. The comments favoring “must” rely at times on the language of opinions and on the Rule 56 standard that summary judgment is

directed when the movant is “entitled” to judgment as a matter of law. More functionally, they emphasize the importance of summary judgment as a protection against the burdens imposed by unnecessary trial, and also against the shift of settlement bargaining that follows denial of summary judgment. The comments favoring “should” focus on decisions that recognize discretion to deny summary judgment even when there appears to be no genuine dispute as to any material fact. They also focus on the functional observation that a trial-court judge may have good grounds for suspecting that a trial will test the evidence in ways not possible on a paper record, showing there is, after all, a genuine dispute. And trial-court judges point out that a trial may consume much less court time than would be needed to determine whether summary judgment can be granted — time that is pure waste if summary judgment is denied, or if it is granted and then reversed on appeal. Still more elaborate arguments also have been advanced for continuing with “should.”

Faced with these comments, and an extensive study of case law undertaken by Andrea Kuperman, the Committee became convinced that neither “must” nor “should” is acceptable. Either substitute for “shall” will redirect the summary-judgment standard from the course that has developed under “shall.” Restoring “shall” is consistent with two strategies often followed during the Style Project. The objection to “shall” is that it is inherently ambiguous. But time and again ambiguous expressions were deliberately carried forward in the Style Project precisely because substitution of a clear statement threatened to work a change in substantive meaning. And time and again the Style Project accepted “sacred phrases,” no matter how antique they might seem. The flood of comments, and the case law they invoke, demonstrate that “shall” had become too sacred to be sacrificed.

The proposed Committee Note includes a relatively brief explanation of the reasons for restoring “shall,” including quotations from Supreme Court opinions that seem to look in different directions.

“Point-Counterpoint” Eliminated

The published proposal included as subdivision (c)(2) a detailed provision establishing a 3-part procedure for a summary-judgment motion. The movant must file a motion identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought; a separate statement of material facts identified in separately numbered paragraphs; and a brief. This was the “point.” The opposing party must file a correspondingly numbered response to each fact, and might identify additional material facts. This was the initial “counterpoint.” The movant then could reply to any additional fact stated by the nonmovant. There was no provision for a surreply by the nonmovant. This procedure was based on local rules in some 20 districts, and was closely modeled on similar provisions in the proposed Rule 56 recommended by this Committee to the Judicial Conference in 1992.

The Committee, after considering the public comments and testimony, has concluded that although the point-counterpoint procedure is worthy, and often works well, the time has not come to mandate it as a presumptively uniform procedure for most cases. The comments and testimony

showed the perils of misuse and suggested that there is less desire for national uniformity than might have been expected.

This part of the proposal provoked a near avalanche of comments. Many comments were favorable, urging that a point-counterpoint procedure focuses the parties and the motion in a disciplined and helpful way. But many of the comments were adverse. Perhaps the most negative comments from practicing lawyers came from those who represent plaintiffs in employment-discrimination cases. They protested that time and again the point-counterpoint procedure fractures consideration of the case, focusing only on “undisputed” “historic” “facts” that are the subject of direct testimony, diverting attention from the need to consider the inferences that a jury might draw from both undisputed facts and disputed facts. Defendants, moreover, have taken to stating hundreds of facts even in simple cases. A plaintiff is hard-put to undertake the work of responding to so many facts, most of them irrelevant and many of them simply wrong. In addition, they protested that Rule 56 procedure stands trial procedure upside-down. At trial the plaintiff opens and closes. On summary judgment the defendant opens and — if there is no opportunity to surreply — also closes. Some complained that defendant employers seem to deliberately manipulate this inversion, making a motion in vague general terms and withholding a clear articulation of their positions until a reply, without the right to file a surreply without leave of court.

Beyond the division in the trial bar, comments came from an unusually high number of district judges. Most of these comments urged that even if the point-counterpoint procedure works well in some cases, and even if it works well in most cases in some districts, the time has not come to adopt it as a presumptively uniform national procedure, even if coupled with permission to opt out by order in any specific case. These comments were backed by extensive experience both with motions presented by point-counterpoint procedure and with motions presented in other forms.

Individual judges with experience in both procedures included two judges from Alaska, which does not have a point-counterpoint procedure, who for many years have accepted regular and hefty assignments of cases in Arizona, which does have a point-counterpoint procedure. Judges John W. Sedwick and H. Russel Holland reported that the point-counterpoint procedure takes longer and is less satisfactory than their own procedure. The District Judges in Arizona have been so impressed by this testimony that they are reconsidering their own procedure.

Courts that have had and abandoned point-counterpoint local rules provide a broader-based perspective. Two illustrations suffice. Judge Claudia Wilken explored the experience in the Northern District of California. See 08-CV-090, and the summary of testimony on February 2. California state courts adopted a point-counterpoint procedure in 1984. From 1988 to 2002 the Northern District had a parallel local rule. The rule was abandoned. It made more work and required more time to decide a motion. It was inefficient and created extra expense. The facts set out in the separate statements were repeated in the supporting memoranda; the separate statements “were supernumerary, lengthy, and formalistic.” Responses often included “objections,” and often included statements of purportedly undisputed facts that were repeated in the supporting memoranda. The objections often were no more than semantic disputes. And matters became really complicated in the face of cross-motions. “[T]he statement of undisputed material facts is a format

that particularly lends itself to abuse by the game-playing attorneys and by the less competent attorneys.” In addition, this format does not lend itself to coherent consideration of fact inferences. Narrative statements are better. “You need to know facts that are not material to understand what happened.”

Judge David Hamilton recounted the experience in the Southern District of Indiana, which had a point-counterpoint local rule from 1998 to 2002. See 08-CV-142, and the summary of testimony on February 2. Motions often asserted hundreds of facts, and “became the focus of lengthy debates over relevance and admissibility.” There was an exponential increase in motions to strike. The separate documents “provided a new arena for unnecessary controversy. We began seeing huge, unwieldy and especially expensive presentations of many hundreds of factual assertions with paragraphs of debate about each one of these.” In one case with a routine motion “the defendant tried to dispute 582 of the plaintiff’s 675 assertions of undisputed material facts.” But the system can work if the statement of undisputed facts is required as part of the brief; the page limits on briefs force appropriate concision and focus. It remains possible to deal with fact inference in this setting, to establish “a convincing mosaic of circumstantial evidence,” by a response that says “See my whole brief. It’s all my evidence. It’s circumstantial.”

The recommendation to abandon the point-counterpoint procedure simplifies proposed subdivision (c). As a matter of drafting, it eliminates the need to refer to “motion, response, and reply.” It facilitates reorganization of the remaining subdivisions. More importantly, it averts any need to determine whether a right to surreply should be added. The arguments in favor of a surreply seem compelling, but a right to surreply could easily degenerate to a proliferation of useless papers in many cases.

Abandoning the point-counterpoint procedure does not mean abandoning the “pinpoint” citation requirement published as proposed subdivision (c)(4)(A) and now promoted to become subdivision (c)(1)(A). The requirement of specific record citations is so elemental that a reminder might seem unnecessary. Regular experience shows that the reminder is in fact useful.

Subdivision (a)

Identifying claim or defense: As published, proposed subdivision (c)(2)(A)(i) required that the motion identify each claim or defense — or the part of each claim or defense — on which summary judgment is sought. This encouragement to clarity has been incorporated in subdivision (a).

“Shall”: The decision to restore “shall” is explained above.

“If the movant shows”: From the beginning in 1938, Rule 56 has directed that summary judgment be granted if the summary-judgment materials “show” there is no genuine issue of material fact. “Show” is carried forward for continuity, and because it serves as an important reminder of the Supreme Court’s statement in the *Celotex* opinion that a party who does not have the burden of production at trial can win summary judgment by “showing” that the nonmovant does not have evidence to carry the burden.

Stating reasons to grant or deny: The public comments addressed matters that were considered in framing the published proposal. No change seems indicated.

Subdivision (b)

Time to respond and reply: As published, subdivision (b) included times to respond and to reply. The Committee recommends that these provisions be deleted. Elimination of the point-counterpoint procedure from subdivision (c) leaves the proposed rule without any formal identification of response or reply. It would be possible nonetheless to carry forward the times to respond or reply. The concepts seem easily understood. But the decision to honor local autonomy on the underlying procedure suggests that the national rule should not suggest presumptive time limits. The published proposal recognized that different times could be set by local rule. Whatever measure of uniformity might result from default of local rules — or adoption of the national rule times in local rules — seems relatively unimportant.

The Committee considered at length the particular concern arising from the decision in the Time Project to incorporate the proposed times to respond and reply in Rule 56 as the Supreme Court transmitted it Congress last March. It may seem awkward to adopt time provisions in 2009 and then abandon them in a rule proposed to take effect in 2010. This concern was overcome by deeper considerations. It seems likely that the proposed Rule 56, if adopted, will not be considered for amendment any time soon. It is better to adopt the best rule that can be devised. And the appearance of abrupt about-face is not likely to stir uneasiness about the process. The time provisions in the 2009 Time Project version are set out in Rule 56(a) and (c). The 2010 rule is completely rewritten, with the only time provision in Rule 56(b). The appearance is not so much one of indecisiveness as one of complete overhaul into a new organic whole.

The published proposal set times “[u]nless a different time is set by local rule or the court orders otherwise in the case.” The emphasis on a case-specific order was designed to emphasize the intention that general standing orders should not be used. “[I]n the case” has been removed at the suggestion of the Style Consultant, Professor Kimble, who observes that use of this phrase in one rule may generate confusion in all the other rules that refer to court orders without limitation. The risk posed by a general standing order setting a different time is alleviated by Rule 83(b), which prohibits any sanction or other disadvantage for noncompliance with any requirement not in the Civil Rules or a local rule “unless the alleged violator has been furnished in the particular case with actual notice of the requirement.”

Subdivision (c)

Point-Counterpoint: The major change in subdivision (c) is elimination of the point-counterpoint provisions of (c)(2), as explained above. The other subdivisions have been rearranged to reflect this change. No comment objected to this provision, and many judges specifically supported it.

“Pinpoint” citations: The Committee readily concluded that deletion of the point-counterpoint provisions does not detract from the utility of requiring citations to the parts of the record that support summary-judgment positions. This provision has been moved to the front of the subdivision, becoming (c)(1). Paragraph (1) also carries forward the provisions recognizing that a party can respond that another party’s record citations do not establish its positions, and recognizing the Celotex “no-evidence” motion.

Admissibility of supporting evidence: As published, proposed subdivision (c)(5) recognized the right to assert that material cited to support or dispute a fact “is not admissible in evidence.” This provision has become subdivision (c)(2), and is modified to recognize an assertion that the material “cannot be presented in a form that would be admissible in evidence.” The change makes this provision parallel to proposed subdivision (c)(4), which carries forward from present Rule 56(e)(1) the requirement that an affidavit set out facts that would be admissible in evidence. More importantly, the change reflects the fact that summary judgment may be sought and opposed by presenting materials that are not themselves admissible in evidence. The most familiar examples are affidavits or declarations, and depositions that may not be admissible at trial.

Materials not cited: As published, the proposal provided that the court need consider only materials called to its attention by the parties, but recognized that the court may consider other materials in the record. Notice under proposed Rule 56(f) was required before granting summary judgment on the basis of materials not cited by the parties, but not before denying summary judgment on the basis of such materials. This provision, published as subdivision (c)(4)(B) and carried forward as (c)(3), has been revised to delete the notice requirement. Some of the comments had urged that notice should be required before either granting or denying summary judgment on the basis of record materials not cited by the parties. Consideration of these comments led to the conclusion that there are circumstances in which it is proper to grant summary judgment without additional notice. A party, for example, may file a complete deposition transcript and cite only to part of it. The uncited parts may justify summary judgment. Notice is required under subdivision (f), however, if the court acts to grant summary judgment on “grounds” not raised by the parties.

Accept for purposes of motion only: Subdivision (c)(3) of the published proposal provided that “A party may accept or dispute a fact either generally or for purposes of the motion only.” This provision is withdrawn. It was added primarily out of concern for early reports that point-counterpoint procedure may elicit inappropriately long statements of undisputed facts. A party facing such a statement might conclude that many of the stated facts are not material and that it is more efficient and less expensive simply to accept them for purposes of the motion rather than undertake the labor of attacking the materials said to support the facts and combing the record for counterpoint citations. Elimination of the point-counterpoint proposal removes the primary reason for including this provision. The provision, moreover, creates a tension with subdivision (g). Subdivision (g) provides that if the court does not grant all the relief requested by the motion, it may order that a material fact is not genuinely disputed and is established in the case. Several comments expressed fear that no matter how carefully hedged, an acceptance for purposes of the motion might become the basis for an order that there is no genuine dispute as to a fact accepted “for purposes of the motion.” The advantages of recognizing in rule text the value of accepting a fact for purposes

of the motion only do not seem equal to the difficulties of drafting to meet this risk. The Committee Note to Subdivision (g) addresses the issue.

Affidavits or declarations: Proposed subdivision (c)(4) carries forward from present Rule 56(e)(1), with only minor drafting changes. It did not provoke any public comment.

Subdivision (d)

Subdivision (d) addresses the situation of a nonmovant who cannot present facts essential to justify its opposition. It carries forward present Rule 56(f) with only minor changes. A few comments urged that explicit provision should be made for an alternative response: “Summary judgment should be denied on the present record, but if the court would grant summary judgment I should be allowed time to obtain affidavits or declarations or to take discovery.” This suggestion was rejected for reasons summarized in one pithy response: “No one wants seriatim Rule 56 motions.” The Committee Note addresses a related problem by noting that a party who moves for relief under Rule 56(d) may seek an order deferring the time to respond to the motion.

Subdivision (e)

Subdivision (e) was published in a form integrated with the point-counterpoint procedure. It has been revised to reflect withdrawal of the point-counterpoint procedure. It fits with courts that adopt point-counterpoint procedure on their own, particularly by recognizing the power to “consider [a] fact undisputed for purposes of the motion.” This power corresponds to local rules that a fact may be “deemed admitted” if there is no proper response. But paragraph (3) emphasizes that summary judgment cannot be granted merely because of procedural default — the court must be satisfied that the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to judgment. Subdivision (e) also fits with procedures that do not include point-counterpoint. In its revised form, it also applies to a defective motion, recognizing authority to afford an opportunity to properly support a fact or to issue another appropriate order that may include denying the motion.

Subdivision (f)

Subdivision (f) expresses authority to grant summary judgment outside a motion for summary judgment. It reflects procedures that have developed in the decisions without any explicit anchor in the text of present Rule 56. After giving notice and a reasonable opportunity to respond, the court may grant summary judgment for a nonmovant, grant the motion on grounds not raised by the parties, or consider summary judgment on its own. The proposal drew relatively few comments.

As published, subdivision (f) required notice and a reasonable opportunity to respond before a court can deny summary judgment on a ground not raised by the parties. This provision caused second thoughts in the Committee. The Committee concluded that notice should not be required before denying a motion on what might be termed “procedural” grounds — the motion is filed after the time set by rule or scheduling order, the motion is “ridiculously overlong,” and the like. It does

not seem feasible to draft a clear distinction that would require notice before denying a motion on “merits” grounds not raised by the parties and denying a motion on “procedural” grounds not raised by the parties. The Committee proposes that subdivision (f) be revised by deleting “deny” from paragraph (2): “(2) grant ~~or deny~~ the motion on grounds not raised by the parties * * *.”

Subdivision (g)

Subdivision (g) carries forward present Rule 56(d), providing in clearer terms that if the court does not grant all the relief requested by the motion it may enter an order stating that any material fact is not genuinely in dispute and treating the fact as established in the case. It drew few comments. The Committee recommends it for adoption as published.

The Committee Note has been amended to address the concern that a party who accepts a fact for purposes of the motion only should not fear that this limited acceptance will support a subdivision (g) order that the fact is not genuinely disputed and is established in the case.

Subdivision (h)

Subdivision (h) carries forward present Rule 56(g)’s sanctions for submitting affidavits or declarations in bad faith. As published it made two changes — it made sanctions discretionary, not mandatory, and it required notice and a reasonable time to respond. It is recommended for adoption with one change, the addition of words recognizing authority to impose other appropriate sanctions in addition to expenses and attorney fees or contempt.

Several comments suggested that subdivision (h) be expanded to establish cost-shifting when a motion or response is objectively unreasonable. The standard would go beyond Rule 11 standards. The Committee concluded that cost-shifting should not be adopted.

Rule 56: Clean Draft

**PROPOSED AMENDMENT TO THE FEDERAL
RULES OF CIVIL PROCEDURE**

Rule 56. Summary Judgment

- 1 **(a) Motion for Summary Judgment or Partial Summary**
2 **Judgment.** A party may move for summary judgment,
3 identifying each claim or defense — or the part of each
4 claim or defense — on which summary judgment is
5 sought. The court shall grant summary judgment if the
6 movant shows that there is no genuine dispute as to any
7 material fact and the movant is entitled to judgment as
8 a matter of law. The court should state on the record the
9 reasons for granting or denying the motion.
- 10 **(b) Time to File a Motion.** Unless a different time is set by
11 local rule or the court orders otherwise, a party may file
12 a motion for summary judgment at any time until 30
13 days after the close of all discovery.
- 14 **(c) Procedures.**

- 15 (1) ***Supporting Factual Positions.*** A party asserting
16 that a fact cannot be or is genuinely disputed must
17 support the assertion by:
- 18 (A) citing to particular parts of materials in the
19 record, including depositions, documents,
20 electronically stored information, affidavits
21 or declarations, stipulations (including those
22 made for purposes of the motion only),
23 admissions, interrogatory answers, or other
24 materials; or
- 25 (B) showing that the materials cited do not
26 establish the absence or presence of a
27 genuine dispute, or that an adverse party
28 cannot produce admissible evidence to
29 support the fact.
- 30 (2) ***Asserting That a Fact Is Not Supported by***
31 ***Admissible Evidence.*** A party may assert that the
32 material cited to support or dispute a fact cannot be

33 presented in a form that would be admissible in evidence.

34 (3) *Materials Not Cited.* The court need consider only
35 the cited materials, but it may consider other
36 materials in the record.

37 (4) *Affidavits or Declarations.* An affidavit or
38 declaration used to support or oppose a motion
39 must be made on personal knowledge, set out facts
40 that would be admissible in evidence, and show
41 that the affiant or declarant is competent to testify
42 on the matters stated.

43 (d) **When Facts Are Unavailable to the Nonmovant.** If a
44 nonmovant shows by affidavit or declaration that, for
45 specified reasons, it cannot present facts essential to
46 justify its opposition, the court may:

- 47 (1) defer considering the motion or deny it;
48 (2) allow time to obtain affidavits or declarations or to
49 take discovery; or
50 (3) issue any other appropriate order.

- 51 **(e) Failing to Properly Support or Address a Fact.** If a
52 party fails to properly support an assertion of fact or
53 fails to properly address another party’s assertion of fact
54 as required by Rule 56(c), the court may:
- 55 **(1)** give an opportunity to properly support or address
56 the fact;
- 57 **(2)** consider the fact undisputed for purposes of the
58 motion;
- 59 **(3)** grant summary judgment if the motion and
60 supporting materials — including the facts
61 considered undisputed — show that the movant is
62 entitled to it; or
- 63 **(4)** issue any other appropriate order.
- 64 **(f) Judgment Independent of the Motion.** After
65 giving notice and a reasonable time to respond, the
66 court may:
- 67 **(1)** grant summary judgment for a nonmovant;
- 68 **(2)** grant the motion on grounds not raised by a party;
- 69 or

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

73 (g) **Failing to Grant All the Requested Relief.** If the court
74 does not grant all the relief requested by the motion, it
75 may enter an order stating any material fact — including
76 an item of damages or other relief — that is not
77 genuinely in dispute and treating the fact as established
78 in the case.

79 (h) **Affidavit or Declaration Submitted in Bad Faith.** If
80 satisfied that an affidavit or declaration under this rule
81 is submitted in bad faith or solely for delay, the court —
82 after notice and a reasonable time to respond — may
83 order the submitting party to pay the other party the
84 reasonable expenses, including attorney’s fees, it
85 incurred as a result. An offending party or attorney may
86 also be held in contempt or subjected to other
87 appropriate sanctions.

COMMITTEE NOTE

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

Subdivision (a). Subdivision (a) carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word — genuine “issue” becomes genuine “dispute.” “Dispute” better reflects the focus of a summary-judgment determination. As explained below, “shall” also is restored to the place it held from 1938 to 2007.

The first sentence is added to make clear at the beginning that summary judgment may be requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense. The subdivision caption adopts the common phrase “partial summary judgment” to describe disposition of less than the whole action, whether or not the order grants all the relief requested by the motion.

“Shall” is restored to express the direction to grant summary judgment. The word “shall” in Rule 56 acquired significance over many decades of use. Rule 56 was amended in 2007 to replace “shall” with “should” as part of the Style Project, acting under a convention that prohibited any use of “shall.” Comments on proposals to amend Rule 56, as published in 2008, have shown that neither of the choices available under the Style Project conventions — “must” or “should” — is suitable in light of the case law on

whether a district court has discretion to deny summary judgment when there appears to be no genuine dispute as to any material fact. Compare *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (“Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case in which there is reason to believe that the better course would be to proceed to a full trial. *Kennedy v. Silas Mason Co.*, 334 U.S. 249 * * * (1948).” with *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (“In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”). Eliminating “shall” created an unacceptable risk of changing the summary-judgment standard. Restoring “shall” avoids the unintended consequences of any other word.

Subdivision (a) also adds a new direction that the court should state on the record the reasons for granting or denying the motion. Most courts recognize this practice. Among other advantages, a statement of reasons can facilitate an appeal or subsequent trial-court proceedings. It is particularly important to state the reasons for granting summary judgment. The form and detail of the statement of reasons are left to the court’s discretion.

The statement on denying summary judgment need not address every available reason. But identification of central issues may help the parties to focus further proceedings.

Subdivision (b). The timing provisions in former subdivisions (a) and (c) [were consolidated and substantially revised as part of the time computation amendments that took effect in 2009.] These provisions are adapted by new subdivision (b) to fit the context of amended Rule 56. The timing for each step is directed to filing, are superseded. Although the rule allows a motion for summary judgment to be filed at the commencement of an action, in many cases the motion will be premature until the nonmovant has had time

to file a responsive pleading or other pretrial proceedings have been had. Scheduling orders or other pretrial orders can regulate timing to fit the needs of the case.

~~Subdivision (b)(2) sets an alternative filing time for a nonmovant served with a motion before the nonmovant is due to file a responsive pleading. The time the responsive pleading is due is determined by all applicable rules, including the Rule 12(a)(4) provision governing the effect of serving a Rule 12 motion.~~

Subdivision (c). Subdivision (c) is new. It establishes a common procedure for several aspects of summary-judgment motions synthesized from similar elements developed in the cases or found in many local rules.

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

~~—The circumstances that will justify departure from the general subdivision (c) procedures are variable. One example frequently suggested reflects the (c)(2)(A)(ii) statement of facts that cannot be genuinely disputed. The court may find it useful, particularly in complex cases, to set a limit on the number of facts the statement can identify.~~

~~—Paragraph (2) spells out the basic procedure of motion, response, and reply. It directs that contentions as to law or fact be set out in a separate brief. Later paragraphs identify the methods of supporting the positions asserted, recognize that the court is not obliged to search the record for information not cited by a party, and carry forward the authority to rely on affidavits and declarations.~~

— Subparagraph (2)(A) directs that the motion must describe each claim, defense, or part of each claim or defense as to which summary judgment is sought. A motion may address discrete parts of an action without seeking disposition of the entire action.

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

— The response must, by correspondingly numbered paragraphs, accept, dispute, or accept in part and dispute in part each fact in the Rule 56(c)(2)(A)(ii) statement. Under Rule 56(c)(3), a response that a material fact is accepted or disputed may be made for purposes of the motion only.

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

— The movant must reply — using the form required for a response — only to additional facts stated in the response. The reply may not be used to address materials cited in the response to dispute facts in the Rule 56(c)(2)(A)(ii) statement accompanying the motion. Except for possible further rounds of briefing, the exchanges stop at this point. A movant may file a brief to address the response without filing a reply, but this brief cannot address additional facts stated in the response unless the movant files a reply.

Subdivision (c)(1) addresses the ways to support an assertion that a fact can or cannot be genuinely disputed. It does not address the form for providing the required support. Different courts and

judges have adopted different forms including, for example, directions that the support be included in the motion, made part of a separate statement of facts, interpolated in the body of a brief or memorandum, or provided in a separate statement of facts included in a brief or memorandum.

Subdivision (c)(1)(A)(4)(A) ~~addresses~~ describes the ways to support a statement or dispute of fact. Item (i) ~~Subparagraph (A)~~ describes the familiar record materials commonly relied upon and requires that the movant cite the particular parts of the materials that support the its facts positions. Materials that are not yet in the record — including materials referred to in an affidavit or declaration — must be placed in the record. Once materials are in the record, the court may, by order in the case, direct that the materials be gathered in an appendix, a party may voluntarily submit an appendix, or the parties may submit a joint appendix. The appendix procedure also may be established by local rule. Direction to a specific location in an appendix satisfies the citation requirement. So too it may be convenient to direct that a party assist the court in locating materials buried in a voluminous record.

Subdivision (c)(1)(B)(4)(A)(ii) recognizes that a party need not always point to specific record materials. One party, without citing any other materials, may respond or reply that materials cited to dispute or support a fact do not establish the absence or presence of a genuine dispute. And a party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact.

Subdivision (c)(2)(5) provides that a ~~response or reply may be used to challenge the admissibility of~~ party may assert that material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence. ~~The statement in the response should include no more than a concise identification of the basis for the challenge. The challenge can be supported by argument in the brief, or may be made in the brief alone. There is no need to make a separate motion to strike. If the case goes to trial, failure to challenge~~

admissibility at the summary-judgment stage does not forfeit the right to challenge admissibility at trial.

Subdivision (c)~~(3)(4)(B)~~ reflects judicial opinions and local rules provisions stating that the court may decide a motion for summary judgment without undertaking an independent search of the record. Nonetheless, the rule also recognizes that a court may consider record materials not called to its attention by the parties. ~~If the court intends to rely on uncited record material to grant summary judgment it must give notice to the parties under subdivision (f).~~

Subdivision (c)~~(4)(6)~~ carries forward some of the provisions of former subdivision (e)(1). Other provisions are relocated or omitted. The requirement that a sworn or certified copy of a paper referred to in an affidavit or declaration be attached to the affidavit or declaration is omitted as unnecessary given the requirement in subdivision (c)~~(1)(A)(4)(A)(i)~~ that a statement or dispute of fact be supported by materials in the record.

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

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

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

Subdivision (e). Subdivision (e) addresses questions that arise when ~~a response or reply does not comply with Rule 56(c) party fails to support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c) requirements, when there is no response, or when there is no reply to additional facts stated in a response. As explained below, summary judgment cannot be granted by default even if there is a complete failure to~~

respond to the motion or reply, much less when an attempted response ~~or reply~~ fails to comply with all Rule 56(c) requirements. Nor should it be denied by default even if the movant completely fails to reply to a nonmovant's response. Before deciding on other possible action, subdivision (e)(1) recognizes that the court may afford an opportunity to ~~respond or reply in proper form~~ properly support or address the fact. In many circumstances this opportunity will be the court's preferred first step.

Subdivision (e)(2) authorizes the court to consider a fact as undisputed for purposes of the motion when response or reply requirements are not satisfied. This approach reflects the "deemed admitted" provisions in many local rules. The fact is considered undisputed only for purposes of the motion; if summary judgment is denied, a party who failed to make a proper Rule 56 response or reply remains free to contest the fact in further proceedings. And the court may choose not to consider the fact as undisputed, particularly if the court knows of record materials that show grounds for genuine dispute.

Subdivision (e)(3) recognizes that the court may grant summary judgment only if the motion and supporting materials — including the facts considered undisputed under subdivision (e)(2) — show that the movant is entitled to it. Considering some facts undisputed does not of itself allow summary judgment. If there is a proper response or reply as to some facts, the court cannot grant summary judgment without determining whether those facts can be genuinely disputed. Once the court has determined the set of ~~direct~~ facts — both those it has chosen to consider undisputed for want of a proper response or reply and any that cannot be genuinely disputed despite a procedurally proper response or reply — it must determine the legal consequences of these facts and permissible inferences from them.

Subdivision (e)(4) recognizes that still other orders may be appropriate. The choice among possible orders should be designed to encourage proper ~~responses and replies~~ presentation of the record. Many courts take extra care with pro se litigants, advising them of the need to respond and the risk of losing by summary judgment if an

adequate response is not filed. And the court may seek to reassure itself by some examination of the record before granting summary judgment against a pro se litigant.

Subdivision (f). Subdivision (f) brings into Rule 56 text a number of related procedures that have grown up in practice. After giving notice and a reasonable time to respond the court may grant summary judgment for the nonmoving party; grant ~~or deny~~ a motion on legal or factual grounds not raised by the ~~motion, response, or reply parties~~; or consider summary judgment on its own. In many cases it may prove useful ~~to act by inviting first to invite~~ a motion; the invited motion will automatically trigger the regular procedure of subdivision (c).

Subdivision (g). Subdivision (g) applies when the court does not grant all the relief requested by a motion for summary judgment. It becomes relevant only after the court has applied the summary-judgment standard carried forward in subdivision (a) to each claim, defense, or part of a claim or defense, identified by the motion ~~under subdivision (c)(2)(A)(i)~~. Once that duty is discharged, the court may decide whether to apply the summary-judgment standard to dispose of a material fact that is not genuinely in dispute. The court must take care that this determination does not interfere with a party's ability to accept a fact for purposes of the motion only. A nonmovant, for example, may feel confident that a genuine dispute as to one or a few facts will defeat the motion, and prefer to avoid the cost of detailed response to all facts stated by the movant. This position should be available without running the risk that the fact will be taken as established under subdivision (g) or otherwise found to have been accepted for other purposes.

If it is readily apparent that the court cannot grant all the relief requested by the motion, it may properly decide that the cost of determining whether some potential fact disputes may be eliminated by summary disposition is greater than the cost of resolving those disputes by other means, including trial. Even if the court believes that a fact is not genuinely in dispute it may refrain from ordering that the fact be treated as established. The court may conclude that

it is better to leave open for trial facts and issues that may be better illuminated by the trial of related facts that must be tried in any event.

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

18 entitle the movant to summary
19 judgment; and

20 **(iii)** a brief of its contentions on the law or
21 facts.

22 **(B)** *Response and Brief by the Opposing Party.*

23 A party opposing summary judgment:

24 **(i)** must file a response that, in
25 correspondingly numbered paragraphs,
26 accepts or disputes — or accepts in part
27 and disputes in part — each fact in the
28 movant’s statement;

29 **(ii)** may in the response concisely identify
30 in separately numbered paragraphs
31 additional material facts that preclude
32 summary judgment; and

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

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

36 (i) must file, in the form required by Rule
37 56(c)(2)(B)(i), a reply to any additional
38 facts stated by the nonmovant; and

39 (ii) may file a reply brief.

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

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

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

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

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

61 **(B) *Materials not Cited.*** The court need consider
62 only materials called to its attention under
63 Rule 56(c)(4)(A), but it may consider other
64 materials in the record:

- 65 (i) to establish a genuine dispute of fact; or
66 (ii) to grant summary judgment if it gives
67 notice under Rule 56(f).

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

73 **(6) *Affidavits or Declarations.*** An affidavit or
74 declaration used to support a motion, response, or
75 reply must be made on personal knowledge, set out

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76 facts that would be admissible in evidence, and
77 show that the affiant or declarant is competent to
78 testify on the matters stated.

C. Rule 8(c): Discharge in Bankruptcy

The Committee recommends approval for adoption of the proposal to delete “discharge in bankruptcy” from the list of affirmative defenses in Rule 8(c)(1). The proposal was published in August 2007. The proposal was suggested by bankruptcy judges and approved by other experts, who argued that statutory changes had superseded the former status of discharge as an affirmative defense. The Department of Justice provided the only arguments resisting this proposal. Because the question was important to the Department, this issue was withheld when the other August 2007 proposals were recommended and accepted for adoption. Continuing discussions failed to persuade the Department to withdraw from its position. Advice was sought from the Bankruptcy Rules Committee, which voted — over the Department’s sole dissent — to approve adoption of the recommendation.

The statutory basis for deleting the description of discharge in bankruptcy as an affirmative defense is set out in the attached memorandum that Judge Wedoff prepared for the Bankruptcy Rules Committee. The Minutes of the Civil Rules Committee discussion that was guided by Judge Wedoff also are helpful. The decisions cited in the memorandum make two important points. First, every court that has considered the impact of 11 U.S.C. § 524(a) on Rule 8(c) has concluded that discharge in bankruptcy can no longer be characterized as an affirmative defense. Second, courts that have looked only to Rule 8(c) without considering the statute have concluded — not surprisingly — that discharge is an affirmative defense. This confusion shows that there is no point in further delay. It is time to decide whether to make the change.

The Department of Justice remains concerned that the effects of discharging a debt arise only if the debt in fact was discharged. A general discharge does not always discharge all outstanding debts. A creditor should be able both to secure a determination whether a particular debt has been discharged, and to collect a debt that was not discharged. These concerns are explored in the attached memorandum from Acting Assistant Attorney General Hertz. They may warrant adding a few sentences to the Committee Note as a brief reminder of the procedures for seeking to determine the creditor’s rights. These sentences are enclosed by brackets to prompt discussion of the recurring need to define the value of offering advice that goes beyond explaining the immediate purpose of the rule text.

The Department of Justice would like to include some additional advice in the final sentence of the bracketed material in the Committee Note. The full sentence would read: “The issue whether a claim was excepted from discharge may be determined either in the court that entered the discharge or — in most instances — in another court with jurisdiction over the creditor’s claim, and in such a proceeding the debtor may be required to respond.” The Committee believes that whatever value there may be in providing the advice in the bracketed sentences, the additional advice suggested by the Department is both unnecessary and beyond the appropriate scope of a Civil Rule Note.

The Committee recommends approval for adoption of this amendment of Rule 8(c)(1), and approval of the Committee Note.

II ACTION ITEM FOR PUBLICATION

Supplemental Rule E(4)(f)

Supplemental Rule E(4)(f) provides:

(f) *Procedure for Release From Arrest or Attachment.* Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules. This subdivision shall have no application to suits for seamen's wages when process is issued upon a certification of sufficient cause filed pursuant to Title 46, U.S.C. §§ 603 and 604 or to actions by the United States for forfeitures for violation of any statute of the United States.

The question is whether to delete the final sentence as superseded by subsequent statutory and rule developments.

Professor David J. Sharpe, in 07-CV-D, wrote for a Maritime Law Association working group that the two statutes have been repealed. (The "official" edition of the Rules, 110th Congress, 2d Sess., Committee Print No. 6, for use of the Committee on the Judiciary of the House of Representatives, notes the repeal of these statutes in 1983.) Deletion of the reference to these statutes seems warranted; publication should flush out any arguments that other statutes should be invoked.

The question whether to delete the reference to forfeiture actions is somewhat more complicated. New Supplemental Rule G, added in 2006, "governs a forfeiture action in rem arising from a federal statute." But under Rule G(1), if Rule G does not address an issue, "Supplemental Rules C and E and the Federal Rules of Civil Procedure also apply." Under Rule G(3)(a) and (b) some civil forfeitures are begun by arrest, but others are not. Rule G(8)(d) provides a petition for release of property held for judicial or nonjudicial forfeiture under a statute governed by 18 U.S.C. § 983(f). The Department of Justice has noted that "[b]ecause there never have been post-arrest hearings in forfeiture cases," thanks to Rule E(4)(f), there was no reason to say more in Rule G. All of this leaves the possibility that arguments will be made to apply Rule E(4)(f) after an arrest of property for forfeiture if the exception in E(4)(f) for forfeiture actions is deleted. It seems likely that most courts would find in Rule G an evident purpose to provide a generally comprehensive procedure for forfeiture actions. But it is not clear that all courts will reach this result. Nor is it clear what policy arguments might be made for applying Rule E(4)(f), apart from the broad argument that there always should be an opportunity to seek a hearing when a court order deprives a person of ordinary control of property. It may be better to recommend publication in a form that offers an alternative stating explicitly that Rule G excludes Rule E(4)(f), inviting comment on the need for this statement.

The Committee recommends publication for comment of this amendment, which is set out in Appendix B.

III INFORMATION ITEMS

Rule 45

The Discovery Subcommittee has been asked to carry forward its initial examination of Rule 45. Many possible questions have been identified. In some ways the most difficult choice will be whether to undertake a complete review of all of Rule 45, reasoning that a second project will not likely be undertaken for several years, or whether to focus on a more manageable set of the more important questions.

Two questions were prominent among the early reasons for examining Rule 45. Some courts have concluded that Rule 45(c)(3)(A)(ii) impliedly authorizes nationwide service of a trial subpoena addressed to a party's officer because it states limits — 100 miles or within the state — only for a person who is neither a party nor a party's officer. This is an improbable reading in face of the express general limits in Rule 45(b)(2), and it has raised concerns of misuse or even abuse.

A second common problem arises when a nonparty seeks relief from a subpoena issued by a court different from the court where the main action is pending. The nonparty can apply to the main-action court for a protective order under Rule 26(c)(1). But a proceeding to enforce the subpoena can be brought only in the court that issued it. Forcing the nonparty to travel to the main-action court to contest the subpoena may impose an undesirable burden. But the main-action court may be in a better position to understand the importance of the discovery in the context of the action, and to integrate this dispute in overall case management. Courts have struggled to find ways to balance these competing concerns.

Several other problems may be noted without implying any ranking of importance.

Rule 45(b)(1) requires that notice be served on each party before serving the person addressed by a subpoena to produce documents, electronically stored information, or tangible things. It does not require notice to other parties when production occurs. Neither does it require notice to other parties of negotiations about compliance between the party who served the subpoena and the person directed to produce. Additional notices might improve the functioning of the rule.

Rule 45(c)(2)(B)(ii) directs that if a person commanded to produce objects, production may be required only by an order that "must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance." Questions have been raised whether the only way to secure protection is by objecting. Questions also have been raised as to what "expense" is covered — does it include, for example, attorney fees spent to determine what items are relevant, responsive, and not subject to claims of privilege or other protection?

Questions as to location begin with the 100-mile limit that applies in several circumstances. This limit was included in the First Judiciary Act, and apparently traces still further back in common-law practice. Times and travel have changed. Should this limit be reconsidered in general? Or should it at least be reconsidered for document production, which often can be accomplished as readily in one place as another?

Complaints have been made about times to comply. Rule 45(c)(2)(B) directs that an objection to a document subpoena "be served before the earlier of the time specified for compliance or 14 days after the subpoena is served." That seems to imply that the time for compliance can be set at less than 14 days. Is that appropriate? And when must a privilege log be filed in relation to the time to

object? There also are complaints that attempts are made to use Rule 45 to circumvent discovery cut-offs: is that a real problem, and is it better addressed by a rule amendment or by encouraging more explicit case-management orders?

The only means of enforcement specified in Rule 45 is the contempt sanction of Rule 45(e). Should some other sanctions be added?

A variety of other questions may well be put aside. Examples include preservation by a nonparty — preservation obligations have been put aside in earlier discovery projects. Real problems seem to arise from prehearing discovery subpoenas issued by arbitrators, but the questions seem better addressed outside Rule 45.

Rule 45 plays a vital role in nonparty discovery. Great care will be taken to avoid reaching beyond changes that can be recommended with confidence.

Rule 4(i)(3): Service on United States Officer or Employee

Rule 4(i)(3) governs service on a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf. Service must be made on the United States. The employee also must be served under Rule 4(e), (f), or (g). The most common methods of individual service are likely to be Rule 4(e)(1) and (2). Rule 4(e)(1) adopts state-law methods of service. Rule 4(e)(2) provides for service by personal delivery to the defendant, leaving a copy at the defendant's dwelling or usual place of abode with a suitable person who resides there, or "delivering a copy * * * to an agent authorized by appointment or by law to receive service of process."

Personal service, and perhaps particularly service at home, can be unsettling and even dangerous. The question has been raised whether some alternative may be appropriate. The most likely alternative will be to work by analogy to Rule 4(e)(2)(C), which allows service by delivery to an agent authorized by appointment or by law to receive service. The challenge would be to identify a process for designating agents free from conflicting interests and likely to convey prompt notice to the individual defendant.

Preliminary discussion has suggested the possibility that the problems of providing for service on an agent are different for judicial branch employees than for employees of other branches. Suitable agents might include the United States Attorney, the clerk of court, the court itself, or the Administrative Office. Judges may be particularly distinctive defendants for additional reasons. The broad scope of judicial immunity means that most claims against them are likely to be frivolous. Problems of security and harassment may be great.

This topic is important. It may be too difficult to yield a solution either by amending Rule 4 or by proposing legislation. The Committee will study it further, beginning with an effort to gain fact information about service on judges, including actual service experiences and security problems encountered by security officers.

Appellate-Civil Rules Questions

The Appellate and Civil Rules intersect at many points, particularly with respect to appeal time and also with respect to appealability. At least two current Appellate Rules Committee projects require attention by both committees. One raises the question whether Civil Rule 58 should be

amended to require entry of judgment on a separate document when the original judgment is altered or amended on one of the five post-judgment motions enumerated in Rule 58(a). The other addresses the divergent approaches taken by the courts of appeals to attempts to “manufacture finality” in order to achieve present review of a ruling that otherwise would not be appealable as a final judgment. These questions are described fully in the Report of the Appellate Rules Committee.

The two committees have created a joint subcommittee to work on these questions and others that might benefit from joint consideration — new questions may arise from the Bankruptcy Rules Committee’s examination of the Bankruptcy Rules provisions on appeals. The six subcommittee members include three members of the Appellate Rules Committee and three members of the Civil Rules Committee. Judge Steven Colloton will chair the subcommittee.

2010 Conference

Planning for the 2010 Conference has progressed well. It will be held on May 10 and 11 at the Duke University Law School. Judge John Koeltl chairs a large planning committee. The foundations have been laid for new empirical work and authors have been found to present principal papers. The agenda for two full days of discussion has been pretty well set.

The goal of the conference is to determine whether there are problems with federal civil procedure that should be addressed by legislation, court rules, education of bench and bar, or other means. One perspective is provided by asking whether it is true that litigants are increasingly choosing state courts in cases that once would have been brought to a federal court, and if so whether the cause is federal pretrial procedure.

Important empirical work for the Conference will be done by the Federal Judicial Center. The Center will undertake a survey of discovery and related issues built on revisions of the survey it undertook for the Committee in 1997. The survey instrument has been developed and responses will be sought over the early summer. Preliminary results should be available by fall. The Committee is grateful for the Center’s continuing support in this vitally important project.

Empirical work also will be done by the American Bar Association Litigation Section, which will send to all its members with identified e-mail addresses a revised form of the survey by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System. That survey itself is very interesting, as demonstrated by the presentation at the January meeting of this Committee. Again, this help is most welcome.

The RAND Institute is working on e-discovery. It is hoped that this work will progress at a rate that will enable presentation at the conference. It also is hoped that additional empirical work will be done by Professor Theodore Eisenberg of Cornell.

Appendix A — Proposed Amendments to Rule 8(c), Rule 26, and Rule 56 for Transmission to Judicial Conference and Memoranda from Judge Wedoff and the Department of Justice on Proposed Amendment to Rule 8(c)

Appendix B — Proposed Amendment to Supplemental Rule E for Public Comment

Appendix C — Draft Minutes of April 2009 Meeting and Final Minutes of February 2009 Meeting



**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CIVIL PROCEDURE¹**

Rule 8. General Rules of Pleading

1

* * * * *

2

(c) Affirmative Defenses.

3

(1) *In General.* In responding to a pleading, a

4

party must affirmatively state any avoidance

5

or affirmative defense, including:

6

• accord and satisfaction;

7

• arbitration and award;

8

• assumption of risk;

9

• contributory negligence;

10

• ~~discharge in bankruptcy;~~

11

• duress;

12

• estoppel;

13

• failure of consideration;

14

• fraud;

¹New material is underlined; matter to be omitted is lined through.

2 FEDERAL RULES OF CIVIL PROCEDURE

- 15 • illegality;
- 16 • injury by fellow servant;
- 17 • laches;
- 18 • license;
- 19 • payment;
- 20 • release;
- 21 • res judicata;
- 22 • statute of frauds;
- 23 • statute of limitations; and
- 24 • waiver.
- 25 * * * * *

COMMITTEE NOTE

“[D]ischarge in bankruptcy” is deleted from the list of affirmative defenses. Under 11 U.S.C. § 524(a)(1) and (2) a discharge voids a judgment to the extent that it determines a personal liability of the debtor with respect to a discharged debt. The discharge also operates as an injunction against commencement or continuation of an action to collect, recover, or offset a discharged debt. For these reasons it is confusing to describe discharge as an affirmative defense. [But § 524(a) applies only to a claim that was actually discharged. Several categories of debt set out in 11 U.S.C. § 523(a) are excepted from discharge. The issue whether a claim was

excepted from discharge may be determined either in the court that entered the discharge or — in most instances — in another court with jurisdiction over the creditor’s claim.]

COMMITTEE NOTE SHOWING REVISIONS

“[D]ischarge in bankruptcy” is deleted from the list of affirmative defenses. Under 11 U.S.C. § 524(a)(1) and (2) a discharge voids a judgment to the extent that it determines a personal liability of the debtor with respect to a discharged debt. The discharge also operates as an injunction against commencement or continuation of an action to collect, recover, or offset a discharged debt. ~~These consequences of a discharge cannot be waived. If a claimant persists in an action on a discharged claim, the effect of the discharge ordinarily is determined by the bankruptcy court that entered the discharge, not the court in the action on the claim. For these reasons it is confusing to describe discharge as an affirmative defense. [But § 524(a) applies only to a claim that was actually discharged. Several categories of debt set out in 11 U.S.C. § 523(a) are excepted from discharge. The issue whether a claim was excepted from discharge may be determined either in the court that entered the discharge or — in most instances — in another court with jurisdiction over the creditor’s claim.]~~

Changes Made After Publication and Comment

No changes were made in the rule text.

The Committee Note was revised to delete statements that were over-simplified. New material was added [to provide a reminder of the means to determine whether a debt was in fact discharged.]

Summary of Comments: 2007 Publication

07-CV-015: Hon. Jeffrey S. Bucholtz, Acting Assistant Attorney General, writes at length to argue that “discharge in bankruptcy” should not be deleted from the Rule 8(c) list of affirmative defenses. Alternatively, the Committee Note should explain that the change is intended to require that creditors plead that the debt was excepted from discharge, and should not observe that the effect of a discharge ordinarily is determined by the bankruptcy court that entered the discharge.

It is recognized that the 9th Circuit BAP in 2005 ruled that a 1970 bankruptcy code amendment invalidated the “discharge in bankruptcy” provision of Rule 8(c); it is argued that whether or not the decision is correct as to the effects of the 1970 amendment, it is wrong after adoption of the 1978 Code. The 1970 amendment reflected fears that creditors would bring actions on discharged debts, hoping for defaults that would waive the discharge defense. Now sanctions for willful violations of the discharge injunction provide adequate deterrence. In any event, if the debt was discharged the debtor can invoke Rule 60(b) to vacate the judgment or can ask the bankruptcy court to enforce the discharge injunction.

The central point is that not all debts of a bankruptcy debtor are discharged even if the debtor is “discharged.” Some debts are excepted.

One category of debts are not dischargeable only if declared not dischargeable by the bankruptcy court during the bankruptcy case; these are the only debts within the exclusive determination of the bankruptcy court — the creditor must advance these grounds of nondischargeability in the bankruptcy case or lose them.

Other debts are automatically excepted from discharge by operation of law; there is no need to raise nondischargeability in the bankruptcy case. Such debts include tax debts governed by 11 U.S.C. § 523(a)(1) — disputes frequently arise on the (a)(1)(C) question whether the debtor made any willful attempt to defeat the tax. At some point someone needs to plead to this question.

A debt also is not discharged if the creditor is not given notice of the bankruptcy case in time to file a claim. Because of this possibility, it is urged that “a debtor who responds to a post-discharge complaint on a debt that may well be excepted from discharge” without raising discharge as a defense should not be able to avoid the ensuing judgment. [It is not said how common this event is as compared to other grounds for nondischargeability, nor why the judgment should not be void under the governing statute if indeed the creditor had the required notice.]

The Committee Note observation about determination of the effect of a discharge by the bankruptcy court that entered the discharge is countered by observing that bankruptcy jurisdiction is conferred on the district courts (and the bankruptcy courts as units of the district courts).

It also is argued that a judgment on a debt that was arguably excepted from discharge must be accorded res judicata effect; this argument migrates into the assertion that if discharge is deleted as an affirmative defense the Committee Note should recognize that the result is to shift to the

creditor the burden of pleading nondischargeability. At least if the pleaded ground of nondischargeability is “plausible,” the debtor should not be able to completely ignore the action on the claimed debt. (The idea seems to be that if the plaintiff pleads nondischarge and the defendant fails to deny the allegation, nondischarge is admitted.)

It also is argued that the statutory provision barring waiver of the provisions on the discharge injunction and voiding a judgment addresses only contractual waivers, not waiver by failure to plead discharge as an affirmative defense.

And it is noted that nonbankruptcy courts have concurrent jurisdiction to determine the application of a specific exception to discharge.

A particular problem arises from tax debts. The government often sues both the tax debtor and a fraudulent transferee, seeking a personal judgment against the debtor on the theory that the tax debt was not dischargeable because of a willful attempt to defeat payment and also judgment against the transferee. The debtor rushes to the bankruptcy court with a complaint to determine dischargeability. If the bankruptcy court proceeds, the government is at risk that a victory declaring the debt not dischargeable is not binding in the separate action against the transferee, while a ruling that the debt was discharged forecloses any action against the transferee. It is better to avoid dual litigation of the same issue by retaining jurisdiction in the district court where the collection action was filed.

Finally, it is urged that no apparent hardship has resulted from Rule 8(c), and that state practice commonly also treats discharge as an affirmative defense.

Response: Deletion of “discharge in bankruptcy” from the Rule 8(c) catalogue of affirmative defenses was recommended with confidence by bankruptcy judges. The detailed Department of Justice comments suggested the need for further advice. Professor Jeffrey Morris, Reporter for the Bankruptcy Rules Committee, generously took up the request for help and provided this response:

RESPONSE TO DOJ COMMENT ON CIVIL RULE 8(c)

The Department is correct, in part, in noting that creditors may pursue in either state or federal courts the collection of debts that are not discharged. It is also correct in noting that bankruptcy courts have exclusive jurisdiction only over dischargeability actions under § 523 (a)(2), (4), and (6) as provided by § 523(c). Furthermore, the Department is correct that the bankruptcy courts have concurrent jurisdiction with other federal courts and state courts to determine the dischargeability of claims excepted from the discharge under the other subparagraphs in § 523(a) of the Bankruptcy Code. I do not believe that these correct statements, however, lead to the conclusion that Rule 8(c) should not be amended to delete “discharge in bankruptcy” from the list of affirmative defenses.

The Civil Rules Committee noted in its materials published in connection with the publication of the proposed amendment to Rule 8(c) that § 524(a)(1) provides that any judgment that

is obtained at any time is void to the extent that the judgment purports to determine the personal liability of the debtor with respect to a discharged debt. The premise of the deletion of “discharge in bankruptcy” from the list of affirmative defenses is that the statute operates to prevent any such judgment from being effective. There should be no need for a debtor to affirmatively assert the discharge as a defense in an action based on a discharged claim. That is true without regard to whether the creditor is a governmental unit, or any other type of creditor. If the underlying claim is allegedly nondischargeable under § 523(a)(2), (4), or (6), and the creditor does not act timely in the bankruptcy court to obtain an order that the debt is excepted from the discharge, that creditor is permanently enjoined under § 524(a)(2) from attempting to collect that debt. Moreover, if the creditor violates that injunction and obtains a judgment, that judgment is void (note that it is void and not voidable) under § 524(a)(1). This statutory scheme is, and is intended to be, self executing. Requiring a debtor (who has already been told not to worry about a creditor who holds a discharged debt) to affirmatively plead the bankruptcy discharge is inconsistent with this system.

The Department notes that this system actually predates the 1978 Code, and the Civil Rules Committee’s materials also highlight that fact. Those materials state that § 524(a)(1) and its predecessor statute both created an injunction against the collection of discharged debts and against any attempts to collect those debts. In fact, one need not go too far back to find (off the top of my head, I think it was in 1966 or so) that debtors once had to apply for a discharge, and the failure to do so resulted in a debtor going through the process but receiving no discharge even though no grounds existed on which to object to the discharge. This led to the change in the default rule from “no discharge unless requested by the debtor” to “discharge granted unless an objection is successfully obtained by a party in interest.” Retaining the discharge as an affirmative defense is inconsistent with over 40 years of bankruptcy law.

The Department is correct that many kinds of debts are not discharged. Of course, for those debts, the debtor/defendant cannot affirmatively or otherwise plead the defense of a bankruptcy discharge. The only impact of maintaining the requirement that debtors affirmatively plead the discharge defense is to obtain judgments more easily in cases in which the debtor otherwise files an answer. Thus, under the DOJ view, if debtor/defendants file no answer, default judgments can be entered. If they file an answer but do not include an available bankruptcy discharge defense, then the discharge defense is waived. This directly contradicts § 524(a) and should not be permitted under the Civil Rules.

It is this statutory scheme that makes deletion of “discharge in bankruptcy” from Rule 8(c) appropriate and, indeed, necessary. The other issues about concurrent jurisdiction and the like raised by DOJ are all correct, but not truly relevant. The closest question the Department raises has very little to do with DOJ whose most likely problems will arise under the tax and student loan nondischargeability categories. That is, under § 523(a)(3), creditors whose claims are not listed in the bankruptcy case can later assert in any court with jurisdiction that their claim was not discharged in the bankruptcy case. The Department’s brief discussion of the issue, however, is misleading in my opinion. In fact, the vast majority of individual debtor bankruptcy cases are no asset cases. The overwhelming majority of courts that have considered the issue have held that claims that were not listed in the debtor’s case are nonetheless discharged. Section 523(a)(3) is effectively limited to the

protection of the holders of claims that suffered by virtue of not receiving notice of the case. These creditors are those who could not timely file an action under § 523(a)(2), (4), or (6), or creditors who would have shared in a distribution of the estate's assets if they had been able to file a proof of claim in a timely fashion. Because most of the individual debtor cases are no asset cases, § 523(a)(3) plays a limited role.

My bottom line – the Rule should be amended as proposed. The Committee Note, however, should also be amended to avoid the suggestion made in the last sentence of the Note. The sentence certainly does not state that the bankruptcy court has exclusive jurisdiction over all matters relating to the discharge, but it could be misunderstood as meaning that bankruptcy courts have this exclusive jurisdiction. It is clear to me that the Committee had no such intention. The Note merely states what I think is the most regular result when an issue of the extent of the bankruptcy discharge is raised. But, amending the Committee Note to replace the last sentence with something along the following lines might be more appropriate.

**Rule 26. Duty to Disclose; General Provisions
Governing Discovery²**

1 **(a) Required Disclosures.**

2 * * * * *

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

4 **(A) *In General.*** In addition to the
5 disclosures required by Rule 26(a)(1),
6 a party must disclose to the other
7 parties the identity of any witness it
8 may use at trial to present evidence
9 under Federal Rule of Evidence 702,
10 703, or 705.

11 **(B) *Witnesses Who Must Provide a***
12 ***Written Report.*** Unless otherwise
13 stipulated or ordered by the court, this

²In the Rule, material added after the public comment period is indicated by double underlining, and material deleted after the public comment period is indicated by underlining and overstriking. In the Note, new material is indicated by underlining and deleted material by overstriking.

14 disclosure must be accompanied by a
15 written report — prepared and signed
16 by the witness — if the witness is one
17 retained or specially employed to
18 provide expert testimony in the case or
19 one whose duties as the party's
20 employee regularly involve giving
21 expert testimony. The report must
22 contain:

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

27 (ii) the facts or data ~~or other~~
28 ~~information~~ considered by the
29 witness in forming them;

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- 30 (iii) any exhibits that will be used
31 to summarize or support them;
- 32 (iv) the witness's qualifications,
33 including a list of all
34 publications authored in the
35 previous 10 ~~ten~~ years;
- 36 (v) a list of all other cases in
37 which, during the previous 4
38 ~~four~~ years, the witness
39 testified as an expert at trial or
40 by deposition; and
- 41 (vi) a statement of the
42 compensation to be paid for
43 the study and testimony in the
44 case.

45 (C) Witnesses Who Do Not Provide a
46 Written Report. Unless otherwise

47 stipulated or ordered by the court, if
48 the witness is not required to provide
49 a written report, ~~this the Rule~~
50 26(a)(2)(A) disclosure must state:

51 (i) the subject matter on which
52 the witness is expected to
53 present evidence under
54 Federal Rule of Evidence 702,
55 703, or 705; and

56 (ii) a summary of the facts and
57 opinions to which the witness
58 is expected to testify.

59 **(D)** *Time to Disclose Expert Testimony.*

60 A party must make these disclosures
61 at the times and in the sequence that
62 the court orders. Absent a stipulation

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63 or a court order, the disclosures must
64 be made:

- 65 (i) at least 90 days before the date
66 set for trial or for the case to
67 be ready for trial; or
- 68 (ii) if evidence is intended solely
69 to contradict or rebut evidence
70 on the same subject matter
71 identified by another party
72 under Rule 26(a)(2)(B) or (C),
73 within 30 days after the other
74 party's disclosure.

75 **(ED)** *Supplementing the Disclosure.* The
76 parties must supplement these
77 disclosures when required under Rule
78 26(e).

79 * * * * *

80 **(b) Discovery Scope and Limits.**

81

* * * * *

82 **(4) Trial Preparation: Experts**

83 **(A) Deposition of an Expert Who May**

84 ***Testify.*** A party may depose any

85 person who has been identified as an

86 expert whose opinions may be

87 presented at trial. If Rule 26(a)(2)(B)

88 requires a report from the expert, the

89 deposition may be conducted only

90 after the report is provided.

91 **(B) Trial-Preparation Protection for**

92 **Draft Reports or Disclosures.** Rules

93 26(b)(3)(A) and (B) protect drafts of

94 any report or disclosure required

95 under Rule 26(a)(2), regardless of the

96 form in which of the draft is recorded.

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97 (C) Trial-Preparation Protection for
98 Communications Between a Party's
99 Attorney and Expert Witnesses.
100 Rules 26(b)(3)(A) and (B) protect
101 communications between the party's
102 attorney and any witness required to
103 provide a report under Rule
104 26(a)(2)(B), regardless of the form of
105 the communications, except to the
106 extent that the communications:
107 (i) Relate to compensation for
108 the expert's study or
109 testimony;
110 (ii) Identify facts or data that the
111 party's attorney provided and
112 that the expert considered in

113 forming the opinions to be
114 expressed; or
115 **(iii)** Identify assumptions that the
116 party's attorney provided and
117 that the expert relied upon in
118 forming the opinions to be
119 expressed.

120 **(DB)** *Expert Employed Only for Trial*
121 *Preparation.* Ordinarily, a party may
122 not, by interrogatories or deposition,
123 discover facts known or opinions held
124 by an expert who has been retained or
125 specially employed by another party
126 in anticipation of litigation or to
127 prepare for trial and who is not
128 expected to be called as a witness at
129 trial. But a party may do so only:

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- 130 (i) as provided in Rule 35(b); or
131 (ii) on showing exceptional
132 circumstances under which it
133 is impracticable for the party
134 to obtain facts or opinions on
135 the same subject by other
136 means.

137 ~~(E)~~ **Payment.** Unless manifest injustice
138 would result, the court must require
139 that the party seeking discovery:

- 140 (i) pay the expert a reasonable fee
141 for time spent in responding to
142 discovery under Rule
143 26(b)(4)(A) or ~~(D)~~; and
144 (ii) for discovery under ~~(D)~~, also
145 pay the other party a fair
146 portion of the fees and

147 expenses it reasonably
148 incurred in obtaining the
149 expert's facts and opinions.
150 * * * * *

COMMITTEE NOTE

Rule 26. Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than “data or other information,” as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and — with three specific exceptions — communications between expert witnesses and counsel.

In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including — for many experts — an extensive report. Many courts read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports. The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts — one for purposes of consultation and another to testify at trial — because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive

and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

Rule 26(a)(2)(B). Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all “facts or data considered by the witness in forming” the opinions to be offered, rather than the “data or other information” disclosure prescribed in 1993. This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.

The refocus of disclosure on “facts or data” is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that “facts or data” be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data “considered” by the expert in forming the opinions to be expressed, not only those relied upon by the expert.

Rule 26(a)(2)(C). Rule 26(a)(2)(C) is added to mandate summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions. This disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue

detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B).

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)(2)(A) and provide the disclosure required under Rule 26(a)(2)(C). The (a)(2)(C) disclosure obligation does not include facts unrelated to the expert opinions the witness will present.

Rule 26(a)(2)(D). This provision (formerly Rule 26(a)(2)(C)) is amended slightly to specify that the time limits for disclosure of contradictory or rebuttal evidence apply with regard to disclosures under new Rule 26(a)(2)(C), just as they do with regard to reports under Rule 26(a)(2)(B).

Rule 26(b)(4). Rule 26(b)(4)(B) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise. It also applies to drafts of any supplementation under Rule 26(e); *see* Rule 26(a)(2)(E).

Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery. The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any "preliminary" expert opinions. Protected "communications" include those between the party's attorney and assistants of the expert witness. The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

The most frequent method for discovering the work of expert witnesses is by deposition, but Rules 26(b)(4)(B) and (C) apply to all forms of discovery.

Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed. These discovery changes therefore do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and related cases.

The protection for communications between the retained expert and “the party’s attorney” should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, a party may be involved in a number of suits about a given product or service, and may retain a particular expert witness to testify on that party’s behalf in several of the cases. In such a situation, the protection applies to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the “party’s attorney” concept.

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.

First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert’s study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work

done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.

Second, under Rule 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed. The exception applies only to communications "identifying" the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party's attorney may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusions. This exception is limited to those assumptions that the expert actually did rely upon in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.

Under the amended rule, discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii) — that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. A party's failure to provide required disclosure or discovery does not show the need and hardship required by Rule 26(b)(3)(A); remedies are provided by Rule 37.

In the rare case in which a party does make this showing, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection does not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial.

Former Rules 26(b)(4)(B) and (C) have been renumbered (D) and (E), and a slight revision has been made in (E) to take account of the renumbering of former (B).

Changes Made After Publication and Comment

Small changes to rule language were made to conform to style conventions. In addition, the protection for draft expert disclosures or reports in proposed Rule 26(b)(4)(B) was changed to read "regardless of the form in which the draft is recorded." Small changes were also made to the Committee Note to recognize this change to rule language and to address specific issues raised during the public comment period.

**SUMMARY OF TESTIMONY AND COMMENTS
RULE 26 DRAFT AMENDMENTS, 2008-09**

Rule 26(a)(2)(B) -- “facts or data”

Washington, D.C.

Stephen B. Pershing, Esq. (Amer. Ass’n Justice) (testimony and 08-CV-52): The proposed substitution of “facts or data” for “facts or other information” would clearly place within Rule 26(b)(3) work product protection any documentary or other tangible “information” that counsel exchanges with a testifying expert beyond “facts or data.” AAJ favors this change.

Written Comments

Robert J. Giuffra, Esq. (08-CV-174) (Federal Bar Council of 2d Cir.): The Council supports the proposed amendment to Rule 26(a)(2)(B)(ii).

Rule 26(a)(2)(C) -- Disclosure requirement

Washington, D.C.

Stephen Morrison, Esq. (testimony and 08-CV-050): I fully support addition of this provision to the rules. This disclosure requirement is a rational requirement and does not impose a heavy burden.

Bruce R. Parker, Esq. (Int'l Assoc. of Defense Counsel): This amendment creates a new category I call "disclosure experts." One concern would be that local rules or Rule 16 orders often limit the number of expert witnesses a party can call. How are these witnesses to be counted? This is not a matter that can, perhaps, be precisely controlled by the national rules, but at least it would be desirable if the Committee Note said something about the expectation whether these witnesses should be counted toward the maximum number of expert witnesses to be permitted.

Debra Tedeschi Herron, Esq. (testimony and 08-CV-45): I agree with the proposed amendment to Rule 26(a)(2). Having an attorney-prepared summary protects both sides so as to promote fairness and avoid trial by ambush.

Latha Raghavan (testimony and 08-CV-051): The proposed rule seems to solve the dilemma of determining the extent of disclosure necessary for employees who are "experts" due to the nature of their employment, but do not ordinarily testify as experts. Where I practice, the magistrate judges often say that if a witness is going to offer testimony covered at all by Fed. R. Evid. 702 there should be a full report. For the clients I represent, this is a major expense, and also raises issues of attorney-client privilege on occasion. This amendment will reduce complaints about surprise and deal with the risk of preclusion at trial for the employer. I strongly support this amendment.

Stephen B. Pershing, Esq. (Amer. Ass'n Justice) (testimony and 08-CV-52): The AAJ supports this change. It provides adequate disclosure of expert opinion and thereby permits informed decisions about whether to depose the proposed witness. At the same time, it avoids burdening witnesses who have not made themselves available to be burdened with such litigation concerns as preparing a full report. The handling of "mixed" witnesses under the rule is welcome, as it imposes the report requirement flexibly based on the character of the testimony rather than rigidly by witness identity. Excluding Fed. R. Evid. 701 witnesses from the list of those for whom disclosure is required is a correct decision also, because it honors the distinction between lay and expert testimony.

San Antonio

Hon. G. Patrick Murphy (S.D. Ill.): These proposed changes look sensible to me. This way, people will not be ambushed by testimony from nonretained expert witnesses.

Wayne Mason (Fed. of Def. & Corp. Counsel) (testimony and 08-CV-125): The proposed rule is sound. It provides a sound scheme for precluding employee experts from disclosure requirements.

G. Edward Pickle, Esq. (testimony and 08-CV-110): Requiring in-house experts who don't regularly provide expert testimony to file full reports would be wasteful. The proposed disclosure should be sufficient without imposing that burden. The world outside the courtroom does not revolve around litigation.

Cary E. Hiltgen, Esq. (president elect of DRI) (testimony and 08-CV-117): This proposed change will be most beneficial and alleviate any concerns about unfair surprise like those often argued when disputes arise over the Rule 26 report requirement's exception for certain witnesses who provide expert testimony. Making this change to the rule would reduce the temptation for courts to conclude that full reports are required from these witnesses despite their exemption from the report requirement. As things now stand, attorneys feel compelled to submit an expert report to avoid any potential dispute if none is supplied. Their fear is not unfounded, as many courts have insisted on reports despite the exception in the current rule.

San Francisco

Kevin J. Dunne, Esq.: It would be desirable to have more certainty on who's an expert required to be disclosed.

Peter O. Glaessner, Esq.: I am concerned about situations in which I cannot get the information needed to provide the disclosure required under proposed Rule 26(a)(2)(C). As a defense lawyer, I may sometimes want to list plaintiff's treating doctor as a witness. But I'm ethically precluded from asking the doctor about his or her opinions outside the context of a deposition. So I am unfairly constrained by the requirement to provide disclosure on that. This is basically a timing issue; the problem would exist if disclosure is required before I can take the deposition of the treating doctor.

Marc E. Williams (president of DRI) (testimony and 08-CV-135): I strongly support the addition of summary disclosure for expert witnesses who are not required to provide a report. Presently, lawyers may feel obliged to prepare a full report even for experts who are not really required to provide reports under the rule. This amendment would eliminate this trying conundrum by ensuring that the parties are able accurately to ascertain the rule's distinction between employees who do not provide expert opinions in the regular course of their duties and those hired to provide an expert opinion.

Daniel J. Herling, Esq. (testimony and 08-CV-129): I support this change. It would go far in reducing the number and scope of arguments relating to who is an expert and who is not.

Kimberly D. Baker, Esq. (testimony and 08-CV-139): I encourage the adoption of the proposed changes to Rule 26(a)(2)(C). The change will allow all parties to get to the task at hand

-- discussing the facts of the case openly and candidly with the experts and formulating opinions that relate to the disputed issues. A summary of the opinions offered will apprise opposing counsel of the opinions held, and counsel can then further explore the factual basis and assumptions underlying the opinions and prepare for cross-examination of the witness.

Written Comments

Gregory P. Joseph, Esq. (08-CV-055): The proposed disclosure is similar in substance to the pre-1993 interrogatory inquiry about expert testimony. The timing is a bit vexing. There is no set time for the new disclosure except “at the times and in the sequence that the court orders” under Rule 26(a)(2)(D). Until pretrial orders are amended to cover these new disclosures, they may be made at any time up until 90 days before trial. Identical timing for these disclosures and the Rule 26(a)(2)(B) reports is implicit. But the reality is that the timing of the reports currently required is governed by pretrial orders. It will take a substantial period of time for pretrial orders to uniformly cover these new disclosures. Gamesmanship will be possible because the opponent is forced to respond with expert rebuttal within 30 days. If the new disclosures occur in the middle of intense discovery or motion practice, it may be very challenging to arrange the expert testimony necessary to respond to them within 30 days. In addition, the rule against a second deposition of a witness could present difficulties if the person so designated has already been deposed before disclosure. Leave to take a second deposition to deal with the expert disclosures should not be required. Instead, the party making the disclosure should have the burden to show that a second deposition is inappropriate if that is the party’s position.

Patrick Allen, Esq. (08-CV-041): Change is needed. Presently various courts take different approaches, and there are often situations in which the lawyer knows and can name his or her expert as required by Rule 26(a)(2)(A) but is unable to accompany that disclosure with the expert’s report. The problem is that the timing is too strict. There should be more flexibility for providing the Rule 26(a)(2)(B) expert report. Perhaps the time should be set forth specifically in the rule.

Hon. Frank H. Easterbrook (7th Circuit) (08-CV-056): In Rule 26(a)(2)(B)(iv), the word “authored” appears as a verb. Use of this word as a verb is becoming more common, but it is not standard usage and is inappropriate for formal writing. The word survived re-stylization but should be fixed now. It is also imprecise. Suppose an expert wrote in 1996 a paper that was published in 1998. Should that be included in a list of publications prepared in 2007? Indeed, the advent of Internet circulation has made “publication” itself ambiguous. In addition, a sentence in amended Rule 26(a)(2)(D) begins “Absent a stipulation.” This use of “absent” is an archaic legalism that should not be employed in modern writing.

Lawyers for Civil Justice & U.S. Chamber Institute for Legal Reform (08-CV-061): We strongly support this amendment that substitutes an attorney summary disclosure for preparation of a full report by a trial witness expert who is not required to provide a report under Rule 26(a)(2)(B). This change confirms the original intent in 1993 of exempting employee “experts” from the report requirement. Under the actual regime now found in many places, an abundance

of caution causes most parties to submit a written report even of “exempt” employees to avoid the risk of adverse consequences later on. It is burdensome and unreasonable for the employee expert to have to compile the various materials required for such a report, particularly when the employee has spent many years at the company and has gained expertise through on-the-job experience.

Wendy S. Goggin, Esq. (Chief Counsel, U.S. Dep’t of Justice -- Drug Enforcement Administration) (08-CV-084): We anticipate that many attorneys will still want to take a deposition of the expert even after receiving the new disclosure, and therefore question whether the requirement will meet the goal of reducing litigation costs.

Charles Miers, Esq. (08-CV-112): I strongly support the changes to Rule 26(a)(2)(C). Under the current rules, I am often forced either to submit a full Rule 26 report for employee experts or risk having the district court preclude them from offering any testimony that may be considered “expert” in nature. Receiving or providing a Rule 26 report for an employee provides little benefit in my experience, adds to the costs of litigation, and generally provides nothing more than what the new rule requires, a summary of the facts and opinions known by the witness. The parties usually attempt to reach an agreement whereby each party’s employees who may be considered “experts” are exempt from the current report requirement. The amendment will prevent manipulation of the rule.

Prof. Stephen D. Easton (08-CV-169): I support the amendment to Rule 26(a)(2)(C) regarding disclosures from experts not required to prepare written reports.

U.S. Dep’t of Justice (08-CV-180): The Department supports the concept of requiring written disclosure of the anticipated testimony of witnesses such as treating physicians and employees of a party. A written disclosure of an employee’s testimony ordinarily should be sufficient for purposes of discovery and will be less time-consuming and burdensome than requiring the employee to prepare and submit an elaborate report. The Department recommends, however, that the rule state more clearly that attorney-client privilege and/or work product protections should apply to communications between the attorney and the employee. This could be accomplished through rule text or, at least, through mention of the existence of such protections in the Committee Note. For example, the Note could add: “Communications between an attorney and the client’s employees often will be privileged. Otherwise privileged communications between an attorney and the client’s employee will remain privileged even if the employee is an expert who does not provide a written report under Rule 26(a)(2)(C).”

Robert J. Giuffra, Esq. (08-CV-174) (Federal Bar Council of 2d Cir.): The Council urges that proposed Rule 26(a)(2)(C) not be adopted. If it is adopted, we recommend clarifying that the rule does not apply to party witnesses involved in the underlying facts in dispute. We also recommend that the requirement for a summary not apply when the expert is available to a party only through compulsory process or when a deposition of the expert has been taken and has covered the subjects for which the witness is expected to present expert evidence. We fear that the amended rule is likely to provide new grounds for disputes and unlikely to streamline discovery. These disputes are most likely when parties are experts in their fields. It is unclear

how fully the disclosures mandated by the proposed rule would apply to party witnesses who are both experts in their fields and percipient party witnesses. Such party witnesses often testify that they believed their own conduct met relevant professional standards (in professional malpractice or fraud cases, for example). The proposed rule could be read to apply to all such witnesses (although we question whether that is its intent). With nonparty percipient witnesses, there may be situations where counsel are unable to obtain summaries of the sort set forth in the amended rule except through compulsory process. Without further definition, parties may not agree on the degree of detail required to provide a “summary of facts and opinion.” We recognize that the current report requirement may be too limiting in situations in which expert testimony is proffered by a party’s employee who lack direct factual involvement and for whom expert reports are not provided. We believe that it would be preferable to leave such isolated instances to the courts’ discretion in managing their cases rather than adding a new rule requiring summaries and introducing additional points of dispute. If the rule is added, the Committee should clarify that it does not apply to party witnesses involved in the underlying facts in dispute, or when the expert witness is available to the party only through compulsory process.

Reuben A. Ginsburg (08-CV-176) (Chair, St. Bar of California Comm. on Admin. of Justice): The Committee believes that the required disclosure of the “facts” to which the witness is expected to testify in proposed (a)(2)(C)(ii) is too broad. There may, for example, be individuals who are expected to testify as both a percipient witness and an expert witness, and the Committee believes that the disclosure requirement should apply only to the basis for expected expert opinions (which would include any facts upon which the expected opinion is based). We therefore recommend that the new subdivision be rewritten as follows: “a summary of the facts ~~and~~ opinions to which the witness is expected to testify and the expected basis and reasons for those opinions.”

Thaddeus E. Morgan, Esq. (Chair, U.S. Courts Comm. of the State Bar of Michigan) (08-CV-184): The Michigan Committee voted to urge adoption of the proposed amendment to Rule 26(a)(2). The proposed amendment conforms the rule to the actual practice used in the Sixth Circuit regarding expert witnesses who are not “specially retained.” See *Fielden v. CSX Transp., Inc.*, 482 F.3d 866 (6th Cir. 2007).

American Institute of Certified Public Accountants (08-CV-185): This amendment effectively balances the cost of providing an expert report with a simpler disclosure that affords fairness with regard to the exchange of the key facts, information and opinion the expert will present at trial.

Rule 26(b)(4) -- generally

Washington, D.C.

Theodore B. Van Itallie, Jr., Esq., Assoc. Gen. Counsel, Johnson & Johnson (testimony and 08-CV-040): I am enthusiastic about the Committee's decision to confront the unforeseen consequences of the 1993 Committee Note to Rule 26(a)(2)(B). Inquiry into all communications between experts and counsel has multiplied expense with little benefit to the parties, and has contributed to the costly practice in our cases of retaining two experts. Although as an original matter it might be preferable to employ the approach used in Australia (where it is unheard of for counsel to steer or direct the contribution of experts), the Committee's second choice solution of reasonably protecting the interactions between counsel and expert makes sense. Perhaps at some point the Committee could consider an entirely different approach to expert witnesses by encouraging selection by the court.

R. Matthew Cairns, Esq., Defense Research Institute (testimony and 08-CV-57): I generally support the position set forth by the Lawyers for Civil Justice in support of the changes to Rule 26 (08-CV-061). I have not found that the current regime of disclosure impedes me in retaining university professors or the like as expert witnesses because they are unwilling to adhere to the strictures that result from the disclosure regime.

Stephen Morrison, Esq. (testimony and 08-CV-050): I support the amendments providing protection for attorney-expert communications. Acrobatic maneuvering by attorneys to avoid creating discoverable draft reports and communications does nothing for the integrity of our discovery process. Although thorough exploration of opposing experts is important, requiring production of all drafts and communications creates an economic divide. Clients who can afford to hire consulting experts are protected, but those who cannot afford to do so are denied protection. The need to engage in this acrobatic maneuvering is an obstacle to hiring the best sort of academic experts, who bridle at the artificiality of what the current rules require.

Bruce R. Parker, Esq. (Int'l Assoc. of Defense Counsel): On behalf of the IADC, we totally endorse the extension of work product protection to draft reports and attorney-expert communications. One problem that will arise, however, is the fact that with mass tort litigation like the cases I work on, the same experts may be called in cases in state court and federal court. So the protections that apply in federal court may not be respected by state courts, and that may curtail their value.

Debra Tedeschi Herron, Esq. (testimony and 08-CV-45): I favor extending work product protections to drafts and -- subject to the three exceptions -- to attorney-expert communications. This amendment will promote fairness in the discovery process and promote comprehensive discussions between counsel and the expert witnesses.

Latha Raghavan (testimony and 08-CV-051): I favor the changes. It is essential that attorneys in the trenches be able to communicate freely with experts to fully develop and

understand the issues in the case. Ethical obligations prevent the attorney from dictating ultimate opinions of the experts. But free exchanges -- including draft reports -- are essential to effective interaction. It is impossible for the expert to opine without first having extensive communication with counsel. Forcing discovery of such communications and draft reports discourages full and effective representation. "The 'gotcha' moment of revealing that an attorney had some input in the process of obtaining the final expert report may feel good for the moment when revealing the lack of integrity of opposing counsel or expert, however, such a moment is often misleading since it ignores the complexity of litigation." I strongly support the rule changes.

Stephen B. Pershing, Esq. (Amer. Ass'n Justice) (testimony and 08-CV-52): AAJ is the largest plaintiff lawyer organization in the country. Although there is a small minority of lawyers who favor complete independence of expert witnesses, the vast majority of our members favor these amendments. Lawyers representing both plaintiffs and defendants agree that practice under the 1993 expert discovery amendments has become preoccupied with a search for counsel's work product that takes up time better spent focusing on the expert's conclusions themselves. We understand that it is often essential for lawyers and expert witnesses to work together, and that the work product of each is laced with the work of the other. But discovery of material passed by the lawyer to the expert almost inevitably intrudes into attorney work product. The crucial thing is to eliminate the squabbling that has become so pervasive. If there is a problem with the amendments, it is perhaps that they don't go far enough. Rule 26(b)(3) still is limited to documents and tangible things, a limitation not adopted in proposed 26(b)(4)(C). The Committee should address that feature of Rule 26(b)(3). For the present, the reality is that experienced lawyers regularly stipulate around the provisions of the 1993 amendments, recognizing that they do not need this material and that expansive interpretations of Rule 26(a)(2) have produced negative consequences. AAJ members with experience using the New Jersey state-court practice -- which provides work product protection like that proposed here for the federal courts -- have found that providing protection has had the welcome result that squabbling has been curtailed. Another feature of the amendment is that it is critically important when the lawyer and the expert are separated by many time zones. If the lawyer is on the East Coast of the U.S. and the expert is in Singapore, modern technology provides manifold methods for communicating, but the 1993 amendments mean that using those methods creates the sort of information that is routinely held discoverable.

Alfred W. Cortese, Jr., Esq.: Speaking for Lawyers for Civil Justice, I can report that a few believe there ought to be free and open discovery of all communications between lawyers and expert witnesses, but the large majority of members favor the proposed changes. The proposed amendments are probably the best way to provide the protection that is needed.

San Antonio

Hon. G. Patrick Murphy (S.D. Ill.): The Rule 26 changes look sensible and helpful to me.

Wayne Mason, Esq. (Fed. Def. & Corp. Counsel) (testimony and 08-CV-125): The proposed rules provide a well-reasoned framework for protection of counsel/expert communication and an expert's draft reports. This will provide needed clarification of the roles played by experts and counsel in litigation. Too often well-funded clients routinely retain both a testifying and a consulting expert.

John H. Martin, Esq. (immediate past president of DRI) (testimony and 08-CV-113): In a large number of cases, far too much time is expended in wasteful deposition discovery, especially with expert witnesses. The purpose of a deposition of an expert witness should be to explore the validity of the opinions themselves. Instead, what often happens is that lawyers spend unnecessary time exploring what the lawyer and the witness talked about, whether draft reports contain minor, and usually insignificant, factual misstatements, and the mechanics by which the final report came into being. On one occasion I got a draft report of an opposing expert that had a nugget of gold in it, but that once-in-a-career experience is not a reason to spend all this time and money on the hunt for another nugget. The proposed amendments should cut down on this activity, and also provide protection to the attorney-expert communications that permit communication without wasteful measures to avoid creating a draft report or other discoverable material. It is not a surprise that expert witnesses often act as advocates for the side for which they testify. There are hired guns, it is true, but the rule provisions are not likely to affect their behavior. The problems come up when you try to hire the honest expert who is uncomfortable with the process. This rule will have a positive effect, enabling lawyers to hire leading figures.

G. Edward Pickle, Esq. (testimony and 08-CV-110): I applaud the changes recommended. Expert witness and consulting fees have become one of the most significant economic burdens of litigation, generally taking a back seat only to attorney fees and the costs of electronic discovery. The current regime regularly more than doubles the expert expenses of a party because counsel must retain a second set of experts to receive confidential expert advice. That is the only way to protect the lawyer's thought processes. The proposed rule would solve this problem by allowing one expert to serve as both the consulting advisor and the testifying expert. Protecting draft reports would also produce benefits. The proposed amendment is a sensible, common sense approach, and reflects what had been common practice in most jurisdictions into the 1980s. An expert witness either is or is not capable of defending a position; the substance of discussions with counsel does not aid in assessing that topic.

Cary E. Hiltgen, Esq. (president-elect of DRI) (testimony and 08-CV-117): The protection for draft reports will not only further efficiency, but also serve accuracy interests in the process of working with expert witnesses. The fear that drafts will be disclosed under the current regime creates barriers between the attorney and the expert witness. These barriers complicate litigation and drive up expenses. The protection of attorney-expert communications is also important. The fear of discovery now prevents most written communication and limits even verbal

communication. Ultimately, the expert is working on behalf of the client, much the same as the attorney. The opinions of the experts -- good and bad -- need to be reviewed thoroughly and discussed in order to prepare effectively for trial.

Keith B. O'Connell, Esq. (Tex. Ass'n of Defense Counsel) (testimony and 08-CV-116): We support the Rule 26 amendments for the reasons articulated by the International Ass'n of Defense Counsel.

San Francisco

Kevin J. Dunne, Esq.: The changes are terrific. This is not a position distinctive for a defense lawyer like me. Within the last six months, I've had plaintiff's counsel in two different cases call me and ask that I agree to stipulate out of the current federal disclosure regime regarding draft reports and attorney-expert communications. Expert discovery has become crazy under the current regime. I have to hire a consulting expert to whom I can say "I think this is a weakness, do you?" The current preoccupation with "collateral" matters during depositions and at trial is distracting and disruptive. Lawyers will spend their entire time questioning about the back-and-forth between the expert and the lawyer. This is undesirable.

Peter O. Glaessner, Esq.: I strongly support the changes.

Daniel J. Herling, Esq. (testimony and 08-CV-129): I support the changes. They will not only eliminate the verbal gymnastics that many attorneys engage in while discussing a case with an expert, but also eliminate the fiction that drafts are not prepared or that they are systematically eliminated by virtue of the word processing equipment being used by the expert. It will also allow a much more thorough vetting of the proffered opinions.

Thomas A. Packer, Esq.: I support the changes. From the practitioner's standpoint, this is a real breath of fresh air. Right now, attorneys may feel that they can only communicate with their experts by phone or in person. E-mail is clearly better, except for the discovery consequences. This change allows us to practice in the 21st century.

Kimberly D. Baker, Esq. (testimony and 08-CV-139): Time is often wasted by asking why a particular word was used in one report versus another or similar queries about changed formats, etc., which can be more productively and cost efficiently used for real discovery. Once the cloak of protection from discovery is draped around the attorney-expert communications, a more expansive exchange of information can occur and both parties can focus on the facts and developing opinions, rather than writing and rewriting reports. Lawyers have to hire duplicative witnesses, at great cost.

Loren Kieve, Esq.: The ABA Civil Discovery standards have endorsed provisions like the ones in the proposed rule since 1999. We support the proposed amendments. Good lawyers do this now by stipulation; it's time to put these provisions in the rule.

Donald F. Zimmer, Jr., Esq. (testimony and 08-CV-140): The practice of having to retain two experts on the same topic (one to testify, one with whom the client and attorney can freely consult) is expensive and contributes to a legal fiction which need not be perpetuated.

Peter S. Pearlman, Esq. (Co-Chair, Rules Comm., Assoc. of Fed. Bar of New Jersey) (testimony and 08-CV-153): The Trustees of the Association unanimously assented to writing to support these rules changes. It is unique for the Trustees to do something unanimously. These changes build on the New Jersey experience under revisions to New Jersey State Court practice since 2002. In New Jersey, practitioners have reported a positive experience with this rule. Operating under the rule, lawyers can focus on the substance of the proposed opinions. Sometimes parties with weak positions try to draw attention away from the content of the opinions to focus instead on the largely irrelevant side show of “who said what to whom,” or what language changed from draft one to draft two to draft three. The rule enables more effective communication between counsel and expert, permitting the expert to formulate a thorough, relevant opinion with a solid empirical basis. Under the prior system (comparable to the federal regime), inquiry into collateral issues frequently took on a life of its own entirely, creating satellite litigation, substantially increasing the cost of litigation, and making it more cumbersome. Experienced federal litigators prefer the New Jersey State Court regime, and stipulate around the current federal regime. We are aware that some academic commentators (see 08-CV-070) favor moving toward the expert witness practices of the legal systems of some foreign countries. But those foreign systems are not adversarial, and rely instead on a state-appointed inquisitor to supplant much of the function of counsel. None provides the extraordinary disclosure and discovery requirements that the federal system imposes. The academics also urge that providing this sensible protection will somehow make expert reports less reliable. We cannot see how taking the focus off the collaborative process of the lawyer and the expert and instead focusing on the content of the opinion will do that. They also suggest that adoption of the proposed amendment will contribute somehow to the decline of ethical conduct. None has been observed in New Jersey since the new rule went into effect over six years ago.

Written Comments

Leslie R. Weatherhead, Esq. (08-CV-003): I oppose the proposed change, not on the ground of any of the specified mechanics. I do not dispute the proffered efficiencies, or doubt that lawyers are routinely agreeing not to ask one another’s experts searching questions about how the lawyers reworded their drafts. I do not doubt that the proposed rule will make trial practice cheaper by obviating expensive dodges lawyers and experts employ. But I very much doubt that, by validating those dodgy practices, we will take trial practice in the direction in which it ought to go. Expert testimony under our evidence rules is an extraordinary exception to the usual rules, and it affords these witnesses rhetorical tools of great power. I think that this privilege produces an implied covenant between the expert and the court, but this covenant has been strained as lawyers became more creative and paid experts-for-hire more willing to put the interests of the litigants ahead of the experts’ devotion to craft and profession. The Supreme Court, in *Daubert*, has devoted considerable attention to the tendency of expert witnesses to break the bonds of professional restraint. Viewed in terms of these concerns, I am completely unconvinced that a rule

change that simply yields to the partisan instincts and habits of the lawyers is a good thing. Rather than validate the fun and games being played by the lawyers, the rules should more strongly condemn them.

William M Griffin III, Esq. (08-CV-007): The proposed changes are wrong-headed. Experts are the only ones who can express opinions as witnesses, but if that opinion has been created by a lawyer or with the help of a lawyer, the jury needs to be aware of that fact. Obviously, a jury needs to know that the person who actually drafted and created the expert's "opinion" is, in fact, the attorney. Today, so many experts are "for hire" that many will say almost anything depending on how they are paid. To further protect these individuals from the light of cross-examination is a travesty. The entire background on the expert and his communications with the attorney who hired him should be brought into the open before the jury.

Kenneth A. Lazarus, Esq. (08-CV-008): Our current litigation system permits expert witnesses to express opinions and does not limit them to matters on which they have personal knowledge. The assumption is that expert witnesses are facilitating the search for truth. The proposed amendments would completely undermine this assumption, suggesting instead the expert witnesses are really advocates, simply another part of the litigation team. This change would facilitate greater deception and manipulation in the presentation of a case, and thereby undermine public respect for law.

Robert L. Rothman, Esq. (Chair, ABA Section of Litigation) (08-CV-038): The Council of the ABA Section of Litigation wholeheartedly supports the proposed amendments of Rule 26 dealing with expert witnesses. The proposed changes are consistent with existing ABA policy and meet the needs of the practicing bar and the public in fulfilling the mandate of Rule 1 to "secure the just, speedy, and inexpensive determination of every action and proceeding."

Patrick Allen, Esq. (08-CV-041): I am especially pleased with the protections included in the proposed amendments to Rule 26(b)(4). Should these changes become effective in federal court, I will seek adoption of a similar rule under the Ohio Rules of Civil Procedure. Our firm recently was required to hire an outside expert to try to retrieve electronic communications between the attorney and the expert witness at considerable expense.

Gregory P. Joseph, Esq. (08-CV-055): I strongly favor the Rule 26 amendments for the reasons detailed in the article attached to the comment. The problem originated in the 1993 amendment to Rule 26, which was construed to open the door to discovery of all communications between the lawyer and the retained expert. These amendments would close the door to almost all discovery of those communications. Among other things, this change means that attorney-client privileged materials, which formerly might be presumptively discoverable upon disclosure to an expert witness, are not stripped of their protection. I have received a draft of a law professors' comment letter (08-CV-070), and found it distinctly unpersuasive. First, they maintain that the amendments will adversely affect the search for truth. They ignore the exceptions in proposed Rule 26(b)(4)(C), which permit open discovery into facts and assumptions provided by counsel. They also ignore *Daubert*, and the burden placed on proponent counsel of proving the

reliability of their expert's testimony. Second, they assert that the current practice is an expression of the basic value of independence of the expert. The kindest thing one can say about this notion is that it is unburdened by exposure to reality. Expert independence is best maintained by a free exchange of ideas between lawyer and expert. Third, they opine that the fact that the current regime causes lawyers and experts to engage in avoidance behavior demonstrates that there are problems with expert testimony requiring further "safeguards." This ipse dixit ignores the reason for the "evasive measures" -- lawyers curtail their written communications with experts to avoid creating highly distortable testimony and exhibits for their adversaries. Hiring two sets of experts may make sense in academia, where every case is worth every conceivable cost, but not in the real world. Fourth, they argue that allowing further inquiry upon a showing of good cause is tautological because there will always be such a need. But the real issue is the merit or lack of merit of the expert's opinion; inquiry into the factual predicate or the reliability or methodology or the fit may or may not implicate counsel/expert interaction. Current practice broadly permits extensive discovery, requires the engagement of multiple experts, and otherwise imposes enormous, pointless costs.

Chris Kitchell (Chair, American College of Trial Lawyers Federal Civil Rules Committee) (08-CV-060): The College fully supports the proposed changes to Rule 26. In our judgment, these proposed changes provide an appropriate balance between the disclosure obligations that are necessary for the parties to develop their cases and prepare for trial, on the one hand, and the burden and expense that frequently results from the discovery of draft reports and communications with counsel, on the other.

Lawyers for Civil Justice & U.S. Chamber Institute for Legal Reform (08-CV-061): On balance, LCJ and ILR support the core amendments that would protect work product and attorney-expert communications. Some of our members are opposed to protecting such communications and drafts, preferring open discovery as a bulwark against threats to the integrity of expert testimony. However, an overwhelmingly large majority of our members support the changes because the small benefits of open discovery do not justify the cost and burden of protecting such communications and the erosion of attorney work product protection. The widespread interpretation of the 1993 amendments to justify broad discovery has handicapped counsel in their efforts to provide vigorous and effective defense for the client. An attorney's collaboration with the expert is a logical and, in the current environment, a necessary extension of the analysis in *Hickman v. Taylor*. This collaboration often takes the form of exchanging drafts. The "solution" of employing two sets of experts inflicts an unnecessary and often substantial expense on the client.

Professors John Leubsdorf and William Simon (and 35 other law professor signatories) (08-CV-070): We write as tenured academics who have often been retained as expert witnesses or consultants in connection with litigation. We oppose the proposed changes to Rule 26(b)(4). They entrench a partisan relationship between the retaining lawyer and the expert witnesses that has long been recognized as the prime source of the pathologies of expert testimony. The lawyer can influence the expert too easily, but the amendment would drastically restrict cross-examination, which is the main safeguard against lawyer influence over expert witnesses. Such

a change would be directly contrary to the changes many scholars have long advocated in our system of expert testimony. Most foreign legal systems avoid partisanship by having experts appointed by the court. Although that has not been done in this country, *Daubert* reflects the view that we need additional, not fewer, safeguards to protect the reliability and integrity of expert evidence. Instead, the proposed amendment embraces the practice of treating experts as paid advocates rather than as learned observers and interpreters. We think that discovery as now allowed is valuable even if it is true that it usually fails to yield evidence (a claim that has not been empirically investigated). Knowing that their interactions will be scrutinized, experts can be expected to write their own reports, and lawyers to avoid proposing drastic changes in reports. The avoidance behaviors that the amendment is proposing to eliminate seem to us to show that the change would be a bad one. Making it more attractive to use the same expert as a witness and consultant seems to us to get things backward. Such a witness faces still greater temptations to provide testimony that will vindicate his or her advice in regard to settlement and the like.

Charles Miers, Esq. (08-CV-112): I support the addition of these protections. In my practice, I have often entered into agreements with opposing counsel to circumvent the current regime's requirements and direct that neither side will produce draft reports. By now, most experienced experts know not to put anything down on paper until they are ready to create a "final" report to avoid discovery. This maneuvering interferes with the free exchange of information.

Phil R. Richards, Esq. (08-CV-121): I am opposed to this amendment. Traditionally experts have been considered witnesses who are removed from the partisan positions of those who retain them and come into court to render an unbiased opinion based on their unique knowledge. In some jurisprudence, experts are deemed witnesses of the court, rather than the parties. One of the best assurances that an expert is being forthright in testimony is the ability of the opposing lawyers to obtain all documents and communications related to the formation and rendering of the expert's opinion.

Robert L. Rothman (ABA Section of Litigation) (08-CV-128): We favor the amendments because we believe that they will focus the courts on the substance of the expert's opinion, reduce litigation expense for all concerned and advance the command of Rule 1. We are convinced, as experienced trial lawyers, that the costs of the 1993 amendments far outweigh any theoretical benefits of allowing the parties to explore every nook and cranny of the communications between counsel and expert. We have seen a letter from some academics (08-CV-070) taking issue with the proposed amendments. These academics' views are strikingly lacking in qualitative or quantitative evidence. In contrast, the practicing bar, on both sides of the "v," overwhelmingly supports the proposed amendments. These practicing lawyers know that they still will be able to cross-examine and test the opposing expert based on what matters -- the content and quality of the expert's report and testimony. Since 1999, the ABA's Civil Discovery Standards have recommended that attorneys stipulate to an arrangement like the one provided by the proposed amendments. The professors say that the proposed amendments are "contrary to the changes many scholars have long advocated in our system of expert testimony," and that "[m]ost foreign judicial systems seek to avoid this partisanship by having experts appointed by the court, often from a list

of certified experts.” We are not told who these scholars are or their experience with or background in U.S. civil litigation. The invocation of foreign legal systems overlooks the fact that most do not have an adversarial system, and none has the exceptional disclosure and discovery mechanisms of the U.S. system. The professors say they seek to promote more reliable expert testimony, but offer no evidence that focusing expert discovery on the expert’s opinion is less reliable if the expert is permitted to develop that testimony through discussions with counsel. The professors seek “a pure and untrammelled world of litigation,” again presumably based largely on the continental inquisitorial system, when they object that the amendments risk “compounding the ambiguity and confusion that currently clouds the role of testifying expert witnesses.” There is no ambiguity or confusion in the real world of litigation in the U.S. An expert is hired by one side to make a presentation that favors that side. Jurors know that. If, for some reason, they do not know that, opposing counsel will make that clear. If the case is tried to the court, the court will also know that. The expert’s testimony will stand or fall, and be accepted or not, based on its content and credibility, not on any preliminary steps that led to it.

John A.K. Grunert, Esq. (08-CV-159): Generally the proposed amendments to Rule 26 are well-conceived and well-drafted.

Federal Magistrate Judges Ass’n (08-CV-161): The FMJA believes the proposed changes bring needed national uniformity to discovery practices relating to experts which will establish brighter lines for counsel’s decisionmaking and reduce the number of areas over which there could be a dispute. But neither Rule 26(b)(4)(B) and (C) nor the Committee Note addresses questions related to preservation of draft expert reports and the necessity for filing privilege logs when Rule 26 is asserted to protect the disclosure of this sort of work product material. Although these two subjects currently are covered by various circuit authorities, it would be helpful to set forth some clarification, either in the Rule or in the Committee Note, regarding whether the changes in the Rule were intended to alter any of those authorities.

Prof. Stephen D. Easton (08-CV-169): Although I applaud the Committee’s interest in reducing disclosure and discovery expenses, I oppose these changes as wrong-headed. “As one who has spent much of the last decade advocating for more, not less, disclosure and discovery regarding the potentially insidious relationship between retaining attorneys and hired experts,” I seek to reinforce the adversary system, not replace it. Unlike many academics who call for replacing party-selected expert witnesses with court experts, I do not believe that would be beneficial. But the cross-examiner needs full discovery and disclosure of the extent of the retaining attorney’s influence over the expert. For full discussion, see Stephen D. Easton, *Attacking Adverse Experts* (ABA Litigation Section 2008), especially chapters 4 and 5. Experts are the only witnesses who can be paid, and paid handsomely, for their testimony. The lawyers are in effect their paymasters, and it is crucial that their influence on the testimony be fully explored. One of the most important ways for the lawyer to influence the expert is through control of the information provided to the expert. Beyond that, the lawyer can control the content of the expert’s report. “By foreclosing the discovery of information about the attorney’s editing of ‘the expert’s’ report, the proposed amendments would give the attorney carte blanche to massively rewrite -- or even write ab initio -- the expert’s report and thereby influence her final opinion, free

of any concern that opposing counsel might expose this influence to jurors. This is a major step in the wrong direction.”

Robert J. Giuffra, Esq. (08-CV-174) (Federal Bar Council of 2d Cir.): We generally recommend adopting the proposed amendments to Rule 26(b)(4). But we worry that, because the proposed protections are not absolute, there is likely to be collateral litigation over the applicability and scope of the protection, and some lawyers may therefore continue the very practices the Committee is hoping to end. The amendments are a welcome attempt to solve the problems currently facing litigation practice with regard to expert witnesses. The Committee’s depiction of the problems is accurate. The amendments would encourage open and free communication between attorneys and experts, and would address inefficiencies and ineffectiveness in the current disclosure requirements. But we fear that, as worded, the amendments may not have their intended effects. The protection provided by invocation of Rule 26(b)(3) is not absolute, and invites highly fact-specific determinations that would engender uncertainty over the protection for given communications, although the discussion in the Committee Note about the difficulty of making a showing of need will provide comfort to practitioners. We are also concerned that the amendments fail to address the situation of a party’s involvement in multiple suits -- and in particular instances in which one of the suits is in state court. This omission may mean that the amendments fail to achieve their purposes. A state court may be unwilling to afford Rule 26(b)(3) protection despite the provisions of the amendments.

U.S. Dep’t of Justice (08-CV-180): The Department supports the proposed amendments. The Department concludes that, on balance, the benefits of this proposal outweigh its disadvantages. Although it understands the concerns of some who say that the amendments will enable attorneys to have undue influence over the expert’s report and opinions, the Department concludes that the discovery explicitly permitted under the amended rule -- regarding the facts or data the attorney provided to the expert and the assumptions the attorney provided -- ordinarily should be sufficient to enable the attorney to determine if an expert’s opinions have been improperly influenced by the attorney.

Thaddeus E. Morgan, Esq. (Chair, U.S. Courts Comm. of the State Bar of Michigan) (08-CV-184): The Michigan Committee voted to urge adoption of the proposed amendment to Rule 26. The amendments will enhance the effective use of expert witnesses and decrease litigation costs.

American Institute of Certified Public Accountants (08-CV-185): We support this proposed amendment. It is important for CPA experts to collaborate with counsel to develop and revise theories and opinions. The current open-ended discovery rules chill the process. Limiting the expert discovery as done by the amended rules would not only limit the need for and cost of consulting experts, but also focus expert discovery on issues that bear on the testifying experts’ final opinions.

Extent of Rule 26(b)(4)(C) Protection

Washington, D.C.

Theodore B. Van Itallie, Jr., Esq., Assoc. Gen. Counsel, Johnson & Johnson (testimony and 08-CV-040): Regarding those expert witnesses not required to make a report under Rule 26(b)(2), and therefore not protected by the proposed amendments to Rule 26(b)(4), it should first be true that their draft disclosures are protected. Rule 26(b)(4)(B) would protect those. Regarding attorney-expert communications, I think I would contend that work product protection applies to those communications. The thrust of the proposed changes to Rule 26(b)(4) is to retract the broad intrusion into attorney-expert communications that was introduced by the 1993 amendments. With that intrusion retracted, I would think that the argument that work product applies to attorney communications with experts not specially retained would be valid.

R. Matthew Cairns, Esq., Defense Research Institute (testimony and 08-CV-57): The protection provided by Rule 26(b)(4)(C) is too limited. It extends only to attorney communications with the expert and not with the expert's staff. But just as attorneys often rely on paralegals or others in their offices to prepare cases, so do expert witnesses. A university professor, for example, may use graduate students in the professor's doctoral program to assist in research, and counsel may deal with those students on a day-to-day basis as the expert's team works on the conclusion to be presented, and preparing the expert's report. The Committee Note should make clear that attorney communications with the expert's assistants are protected just as are attorney communications directly with the expert. Additionally, consideration should be given to extending Rule 26(b)(4)(C) to communications with in-house experts who do not regularly testify as expert witnesses even though they are not required to provide a report under Rule 26(a)(2). To make suitable disclosure under the new disclosure requirements for such witnesses, counsel will have to communicate with them, so those communications arguably should be protected as well. The current draft does not adequately explain why Rule 26(b)(4)(C) protection does not extend to such communications, or why the two types of expert witnesses are treated differently. I have not formed a conclusion on whether the protection should be expanded, but urge further thought about the subject. A major concern here is the attorney-client privilege; the in-house person may or may not be within the "control group" under New Hampshire attorney-client privilege law, but the communications with that person should be covered. So the in-house person is different from other expert witnesses not required to provide a report, such as the treating physician. Indeed, in New Hampshire, plaintiff's counsel can freely communicate with plaintiff's doctor, but defense counsel can't. If in a deposition of the doctor we ask what plaintiff's lawyer said to the doctor we encounter a privilege objection and have to suspend the deposition to work around that problem. Regarding underlings, he finds that he does have to interact with them when he cannot reach the retained expert (such as a university professor), but has not to date been impeded by the disclosure rules in engaging in strategic interaction with retained expert witnesses.

Stephen Morrison, Esq. (testimony and 08-CV-050): I favor including protection for attorney communications with the expert's assistants within the protection.

Bruce R. Parker, Esq. (Int'l Assoc. of Defense Counsel): In the defense bar, there is a debate about whether to favor extending protections to cover those expert witnesses who don't have to provide a report. Some argue that the attorney-client privilege is an uncertain protection. As a lawyer who has represented many companies sued in mass tort litigation, I know that in-house scientific people are often the most helpful to me in understanding the issues. They are likely not to be people who regularly testify as expert witnesses, so they would not have to prepare reports. But I really need to be able to talk strategy with them. So that consideration might cause me to favor extending protection beyond those experts required to prepare a report. But on balance I am opposed to that extension because of the importance of allowing defendants to challenge treating doctors. Those witnesses are likely to be viewed by the jury as the most important expert witnesses, both because they have long-term involvement with the plaintiff and because they are regarded as truly independent, while an employee of defendant is not. It used to be that we could often obtain by agreement an opportunity to talk to the treating doctor, but since the passage of HIPAA -- with its stringent rules on patient confidentiality -- that is no longer possible. So from the defense side, the only way I can talk to the doctor is in a deposition. And I know that plaintiff counsel sometimes tell treating doctors things that prejudice them against my clients. If I could not ask about that I could not do an adequate job for my clients. That is too high a price to pay to insulate my discussions with my client's in-house experts. Regarding grad students and others who assist the expert witnesses, I've never asked them their opinions about the issues raised in the case. I have found, however, that if discovery is a possibility I will be cautious about talking to those people.

Alfred W. Cortese, Jr., Esq.: LCJ does not yet have a uniform position on whether the protection should be extended to all expert witnesses rather than only those specially retained. Similarly, LCJ is not certain of its position on whether communications with the expert's staff should be protected. On these topics, we may submit further comment.

San Antonio

Wayne Mason, Esq. (Fed. of Def. & Corp. Counsel) (testimony & 08-CV-125): We favor extending the protections to include "disclosure experts" who are not specially retained but would be subject to disclosure under the changes to Rule 26(a)(2). Lawyers need to communicate with these people, and they need to communicate with the lawyer. The attorney-client privilege may apply to some of these people, but often does not apply. In the defense community there is a debate about whether protecting communications between counsel and the plaintiff's treating doctor is desirable. Although some of our members have concerns regarding physicians, on balance we believe that the better-reasoned approach is to provide work product protection for communications with all witnesses who do not provide a written report. In my view, the three exceptions to protection under the proposed amendment sufficiently equip me to interrogate the treating doctor even if the communications with plaintiff's counsel are generally protected. I do not need more, and protection as to the in-house witnesses of my client who will offer partly expert testimony is more important. Handling waiver of this protection is uncertain. That comes down to whether this is a "privilege" or a "protection." This protection should extend also to communications with the employees and representatives of expert witnesses.

John H. Martin, Esq. (immediate past president of DRI) (testimony and 08-CV-113): I support extending the work product protection to disclosure experts. I am willing to give up the right to cross plaintiff's treating doctor about what the plaintiff lawyer said. I need to be able to talk freely with the company's employees who will give expert testimony. I also need to talk freely to the company's employees who will not give expert testimony. Although I have some concern about the possibility that the opposing lawyer will be able to influence expert witnesses, I view it as a trade off, and believe the protection is more important than the opportunity to examine the other side's expert witnesses. I also think that the protection should extend to the staff of the expert. I need to be able to communicate with them. They are conduits between me and the expert. In fact, I've had an instance in which the staff members were deposed.

G. Edward Pickle, Esq. (testimony and 08-CV-110): I favor extending the protection to attorney communications with those witnesses not required to provide a report. There is a trade-off from the defense side in thus insulating the communications between the plaintiff lawyer and treating doctors, but it is worth it. For in-house experts, the proposed disclosure provisions of amended Rule 26(a)(2)(C) would provide information, and further discovery would be allowed. We should avoid becoming more demanding.

Stephen Pate, Esq. (vice president, Fed. of Corp. & Defense Counsel): At first I did not agree with Wayne Mason's view (see above). But on reflection I have come to agree with him. There is a trade off between the benefit of inquiry into communications between my opponent and his or her experts and the burdens of similar inquiry about my communications with mine.

San Francisco

Marc E. Williams (president of DRI) (testimony and 08-CV-135): I support the extension of protection to communications with expert witnesses to include employee witnesses not required to prepare a report. Work product protections are essential to the litigation process, and providing additional protection for these people outweighs any potential additional costs. By extending this protection, the Committee would help to ensure that parties are able to gather information free from the underlying threat of having to divulge that information at a later date. This is important with in-house experts who possess a unique, and sometimes highly sensitive, familiarity with the relevant subject matter. This person may be a former employee no longer employed by the company. These sorts of people are not specially retained. This protection would apply where the attorney-client privilege leaves off. It would probably be possible to "specially retain" these people and make them eligible for protections (response to question). It could also be true that similar concerns apply to purely fact witnesses, and that there would be complications in dealing with witnesses whose information consisted of a blend of factual and expert knowledge (response to question).

Daniel J. Herling, Esq. (testimony and 08-CV-129): I favor extending protection to employees who are not required to prepare a report. The problems come up with employees who have expertise; this is a gray area about whether they are "testifying experts." We know that under the current view anything we say to retained experts is open to discovery. But with others things

are not so clear. For example, suppose an IP opinion letter was written ten years ago. I need to find somebody to tell me whether the assumptions made in the letter are correct. If I choose to vet this through the same person I use as a nonretained expert, I may open up discovery inappropriately. You should think more about this issue.

Thomas A. Packer, Esq.: The protection should apply to all expert employees, whether or not they have to prepare a report. The rule should not disadvantage a company just because the experts are in-house. According work product protection is important to attorney interaction with these employees. The attorney-client privilege should apply for all lawyer interaction with the employee about purely factual matters, and also for expert opinion testimony they might give about those factual matters. But it is not clear that the privilege would also apply when these employees are instead doing extra work -- beyond the factual information they received as employees from involvement in the underlying events. That's where the expanded protection the rule provides for communications between the expert and employee is important.

Donald F. Zimmer, Jr., Esq. (testimony and 08-CV-140): Employees of a party who may offer minimal expert opinion testimony should be excused from the report requirements, and work product protection should extend to them under proposed Rule 26(b)(4)(C).

Peter S. Pearlman, Esq. (Co-Chair, Rules Comm., Assoc. of Fed. Bar of New Jersey) (testimony and 08-CV-153): The 2002 New Jersey rule providing work product protection for lawyer-expert communications provides protection only for communications with experts "retained or specially employed." This limitation has not caused difficulty in New Jersey.

Written comments

Lawyers for Civil Justice & U.S. Chamber Institute for Legal Reform (08-CV-061) and Supplemental Comments (08-CV-181): We believe that there should be protection for communications between counsel and the expert's staff, researchers, and assistants. Although these people are not expected to testify, they provide input into the expert's report. Often an expert bases a report and resulting testimony on the work of a team of individuals. Therefore, we think that the Note should mention this possibility and provide protection for the attorney's communications with these important people. Supplemental comments: Protection should be extended to those disclosure experts who are employed by the party making the disclosure. The assumption seemingly made that they would not be involved as deeply in the development of case strategy as retained experts is not consistent with our members' experience. Instead, in-house scientists, engineers, and technical personnel are often the most knowledgeable individuals regarding the matters at issue. The initial education of trial counsel therefore comes from employee experts, and these experts are very important in helping trial counsel to winnow down important concepts from a mass of documents and theories, as well as explaining the reasonableness of a party's conduct. The current Committee Note is clear that no attempt was made to exclude protection of communications between disclosure experts and counsel, but the amendments should explicitly extend work product protection to disclosure experts who are employees of the party making the disclosure (but not to other disclosure experts). Such experts

are likely to be viewed by the jury as having a degree of bias in favor of the party, while nonemployee experts (such as police officers, federal investigators, government officials and treating physicians) are more likely to be viewed as uninfluenced by counsel. With investigators, for example, full discovery of conversations between them and counsel may bear on whether “the sources of information or other circumstances indicate lack of trustworthiness” under Fed. R. Evid. 803(8). Moreover, communications between the disclosure expert and counsel are not likely to fall within any of the three exceptions to proposed Rule 26(b)(4)(C). The protection should also be extended explicitly to communications between the attorney and the expert’s staff. Staff members can play an integral role in the research, development, and preparation phases of the expert report and opinion, which may often be a collaborative effort of a group of individuals. The solution to this issue would be to add a few words to the Committee Note to clarify that the work product protection extends to an expert’s staff, including individuals that assist the expert in developing the expert report and the overall provision of expert services. Earlier cases treated experts as “agents” of the attorney. As the Committee has heard, the question of discovery from these people has come up in litigation, and the handling of it should be clarified in the Committee Note. All members of the litigation team, including experts and their staff, must have the ability to examine the facts, reach conclusions, and speak freely in order to render effective legal services. We therefore urge that the Committee Note at lines 59-62 be amended as follows: “The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney expert communications between attorneys and experts, including staff working at their direction.”

Charles Miers, Esq. (08-CV-112): I believe that the comment to the rule should make clear that protection is provided for communications between the lawyer and the expert’s staff, researchers, or assistants who are not expected to testify, but who may provide input to or assist with certain portions of the expert’s report. For example, in an environmental clean-up case, one expert may be expected to testify, but she may have received assistance from a team of experts (hydrologists, environmental engineers, chemical engineers, etc.).

Robert L. Rothman (ABA Section of Litigation) (08-CV-128): We have considered the question raised by the invitation for comment on whether the protection for communications should be limited to communications between counsel and an expert required to make a report. We believe the answer is “it depends.” If, for example, the testimony comes from someone who is essentially a fact witness -- the archetype being a treating physician -- then communications between counsel and that witness should be discoverable. If the witness is more akin to a retained expert -- for example an employee of a party, such as an in-house mechanical engineer whose opinion is sought on a matter within her scientific expertise -- then the rationale for maintaining traditional work product protection for communications between counsel and the witness would seem to apply.

John A.K. Grunert, Esq. (08-CV-159): I am concerned about three things. First, the Committee Note discussion of extending protection to “oral” draft reports and communications introduces uncertainty. Rule 26(b)(3), by its terms, applies only to documents and tangible things, so either proposed Rules 26(b)(4)(B) and (C) do not mean what they say, or Rule 26(b)(3) does

not mean what it says, or the Committee Note is wrong. It is unwise to promulgate a rule that will generate disputes. One solution would be to strike the statements in the Committee Note on this topic. This Note discussion seems to be about “oral draft” reports, but that is a phrase not found in ordinary English usage. The language of the proposed rules accomplishes the goal without the need for mention in the Note. Another solution would be to redraft the proposed rules to remove the language about form of communication and substitute (as to proposed Rule 26(b)(4)(C)) the statement that the protection “applies to oral communications between the party’s attorney and any such witness.” There would be no need to mention oral drafts in (B) because “draft” does not include anything oral. Second, the protection for communications should apply also to some experts not required to prepare reports. The attorney’s communications with some “nonretained” experts -- treating doctors or police accident reconstructionists, for example -- should not be protected. But communications with a corporate defendant’s employee should be protected. Third, The rule should explicitly provide protection for communications with non-testifying experts whenever they might be deposed. This could be done by amending current Rule 26(b)(4)(B), now to be redesignated 26(b)(4)(D), to add such protection there.

Rule 26(b)(4) -- Effect on *Daubert* Decisions

Washington, D.C.

Bruce R. Parker, Esq. (Int'l Assoc. of Defense Counsel): I know that some have suggested that the adoption of these discovery changes will have an impact on *Daubert* decisions. I see no reason to expect that to happen. I regularly litigate *Daubert* issues, and can think of no instance in which attorney-expert communications or draft reports played a role in making a decision whether a given witness could offer opinion testimony. For purposes of discrediting the opposing expert's testimony, I don't care about what the lawyer said to the expert; I only need to be able on cross examination to challenge the opinion as given. If somebody wants to improve the handling of expert witnesses on this front, one should be dealing more aggressively with speaking objections and nonresponsive "answers" from expert witnesses. Often I come out of a seven-hour expert deposition with about an hour and a half of real testimony.

Stephen B. Pershing, Esq. (Amer. Ass'n Justice) (testimony and 08-CV-52): AAJ members see no reason for wanting access to attorney-expert communications or draft reports to do a thorough job preparing for *Daubert* issues. Probing interaction between the experts and opposing counsel does not really matter. What matters is challenging the opinions on their merits.

Rule 26(b)(4)(C) -- Exceptions to protection provided

Washington, D.C.

Debra Tedeschi Herron, Esq. (testimony and 08-CV-45): The exceptions further fairness in the discovery process while the rule affords appropriate protection for attorney-expert communications.

Stephen B. Pershing, Esq. (Amer. Ass'n Justice) (testimony and 08-CV-52): The three exceptions show that these amendments are not really anti-disclosure provisions. The three exceptions cover all an attorney would sensibly want or need to challenge an opposing expert. Going further would raise risks of rekindling the squabbling that was produced by the 1993 amendments. For example, maybe there would be some value to know about assumptions the lawyer told the expert to make that the expert did not rely on in reaching the opinion to be presented, but that is really not important. And enabling discovery would increase the risk of the sort of squabbling about unimportant points that has become so pervasive and that these amendments are seeking to end.

Alfred W. Cortese, Jr., Esq.: The exceptions permit adequate inquiry to get at the validity of the expert opinion.

San Antonio

Wayne Mason (Fed. of Def. & Corp. Counsel) (testimony and 08-CV-125): The three exceptions to protection of attorney-expert communications are generally sufficient to permit needed inquiry.

John H. Martin, Esq. (immediate past president of DRI) (testimony and 08-CV-113): The three exceptions provide significant ability to inquire about pertinent matters even when the protections afforded by the amended rule apply.

Written Comments

Norman W. Edmund (founder of Edmund Scientific Co.) (08-CV-005): The exception permitting discovery regarding communications that “identify assumptions that the party’s attorney provided and that the expert relied upon in forming the opinions to be expressed” should be revised to “and identify how they have applied the steps or stages of the scientific method in forming the opinions.” This change would respond to the directive in *Daubert* that “scientific knowledge” is information “derived by the scientific method.” The comment attaches research reports from the commentator’s website www.scientificmethod.com on the nature and operation of the scientific method. Included is a 14-step set of stages or ingredients for scientific testimony that may be used for expert witnesses and an analysis of the Supreme Court’s treatment of the methodology and the scientific method.

Patrick Allen, Esq. (08-CV-041): Because there are exceptions to the protection provided, it still may happen that attorney-expert communications are subject to discovery. I now find myself using the telephone to avoid creating electronic records of my communications with expert witnesses. Avoiding the costs of unearthing such electronic communications, which can be considerable, would be desirable.

Professors John Leubsdorf and William Simon (and 35 other law professor signatories) (08-CV-070): We find it difficult to understand the exception to the protection provided for situations in which the party shows that it has a substantial need and cannot obtain the substantial equivalent without undue hardship. Taking the ordinary work product attitude toward this question, it seems to us that it will always be true that the information shielded by the amendment is necessary, since the amendment bars discovery and the expert will rarely be free to speak with opposing counsel. So it would seem that discovery would always be available through this exception.

Committee on Civil Litigation, U.S. Dist. Ct., E.D.N.Y. (08-CV-098): We endorse the goal stated on p. 7 of the Advisory Committee's report supporting questioning of an expert on why the expert considered (or did not consider) certain factors, why the expert used (or did not use) certain approaches or methodologies, and why the expert did (or did not) attempt to draw certain types of conclusions, even if the answers to such questions involve communications with counsel. In our experience, such questions and answers are important elements of expert discovery and inquiry at trial. But the language of the proposed rule does not appear to allow for such questions. Only three exceptions are carved out of proposed Rule 26(b)(4)(C), and it is not clear to us that these three exceptions allow for the types of questions discussed on p. 7 of the report. For example, a party attempting to elicit deposition testimony regarding counsel's directions to an expert to use a certain approach or not to draw a certain conclusion would not appear to fall within any of those three specified conclusions. We therefore think a fourth exception should be added: "(iv) relate to matters such as why the expert considered (or did not consider) certain factors, why the expert used (or did not use) certain approaches or methodologies, and why the expert did (or did not) attempt to draw certain types of conclusions." We believe that this addition is important to ensure the opportunity to make these important inquiries.

Joan Harrington, Esq. (08-CV-151): I support the Committee on Civil Litigation of the U.S. District Court in the E.D.N.Y. regarding the need to revise the proposed rule to clarify that questioning will be allowed on why the expert considered (or did not consider) certain factors.

American Institute of Certified Public Accountants (08-CV-185): The exceptions allow for discovery to an extent that provides assurances that appropriate information will continue to be available. We believe, however, that Rule 26(b)(4)(C)(ii) and Rule 26(a)(2)(B)(ii) should be rewritten to limit disclosure and discovery to information "relied upon" rather than "considered by" the expert witness.

Rule 26(b)(4) -- Use at Trial; Rules Enabling Act

Washington, D.C.

Stephen B. Pershing, Esq. (Amer. Ass'n Justice) (testimony and 08-CV-52): The proposed Committee Note properly indicates that cross-examination at trial about matters protected under the amendment should not be allowed. The "cf." citation to *United States v. Nobles*, 422 U.S. 225 (1975) gives some guidance on the point. The Note could not give more guidance without exceeding the Committee's proper role under the Rules Enabling Act. We note that *Nobles* has been followed in both civil and criminal cases. It would be good for the Note also to address the interaction of proposed Rule 26(b)(4)(C) and Fed. R. Evid. 612. In addition, it would be desirable for the Note to address the possibility of discovery or use of such material in subsequent litigation. In our view, protection should be extended, and the Note should encourage courts to give the protection the greatest reasonable effect.

San Antonio

John H. Martin, Esq. (immediate past president of DRI) (testimony and 08-CV-113): I have seen the Committee Note about use at trial, and expect that most judges would honor it. At the same time, work product protection is not a privilege. It is not likely that attorneys will often ask questions at trial they don't know the answer to, so providing a protection through discovery is likely, as a practical matter, to be significant. But I would expect some attorneys to try to do it, and would file a motion in limine if I saw this coming. I would not hire consulting experts just to avoid the risk that inquiry at trial might be allowed. But if the Committee Note discussion were removed I would be concerned about this problem. It would almost be better -- if the draft Note discussion were dropped after the public comment period -- that it had never been there.

San Francisco

Peter S. Pearlman, Esq. (Co-Chair, Rules Comm., Assoc. of Fed. Bar of New Jersey) (testimony and 08-CV-153): The argument that the proposed amendment cannot be made without an act of Congress is misdirected. The proposed amendment does not modify an evidentiary privilege. In fact, it addresses the work-product doctrine, not the attorney-client privilege. The work-product doctrine is not among the privileges codified in the Federal Rules of Evidence. Case law has recognized from the doctrine's inception in *Hickman v. Taylor* that it was not a privilege. The sorts of privileges involved in the Federal Rules of Evidence were different. Case law has therefore specifically recognized that work product protection is not a "privilege" and therefore is outside the scope of Fed. R. Evid. 501. In fact, the 1993 amendments were adopted through these same Rules Enabling Act mechanisms. To the extent those amendments are seen as having removed an evidentiary privilege, they suffer from the same infirmity as is suggested with regard to the current amendments. All these proposed amendments do is to return us to where we were before 1993.

Written Comments

Kenneth A. Lazarus, Esq. (08-CV-008): There is presently no privilege that prevents inquiry at trial into the matters sought to be protected by this amendment. But unless this information is excluded at trial, the proposed amendments may be counter-productive. If, however, the goal is to prevent inquiry at trial, the right way to address the question is head-on by amending the Federal Rules of Evidence. Indeed, by attempting to create what arguably amounts to a qualified privilege in Rule 26, you may inadvertently invite an eventual constitutional challenge on the Rules Enabling Act under the *Chadha* principle.

Patrick Allen, Esq. (08-CV-041): I believe it would be appropriate to include protection from disclosure whether in discovery or in trial. If draft opinions are not discoverable before trial, the subject of draft opinions should not be raised at trial.

Gregory P. Joseph, Esq. (08-CV-055): Academic commentators (08-CV-070) argue that this amendment would somehow run afoul of the Rules Enabling Act because it is effectively “modifying a privilege.” This argument proves too much. If returning the state of discovery to essentially where it was prior to the adoption of the 1993 amendments does that, the argument actually proves that the 1993 amendment itself violated the Rules Enabling Act. For discussion of that possibility, see Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97 (1996). It is impossible to argue that the proposed amendment can run afoul of the Act without conceding that the 1993 amendments -- which created the problems now being corrected -- did so first.

Professors John Leubsdorf and William Simon (and 35 other law professor signatories) (08-CV-070): The purpose and effect of the amendment are to extend the attorney client privilege to cover a broad range of communications between lawyers and testifying experts, and it therefore may be subject to 28 U.S.C. § 2074(b)’s requirement for affirmative adoption by Congress. The amendment is plainly meant not only to forbid discovery on these topics, but also to prevent their use as evidence at trial. Unless it bars inquiry at trial, it will not accomplish its declared goals. But placing materials beyond the scope of inquiry both in discovery and at trial is precisely what privilege rules do. Moreover, the grounds of the amendment are precisely the same as those relied on to support most privileges: the asserted value of a class of private communications, and the fear that they will be discouraged if outsiders can inquire into them. This concern about the role of Congress is reinforced by the recent experience with Evidence Rule 502, which Congress did adopt as written, but only with a lengthy explanatory Statement of Congressional Intent.

Robert L. Rothman (ABA Section of Litigation) (08-CV-128): There is no problem with rulemaking authority here. The current provisions in Rule 26 were adopted in 1993 through the normal Rules Enabling Act mechanism. No one suggested at that time that this required an Act of Congress. To the extent that courts interpreted those 1993 changes as removing an attorney’s communications with a testifying expert from work-product protection, there is no reason why a further rule amendment cannot make clear that these communications are now protected as attorney work product. All this amendment does is return the rule to its pre-1993 status. If the

argument were correct, the 1993 amendment itself would have been invalid because it “abolished” an evidentiary privilege. By the same token, we do not anticipate these issues to be raised at trial, because work product objections would properly prevent inquiry there too, and keep the trial focused on the issues that matter -- in this situation the substance of and support for the expert’s opinion.

Prof. Stephen D. Easton (08-CV-169): If the proposed amendments are adopted, a civil attorney conducting a cross-examination would almost never ask an expert about the extent to which a retaining attorney influenced her opinion, because the cross-examiner would not know the answer to that question.

Rule 56. Summary Judgment

- 1 **(a) Motion for Summary Judgment or Partial**
2 **Summary Judgment.** A party may move for
3 summary judgment, identifying each claim or defense
4 — or the part of each claim or defense — on which
5 summary judgment is sought ~~on all or part of a claim~~
6 ~~or defense.~~ The court ~~should~~ shall grant summary
7 judgment if the movant shows that there is no genuine
8 dispute as to any material fact and ~~a party~~ the movant
9 is entitled to judgment as a matter of law. The court
10 should state on the record the reasons for granting or
11 denying the motion.
- 12 **(b) Time to File a Motion, ~~Response, and Reply.~~** These
13 ~~times apply to~~ Unless a different time is set by local
14 rule or the court orders otherwise, ~~in the case:~~ ~~(1)~~ a
15 party may file a motion for summary judgment at any
16 time until 30 days after the close of all discovery.†

17 ~~(2) a party opposing the motion must file a~~
18 ~~response within 21 days after the motion is~~
19 ~~served or that party's responsive pleading is~~
20 ~~due, whichever is later, and~~

21 ~~(3) any reply by the movant must be filed within~~
22 ~~14 days after the response is served.~~

23 **(c) Procedures.**

24 **(1) *Supporting Factual Positions.*** An assertion
25 party asserting that a fact cannot be or is
26 genuinely disputed ~~or is genuinely disputed~~
27 must be supported the assertion by:

28 **(A) *Supporting Fact Positions*** citation
29 citing to particular parts of materials
30 in the record, including depositions,
31 documents, electronically stored
32 information, affidavits or declarations,
33 stipulations (including those made for

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34 purposes of the motion only),
35 admissions, interrogatory answers, or
36 other materials; or

37 **(B)** a showing that the materials cited do
38 not establish the absence or presence
39 of a genuine dispute, or that an
40 adverse party cannot produce
41 admissible evidence to support the
42 fact.

43 **(2)** *Asserting That a Fact Is Not Supported by*
44 *Admissible Evidence.* A response or reply to
45 ~~a statement of fact may state~~ party may assert
46 that the material cited to support or dispute ~~the~~
47 a fact is not cannot be presented in a form that
48 would be admissible in evidence.

49 **(3)** *Materials Not Cited.* The court need consider
50 only the cited materials ~~called to its attention~~

51 ~~under Rule 56(c)(1)(A), but it may consider~~
52 other materials in the record.†

53 ~~(A) to establish a genuine dispute of fact;~~

54 or

55 ~~(B) to grant summary judgment if it gives~~
56 notice under Rule 56(f).

57 ~~(4) *Accept or Dispute Generally or for Purposes*~~
58 ~~*of Motion Only.* A party may accept or~~
59 ~~dispute a fact either generally or for purposes~~
60 ~~of the motion only.~~

61 (4) *Affidavits or Declarations.* An affidavit or
62 declaration used to support or oppose a
63 motion, ~~response, or reply~~ must be made on
64 personal knowledge, set out facts that would
65 be admissible in evidence, and show that the
66 affiant or declarant is competent to testify on
67 the matters stated.

68 **(d) When Facts Are Unavailable to the Nonmovant.** If
69 a nonmovant shows by affidavit or declaration that,
70 for specified reasons, it cannot present facts essential
71 to justify its opposition, the court may:

72 (1) defer considering the motion or deny it;

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

75 (3) issue any other appropriate order.

76 **(e) Failing to Properly Support or Address a Facture**
77 **to Respond or Properly Respond.** If a response or
78 ~~reply does not comply with Rule 56(c) — or if there~~
79 ~~is no response or reply —~~ party fails to properly
80 support an assertion of fact or fails to properly
81 address another party’s assertion of fact as required
82 by rule 56(c), the court may:

83 (1) ~~afford give~~ an opportunity to properly ~~respond~~
84 ~~or reply~~ support or address the fact;

- 85 (2) consider a the fact undisputed for purposes of
86 the motion;
- 87 (3) grant summary judgment if the motion and
88 supporting materials — including the facts
89 considered undisputed — show that the
90 movant is entitled to it; or
- 91 (4) issue any other appropriate order.
- 92 (f) **Judgment Independent of the Motion.**
- 93 After giving notice and a reasonable time to
94 respond, the court may:
- 95 (1) grant summary judgment for a nonmovant;
- 96 (2) grant ~~or deny~~ the motion on grounds not
97 raised by a party ~~the motion, response, or~~
98 reply; or
- 99 (3) consider summary judgment on its own after
100 identifying for the parties material facts that
101 may not be genuinely in dispute.

- 102 **(g) Failing to Grant All the Requested Relief Partial**
103 **~~Grant of the Motion.~~** If the court does not grant all
104 the relief requested by the motion, it may enter an
105 order stating any material fact — including an item of
106 damages or other relief — that is not genuinely in
107 dispute and treating the fact as established in the case.
- 108 **(h) Affidavit or Declaration Submitted in Bad Faith.**
109 If satisfied that an affidavit or declaration under this
110 rule is submitted in bad faith or solely for delay, the
111 court — after notice and a reasonable time to respond
112 — may order the submitting party to pay the other
113 party the reasonable expenses, including attorney’s
114 fees, it incurred as a result. An offending party or
115 attorney may also be held in contempt or subjected to
116 other appropriate sanctions.

COMMITTEE NOTE

Rule 56 is revised to improve the procedures for presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts. The standard for granting summary judgment remains unchanged. The language of subdivision (a) continues to require that there be no genuine dispute as to any material fact and that the movant be entitled to judgment as a matter of law. The amendments will not affect continuing development of the decisional law construing and applying these phrases.

Subdivision (a). Subdivision (a) carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word — genuine “issue” becomes genuine “dispute.” “Dispute” better reflects the focus of a summary-judgment determination. As explained below, “shall” also is restored to the place it held from 1938 to 2007.

The first sentence is added to make clear at the beginning that summary judgment may be requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense. The subdivision caption adopts the common phrase “partial summary judgment” to describe disposition of less than the whole action, whether or not the order grants all the relief requested by the motion.

“Shall” is restored to express the direction to grant summary judgment. The word “shall” in Rule 56 acquired significance over many decades of use. Rule 56 was amended in 2007 to replace “shall” with “should” as part of the Style Project, acting under a convention that prohibited any use of “shall.” Comments on proposals to amend Rule 56, as published in 2008, have shown that neither of the choices available under the Style Project conventions

— “must” or “should” — is suitable in light of the case law on whether a district court has discretion to deny summary judgment when there appears to be no genuine dispute as to any material fact. Compare *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (“Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case in which there is reason to believe that the better course would be to proceed to a full trial. *Kennedy v. Silas Mason Co.*, 334 U.S. 249 * * * (1948)),” with *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (“In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”). Eliminating “shall” created an unacceptable risk of changing the summary-judgment standard. Restoring “shall” avoids the unintended consequences of any other word.

Subdivision (a) also adds a new direction that the court should state on the record the reasons for granting or denying the motion. Most courts recognize this practice. Among other advantages, a statement of reasons can facilitate an appeal or subsequent trial-court proceedings. It is particularly important to state the reasons for granting summary judgment. The form and detail of the statement of reasons are left to the court’s discretion.

The statement on denying summary judgment need not address every available reason. But identification of central issues may help the parties to focus further proceedings.

Subdivision (b). The timing provisions in former subdivisions (a) and (c) are superseded. Although the rule allows a motion for

summary judgment to be filed at the commencement of an action, in many cases the motion will be premature until the nonmovant has had time to file a responsive pleading or other pretrial proceedings have been had. Scheduling orders or other pretrial orders can regulate timing to fit the needs of the case.

Subdivision (c). Subdivision (c) is new. It establishes a common procedure for several aspects of summary-judgment motions synthesized from similar elements developed in the cases or found in many local rules.

Subdivision (c)(1) addresses the ways to support an assertion that a fact can or cannot be genuinely disputed. It does not address the form for providing the required support. Different courts and judges have adopted different forms including, for example, directions that the support be included in the motion, made part of a separate statement of facts, interpolated in the body of a brief or memorandum, or provided in a separate statement of facts included in a brief or memorandum.

Subdivision (c)(1)(A) describes the familiar record materials commonly relied upon and requires that the movant cite the particular parts of the materials that support its fact positions. Materials that are not yet in the record — including materials referred to in an affidavit or declaration — must be placed in the record. Once materials are in the record, the court may, by order in the case, direct that the materials be gathered in an appendix, a party may voluntarily submit an appendix, or the parties may submit a joint appendix. The appendix procedure also may be established by local rule. Direction to a specific location in an appendix satisfies the citation requirement. So too it may be convenient to direct that a party assist the court in locating materials buried in a voluminous record.

Subdivision (c)(1)(B) recognizes that a party need not always point to specific record materials. One party, without citing any other materials, may respond or reply that materials cited to dispute or support a fact do not establish the absence or presence of a genuine dispute. And a party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact.

Subdivision (c)(2) provides that a party may assert that material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence. There is no need to make a separate motion to strike. If the case goes to trial, failure to challenge admissibility at the summary-judgment stage does not forfeit the right to challenge admissibility at trial.

Subdivision (c)(3) reflects judicial opinions and local rules provisions stating that the court may decide a motion for summary judgment without undertaking an independent search of the record. Nonetheless, the rule also recognizes that a court may consider record materials not called to its attention by the parties.

Subdivision (c)(4) carries forward some of the provisions of former subdivision (e)(1). Other provisions are relocated or omitted. The requirement that a sworn or certified copy of a paper referred to in an affidavit or declaration be attached to the affidavit or declaration is omitted as unnecessary given the requirement in subdivision (c)(1)(A) that a statement or dispute of fact be supported by materials in the record.

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

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

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

Subdivision (e). Subdivision (e) addresses questions that arise when a party fails to support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c). As explained below, summary judgment cannot be granted by default even if there is a complete failure to respond to the motion, much less when an attempted response fails to comply with Rule 56(c) requirements. Nor should it be denied by default even if the movant completely fails to reply to a nonmovant's response. Before deciding on other possible action, subdivision (e)(1) recognizes that the court may afford an opportunity to properly support or address the fact. In many circumstances this opportunity will be the court's preferred first step.

Subdivision (e)(2) authorizes the court to consider a fact as undisputed for purposes of the motion when response or reply requirements are not satisfied. This approach reflects the "deemed admitted" provisions in many local rules. The fact is considered undisputed only for purposes of the motion; if summary judgment is denied, a party who failed to make a proper Rule 56 response or reply remains free to contest the fact in further proceedings. And the court may choose not to consider the fact as undisputed, particularly if the court knows of record materials that show grounds for genuine dispute.

Subdivision (e)(3) recognizes that the court may grant summary judgment only if the motion and supporting materials — including the facts considered undisputed under subdivision (e)(2) —

show that the movant is entitled to it. Considering some facts undisputed does not of itself allow summary judgment. If there is a proper response or reply as to some facts, the court cannot grant summary judgment without determining whether those facts can be genuinely disputed. Once the court has determined the set of facts — both those it has chosen to consider undisputed for want of a proper response or reply and any that cannot be genuinely disputed despite a procedurally proper response or reply — it must determine the legal consequences of these facts and permissible inferences from them.

Subdivision (e)(4) recognizes that still other orders may be appropriate. The choice among possible orders should be designed to encourage proper presentation of the record. Many courts take extra care with pro se litigants, advising them of the need to respond and the risk of losing by summary judgment if an adequate response is not filed. And the court may seek to reassure itself by some examination of the record before granting summary judgment against a pro se litigant.

Subdivision (f). Subdivision (f) brings into Rule 56 text a number of related procedures that have grown up in practice. After giving notice and a reasonable time to respond the court may grant summary judgment for the nonmoving party; grant a motion on legal or factual grounds not raised by the parties; or consider summary judgment on its own. In many cases it may prove useful first to invite a motion; the invited motion will automatically trigger the regular procedure of subdivision (c).

Subdivision (g). Subdivision (g) applies when the court does not grant all the relief requested by a motion for summary judgment. It becomes relevant only after the court has applied the summary-judgment standard carried forward in subdivision (a) to each claim, defense, or part of a claim or defense, identified by the motion. Once

that duty is discharged, the court may decide whether to apply the summary-judgment standard to dispose of a material fact that is not genuinely in dispute. The court must take care that this determination does not interfere with a party's ability to accept a fact for purposes of the motion only. A nonmovant, for example, may feel confident that a genuine dispute as to one or a few facts will defeat the motion, and prefer to avoid the cost of detailed response to all facts stated by the movant. This position should be available without running the risk that the fact will be taken as established under subdivision (g) or otherwise found to have been accepted for other purposes.

If it is readily apparent that the court cannot grant all the relief requested by the motion, it may properly decide that the cost of determining whether some potential fact disputes may be eliminated by summary disposition is greater than the cost of resolving those disputes by other means, including trial. Even if the court believes that a fact is not genuinely in dispute it may refrain from ordering that the fact be treated as established. The court may conclude that it is better to leave open for trial facts and issues that may be better illuminated by the trial of related facts that must be tried in any event.

Subdivision (h). Subdivision (h) carries forward former subdivision (g) with three changes. Sanctions are made discretionary, not mandatory, reflecting the experience that courts seldom invoke the independent Rule 56 authority to impose sanctions. *See Cecil & Cort, Federal Judicial Center Memorandum on Federal Rule of Civil Procedure 56(g) Motions for Sanctions (April 2, 2007).* In addition, the rule text is expanded to recognize the need to provide notice and a reasonable time to respond. Finally, authority to impose other appropriate sanctions also is recognized.

Changes Made After Publication and Comment

Subdivision (a): “[S]hould grant” was changed to “shall grant.”

If “the movant shows that” was added.

Language about identifying the claim or defense was moved up from subdivision (c)(1) as published.

Subdivision (b): The specifications of times to respond and to reply were deleted.

Words referring to an order “in the case” were deleted.

Subdivision (c): The detailed “point-counterpoint” provisions published as subdivision (c)(1) and (2) were deleted.

The requirement that the court give notice before granting summary judgment on the basis of record materials not cited by the parties was deleted.

The provision that a party may accept or dispute a fact for purposes of the motion only was deleted.

Subdivision (e): The language was revised to reflect elimination of the point-counterpoint procedure from subdivision (c). The new language reaches failure to properly support an assertion of fact in a motion.

Subdivision (f): The provision requiring notice before denying summary judgment on grounds not raised by a party was deleted.

Subdivision (h): Recognition of the authority to impose other appropriate sanctions was added.

Other changes: Many style changes were made to express more clearly the intended meaning of the published proposal.

SUMMARY OF COMMENTS: 2008 RULE 56 PROPOSAL*General*

08-CV-004, Benjamin J. Butts, Esq.: Supports the proposed Civil Rules amendments.

08-CV-008, Kenneth A. Lazarus, Esq., for American Medical Assn. and other medical associations: “In general, our group strongly supports” the revision.

08-CV-028, Hon. H. Russel Holland: The focus is on proposed Rule 56(c), but there is a general comment that “the proposed amendments to Rule 56” are not compatible with the purposes stated in Rule 1.

08-CV-037, Professor Adam Steinman: It is wise to refrain from attempting to change the summary-judgment standard or the assignment of burdens. But Rule 56(c) should be redrafted to protect against inadvertent misinterpretations that could change the standard or the burdens.

08-CV-039, Professor Alan B. Morrison: “[T]he changes will improve the operation of the Rule and bring the practice in line with the better practices in a number of districts.” But the references to local rules at pp. 85, 99-100 in the publication booklet should be reconsidered. “If these amendments are adopted, as I hope they will be, that should be the end of local rules in this area.”

08-CV-046, Center for Constitutional Litigation (American Association for Justice), John Vail, Esq.: “Summary judgment today is widely inappropriately used and the proposal before you is apt to exacerbate that problem.” It began as a device to enforce plaintiffs’ debt-collection and like claims, overcoming sham defenses. It became generalized; now it is not a plaintiff’s device, and indeed has become a dilatory tactic. It has grown to reach questions of negligence, intent, and the like that are unsuited to summary disposition. It deters settlement, increases aggregate legal expenditures, and biases results against plaintiffs in civil rights cases. “[T]he less conscientiously it is used as a tool to weed out purely legal disputes, the more intense the doubts that it comports with the Seventh Amendment’s jury trial guarantee.”

08-CV-049, Professor Elizabeth M. Schneider: The discussion of the point-counterpoint procedure in proposed subdivision (c) is set against a background of concern for the overall impact of summary judgment on civil rights and employment cases. The detailed statement and response procedure may aggravate an already unsatisfactory situation. The FJC study demonstrates the facts that summary judgment is sought more often in employment discrimination and other civil rights cases, is more often granted, and more often terminates the litigation. Other empirical research reaches similar conclusions, and also demonstrates that the differences are not due to the “weak” nature of many of these cases or to poor lawyer selection of what cases to bring.

08-CV-055, Gregory P. Joseph, Esq.: “I do not support the amendments to Rule 56. * * * I * * * concede at the outset that it reads much better than the existing text.” (The chief concern addresses the point-counterpoint procedure, as summarized with Rule 56(c) below.)

08-CV-061, Lawyers for Civil Justice & U.S. Chamber Institute for Legal Reform: Supports the proposal, but with two changes. “Should” grant ought be changed to “must grant”; sanctions should be provided for moving, responding, replying, or submitting an affidavit or declaration “without reasonable justification.”

08-CV-098, E.D.N.Y. Committee on Civil Litigation: The Committee should “reconsider amending the rule.” It “has generated a large body of interpretation over years of practice, judicial construction, and academic study. Altering a rule with such an extensive interpretive history may lead to unintended adverse consequences that neither the Advisory Committee nor this committee can predict.”

08-CV-100, L. Steven Platt, Esq.: “[I]n practice the courts are treating the plaintiff as still having the burden of proof in opposing summary judgment motions and the courts improperly take the inferences in favor of the moving party * * *.” “[T]he Committee should move in the direction of limiting the one-sidedness (i.e., favoring the moving party) of the current rule. A considerable body of research shows that summary judgment and other procedural devices disproportionately limit the access to justice by plaintiffs in civil rights cases. * * * The rule should discourage the current, overly aggressive use of summary-judgment practice, and especially should discourage judges from granting this motion[] improperly because they have such crowded dockets.” One means “would be a rule providing that summary judgment should be denied if any of the movant’s ‘material facts not in dispute’ are, in fact, disputed or otherwise * * * not a legitimate basis to rely on * * *.”

08-CV-109, Ellen J. Messing, Esq., for Seven Massachusetts Lawyers: “[T]he Committee should move in a different direction [from point-counterpoint procedure]. It should take appropriate steps to limit the abuse of summary judgment motions in civil rights and other cases where the parties are disproportionate in resources.” One means would be to provide that summary judgment “will be denied if any of the movant’s ‘material facts not in dispute’ are, in fact, disputed or otherwise * * * not a legitimate basis to rely on for summary judgment purposes.”

08-CV-116, Keith B. O’Connell, Esq., for Texas Assn. of Defense Counsel: Apart from urging adoption of “must,” the Association “generally supports the adoption of the other proposed amendments to Rule 56 * * *.”

08-CV-127, Michael R. Nelson, Esq.: “The Committee’s goals of establishing a clear, consistent national standard governing summary judgment and developing an improved summary judgment procedure without changing the standard for the entry of summary judgment are laudable.”

08-CV-133, Sharon J. Arkin, Esq.: Although the conclusion of this section states that it would be a mistake to substitute “must” for “should,” the underlying theme is a more general suggestion that summary judgment should not be further encouraged. “[T]he proposed changes to Rule 56 are not only unnecessary but actually destructive to the fundamental purpose of the civil justice system: Fair and just resolution of disputes.” “I am a strong supporter of the jury system.” “The ever-growing prevalence of summary judgment motions is having a very negative impact on the justice system. One of the most significant impacts is on the public’s perception of justice itself.” A party who loses

after jury trial is likely to believe that at least there was a day in court with a fair process; a party who loses after a judge decides on paperwork submitted by the lawyers is “confused and appalled,” feeling “cheated and angry.” Defendants make summary judgment motions for many reasons — to flush out the plaintiff’s theories or experts; to increase billings before settling; to take advantage of a judge’s desire to clear the docket, or the plaintiff’s inability to respond adequately; or to exploit the possibility of a mistaken grant. Summary judgment is appropriate in cases where undisputed facts require resolution of a particular question of law. But it is often granted in complex cases that involve issues of credibility, intent, and reasonable inferences.

08-CV-145, Professor Stephen B. Burbank: This long comment focuses on the point-counterpoint procedure of subdivision (c). But it includes general observations as well. Rule 56 “is very differently interpreted in different circuits and in different types of cases.” “Another problem is suggested by evidence that some courts are granting summary judgment by resort to techniques of factual and legal carving that threaten the right to jury trial and the integrity of the substantive law. Still another is that — apart from the problem of delay — summary judgment motions may be used by one party to inflict expense on the opponent.” The threat to jury trial is augmented by the risk of “cognitive illiberalism.” A judge may not be aware of the personal experiences that shape understanding of the world and fail to recognize the different experiences that may lead jurors to different understandings. Employment discrimination cases are a particularly troubling example of summary judgments granted when a jury including members sharing the life experiences of the plaintiff may have a different understanding of probable discrimination.

08-CV-150, Elizabeth J. Cabraser, Esq., for Public Justice: “Strategies of attrition, resistance, and delay have, to our clients’ detriment, all too often exploited loopholes and unintended opportunities in procedures that were designed to serve and balance the interests of both sides. * * * Procedural innovations, including time limits, bifurcation, and aids to juror comprehension, are and should be increasingly used to decrease cost, while increasing effectiveness, and preserving the jury’s irreplaceable fact-finding function.” Rather than rush to summary judgment, courts should explore summary jury trials, which “provide useful information on how [witnesses, advocates, and experts] play, in the real world.” Summary judgments beget appeals; summary jury trials beget settlements.

08-CV-160, Professor Stephen N. Subrin: “The amendments would continue the trend of replacing oral advocacy and trial in open court with disposition by documents.” Summary judgment, further, “often inherently calls for subjective determination of what is a sufficiency of evidence and what inferences to draw from evidence. Judges, like all humans, cannot be perfectly neutral, try as they may.” As Cardozo expressed it, there is an “inescapable relation between the truth without us and the truth within. The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us. No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties.”

08-CV-167, Cynthia L. Pollick, Esq.: Attaches a letter sent by a client to the judge who granted summary judgment for the defendant, expressing concern that the justice system failed her by denying a jury trial. The comment urges that the present system is hard enough; the proposed

amendments would make it harder for everyday citizens, leaving unfortunate long-lasting impressions about the federal justice system.

08-CV-175, Hon. Marcia S. Krieger: The Rule 56 title should be “Summary Judgment or Summary Determination.” The ruling may not be a judgment, but only a determination. “This confusion is particularly significant when the rule is used for determination of ‘part of’ a claim or defense.”

08-CV-177, Paul R. Harris, Esq.: “[T]he summary judgment device truly is broke and in great need of fixing.” Adding point-counterpoint will only make it worse. “[I]n the employment law context, summary judgment practice needs to be restricted, not enhanced.”

08-CV-183, Professor Eric Schnapper: This comment includes a long paper on the development of Rule 56 into a device that was not — and could not have been — foreseen when it was created in 1938. The core theme is that present procedure does not provide the nonmovant a fair opportunity to respond when the motion addresses the sufficiency of the evidence. Changes should be made to provide an opportunity that comes closer to the setting in which judgment as a matter of law arises at trial. The paper is fascinating reading, but cannot be adequately summarized. Particular points are noted below.

Thomas Gottschalk, Esq., for the Institute of Legal Reform, Nov. 17, 89, 91: “[P]laintiffs don’t like summary judgment very much and defendants would like to have more of it.”

Hon. Royal Ferguson, Jan. 14 hearing, 7-10: In opposing point-counterpoint, begins: “Summary judgment fundamentally alters the balance of power between plaintiffs and defendants by raising both the cost and risk to plaintiffs in the pretrial phases of litigation, while diminishing both for defendants. * * * [S]ummary judgment, as we have it today, has created an unlevel playing field.” The procedure should not be further complicated by adding point-counterpoint.

Michele Smith, Jan. 14, 32, at 39-40: Summary judgment should be made meaningful because it is an important part of practice. Point-counterpoint will help by forcing careful attention in deciding whether to make a motion, and in deciding how to respond. “I do not file motions out of just habit or routine. * * * [I]t really affects your credibility before the judges before whom you practice. * * * [M]y clients aren’t the type of clients that like to pay for summary judgments that don’t have a prayer of being granted.”

Hon. Robert S. Lasnik, Feb. 2, 11, 18: “[T]here are problems with summary judgment,” that “may have to do with lawyers who are churning cases inappropriately, lack of training and education among the lawyers.”

Hon. Claudia Wilken, Feb. 2, 46, 47: “I agree that Rule 56 very much does need to be revised.” (But point-counterpoint is not the way to do it.)

Jeffrey J. Greenbaum, Esq., Feb. 2, 221, 223-224: (This testimony reflects the views of officers and members of the council of the ABA Litigation Section, but is not ABA policy.) Because we really

do not have a uniform national rule now, “summary judgment is governed by a patchwork of local rules. I believe it is broken at present. The variations in rules are traps for the unwary who don’t know local practice. They foster confusion and non-compliance.” What, for example, is the consequence of not properly responding to a fact? It varies from district to district. “With something as important as summary judgment we believe there should be a uniform practice.” Uniformity will ensure less confusion and better compliance. “[N]o change, continuing our current practice, or optional procedure should not be a choice * * *.”

Rule 56(a)

PARTIAL SUMMARY JUDGMENT

08-CV-008, Kenneth A. Lazarus, Esq., for American Medical Assn. and other medical associations: It is good to adopt the common phrase “partial summary judgment.” Recognizing motions that address a claim, defense, or part of a claim or defense “will serve to promote greater utilization of the summary judgment process.”

08-CV-161, Federal Magistrate Judges Assn.: It is good to add “partial summary judgment” to the title.

08-CV-180, U.S. Department of Justice: Recognizing partial summary judgment “will be a valuable clarification and recognition” of this practice.

GENUINE DISPUTE

08-CV-162, Federal Practice Comm., Dayton Bar Assn.: Does not object to change from “issue” to “dispute,” as a change adopted for clarity without changing the standard.

ORAL ARGUMENT

08-CV-048, Stephen Z. Chertkof, Esq.: The rule should provide that courts should hear oral argument before granting a motion, and must hear oral argument before granting a “Celotex no-evidence” motion. It is difficult to fully understand the facts and issues solely on a paper record.

08-CV-117, Malinda Gaul, Esq.: Summary judgment motions are made in every employment dispute. They are granted far more often than denied. Many grants are reversed on appeal, but many employees cannot afford to appeal. “Therefore, I encourage the addition of a requirement for the Courts to conduct oral arguments on all motions.”

Prof. Elizabeth Schneider, Nov. 17, 62 at 76-77: “[Y]ou really want oral argument often in summary judgment cases because it’s everything. That’s it.” It is like going back to equity trial on the papers.

Malinda Gaul, Esq., Jan. 14, 23 at 25-26: Opportunity should be provided for oral argument. There is only a short time to respond. An oral argument would provide an opportunity to address the facts.

Brian Sanford, Esq., Jan. 14, 27 at 31-32: “[O]ral argument would be a nice thing, which is not the practice” in the Northern District of Texas.

Margaret Harris, Esq., Jan. 14, 44 at 49-50: Oral argument should be provided. It makes a difference when a judge misunderstands the record. Telling the parties what the judge thinks is called for and giving an opportunity to respond can be important.

“SHOULD,” “SHALL,” “MUST”

08-CV-008, Kenneth A. Lazarus, Esq., for American Medical Assn. and other medical associations: When there is no genuine dispute, “there appears to be agreement all around that imposition of summary judgment should be mandatory.” “[A]ccuracy should trump style here and * * * it would be preferable to substitute the word ‘shall’ for ‘should.’”

08-CV-011, Robert B. Anderson, Esq.: Although it speaks of retaining “the present language,” it seems clear that this comment favors “shall,” not “should.” The concern is that “should” will be seized by the trial judges and appellate courts that disfavor summary judgment to deny motions “even when undisputed facts and settled law would otherwise mandate summary judgment.” There is a risk that summary judgment will become “totally discretionary under all circumstances,” particularly as state courts and legislatures pick up on the federal model.

08-CV-016, Joseph D. Garrison, Esq.: In frequent appearances at the annual NYU employment-law seminar, he asks judges to raise their hands if they have “encountered situations where testimony at trial differed from that presented in summary judgment affidavits. It was the rare judge who did not raise his or her hand. This is why I believe judges should preserve their discretion to deny summary judgment in those circumstances where, for whatever reason, the judge is unwilling to credit a material affidavit.”

08-CV-039, Professor Alan B. Morrison: “Should” is the proper choice. It may be easier to have a short trial, particularly in a nonjury case, make Rule 52 findings, and send the case up to the court of appeals once. And “there are rare exceptions with no disputed material facts in which a denial is still appropriate.” “[A]ll the incentives for the judge are to grant summary judgment”; there is little likelihood that judges will abuse whatever discretion they have to deny.

08-CV-040, Theodore B. Van Itallie, Jr., Esq.: Writing as Associate General Counsel of Johnson & Johnson, responsible for global litigation. “I believe it critical that the mandatory ‘must’ replace the precatory ‘shall’,” making it clear that summary judgment is a matter of right. “Summary judgment rulings applying legal principles to undisputed facts create the guidance that unquestionably the business community seeks and which benefits the process of making reasonable choices in a complex world. The uncertainty engendered by delegating to juries that application of law to fact contributes to the litigation-fearing culture that is so prevalent in this country.”

08-CV-044, Claudia D. McCarron, Esq.: If “shall” was ambiguous, it should be replaced by “must.” “Should” will mean an increase in the number of cases in which discretion is exercised to deny summary judgment; facing the cost of moving, “fewer meritorious motions will be filed.” The concern that trial may produce a different record is misplaced — “trial will always change the record.” Rule 56 embodies the judgment that summary judgment is an appropriate juncture at which to terminate a case. And it is the responsibility of lawyers to ensure that pretrial circumstances do not fail to afford a fully reliable record for summary judgment.

08-CV-045, Debra Tedeschi Herron, Esq.: Summary judgment too often is deferred, ultimately leading to denial. “When properly supported, summary judgment must be granted as it lessens the exorbitant costs of litigation and restores faith in the juridical system.” A discretionary standard compromises the importance of summary judgment “and is a waste of time and resources.”

08-CV-046, Center for Constitutional Litigation (American Association for Justice), John Vail, Esq.: It would be wrong to adopt “must.” “[R]educing trial judge discretion to deny summary judgment from little to zero in any circumstance would be a profound and dangerous mistake.” “Trial judges need, and should be encouraged to use, the discretion to deny summary judgment simply because the procedure does not promise to streamline litigation.” [This view is stated as one conclusion that flows from a lengthy statement of challenges to the point-counterpoint procedure in proposed Rule 56(c). That procedure can be misused by stating an overwhelming number of facts, most of them not material. More importantly, breaking the case down into discrete facts loses the power of narrative, of story, distorting the process of deciding on the evidence as a whole.]

08-CV-047, Professor Edward Brunet: “Must” should be restored. Discretion has considerable costs. Fewer motions will be granted, leading to trials in cases that do not present fact issues. Arguments addressed to the court’s discretion will be different, and more difficult for the court. The price of settlement likely will increase because the transaction costs of litigation will increase. The cost of making a summary-judgment motion also will increase by making the process discretionary and thus more complex; some parties may be deterred from making any motion. It must be recognized that courts already possess some degree of discretion, as reflected in statements of reluctance to grant summary judgment in some types of cases, including antitrust, civil rights, and negligence claims. This kind of discretion in turn threatens the transsubstantive nature of the Civil Rules, a value vigorously championed by Judge Clark. It is not too late to undo the choice made in the Style Project.

08-CV-049, Professor Elizabeth M. Schneider: Keep “should.” “[T]here are some cases where there are no disputed issues of material fact where summary judgment should still be denied.”

08-CV-050, Stephen G. Morrison, Esq.: The “unbounded discretion” conferred by “should” “could result in parts of the case, or the entire case, being tried to a jury when it never should have made it that far.” “Must” will promote the most efficient and inexpensive manner of providing justice.

08-CV-051, Latha Raghavan, Esq.: It has long been understood that “shall” is a mandate to grant summary judgment. It has meant “must.” “[T]o preserve the intent and purpose of summary judgment, it is preferable to” adopt “must.”

08-CV-056, Hon. Frank H. Easterbrook: “Must” is the proper word. Some judges prefer to deny, despite the absence of genuine dispute as to any material fact, because at least one party will be satisfied by the jury’s verdict, both parties will appreciate being heard, and trial spares the need to decide the motion. But the party who shows there is no genuine dispute should not have to bear the costs of trial, nor should other parties in the trial queue have to wait longer. Beyond that, recognizing discretion to deny the motion will lead to arguments on appeal in this form: To be sure, there was no genuine dispute. But it was an abuse of discretion to grant the motion because better evidence might have appeared at the time of trial and trial would have been short. “That is not an argument that appellate litigants should be allowed to make, or appellate courts to address.”

08-CV-057, R. Matthew Cairns: The 2007 Style amendment should be unwound by substituting “must,” “though in my opinion ‘shall’ was just fine.” Recognizing discretion to deny will be a disincentive to moving for summary judgment. The Committee believes that summary judgment may properly be denied if the record is not fully developed or if it is difficult to ascertain credibility from the paper record. But it is the responsibility of nonmovant’s counsel to develop the record to show there is a genuine dispute, or to use cross-examination or other evidence to create a credibility dispute. “The court should not substitute itself for counsel * * *, or bail out the party or counsel who fails in his obligations under the rules and good practice, just as it wouldn’t at trial.”

08-CV-060, Federal Civil Rules Committee, American College of Trial Lawyers: With only 3 members of the 36-member committee dissenting, favors “must” “[i]f Rule 56 is to mean anything.” The laudable purpose of summary judgment is to render judgment short of trial when there are no disputed facts. This purpose should not be undermined by non-mandatory language. “Many College Fellows also are troubled by the current practice of some courts to use their discretionary power to force settlement.”

08-CV-061, Lawyers for Civil Justice, U.S. Chamber Institute for Legal Reform: Summary judgment “remains an underutilized and ineffective tool.” Motions are too often deferred until trial or denied without explanation. Adhering to “should,” as added by the Style Project, undermines the purpose and utility of summary judgment. “Should” will lead courts to an increasingly expansive view of the “negative discretion” to deny well-founded summary judgment motions. The Supreme Court has said that Rule 56 “mandates” summary judgment when there is no genuine dispute. That was the plain-language meaning of “shall.” The decision in *Kennedy v. Silas Mason Co.*, cited in the 2007 Committee Note, turned on finding disputed facts; it does not support discretion to deny a properly supported Rule 56 motion. Nor is there persuasive support in lower-court decisions for finding such discretion. It would be a mistake to distinguish between summary judgment on an entire action and “partial” summary judgment, recognizing discretion to deny partial summary judgment despite the absence of a genuine dispute as to some part of the action — summary judgment is needed to narrow the issues for trial.

08-CV-066, Richard L. Seymour, Esq.: “Should” is the proper word. If “must” is substituted, the result will be an increase in improper grants of summary judgment in close cases. The risk is shown by a computer search for grants of summary judgment in employment-discrimination cases between September 1, 2008, and November 16, 2008. 145 cases were found. 122 involved grants “solely to employers.” In these 122, 98 were affirmed, 9 were reversed or vacated, and 15 were affirmed in part and reversed in part. “When nearly a fifth of summary judgment decisions are reversed at least in part, it is difficult to conclude that summary judgment is not being granted in close cases.” An improper grant delays the case even when reversed, and adds a great deal of expense. Many parties cannot afford the expense of appeal.

Decisions in the First, Second, and Third Circuits “have criticized the tendency of district courts to use summary judgment as a device to clear their dockets rather than to identify and dispose of hopelessly unmeritorious cases.” This tendency too will be exacerbated by “must.”

(The comment and testimony explore two cases — one leading to reversal on appeal, the other to affirmance — that are described as “highly improper grants of summary judgment.” Adopting “must” will mean “that the existing rate of miscarriages of justice, whatever its number, will be increased.”)

Finally, it is urged that in the employment discrimination field courts have “fairly routinely” accepted concepts offered as rules of thumb that might properly be used as jury arguments but instead become “hardened * * * into ‘no reasonable jury could disagree’ rules of law. The rule of thumb concepts are then relied upon to destroy countless close cases until the Supreme Court disapproves them.” Numerous examples follow.

In the end, it is argued that frequent use of summary judgment decreases respect for the courts, while trials increase respect.

08-CV-110, G. Edward Pickle, Esq.: “In changing ‘shall’ to ‘should,’ the scriveners of the 2007 changes exceeded the scope of their stylistic charge and wrought a material, substantive change in Rule 56.” “There is no room or viable reason for discretion.” The argument for discretion when it is a matter of partial summary judgment at most ignores the reality that few cases are tried. “Narrowing issues as early as reasonably practicable lessens the scope of discovery, trial preparation, and other costs.” Carrying unnecessary issues into trial may confuse or prejudice the jury — granting partial judgment as a matter of law after the verdict does not unring the bell, much less show “whether its clanging drowned out other evidence.” “The grant or denial of a partial summary judgment motion generally has a palpable effect on the settlement value of a case.”

08-CV-111, Carlos Rincon, Esq.: Those who favor “should” seem to be attacking summary judgment practice as a whole as unfair to plaintiffs, who must rely on jury assessments of credibility and of matters “that are inherently grey, such as motive or intent.” But trial is appropriate only when there are material issues of fact. “Should” “opens the door to discretion even in cases that as a matter of law require dismissal,” leaving undeserving cases to increase litigation expenses and unfairly drive up the costs of settlement.

08-CV-113, John H. Martin, Esq.: Strongly supports “must,” for the reasons advanced by so many others. “Granting total, or even partial, summary judgment in proper cases can result in enormous savings of unnecessary litigation costs.”

08-CV-116, Keith B. O’Connell, Esq., for Texas Assn. of Defense Counsel: “Must” ought to replace “should.” “‘Should’ has never meant ‘shall,’” and “will render the rule both under-utilized and ineffective. “[T]he need for clear guidance, more certainty and more clarity is palpable.” The need is illustrated by the denial of summary judgment in a recent case, followed by great expense for expert witnesses and attorneys and then settlement in an amount reflecting plaintiff’s estimate that the case had little merit. Jury trial is vanishing, but not because summary judgment is granted too often. It is the increased costs of litigation and loss of confidence in the jury system that are “forcing parties to move outside of our civil justice system.”

08-CV-117, Cary E. Hiltgen, Esq.: “[S]hould takes away any requirement judges had to sustain meritorious motions and all advancements made by the requirements relating to the statement of facts become inconsequential. Moreover, the force behind the filing of a summary judgment motion would dissipate.” “Should” “creates confusion in the burden required by the moving party.” A court could decide for jury trial even when there is no genuine dispute of material fact. Many state courts recognize greater discretion than the federal rule has recognized, and for that reason “summary judgment motions filed in state court do not seem to have the same effect as those filed in federal courts.” Eliminating claims without factual support is critical in promoting inexpensive and speedy trial. Taking the strength out of the motion also decreases the possibilities for settlement. “The fear placed on the opposing party that a well-written summary judgment could prevail is an important strategic tool.” Denial of partial summary judgment will make trials longer and will create greater jury confusion.

08-CV-119, Thomas J. Crane, Esq.: “I am strongly opposed to making the grant of summary judgment mandatory in certain cases. * * * Since 1992, I have seen summary judgment more and more become a docket clearing device.” “In ADA cases, today, 92-97% of reported ADA Title I cases are dismissed by summary judgment or judgment as a matter of law.” “Summary judgment is already granted frequently and even routinely. In my experience, deserving cases are too often dismissed through summary judgment.”

08-CV-121, Phil R. Richards, Esq.: (It is unclear whether this comment is submitted for the American College of Trial Lawyers.) “[T]he rule should provide that a court ‘should’ grant summary judgment for either party” if entitled, “either globally or on any specific issue, regardless of whether they are the movant or the respondent.” (This seems an implicit endorsement of “should,” but there is no elaboration.)

08-CV-124, Wayne B. Mason, Esq., for Federation of Defense & Corporate Counsel: “Must” will avoid any ambiguity. Summary judgment too often is not granted, even when both sides move and agree that the case should be determined by ruling on the motions. Clients should be spared the expense of preparing and trying a case that should have been disposed of on summary judgment.

08-CV-127, Michael R. Nelson, Esq.: Changing “shall * * * forthwith” to “should” “will result in the creation of a more discretionary standard.” Defense litigators regard the change as drastic. Summary judgment is not disfavored; it is necessary to avoid “long and expensive litigation productive of nothing.” “Furthermore, summary judgment ‘serves as an instrument of discovery in its recognized use to call forth quickly the disclosure on the merits of either claim or defense on pain of loss of the case for failure to do so.’” In *Celotex*, the Court says that Rule 56 mandates summary judgment when the standard is satisfied. Professor Shannon has it right in his article submitted as 08-CV-134. Adopting “should” would be akin to expressing a speed limit as a matter of the driver’s discretion. To be sure, there is discretion to deny summary judgment “as long as there is a genuine dispute as to a material fact.”

Mr. Nelson also expresses doubts about recognizing discretion to deny partial summary judgment, but concludes: “[S]o long as any amendment to Rule 56(a) indicates that complete summary judgment ‘must’ be granted, the discretionary standard of ‘should’ would be acceptable for rulings on partial summary judgment.”

08-CV-131, Gregory K. Arenson, Esq., for New York State Bar Assn. Commercial & Federal Litigation Section: “Should” “is better, adequately preserves the competing interests involved and is most consistent with the law described in the 2007 Advisory Committee Note describing the stylistic change. “To the extent that ‘shall’ in the original Rule 56(c) was meant to be mandatory, that is not how courts applied the rule * * *. If experience taught the courts to ignore a mandatory rule in practice, it would be expected that the same good reasons * * * would cause them to ignore a similar mandatory rule in the future. Rather than cause courts to discreetly break the rule, it is better to honestly acknowledge that there may be circumstances where a savvy court would not grant summary judgment * * *.” Concerns of case management, the timing of settlement discussions or trial, or the eventual admissibility of evidence at trial may be reason to deny. “[T]he slight additional discretion” in “should” as compared to “must” “is not likely to result in judges failing to dispose of cases on summary judgment that deserve such disposition. Courts’ self-interest in disposing of cases on their dockets should not be discounted.” Nor should courts be discouraged from attempting to settle cases immediately after summary judgment motions have been briefed. Nor is the word “must,” without a specific deadline, “likely to do anything to actually speed those recalcitrant or overworked jurists who are unable or unwilling to make a decision.” Nor does it make sense to distinguish between granting summary judgment on an entire case and partial summary judgment — the standards should be the same.

08-CV-133, Sharon J. Arkin, Esq.: Prefers “should,” out of the general distrust of summary judgment summarized with the general comments at the beginning.

08-CV-134, Prof. Bradley Scott Shannon: Adopt “must,” for the reasons set out in the article submitted with the comment, *Should Summary Judgment be Granted?* 58 Am.U.L.Rev. 85 (2008).

08-CV-135, Marc E. Williams, Esq., for DRI: The practical effect of adopting “should” “has been to grant Courts wide discretion in their ability to deny a party summary judgment when there is no disputed issue of material fact. *Celotex* says that Rule 56 mandates summary judgment. “Meritless

cases that were once ripe for summary judgment are now subject to the threat of an extended, expensive litigation process.” And there is a risk that “should” will be interpreted inconsistently by different judges. “Must grant” is better.

08-CV-136, Andrew B. Downs, Esq.: “Should” is wrong. “If the facts and the law support entry of summary judgment, a refusal to do so provides fuel for those who perceive result-oriented actions by courts or the use of calculated uncertainty to pressure parties to settle.”

08-CV-137, Mary Massaron Ross, Esq.: “Should” “changed the standard in fundamental ways.” The language of Rule 56 before the Style Project shows that it mandated summary judgment. The 1986 cases show that the right to summary judgment is a legal entitlement. The utility of Rule 56 “is severely hampered when the rule permits unbridled discretion to deny summary judgment.” This will undermine the confidence of litigants in the civil justice system. It is vitally important that baseless suits be dismissed as soon as possible to reduce the costs imposed by unfounded litigation — “civil rights suits are regularly filed without factual or legal support.” Summary judgment also plays an important role in simplifying the cases that do proceed to trial, providing a better focus for the jury. Summary-judgment benefits both plaintiffs and defendants by making the federal courts an efficient, just, and speedy dispute resolution mechanism.

08-CV-138, Jeffrey W. Jackson, Esq.: Experience as General Counsel of State Farm Insurance Companies shows that “summary judgments are rarely granted.” Over the last three years, approximately 3.5% of actions against the company were fully resolved by summary judgment (the cases were 18% in federal court and 82% in state court). “Should” will lead to still fewer grants. Except for Pennsylvania, all state summary-judgment rules now say “shall”; it is likely that states will gradually follow any federal lead to “should,” adding congestion to the dockets of all courts. Summary judgment, moreover, is for cases “at the margin”; they devour litigants’ resources and court time. These costs are factored into insurance rates. And courts are “judicious in granting summary judgment motions” — of 20 cases taken on appeal from summary judgments for State Farm, 17 were affirmed. “Shall” “does not deny deserving litigants their day in court.”

08-CV-139, Kimberly D. Baker, Esq.: In 24 years of defending litigation, effective use of summary judgment has been seen to reduce the costs of litigation, and the motions prompt settlement negotiations or mediation. Many commentators expect a large increase in employment litigation in the current economic environment, including claims that have no sufficient legal basis. “Businesses and employers should be certain that when an employee has not met the legal standards to prevail, the lawsuit will be dismissed, eliminating the need to present a defense to a jury that may be comprised of citizens who are angry about the economic downturn and seeking an avenue to strike back.” Employment actions, moreover, “commonly seek relief under many statutes”; discovery commonly shows that many of the claims have no legal or factual basis. Summary judgment should be used to focus the case. “Shall,” not “should,” is the appropriate word.

08-CV-140, Donald F. Zimmer, Jr., Esq.: “Must,” or “at a minimum ‘shall.’” “The word ‘should’ is vague and provides little comfort to moving parties seeking certainty if they are able to meet their burden of proof.”

08-CV-142, Hon. David F. Hamilton: (1) “Must” is too strong; it should be used only when there are consequences, such as review by appeal or mandamus for denials of summary judgment. “I doubt the Committee intends to go in that direction.” (2) “Should” is strong enough. Judges are not going out of the way to look for work by trying cases that clearly should be decided on summary judgment. “[T]he summary judgment standard often requires the appellate court to consider a highly artificial and even hypothetical set of facts, or even two or more sets of hypothetical facts when there are cross-motions. In those close cases, I think it’s helpful to have the option of a trial, where shaky testimony can be knocked down, rather than to force the appellate courts to develop the law based on improbable testimony.”

08-CV-143, Stefano G. Moscato, Esq., for National Employment Lawyers Assn.: “Should” is proper. The judge should not be forced to rule on all aspects of a motion. There is no outcry that federal judges have been denying summary judgment in employment cases that deserve summary judgment. The empirical evidence is to the contrary. “If the language is rewritten as ‘must,’ will there be a genuine appellate issue that a court refused to grant summary judgment, perhaps for legitimate reasons of docket control, when ‘the record demanded it’”?

08-CV-144, Ralph A. Zappala, Esq.: “Must” is better. “[A] pending summary judgment motion provides an incentive for resolving cases. Seeing an adversary’s case presented in orderly fashion, with evidence, is beneficial to the litigants.” “Must” will provide an incentive for litigants to focus on the claims and defenses and related facts.”

08-CV-152, Jeffrey J. Greenbaum, Esq. (joined by 26 officers and members of ABA Section of Litigation, writing for themselves): “Must” is needed to avoid the practice before 1986, when “courts routinely denied motions for summary judgment and treated them as disfavored motions.” “Should” “will, as a practical matter, return summary judgment to that disfavored status * * *.”

08-CV-156, Brian P. Sanford, Esq.: A court should not be required to state reasons for denying summary judgment. “[T]he court has discretion to deny for reasons of credibility or fairness. A denial results in a trial.”

08-CV-158, Professor Suja A. Thomas: “Should” is appropriate “because courts should be given discretion in tough cases. * * * Indeed, judges in the same case often disagree on what the evidence shows and thus whether summary judgment should be granted.”

08-CV-161, Federal Magistrate Judges Assn.: “Should” “reflects the current law.” And “must grant” “might suggest that the court ‘must’ entertain motions that address the case in a piecemeal fashion.”

08-CV-161, Federal Practice Comm., Dayton Bar Assn.: “[S]hould’ does not lend itself to clarity. * * * ‘Must’ also is not inconsistent with the pre-2007 version of the rule, whose use of the word ‘shall’ adequately conveyed the concept * * *.”

08-CV-167, Michael T. Lucey for Federation of Defense & Corporate Counsel: “Must” is important. It is not uncommon to have a court deny cross-motions for summary judgment even though the parties agree that the case should be determined by the court. Failure to grant a motion sometimes appears to be used as a settlement tool. There should be a clear, unambiguous direction to grant meritorious motions.

08-CV-174, Federal Bar Council, by Robert J. Giuffra, Jr., Esq.: “While there is room for debate, we believe that, on the whole, giving the district court discretion to deny summary judgment, if used in limited circumstances, is salutary, and thus the ‘should grant’ language is preferable to the alternative ‘must grant.’”

08-CV-176, State Bar of California, Committee on Administration of Justice: Supports retaining “should” “for the reasons given by the Advisory Committee, and because ‘should’ allows for the limited discretion recognized by the case law.”

08-CV-180, U.S. Department of Justice: Celotex says that Rule 56 mandates entry of summary judgment. Mandatory language — either “must” or “shall” should be used. The rare instances in which discretion to deny summary judgment can be exercised can be accommodated without using discretionary words in Rule 56. “[I]n those cases, the district judge should be under a specific obligation to state on the record why summary judgment is not being granted.”

08-CV-181, Lawyers for Civil Justice, etc.: This comment supplements earlier comments, 08-CV-061. “Must” best represents modern usage under the Celotex trilogy. “We would, however, reluctantly support restoring ‘shall be granted’ on the basis that it is a ‘sacred phrase’ that retains the standard applied over seventy years of summary judgment jurisprudence.” “[R]ules must be rules, not suggestions, or they serve little purpose to guide those who comply with them.” As Judge Easterbrook notes, 08-CV-056, “should” “introduces additional appellate issues regarding judicial discretion.” “Should” will return summary judgment to the disfavored status it had before Celotex and its companion decision made it a pillar of the civil justice system. “The filing of a well-written summary judgment motion can provide the catalyst for settlement negotiations, making it an important strategic tool.” “AN ineffective summary judgment procedure will continue to make trial preparation more expensive and time consuming, increase the number of cases on court trial dockets, and result in longer trials.” “Judicial discretion is inherent in the standard that requires a judge to determine the facts in dispute and the law applicable to those facts.” “If American business is to remain competitive in the world marketplace, the cost and inefficiency of our civil justice system must not continue to put our businesses at a competitive disadvantage.”

08-CV-183, Professor Eric Schnapper: “Should” is correct. “It is entirely common for the evidence and contentions of the parties to be somewhat different at trial than they were at summary judgment. * * * [T]hese differences would at times lead the district judge to conclude that the nature of the future trial record is insufficiently clear to warrant summary judgment. In addition, a judge considering a summary judgment motion may reasonably conclude that he or she does not understand the factual issues as well as he or she would at the end of a trial.” Rule 50, for that

matter, does not require that a motion made during trial be granted even when the judge believes that the evidence up to that point is insufficient to support a verdict.

Claudia McCarron, Esq., Nov. 17, 5, 9-15: Advocates have long believed that they are entitled to summary judgment on showing no genuine issue of material fact. “The interjection of a discretion to deny an otherwise meritorious motion suggests a kind of arbitrariness that I believe will breed distrust.” The cases that seem to recognize discretion to deny might as well have denied by finding a material issue of fact. *Kennedy v. Silas Mason* was decided in 1948; whatever it means, to the extent that its flavor reflects distrust of summary judgment the 1986 decisions reflect a different view. The cases decided since December 1, 2007, do not seem to reflect that “should” has made an difference, but that is because the change has not sunk into professional consciousness. Discretion was no an issue in any of the cases reviewed for this period. But people who dislike summary judgment will pick up on the change and the Committee Note. The view that it may be simpler to try a case than to wade through mountains of motion papers to determine whether there is a genuine issue of material fact does not justify denial; “the bar will view a denial, a discretionary denial, and litigants even more than the bar, as something that is arbitrary and unpredictable.” And there are opportunities for partial summary judgment in these circumstances.

Richard T. Seymour, Esq., Nov. 17, 15, 26: The primary argument is that in employment cases courts too often grant summary judgment because they fail to consider the inferences that might be drawn in favor of the nonmovant. Then urges that “should” is the right word. “[C]hanging it to ‘must’ has got to produce a stomp on the accelerator pedal in the grant of summary judgment * * *.”

Leigh Schachter, Esq., Nov. 17, 26, 31-36: The substitution of “should” for “shall” in the Style Project simply did not catch the attention it should have drawn. It is unfair to put to trial a party who has demonstrated that there is no genuine dispute of material fact. The place where discretion is needed is reflected in present Rule 56(d), which reflects the need to allow adequate opportunity for discovery. After the process has been gone through, there is no need for discretion. Partial summary judgment may seem different, at least when there is a relationship between an issue ripe for summary judgment and other issues that will go to trial, although even then it is better to grant summary judgment. The lack of any standard to limit discretion, further, “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 * * *.”

Steve Cherkof, Esq., Nov. 17, 34: “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.”

Prof. Edward J. Brunet, Nov. 17, 52: “[S]ummary judgment mechanics need to be as firm and nondiscretionary as possible in order for Rule 56 to work its magic. * * * The word ‘entitled’ in this discussion needs to be given some meaning.” Summary judgment will become flabby and ambiguous. Adoption of “should” a year ago has not yet tilted the practice, but long-term use will result in additional judge-made exceptions. Movant and nonmovant will come to argue in difficult-

to-decide discretionary terms. Fewer motions will be granted; the number of trials will increase. “Now, there is discretion in summary judgment. It comes from appellate courts. So in three types of cases, including antitrust, civil rights, and negligence, we see great reluctance to grant summary judgment * * *.” And “interesting things will happen” if summary judgment is “should” but no corresponding change is made for directed verdict. De novo review is a substantial safeguard; review for abuse of discretion will lead to arguments that a grant was an abuse of discretion. But there is a need for some discretion when the choice is between partial summary judgment, sending the case to trial on closely related issues, or instead trying all issues. As to language, it is better to avoid must, should, or substitutes such as required or appropriate. It should be: “Summary judgment is granted if * * *.”

John Vail, Esq., Center for Constitutional Litigation, Nov. 17, 79, 88: The view that there is an “entitlement” to summary judgment raises a serious Seventh Amendment question. Summary judgment is denied; the movant loses the jury verdict on evidence that properly defeats a motion for judgment as a matter of law; on appeal from judgment on the properly supported verdict the movant argues that it is entitled to judgment on the summary-judgment record. Reversal of judgment on the jury verdict appears to be reexamination of a fact found by a jury contrary to the Seventh Amendment.

Thomas Gottschalk, Esq., for the Institute of Legal Reform, Nov. 17, 89, 91-97: The American legal system is preeminent in the world. “The only negatives are the issues of high cost and intrusiveness * * *.” Summary judgment is an important safeguard against the costs of discovery on issues that can be disputed when the case can be resolved as a matter of law on other issues. There is no justice in a system that does not grant summary judgment to a litigant who is entitled to it. Current subdivision (f), to become (d), provides adequate protection by ensuring adequate opportunity for investigation and discovery before summary judgment is granted. To add “an undisciplined, unrestrained, if you will, undefined, notion of discretion,” without any idea of what “should” means, will present a serious issue of meritorious motions being denied. “Shall” was interpreted by the Supreme Court in *Celotex* as mandating summary judgment. Even under “shall” there was some language — not holdings — suggesting some sort of implicit discretion to deny. “That occurred under ‘shall.’ We know what’s going to happen using the word ‘should.’” There is no need to worry that with “must” a meritorious jury verdict after trial will be upset because the verdict loser shows that judgment ought to have been granted on the summary-judgment papers. (In response to a question, avoiding the issue by saying “summary judgment is to be granted” “is as strong as must.”)

Theodore Van Itallie, Esq., Nov. 17, 105-111: The simple style change from “shall” to “should” might not have caused a problem. But the present proposal has drawn comments and testimony, creating a legislative history that makes it much more consequential to persist with “should.” Retaining “should” may suggest that the Committee embraces the discretion that some courts feel they have. An attempted finesse, such as “is to be granted,” is not effective. There is an inertia against summary judgment. Courts are obliged to grant summary judgment when the facts are undisputed. This is important to provide pronouncements of law that will guide others. The lack of opinions providing clear guidance on the law feeds into undesirable risk-averse behavior.

“[T]here’s a benefit in getting rules articulated, and this is the perfect vehicle.” Because of settlement, from the perspective of providing legal guidance too few cases will get to trial in any event. To be sure, it is proper to deny summary judgment when there are competing reasonable inferences. But it is not proper to deny because there are important public issues — resolution of the law by a clear summary judgment ruling is all the more important. Nor is it proper to deny summary judgment simply because it is less work for the judge to send the case to trial.

Stephen G. Morrison, Esq., Nov. 17, 120, 121-126: It is rare that either plaintiff or defendant is able to dispose of an entire action on summary judgment. Instead summary judgment focuses the case on the matters that truly are in issue. It provides three opportunities for speedy, just, and inexpensive resolution — and all are enhanced by “must.” First, the motion itself often brings the parties to the table and leads to serious discussions. Second, they come together during oral argument and each may concede some points — again, if they know the judge faces a true “shall” or “must” decision, they will consider matters more seriously. Third, after the judge rules they have another chance to resolve the case by settling. “Should” or “may” is inappropriate even for partial summary judgment. It is not fair for a judge to punt merely because it is too hard or too time-consuming to rule on the motion. Nor is it proper to deny the motion because the case involves the public interest — juries do not have to give reasons, while the reasons given by a judge for summary judgment better serve the public interest. Avoiding the problem by deliberately writing an ambiguous “if/then” rule will lead to different standards in all of the circuits, and eventually a resolution by the Supreme Court. It is better to achieve clarity now by adopting clear rule language.

Bruce R. Parker, Esq., for International Assn. of Defense Counsel, Nov. 17, 129, 139-141: Summary judgment is rarely granted in personal injury actions. But it had never occurred to me that “shall” admitted of any discretion. If the facts are truly undisputed and the law is in our favor, summary judgment must be granted. Trying to explain denial to a client is difficult. Denial “breeds a certain disrespect for our litigation process.”

Debra Tedeschi Herron, Esq., Nov. 17, 141-143: Favors “must.” It will avoid lengthy trials.

Latha Raghavan, Esq., Nov. 17, 143-146: “Thou shalt not kill” is a command. “Shall” means “must.” Celotex establishes a mandatory standard. The point-counterpoint procedure forces the attorneys to do the work. Further protection is provided by the rule that the judge need not search the record.

Alfred W. Cortese, Jr., for Lawyers for Civil Justice, Nov. 17, 153, 154-161, 163: “[W]e did not focus on” the change from “shall” to “should” in the Style Project “because we were content with the committee’s assertion that they were not changing the substance of any of the rules.” Celotex established a mandatory interpretation of “shall.” That was the intent of the original rule. It should be restored. “[W]e’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.” “Should” does not fit with “entitled” to summary judgment. It is a suggestion, not a rule. It is wishy-washy. “[S]ummary 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 the other.” “Should” gives “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.” “I would leave you with the thought that we do want commandments, not suggestions. [Q] Because they’ve been so effective? [A] They haven’t been effective enough. I wouldn’t dilute them.”

Hon. G. Patrick Murphy, Jan. 14, 12-13, 19-20, 43-44: “I agree with that “must.” If there’s no disputed issue of fact, surely you must grant the motion.” Why would you want to have a trial if there’s nothing to try? But does that mean that disappointed movants will be petitioning for mandamus? “I’m not sure what that means.” (Responding to questions Judge Wood put to another witness, Judge Murphy later expressed concern that “must” might mean that a busy judge might have to drop everything else to make a prompt ruling on a summary-judgment motion, or face mandamus, but offered no firm conclusion.)

Brian Sanford, Esq., Jan. 14, 27 at 31: Because it is a “should standard,” the judge should have absolute discretion to deny summary judgment and not have to explain it.

Michele Smith, Esq., Jan. 14 at 32, 34-37, 40-43: “Must” is important to offer direction on the obligation to grant summary judgment. “Clear and unequivocal guidance is imperative * * * [because] most judges * * * do not like granting summary judgment.” Some judges believe summary judgment is just not appropriate, that all cases should get to a jury. Others worry about reversal. The reality of practice is that it is much easier to get summary judgment in a case with small stakes than in a case with large stakes, even though the cases are indistinguishable under the summary-judgment standard. Judgment often is denied with the suggestion that the parties mediate, leaving the defendant in the unenviable position of determining whether they would prefer to pay some money to get out of the case and avoid “the uncertainty of a trial in jurisdictions that may not be favorable.” Partial summary judgment, further, saves resources for all parties, and for the court. And “must” is better than “shall.” Judge Wood asked whether reality is better expressed by “should,” because there will be cases in which the judge just is not ready to rule, and also whether the standard should be the same when granting partial summary judgment would leave part of the case for trial. Ms. Smith responded that the standard should be “must” both for full and for partial summary judgment. She also recounted her own experience with having to tell a client that there is no effective way to make sure the judge will decide a summary-judgment motion before trial

Margaret Harris, Esq., Jan. 14, 44 at 49: “Shall. I kind of like that. * * * [I]f I were a District Court Judge, I might take a little offense if the rules were telling me I must do something. I would think that I’m intelligent enough to exercise my own discretion * * *.”

Wayne Mason, Esq., for Federation of Defense & Corporate Counsel, Jan. 14, 60 at 61-63, 66-70, 71-75: Clients are frustrated when counsel has to explain that the motion is right on the undisputed facts and on the law but it is not granted. Sometimes there is no ruling at all. Sometimes there is a denial without any explanation. “[I]t should not be discretionary.” “[I]t is important * * * for people to be able to trust the fact that it will be ruled on.” It costs a lot to prepare for trial — in many cases it is not a 3-day trial, but a 3-week trial or even potentially a 3-month trial. Even when

trial is likely to be brief, partial summary judgment can narrow the issues and has an effect on settlement. The most important issue in the rule is “must” rather than “should.” “Shall” was understood to be mandatory. Nonetheless petitions for mandamus to compel a ruling were rare. They will remain rare if the rule says “must”; no one wants to seek mandamus on a question like this. “I’m not naive enough to * * * believe that there are times when summary judgment would still be denied under the ‘must’ standard.” But the message should be that it is nondiscretionary; if “should” remains, state courts are likely to follow this lead and the situation in state courts is already bad enough.

John H. Martin, Esq., Jan. 14, 82, at 91, 93-96: “Must” is appropriate. In one recent experience a motion for summary judgment on a narrow ground in an otherwise complex case languished without any decision until a new judge was appointed to the case and promptly granted summary judgment, which was affirmed on appeal. “I don’t have a good answer to how you make a judge rule on any motion.” But softening the command to “should” “might send a message to some judges that they’ve got a lot more discretion on summary judgments than they think they do.”

G. Edward Pickle, Esq., Jan. 14, 104, 107-111, 113-115: For 70 years “shall” has made summary judgment mandatory when there is no genuine issue. Our civil justice system is too costly; it is not competitive with other democratic developed nations. Summary judgment is one of the most effective tools for managing costs. Legions of cases establish the mandatory meaning of “shall.” If we stick with “should,” judges who have some antipathy toward summary judgment — either as a matter of overwork or as just disliking it — “can drive a truck through it.” The discretionary option will be a “total way out.” Most lawyers have not yet caught up with the 2007 Style change, but the risk is there. And uniformity is crucial on this point — the standard for summary judgment cannot vary from one court to another. Nor should the standard be relaxed for partial summary judgment. No smart lawyer will risk provoking a partial summary judgment that will be reversed after trial and appeal, forcing another trial. In managing outside counsel I would never approve such a motion. When there is a solid basis, however, partial summary judgment is important. It narrows the issues for trial, and gives the parties a better foundation for settlement. One of the biggest problems practitioners have is the judge who simply will not rule on a motion. When the ruling is deferred to the start of trial, most often it is a simple and unexplained denial. But there may be a partial grant — that simplifies trial, but an earlier ruling would have spared the parties the costs of preparing to try those issues.

Cary E. Hiltgen, Esq., Jan. 14, 121-128: His own practice is not to file a summary-judgment motion in every case. For one client, he has tried 100 cases to completion. He made summary-judgment motions in 26 of those cases — 12 were in federal court, 14 in state court. He kept the motions simple. His clients are interested in cost — they do not want to pay the cost of a losing motion, but they do want to save trial costs by successful motions. Partial summary judgment works. If summary judgment is made discretionary, “you are asking to exacerbate the amount of time and money involved.” There is no room for discretion. The party has “the absolute right” to get rid of claims that lose on the undisputed facts. “Must” is the proper word.

Keith B. O’Connell, Esq., for Texas Assn. of Defense Counsel, Jan. 14, 129-140: It should be “must.” As an anecdote, offers a case in which summary judgment was not granted despite a compelling showing, leading to prolonged proceedings, and settlement at a low value that avoided the cost of trial but probably left the plaintiff with very little in relation to a serious loss. Faith in the system is diminished if people believe courts act arbitrarily. That includes denial of warranted summary judgments. There are lots of cases that seem to recognize discretion to deny. But they did not involve motions that satisfied all of these conditions: “the motion is not premature; there has been adequate time for discovery; an adequate record to support the judgment has been made; the motion has been filed in accordance with a schedule order — you know, the deadline, it’s not filed on the eve of trial; proper notice has been given to the other side; the other side has had a reasonable opportunity to respond; the movant has — the movant has shown, based on an adequate record, that there is no genuine issue of material fact; the movant has shown, based on an adequate record, that the movant is entitled to judgment as a matter of law.” When all of those things do not occur, it is proper to deny summary judgment, whether the rule says “shall” as it has or instead says “must.” Nor will it help to attempt to avoid the issue by rewriting the rule to say only that a party may move, without stating any standard to guide the court’s action. There is too much history, too much risk of changing the standard.

Stephen Pate, Esq., Jan. 14, 140, 141-144: Has had motions for summary judgment denied both as defendant and as plaintiff in insurance contract cases. “[J]udges are reluctant to rule on summary judgment motions, even though it’s a situation involving a contract which involves matters of law.” Cross-motions are both denied even when you expect one side or the other is right on the law. Adopting “must” does not threaten a wave of petitions for mandamus — “I don’t think a case has ever been strong enough for it,” and lawyers are reluctant to mandamus a judge. “Must” also will protect against judges who use summary-judgment as a settlement tool. An example is provided by a case in which a judge waited seven months and then granted partial summary judgment a week before trial — “I think he thought he was a mediator and not a judge * * *.”

Carlos Rincon, Esq., Jan. 14, 147, 148-152: “Must” is right. For all the talk that summary-judgment motions are filed in every case, “we are very cautious.” The data on employment cases reflect the fact that changes in other areas of the law are drawing more lawyers to employment cases, leading to more employment cases. Nor is the wish for actual jury trial and confrontation all that it may seem. Litigants are increasingly anxious for “an opportunity to vent, to tell their story. And that certainly happens.” They are more concerned with solutions, including ADR as a means of achieving solutions.

Tom Crane, Esq., Jan. 14, 156, 156-157: Summary judgment is overused. There is no need to increase its use by changing to “must.”

Michael R. Nelson, Esq., Feb. 2, 58, 60-64, 66-70: Anderson v. Liberty Lobby is cited both for and against discretion to deny. “[T]hen we need a rule.” A court never says that a party is entitled to summary judgment, but that judgment is denied as a matter of discretion. “They find some issue that needs to be tried,” and can do that even with “must.” But at least “must” gives a clear standard. Since the Style change to “should,” and since publication of the present proposal, we are seeing

comments supporting negative discretion to deny summary judgment even though the standard is satisfied. Denial cannot be supported simply because the judge would rather see the testimony at trial; nor for fear of the costs of appeal, reversal, and remand for trial; nor because a trial remains necessary on other issues — it is expensive to bring cases to trial, and summary judgment can narrow the issues to be tried. Trial should be avoided even if it is a simple half-day event with two local witnesses. The same thing should hold on Rule 12 motions to dismiss for failure to state a claim. Rule 12 has never directed that the court “shall” grant the motion, but it too should be a matter of right. “I think ‘shall’ [sic for should?] is just going to create more and more mental leeway with the judge.”

Jeffrey W. Jackson, Esq., Feb. 2, 71-80: As general counsel for State Farm Mutual Automobile Insurance Company surveyed all the first-party lawsuits against the company and its affiliates from November 20, 2005 through November 20, 2008. There were about 6,500 suits in that period. Summary judgment totally disposed of 224 of them, or 3.5%. Voluntary dismissals and other dismissals disposed of 25%. Settlement accounted for 70%. Fewer than 2% went to trial. Most of these cases — 82% — were in state courts, only 18% in federal courts, but all of the states save Pennsylvania have “shall” in their summary judgment rules. We have not yet counted the number of cases in which we moved for summary judgment, nor the number of partial grants. But with grants so low, what is the need to reduce it from “shall” to “should,” rather than “must”? Trial costs five times as much. Nor do we always move for summary judgment — some cases do not support the motion. But if it is supported, we may make it despite the chance of denial and wasted cost — some cases involve questions of law, such as coverage, that we cannot resolve by settling to save the costs of summary-judgment practice. Finally, we have some 120,000 third-party cases against our insureds. The costs of defending them go into our insurance rates. Efficient procedure is important. “Shall” might do the job. And it would go part-way to say that the court must grant summary judgment “unless for good cause stated on the record.”

Kevin J. Dunne, Esq., Feb. 2, 80-83, 86-87: “I’m a defense lawyer. * * * I want summary judgments granted and I think in many instances they should be granted and I don’t think they’re granted enough.” Denials may be by failure to rule, or by outright denial. Some judges deny because they love the right to jury trial — “I think their philosophy should be moderated.” “[J]udges who don’t like to work as hard as other judges don’t like to grant summary judgments.” They should not be able to hide behind “should.” “[T]heir idea is ‘If I deny this, it will settle. If I deny this, it will have to go to a jury.’” I want a more certain system, so I can give a client a better idea of what will happen if we move for summary judgment. Grant or denial is “a huge swing in money.” I often attempt to get permission for interlocutory appeal under § 1292(b) after a denial, and sometimes a judge will grant permission. If we have “shall” or “must” it will be easier to get reversal on appeal. And it may support review by mandamus.

Mary Massaron Ross, Esq., Feb. 2, 87-92: “Shall” was always understood to be mandatory. “Should” “conveys discretion, a hope, an expectation, but not an obligation.” It is difficult to explain denial to a client when there are not genuine fact disputes. And it is costly — not only in money, but in emotion. Partial summary judgment also is important because it can pare a case down, and by doing so reduce the aberrant results that can flow from “a sort of generalized

presentation to the jury.” As an appellate lawyer, I spend a lot of time explaining to trial lawyers and clients why an appeal is not a good thing. Mandamus is not a risk if the rule says “must.” It is an extraordinary writ and the courts of appeals are not likely to grant it. “It’s expensive. It gets the trial judge mad at you if you lose.”

Sharon J. Arkin, Esq., Feb. 2, 94, 98-101: Summary judgment is often granted where it should not be. As a plaintiff’s lawyer in complex litigation I have opposed hundreds of summary-judgment motions, “and most of them are not granted, but I have reversed on appeal dozens which were granted.” “Should” is appropriate. The judge who has a gut feeling there is something in the case should be able to send it to trial even if the plaintiff has not been able to identify specific fact disputes. This goes back to the inference issue. “Shall” has some flexibility. So does “should.” “Must” does not. “[T]he case law has evolved such that flexibility is available.”

Elizabeth J. Cabraser, Esq., Feb. 2, 107, 117: “Must” and “shall” are appropriate for rules directed to lawyers. “Should” is the proper word for a rule directed to judges. The determination to leave the standard unchanged makes “should” the appropriate word. (In addressing point-counterpoint, she also notes, p 112, that when summary judgment is denied “facts that may be quite material come into evidence in the course of that [trial] time that were not enumerated or argued or submitted to the court in the summary judgment stage.”)

Stefano G. Moscato, Esq., for National Employment Lawyers Assn., Feb. 2, 117, 133-135: “Should” is better. In employment discrimination cases “there is no outcry that federal courts are denying summary judgment motions in cases where they should be granted. Quite the opposite is true.” Yes, it would be difficult if a judge ruled that although an employment plaintiff had showed there was no genuine dispute and was entitled to judgment as a matter of law, the motion would be denied. But that does not happen. It is not proper to argue that discretion can be exercised in favor of a plaintiff but never against.

Peter O. Glaessner, Esq., Feb. 2, 137, 140-145: “Shall” or “must” should be adopted. Rule 12 is not the same — it rests on notice pleading, and is invoked before the parties are heavily invested in the litigation. By the time of summary judgment the case already has become quite expensive. Denial will lead to an expensive trial. Individual employment trials in my experience involve five to eight claims and last three to five weeks, even as single-party cases. Summary judgment is an important tool to narrow the case, shaping the duration of the trial and what evidence might be admissible. My clients are primarily public entities and non-profits, not Fortune 500 corporations. A \$50,000 to \$100,000 trial is very expensive for them. Rule 56 practice has historically been geared to “shall.” It has been a mandatory directive. A change to “should” will be seen by some as a change.

Ralph A. Zappala, Esq., Feb. 2, 151-153: “Must” provides a very strong incentive in commercial litigation. Often an adversary cannot stipulate, but will be able to resolve the case when the case is laid out on summary judgment. Or summary judgment gets rid of many things that come in with notice pleading, things that do not matter. “[S]ummary judgments trim away the dead wood and leave a healthy tree for the judicial process * * *.”

Marc E. Williams, Esq., Defense Research Institute, Feb. 2, 157, 163-173: Shifting to “must” will not lead to frequent applications for mandamus to review a denial. “It is something that almost never comes up in terms of mandamus simply because it is so disfavored and the risks are so high.”

Practitioners already are arguing that “should” means the court should let the case go to trial even though there is no genuinely disputed material fact. A similar argument has been made in a pending appeal, although it is framed as an argument that reasonable inferences favoring the nonmovant should have defeated summary judgment.

Any risk that “must” might seem to come too close to denying the right to jury trial can be addressed in the Committee Note. The Note can explain that the change from “should” to “must” is not intended to change the standard, “but to clarify the fact that the change from ‘shall’ to ‘should’ was nothing more than a stylistic change * * *.” The right to jury trial ends at the point where the fact-finder has no facts to find.

As for the case in which there is a novel issue of law that might be illuminated by a full fact record, “[r]egardless of the judge’s individual belief that the record might be better developed at trial, which one could make the argument that any record is better developed at trial — I don’t know if that’s necessarily the case. I think oftentimes the record is more muddled at trial.” When there are no material issues of fact, the question becomes one of law and the court should decide it.

Daniel J. Herling, Esq., Feb. 2, 175-177: Already lawyers are arguing that “should” gives discretion to deny the motion. “I’m not saying judges are buying the argument, but they are continuing to see it.”

Andrew B. Downs, Esq., Feb. 2, 190, 191-195: The change to “should” is generating arguments for discretion to deny. But what discretion can there be if the record shows no genuine dispute as to any material fact, all favorable inferences are recognized for the nonmovant, and the law entitles the movant to win? Subjective denials will lessen respect for the judiciary. But it would be a mistake to attempt to write a rule that compels the judge to decide the motion within a specified deadline.

Michael T. Lucey, Esq., for Federation of Defense & Corporate Counsel, Feb. 2, 202, 203-207: “‘Shall’ is ‘must.’ ‘Shall’ is ‘will.’” Already in mediations, adversaries have asserted that the change to “should” means my case is no longer a summary-judgment case. Courts have not yet come to say this, but the argument is being advanced. And the cost-benefit analysis offered to support discretion is wrong. If the clients want to spend more money on summary judgment than on trial, that’s their right. The view that the court should not devote eight days to summary judgment in a case that will take two days to try is wrong.

Kimberly D. Baker, Esq., Feb. 2, 209-220: The need to abandon “should” is illustrated by a case in which the judge put the parties through prolonged pretrial proceedings and trial preparation without ruling on a summary-judgment motion based on the statute of limitations. The motion was granted on the eve of trial. Both parties would have wanted the “shall” or “must” standard. Nor is it suitable ground to deny the motion because the nonmovant or the court would prefer to have a jury decide.

Both movant and nonmovant need to be confident that a uniform standard is applied. I would go back to “shall.” Must may be a little stronger than shall, but it is much closer to shall than is should. Adopting “must” will not eliminate all discretion. “I think discretion of some kind is always going to be there.” The alternative of saying “must, unless for good cause” will not work. It would take years of appellate wrangling to determine what “good cause” might mean.

Jeffrey J. Greenbaum, Esq., Feb. 2, 221, 235-238: (This testimony reflects the views of officers and members of the council of the ABA Litigation Section, but is not ABA policy.) “Should” changes the standard. “Shall” means “must.” Summary judgment is no longer a disfavored device — Celotex established that. Should will take it back to a disfavored device. Nor should “must” be qualified by “except for reasons stated on the record.” That would open a real Pandora’s box. “[T]he style change has snuck in as a style change.” If the judge thinks the case should go to trial, the judge is going to find a fact dispute on the issue that is really troubling.

Donald F. Zimmer, Esq., Feb. 2, 248, 249-250: A party is entitled to certainty and consistency — if the motion shows there is no genuine dispute, the party is entitled to summary judgment. Almost all state rules use “shall.” “‘Must,’ of course, would be preferable from a defense standpoint, but I see the nuance in between those terms.” Should “is decidedly more voluntary and much closer to ‘may.’”

STATE REASONS

08-CV-056, Hon. Frank H. Easterbrook: The rule should say “must,” requiring a statement of reasons both for grants and for denials. A grant usually is the terminating order. Even for a partial grant, the reasons will help counsel plan the rest of the case. Reasons are essential for a denial when it may be appealable, as with official immunity. The invitation for comment suggests nothing would be gained by requiring the court to state the obvious, “but when the reasons are obvious a sentence or two will do. The problem with using the word ‘should’ in the rule is that it authorizes the judge to keep silent even when the reasons are not obvious.”

08-CV-071, Hon. Paul J. Kelly, Jr.: The Committee Note generates inappropriate pressure to state the reasons for denying summary judgment by stating that the court need not address every available reason. The Note “should make it clear that courts are not required to state on the record the reasons for denying a motion for summary judgment, but rather retain discretion to deny a motion summarily.”

08-CV-134, Prof. Bradley Scott Shannon: There is no reason to distinguish between granting and denying summary judgment. A statement of reasons should be required for either action.

08-CV-156, Brian P. Sanford, Esq.: A court should not be required to state reasons for denying summary judgment. “[T]he court has discretion to deny for reasons of credibility or fairness. A denial results in a trial.”

08-CV-161, Federal Magistrate Judges Assn.: Agrees with requiring the court to state the reasons for granting or denying the motion.

08-CV-180, U.S. Department of Justice: “It is critical that parties understand the basis for the court’s ruling, whether the motion is being granted or denied.” The Department supports this provision.

08-CV-183, Professor Eric Schnapper: It is important to have an explanation for grant or denial of a question-of-law motion; denial of a motion based on the statute of limitations, for example, will often be the last time the issue is addressed in the district court and it is important to have an explanation for purposes of any later appeal. Explanation also is important to permit review when the court grants an evidence-sufficiency motion. But an explanation of denial of an evidence-sufficiency motion is not always helpful. If the judge thinks an explanation will help the parties prepare for trial, the judge can explain. But explanation of a denial usually is meaningless after trial — the sufficiency of the evidence will be measured by the trial record, which usually is different from the summary-judgment record.

Brian Sanford, Esq., Jan. 14, 27 at 31: Findings should be required on granting summary judgment, but there is no need on denial. “[A] judge should have absolute * * * discretion to deny summary judgment and not have to explain it. They still get a trial.”

STANDARD: INFERENCES

08-CV-048, Stephen Z. Chertkof, Esq.: Provide that “a moving party must support its motion by undisputed facts without inferences, while the nonmoving party may rely on both undisputed and disputed factual assertions as well as inferences drawn from such evidence.”

08-CV-066, Richard T. Seymour, Esq.: Rule 56 should require the movant to show that its position does not rely on disputable inferences in its favor, “and that no reasonable inference from the record could be drawn to support the nonmoving party with respect to the contention at issue.” And the nonmoving party should be required to address the question of inferences. Without these requirements, “the court does not have a developed perspective as to the possible inferences in the case, and can result in the court’s inadvertent drawing of inferences in favor of the moving party.” Courts can easily slip into this error.

08-CV-075, Mark Hammons, Esq.: Summary judgment must be denied when different inferences can be drawn from undisputed facts. “Because a change in intent might be inferred from [(c)(2)], the language should be altered to read: “There is no genuine issue as to any material fact or material factual inference.”

08-CV-118, Malinda Gaul, Esq.: The rule should provide that a motion can be supported only by undisputed material facts, “without inferences.” The nonmovant “may support its response by undisputed and disputed facts, as well as any inferences drawn from the evidence.”

08-CV-143, Stefano G. Moscato, Esq., for National Employment Lawyers Assn.: The point-counterpoint procedure “does not work well for those cases where the plaintiff relies heavily on inferences to be drawn from undisputed facts, and which depend on placing those facts in a broader context of other facts.” “[T]he complex narratives typical to [sic] our members’ cases cannot be effectively told in a list of undisputed facts.” The nonmovant should be expressly permitted to articulate the reasonable inferences that might be drawn from the listed facts, and to point to other facts in the record that support the inferences.

08-CV-157, Margaret A. Harris, Esq.: “But what about inferences”? They should be added to the rule text: “should grant summary judgment if, after resolving all factual disputes and drawing all inferences in favor of the non-movant, there is no genuine dispute * * *.” In the employment law field, the case law is not clear as to what facts are “material.” The Supreme Court has recognized in *Ash v. Tyson Foods*, 126 S.Ct. 1195 (2006), that “meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage.”

08-CV-171, Sue Allen, Esq.: “I am a plaintiff’s employment lawyer and am frustrated by the failure of judges to give my clients the benefit of inferences in their favor.” The proposed Rule 56 changes “will add to the considerable burden that employment law claimants bear * * *.”

Richard T. Seymour, Nov. 17, 15-26: Studying innumerable appellate opinions in employment discrimination cases shows too often summary judgment is granted “by a judge taking a rule of thumb, transmitting it into no reasonable juror could disagree with this principle of law,” and winning appellate affirmance. Jury arguments become rules of law. Of 122 appellate opinions suitable for analysis rendered since this September 1, almost one-fifth reversed summary judgments. Some of the opinions comment on a rush to judgment that uses summary judgment as a docket-clearing device. The problem is structural. Inferences are left out of the equation. The motion is made without ever identifying the range of inferences that can be drawn in favor of the nonmovant, without showing the inferences that must be drawn in the movant’s favor to support summary judgment. “[T]here 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.” Inference problems are easily demonstrated by the many cases that require a showing of intent without any open statement of intent by the defendant. The rule text should be changed to require that “inferences be addressed by the parties in an orderly fashion.” (Then describes several sequences of cases in which rules of thumb adopted by lower courts to grant summary judgment against employment plaintiffs have been ultimately rejected by the Supreme Court.)

Prof. Edward J. Brunet, Nov. 17, 52 at 59-60: The suggestion that a reference to inferences should be written into the rule text is unwise. The text “can’t cover every issue, and I think inference is just an asking for liability to go there.”

Margaret Harris, Esq., Jan. 14, 44 at 46-48, 51: Employment discrimination cases are very complex. “Hardly ever do we have direct evidence.” What facts are “material” can be difficult to define when the case depends on complex circumstantial evidence. The Supreme Court recently reversed lower courts that failed to consider the inference of discrimination that may flow from addressing an

African-American employee as “boy.” “[T]he word ‘inferences’ needs to be in the language of the rule. That is the law.” “[T]hink about Hamlet. How do you reduce that to a point/counterpoint? Is the guy crazy or is he not? How do you decide was revenge appropriate or wasn’t it? I mean, all those are inferences that you draw.” “[O]ur cases are proved more like we’re the hounds barking at night. Little tiny — little tiny things.”

Steve Chertkof, Esq., Nov. 17, 34-52: This testimony is summarized with the point-counterpoint procedure. Argues at length that when intent is at issue decision commonly turns on inferences from facts that, standing alone, do not seem “material.” The rule text should make clear that a nonmovant can respond by pointing to reasonable inferences that defeat a motion that seems to show there is no genuine dispute as to material facts.

Hon. Claudia Wilken, Feb. 2, 46, 55-56: Inferences present a problem for point-counterpoint procedure. It may be argued that an inference is not a fact, and cannot be included in the statement or response. “And yet in order to understand the narrative, in order to understand what’s really happening, you need to point out the inferences.”

Rule 56(b)

08-CV-039, Professor Alan B. Morrison: (1) The proposal allows times to be varied by local rule [at the end, he suggests this is a mistake]. Why not allow the parties to stipulate to different times, unless there is a scheduling order? (2) “[A]dditional time should be allowed either side if the other moves for summary judgment at or near the end of the time allowed,” again with an exception for cases governed by a scheduling order. (3) It sounds unduly directory to establish the time limits for response and reply by stating that the opposing party “must” file a response, and the movant “must” file a reply. These should be reduced to “may.”

08-CV-046, Center for Constitutional Litigation (American Association for Justice), John Vail, Esq.: (1) allowing a defendant to move at any time “likely will force many nonmoving plaintiffs to respond to summary judgment motions before they can conduct enough discovery to obtain the support they need for the responses that proposed subsection (c) requires.” [It is not clear just what drafting change is recommended.] (2) The movant — the defendant — can take months to prepare a motion, billing by the hour; 21 days is not sufficient time to respond, “even if the defendant’s statements of undisputed facts are clear and correct.” Plaintiffs’ lawyers typically work for a contingent share of the recovery; imposing the duty of responding to extensive statements of undisputed facts impairs efficiency. Plaintiffs should be allowed to challenge the number of fact statements in the motion, or to challenge the materiality of the facts, before a full response is required.

08-CV-133, Sharon J. Arkin, Esq.: “[A] defendant should not be permitted to file a motion for at least 60 days after its answer has been filed, in order to permit the plaintiff a reasonable opportunity to conduct necessary discovery.” Close judicial supervision will remain necessary to make sure that a recalcitrant defendant does not make discovery so difficult as to impede opposition to the motion. (California has expanded to 75 days the time to oppose, Code Civil Procedure § 437c.)

08-CV-134, Prof. Bradley Scott Shannon: The reference to “local rules” should be deleted in favor of a uniform national standard. Exceptional cases can be dealt with by court order. And authority for a court order can be found in Rule 16. In addition, the rule should not say that an opposing party must file a response; the consequences for not filing are severe, but there is no obligation to respond.

08-CV-156, Brian P. Sanford, Esq.: The time limit should be 30 days before the close of discovery. Motions often present declarations or witnesses not deposed or documents not emphasized. Discovery should be available to respond to the motion.

08-CV-179, Robert J. Wiley, Esq.: Discovery usually ends before the motion is made. “This encourages defendants to hide the ball and litigate by surprise.” It is important to allow the nonmovant to depose the witness after a Rule 56 affidavit is filed. Summary-judgment motions should be due not less than 45 days before the close of discovery, with a corresponding 45-day response deadline.

08-CV-180, U.S. Department of Justice: Supports the timing provision, including the response provision recognizing that under Rule 12(a)(2) the United States may have 60 days to plead, and that the 21-day response period should be measured from the time the responsive pleading is due.

08-CV-183, Professor Eric Schnapper: The movant controls the time of moving, and often relies on material — most notably affidavits — unknown to the nonmovant. The nonmovant’s dilemma is aggravated by the inadequacy of present Rule 56(f) (to become 56(d)), which virtually forces a simultaneous response to the motion and request for greater time for discovery. The rule should require that the movant disclose any affidavits and documents it intends to rely on at least 90 days before making the motion and before the close of discovery.

Brian Sanford, Esq., Jan. 14, 27 at 29-30: The motion should be filed before discovery is ended. I cannot cross-examine a declaration. If the motion is made before the discovery deadline, “I can notice that person up for a quick deposition, I can send out another set of discovery requests.” I should not have to make a special motion for added discovery time. Some judges let me have more time, but some do not.

Sharon J. Arkin, Esq., Feb. 2, 94, 105-106: There should be more time to respond. The plaintiff should have at least 60 days to conduct discovery after the motion is served.

Rule 56(c)

POINT-COUNTERPOINT

08-CV-003, Leslie R. Weatherhead, Esq.: “Enthusiastically” supports proposed Rule 56. Sets out E.D.Wash. Rule 56.1, a point-counterpoint rule that permits the court to assume the facts claimed by the moving party are admitted without controversy except to the extent they are controverted by the nonmovant’s “counterpoint” statement. “This procedure forces the disorganized lawyer to think clearly about the evidence in his or her case before bringing a motion for summary judgment, and

forbids the wily practitioner from manufacturing a spurious ‘genuine issue of material fact’ by raising a confusing welter of facts in opposition * * *.” [The local rule allows the nonmovant to dispute or “clarify” a fact. “Clarify” is a word that may deserve consideration.]

08-CV-006, Hon. Avern Cohn: Suggests adding a requirement that the movant and nonmovant integrate the statement, response, and supporting citations in a single document. Each fact would be set out separately, in a form that includes statement, response, supporting citations, and response citations. In like fashion, a single document (apparently a separate single document) would be used to merge any additional facts stated by the nonmovant and the movant’s reply.

08-CV-008, Kenneth A. Lazarus, Esq. for American Medical Assn. and other medical associations: By requiring additional specificity of proponents and opponents, the rule “will ultimately serve to refine and further enhance the summary judgment process.”

08-CV-009, Hon. G. Patrick Murphy: Seems to be addressed to subdivision (c), recounting that “this procedure was tried in our court by local rule and it proved to be a waste of time * * *. An entire motion practice developed around what is an ‘undisputed fact.’” The practice adds to the tremendous advantage larger firms have over smaller firms. The amendment will be a disaster; “don’t do it.”

08-CV-010, Hon. Scott Kreider: “[C]ases where parties have submitted their statements of fact in enumerated paragraph format often lead to more litigation over what is and is not disputed * * *.” If a separate statement of facts is to be required, it would be better to have a joint statement that sets out the opposing party’s responses with each alleged fact. And it might work better to require citations to the record in the argument section of the summary judgment memorandum; many lawyers simply refer in the argument to the statement of material facts, a practice that “is often annoying and time consuming.”

08-CV-014, Hon. Ortrie D. Smith: Joins Judge Sedwick’s opposition, 08-CV-017. “This may be one of those instances where making work does not equate to making better.”

08-CV-016, Joseph D. Garrison, Esq.: The problem with detailed statements is that some lawyers defending individual employment cases make abusive submissions detailing hundreds of facts, imposing inappropriate burdens on the small firms that often represent plaintiffs. The remedy should be a motion to strike an abusive submission; there is no need for other sanctions. This proposal is summarized at greater length with Rule 56(e) on defective motions.

08-CV-017, Hon. John W. Sedwick: Judge Sedwick compares practice in the District of Alaska, his own court, with practice in the District of Arizona, where he has been assigned more than 1,200 cases over the last ten years. Arizona Local Rule 56.1 “is in substance identical to” proposed Rule 56(c). Experience shows it is a mistake that increases costs for clients, imposes greater burdens on the court, threatens to force busy district judges to transfer still greater parts of civil litigation to magistrate judges, will yield little or no benefit in better dispositions, and will differentiate federal practice from state-court practice. These consequences flow from the greater length of motions

under this practice, and are augmented by a corresponding increase in motions to strike. “Summary judgment papers in Arizona can be truly gargantuan”; in one recent case, the motion listed 322 facts, and appended 524 pages of exhibits. “A list of 20 to 30 statements of fact with 75 to 100 pages of exhibits is probably typical.” It takes “up to twice as much time” to decide these motions. “One might speculate that the elaborate statements of fact required by the Arizona rule improve the quality of the court’s decision. That has not been my observation.” Even if there is some benefit, it likely “would be small, for summary judgments are not often reversed due to a factual error by the trial court.” Without this rule, a motion that simply asserts there are no material facts in dispute may be met by a response that agrees and argues only the law, or by a response that points to two or three issues of disputed fact. It is rare to encounter a response that provides a long list of allegedly material and disputed facts. Under proposed subdivision (c), “[b]ecause counsel for the moving party cannot know what facts the opposing party might contend are material, he or she is very likely to create a longer list than is actually necessary. * * * Lawyers who have even a tiny doubt about whether a fact should be listed will usually resolve that doubt in favor of adding the fact to the list.” And responding parties may be led into “substantial effort to show that facts which actually do not make any difference are in dispute.” Once started down this track, the responding party also may be tempted to include additional facts that will then be attacked by the reply.

08-CV-020, Hon. Joseph M. Hood: Joins Judge Sedwick’s comments, 08-CV-017, noted above. “This may be one of those instances where making work does not equate to making better.”

08-CV-028, Hon. H. Russel Holland: Judge Holland joins Judge Sedwick. Like Judge Sedwick, Judge Holland has “assisted with Arizona civil cases for the last ten years.” As compared to Alaska, the Arizona local Rule 56 practice is “not compatible with” the purposes of Rule 1. The separate statement of facts requirement “causes summary judgment motion practice to be more complex and convoluted.” The Arizona rule “actually encourages counsel to claim the existence of fact disputes that either do not exist or are not material to the case.” And it generates subsidiary motion practice “in somewhere between one-third and one-half of the cases where summary judgment motions are made” — “squabbles over whether a party has or has not met all of the technical requirements of the Arizona rule and/or efforts to strike portions of a party’s separate statement of facts. We rarely see that kind of subsidiary motion practice in Alaska * * *.” (Judge Holland offered similar points in his summary, 08-CV-149: Counsel generally do a responsible job of setting forth in a memorandum of points and authorities the material facts that are claimed to be undisputed.)

08-CV-030, Hon. Graham C. Mullen: Also joins Judge Sedwick’s comments. There has been little difficulty with summary-judgment motions in the Western District of North Carolina. “The lawyers have all but uniformly cited to appropriate parts of the records in their briefs.” The occasionally sloppy motion can be dealt with by a simple direction to refile. Rather than fix a problem, proposed Rule 56(c) will add cost, delay, burden on the courts, and unnecessary wheel spinning.

08-CV-033, Hon. Inge Johnson: Separate paragraphs may be workable, but it will not work to require separate numbered paragraphs for undisputed facts. “I have had experience with such a rule and you would be surprised how many attorneys cannot count. * * * It is easier to read just an essay about what the undisputed facts state and the reference to the record.”

08-CV-037, Professor Adam Steinman: There is a minor flaw in (c)(2)(B)(ii), which can be fixed: “(ii) may in the response concisely identify in separately numbered paragraphs additional material facts — as to which there is at least a genuine dispute — that preclude summary judgment.” It should be clear that the nonmovant need not rely on facts established beyond genuine dispute; it suffices that the fact is material and subject to dispute.

08-CV-039, Professor Alan B. Morrison: (1) Offers a number of drafting suggestions that carry through the suggestion made for subdivision (b), reducing “must” to “may” in many applications. (2) Would add two words in (c)(4)(A): “(A) A statement that a fact cannot be genuinely disputed or that is genuinely disputed must be supported by * * *.” (3) It is unclear how a party “shows” that an adverse party cannot produce admissible evidence to support a fact. It does not work simply to cite to parts of the record that do not show admissible evidence; explanation is needed. Should the explanation be in the statement of facts, or in the brief? If in the statement, the statement will be made longer and more argumentative than a statement of undisputed facts usually is. If in the brief, page limits may be effectively reduced. (4) It is not clear how to relate the (c)(5) statement that cited materials are not admissible in evidence to the (c)(6) requirement that an affidavit must set out facts admissible in evidence. The confusion can be eliminated by revising (c)(6): “An affidavit or declaration may be used to support a motion, response, or reply ~~must be~~ if it is made on personal knowledge, sets out forth facts * * *, and shows * * *.”

08-CV-042, Hon. Robert G. Doumar: Proposed subdivision (c) “is unnecessary and approaches changes for the benefits of billable hours of large law firms.” Continuing amendments of the Civil Rules have raised the cost of litigation so high that “small businesses of the United States cannot afford to ever be in federal court.” Most lawyers in the Eastern District of Virginia refuse to come to federal court because of the complexity of litigation under the Rules. This proposal “promotes less benefit than it costs.”

08-CV-043, Hon. David C. Norton: Proposed (c) “would make our jobs [as district judges] more difficult, not less difficult. Also, it would raise, not lower, the cost of litigation.” Discarding (c) will require revising (e), which refers to (c), and also “jettison[ing] Proposed Rule 56(g) in its entirety, for it would be inoperable without Rule 56(c).”

08-CV-044, Claudia D. McCarron, Esq.: In her early years in practice, summary-judgment motions commonly stated “for reasons stated in the attached memorandum of law”; the memorandum provided a narrative. Then some districts adopted local rules, or individual judges adopted individual practices, requiring a statement of material facts and a response. “[R]equiring such a statement is useful and rarely unduly burdensome.” It “allows the moving party to impose clarity on a case * * *. This is particularly valuable in federal cases where notice pleading permits suits to be initiated without specificity * * *.” “Opposing parties who have a clear understanding of their respective theories also benefit from being required to state the material facts and respond to them.” Cross-motions are often filed in insurance disputes. Left to narratives, each party clings to its own reality and “the parties produce motions papers that seem nearly unrelated. * * * Advocates will benefit from the discipline imposed on them by requiring statement of fact and responses thereto.” The process “ensures that the parties reach some shared reality regarding their agreements and

disagreements.” There is a risk that the procedure will generate motions “that arrive in boxes and overwhelm a smaller firm. However, in these cases, discovery materials and trial exhibits will be no less burdensome.”

08-CV-046, Center for Constitutional Litigation (American Association for Justice), John Vail, Esq.: Offers several points.

(1) Conceptually, the party who bears the trial burdens should have the same freedom as at trial to present the facts as a persuasive whole, not rent “into individual threads of fact, each of which the court must consider in isolation.” The facts are found by listening to a narrative, through a process of making sense of information by creating a meaningful summary. Analytical abilities are radically insufficient for full competence in telling and understanding stories. The point-counterpoint process distorts the factfinding chore.

(2) The rule is rigid, trapping the nonmovant into a response pointing to admissible evidence or explaining why none is available.

(3) The (c)(4)(B) provision that the court need not consider materials not called to its attention creates an incentive for better-funded parties to load their fact statements so heavily as to increase the chance that a poorer adversary will miss something. In districts with local rules that resemble the point-counterpoint process, movants “pile up fact averments to an absurd degree * * * in an attempt to obtain or exploit a tactical advantage over a less well-resourced opponent.”

(4) There is no procedure for ruling on the admissibility of the materials relied upon: what is the test of relevance or materiality at the Rule 56 stage? Does a balancing test apply? What of the ability to “link up” one piece of evidence to another, or evidence whose admissibility depends on other evidence?

(5) There is no provision for responding to a listed fact “by pointing out that the fact does not allow the inference the movant wants to draw, or that the fact is divorced or disaggregated from a context that puts it in a different light and would allow other inferences against the movant * * *.” Some judges in districts with local rules similar to proposed Rule 56(c) are reported to reject such filings “because they do not fit into a specific provision of the rule.”

08-CV-047, Professor Edward Brunet: There will be complaints that the point-counterpoint procedure will increase costs both for movants and nonmovants. Some lawyers already prefer state courts because of the perceived brevity, simplicity, and lower costs of their procedure. But the point-counterpoint procedure is desirable. Stating the facts will focus the judge’s attention. Providing record citations “requests work already done by careful counsel,” and will save the court’s time in searching the record. The nonmovant “should see the summary judgment issues with greater clarity following efforts to cite to record, a vision that greatly facilitates case evaluation and settlement promotion.” The Committee Note, p. 38, line 76, emphasizes the need to avoid over-long motions; the Note as a whole should be revised to better reflect the importance of this concern.

08-CV-048, Stephen Z. Chertkof, Esq.: “To discourage unnecessarily lengthy lists of proposed disputed facts * * *, the proposed rule should define ‘material facts’ as those ‘that might affect the outcome of the suit under the governing law’ * * *.” The rule text also should provide that summary judgment must be denied if the nonmovant shows a genuine dispute as to any single fact designated as material by the movant. Facts that are not designated as material may not be included in the statement of facts, but may be included in the brief when that helps full understanding.

08-CV-049, Professor Elizabeth M. Schneider: Expresses concern that the proposed point-counterpoint procedure will have a particularly adverse impact on employment discrimination and other civil rights actions. The testimony of judges who have experience both in districts with this procedure and districts without this procedure is telling. The procedure adds additional and unnecessary work for parties and the court without offsetting benefit. The effect of breaking the case down into too many discrete parts is to detract from the often necessary holistic appraisal of different aspects of the evidence in the context of the legal claims. “Slice-and-dice” atomization is a mistake. There is no real reason to do this — only 20 districts have adopted local rules analogous to the full point-counterpoint procedure proposed now.

08-CV-053, Hon. Benson Everett Legg: The judges of the District of Maryland completely agree with Judge Sedwick, Comment 08-CV-017 above, and unanimously urge that proposed Rule 56(c) not be adopted.

08-CV-055, Gregory P. Joseph, Esq.: Offers both criticisms and drafting suggestions.

“In my practice, statements of indisputable fact (“SIF”) are expensive and pointless.” Consider the mammoth statement needed in a big corporate fraud case. The response to each paragraph of the statement would “meticulously analyz[e] each verb, adjective, adverb and noun in every statement. Even those statements with which there is no substantive disagreement will largely be restated to make sure that the phrasing is acceptable and that nothing is being snuck by.”

A movant cannot trust that the nonmovant will agree to anything, so every statement must be restated in an affidavit or declaration.

If there are simultaneous motions, “as is common,” there will be competing SIFs.

How does Rule 56(c) apply when a motion under Rule 12(b)(6) or 12(c) is converted to summary judgment by considering materials outside the pleadings?

The Rule 56(c)(3) provision that a party may accept or dispute a fact either generally or for purposes of the motion only should have a default provision — and it should be that if the nonmovant does not specify, an acceptance or denial is for purposes of the motion only. “A point that a party may be willing to concede or is forced to fight in one constellation of claims, to make one argument * * * on summary judgment, may be prejudicial before a jury or otherwise harmful under the post-summary judgment array of claims and relevant facts.”

So too, the movant's statement of indisputable facts should be for purposes of the motion only. An example is a motion based on a limitations defense, in which the defendant recites the notoriety of its misconduct. No matter how careful the defendant may be to hedge the statement so it is not an admission of "mis"conduct, there may be slips.

08-CV-057, R. Matthew Cairns, Esq.: For years the District of New Hampshire has required a separate statement of material facts and a response that specifically lays out the facts that are disputed. This practice "has forced movants and opponents to focus on that which is truly material * * *, rather than simply asserting a long litany of facts * * * or throwing numerous facts against the wall * * *. It has also focused the court's attention and permitted it the luxury of not having to decipher what a party thinks is material or in dispute. This latter point is particularly important in cases where there are pro se litigants * * *."

08-CV-060, Federal Civil Rules Committee, American College of Trial Lawyers: "[T]he adoption of the 'three-document' approach to motions and oppositions that already is used in the vast majority of district courts should provide uniformity of practice across all federal courts."

08-CV-062, Hon. Roger L. Hunt: Joins Chief Judge Sedwick's comment, 08-CV-017, "strongly urging against" proposed Rule 56(c). It would only serve to increase the cost of litigation and the burden on the Courts, with no appreciable benefit."

08-CV-064, Hon. James C. Fox: Also joins Judge Sedwick's views, 08-CV-017, urging rejection of proposed Rule 56(c).

08-CV-072, "Practitioners' Comment": Seventy lawyers — one of them Gregory P. Joseph, author of 08-CV-055 — succinctly "urge the Committee not to mandate the use of statements of undisputed fact ("SUF") as the default rule in connection with all summary judgment motions but, rather, to make the default rule that no SUF is required, permitting the judge, in any particular case, to require an SUF if he or she deems it appropriate."

08-CV-090, Hon. Claudia Wilken: Judge Wilken writes on behalf of the Northern District of California. "From at least 1988 until 2002" the court's local rules required "a statement of material facts not in dispute." [Apparently there was no express requirement of a counterpoint response.] The rule was abandoned in 2002. "Since this rule change, we have found the summary judgment motion practice to be much improved." This improvement is described as "our experience with judicial efficiency and understanding." Comments by lawyers will "express the inefficiencies and expense that proposed Rule 56(c) would cause them and their clients."

Under the local rule, memoranda supporting the motion commonly also stated the undisputed facts; the separate statements "were supernumerary, lengthy and formalistic." "Opposing parties frequently filed objections * * *, and sometimes their own statements of purportedly undisputed facts," again duplicating the fact statements in the memoranda. (08-CV-155 adds that the statements often sounded "almost like fact pleading or requests for admissions." The fact statements in movants' briefs were repetitive but more understandable. Nonmovants often offered objections and

opposing facts that “really raise[d] only semantic disputes over the way the facts were phrased.” And matters became really complicated with cross-motions, where the same party is both a nonmovant, whose facts must be accepted as true, and also a movant who must accept the truth of the other party’s facts. “[T]he statement of undisputed material facts is a format that particularly lends itself to abuse by the game-playing attorneys and by the less competent attorneys.”)

“A complex narrative cannot be effectively told in a list of undisputed facts. There may be facts that are disputed, where the disputes are not dispositive but are necessary to an understanding of events.” The nonmovant cannot effectively communicate its version if it must do so by responding in the order of the movant’s statement, “again, without the context of disputed but important facts.” Then the nonmovant must set out its own set of undisputed facts outside the chronological order established by the movant’s statement.

“Further, a case whose disposition relied on inference cannot be well explained in formal lists of facts. * * * Even the nomenclature of undisputed facts is counter-intuitive; often the ultimate facts are legitimately disputed, due to competing reasonable inferences * * *.” “The complex circumstances of a case can best be expressed in a narrative statement which addresses the uncontestable facts, in the context of all of the facts necessary to explain the events, in a meaningful chronology.”

(08-CV-155 adds that since abandoning point-counterpoint in 2002, fact statements are submitted in narrative form as part of the briefs and within brief page limits. The practice is much improved. Narrative statements address “incontestable facts and reasonable inferences from them, in the context of all the facts necessary to explain the events, in a meaningful chronology.” The opposing party can provide its own narrative, unrestricted by the chronology chosen by the movant. Objections to admissibility are made in a motion to strike, or — better — in the brief. This procedure works better than a procedure that would require a separate statement of undisputed facts as part of the brief; the separate statement either would require duplicating the facts, or attempting to use the statement as the narrative.)

08-CV-098, E.D.N.Y. Committee on Civil Litigation: An earlier Local Rule 56.1 required a statement of material facts about which the moving party contends there is no genuine issue, with a specific record citation. The opposing party is required to file a response. The Rule was similar to proposed Rule 56(c). “Many attorneys in our district expressed confusion about the meaning and operation of the predecessor Local Rule 56.1 * * *.” It was revised.

08-CV-100, L. Steven Platt, Esq., writing “As a past President of the National Employment Lawyers Association”: The point-counterpoint system used in the Illinois district where Mr. Platt practices “doesn’t work and unfairly favors the defendants.”

Statements of facts allegedly not in dispute are too long. In one recent case the statement recited 250 facts. Responding entails “an enormous waste of time and extreme burden”; the burden is particularly severe for employment plaintiffs’ lawyers who typically do not charge on an hourly basis.

The point-counterpoint system is, for many reasons, “biased against plaintiffs and their lawyers in civil rights cases.” (1) The rule recognizes only one mode of response — advancing facts that contradict the asserted facts. (2) There must be a way to respond to facts that “may be accurate, but that are misleadingly [sic] or are stated disingenuously. It may be true that the employer has a written policy prohibiting discrimination; but it also may be true that it is not enforced — yet the nonmovant could be sanctioned for providing the context. (3) The fact may be correct but irrelevant. (4) The fact may be correct, but the inference the movant claims is unwarranted. An employee violates company policy and is fired, but the full facts show that all employees violate the policy and this employee was instructed by his supervisor to violate the policy. (5) The asserted fact may depend on the credibility of a witness the jury is not required to believe. (6) The asserted fact is based on inadmissible evidence. Under the proposed rule the nonmovant cannot rely confidently on its inadmissibility argument, and thus must undertake the additional work of responding fully. (7) An accurate fact may have “a different significance if considered in conjunction with other facts that are not listed.” An employee may admit that her supervisor never openly propositioned her, but have a great deal of other evidence of quid-pro-quo harassment. The facts cannot be treated in atomized fashion.

It is unfair to allow the movant to reply but not to provide a sur-reply. “That is especially true in light of the growing practice on the part of some movants of saving major points for reply briefs to which non-movants are not permitted to respond.”

08-CV-104, Hon. Robert L. Miller, Jr.: Chief Judge Miller writes for all the District and Magistrate Judges of the Northern District of Indiana. The Southern District of Indiana once adopted a local rule that was much like the proposed point-counterpoint procedure. The Northern District studied the procedure in the hope that state-wide uniformity could be achieved by adopting a parallel local rule, but decided that the rule was “likely to lead to inefficiency.” The Southern District eventually abandoned its rule because it “led to too much satellite briefing, such as motions to strike for non-compliance with the requirement.” Rule 56 leaves crevices in practice that, for the most part, have been admirably filled by local rules or individual orders. Uniformity is not an end in itself, but should be pursued only when it serves the goals expressed in Rule 1.

08-CV-109, Ellen J. Messing, Esq., for Seven Massachusetts Lawyers: The District of Massachusetts has a point-counterpoint practice. “From our perspective as plaintiffs’ civil rights lawyers, this system is an unmitigated disaster.” (1) “[T]he sheer length of the lists of assertedly not-in-dispute material facts encouraged by the system tends to overwhelm plaintiffs and their lawyers.” In a recent case the statement, including exhibits, exceeded 600 pages. The labor required to show that all of them are unsupported, irrelevant, or misleading is an enormous burden. (2) The methods allowed to respond are too narrow; the rule “is profoundly biased against plaintiffs and their lawyers in civil rights cases.” The asserted fact may be accurate, but misleadingly stated, disingenuously utilized, irrelevant, or offered to support an unwarranted inference. The fact may turn on the credibility of witnesses the jury is entitled not to believe — “As such, it cannot be meaningfully disputed.” The fact may be inadmissible, but the nonmovant must respond fully because the admissibility issue is seldom certain. The significance of the fact may turn on other facts that are not listed. (3) It is “profoundly one-sided” to stop the exchanges with the movant’s reply. “In

practice, movants' reply briefs virtually always raise central points that require a response * * *." There is "a growing practice on the part of some movants of saving major points for reply briefs to which non-movants are not permitted to respond."

08-CV-110, G. Edward Pickle, Esq.: Point-counterpoint "facilitates resolution of summary judgment motions. Non-responsive arguments and obfuscation are rendered more obvious."

08-CV-111, Carlos Rincon, Esq.: The proposed procedure "would preserve and establish a more efficient summary judgment practice." Litigants and counsel will remain focused. "[B]y highlighting what truly is at issue based on the case record, the parties are on notice of what truly is critical in a case and it affords the parties a sense of transparency in understanding what the Court construes as being more significant * * *."

08-CV-113, John H. Martin, Esq.: Strongly favors point-counterpoint. He has practiced in districts that do it, and in those that do not. The procedure "requires the parties to specify clearly what facts they contend are, or are not, truly in dispute." Although a party may list facts that are not material, the nonmovant has ample opportunity to demonstrate which dispositive facts they contend are disputed. The result usually is a very small number of potentially disputed issues.

08-CV-114, Gregory S. Fisher, for Alaska Chapter, Federal Bar Assn.: Point-counterpoint "will needlessly increase fees and costs as it will take more time to draft, review, and file motion papers. It will also take more time to analyze responses * * *. Current practice provides for a streamlined filing that incorporates argument with relevant facts in one filing." The experience of courts and judges that have worked with this procedure and rejected it is telling. A district that likes the procedure can adopt it by local rule.

08-CV-117, Cary E. Hiltgen, Esq.: "[T]he requirement of undisputed facts will bring consistency nationwide, promote good motion practice and will allow Courts the ability to easily and properly adjudicate claims * * *."

08-CV-118, Malinda Gaul, Esq.: Supports the proposed (c) procedures, but the requirement that the movant present only material facts that cannot be genuinely disputed should be enforced by providing that the court must deny the motion if the nonmovant shows a dispute as to any fact the movant claims is material. (And the movant may not advance inferences, while the nonmovant may respond with undisputed facts, disputed facts, and inferences.)

08-CV-120, Hon. John W. Sedwick: Judge Sedwick writes for all the District Judges of Alaska (he wrote for himself, 08-CV-017, summarized above). The judges unanimously oppose (c). "[I]t is particularly discouraging to see a committee of the Judicial Conference pursuing a concept that will make a significant aspect of our work more burdensome."

08-CV-121, Phil R. Richards, Esq.: (It is unclear whether this comment is on behalf of the American College of Trial Lawyers.) "[A]n explicit disclosure of the undisputed facts or any statement of

evidence disputing the opponent's facts is necessary," but it is better included in the brief rather than a separate statement. A separate filing only increases the paper required.

08-CV-123, Hon. Barbara B. Crabb: W.D. Wis. uses a procedure very much like proposed (c), "and I find it very helpful * * *. Yes, the process can be daunting, particularly in patent cases and class actions, but it does seem to cut through the chaff." But it should not be written into Rule 56. Other courts find that different procedures work better for them. "So long as each court makes it clear to the litigants what its expectations are, I'm not convinced that litigants are affected adversely by not having a consistent federal rule on the subject."

08-CV-132, Hon. Timothy J. Savage: "Having used the same procedure that is proposed * * * for several years, I support the proposed new rule. Using the procedure requiring the parties to specifically identify disputed and undisputed facts with citations to the record has been invaluable. * * * The procedure eliminates the wasteful and needless searching of the record with which the attorneys are familiar and the court is not." Sufficient flexibility is preserved by allowing the court to depart by order in the case.

08-CV-133, Sharon J. Arkin, Esq.: Point-counterpoint "is * * * very disturbing * * *. because it encourages defendants to set forth excessive, unnecessary facts that must be addressed by the plaintiff in a painstaking, piecemeal way." California has a similar procedure; defendants often propose more than 100 facts. "Responding to these individual facts is daunting, tedious, time-consuming and resource-intensive." "I am convinced that defendants deliberately utilize this process in the hope that plaintiff's counsel will simply be overwhelmed and unable to adequately respond * * *." The effect is exacerbated by "the very common circumstance that trial court judges — probably because of workload issues — simply do not consider the effect of reasonable inferences from the facts set forth in the point-counterpoint." Even if the fact is true, that does not mean there are no contrary inferences. "But I have found it common that judges ignore the reasonable inferences and simply grant summary judgment if the plaintiff cannot cite to directly contrary evidence."

08-CV-135, Marc E. Williams, Esq., for DRI: Point-counterpoint will identify the facts and legal issues at an early juncture. The court will be focused solely on the material issues. Some commentators fear that this procedure "will leverage the advantage that 'larger firms' have over 'smaller firms,'" but "any additional work associated with the litigation of the statement of undisputed facts will likely be more than offset by a process that is streamlined to focus the subsequent litigation solely on issues that are relevant to a swift resolution."

08-CV-136, Andrew B. Downs, Esq.: This procedure is similar to the procedure adopted by California in 1984. It works, and proposed Rule 56 improves on California practice. Allowing the court to go beyond the motion under proposed 56(f) protects against abuse by not restricting the court to the formulations used by the parties. There are lengthy motions under this procedure, but other motions will be more narrow or will not be filed at all because of this procedure. But some judges have standing orders that require the parties to provide a joint statement of undisputed facts. That procedure can work when all lawyers are intellectually honest and fully candid with the court

— and have clients that will authorize unfavorable admissions — but it often precludes meritorious motions or generates ancillary motion practice. The Committee Note should disapprove court orders for a joint statement.

08-CV-140, Donald F. Zimmer, Jr., Esq.: Point-counterpoint, the practice in California state courts, “is neither wasteful nor cumbersome, * * * but actually helps focus the parties on the material facts at issue.” Practitioners will attest that “shorter is often better.” Courts will not be fooled by extraneous disputes over non-material facts, and “can discern whether papers have been lodged in an attempt to obfuscate the real issues at hand.”

08-CV-142, Hon. David F. Hamilton: From 1998 to 2002 S.D.Ind. required separate “point-counterpoint” documents, as the proposal would do. But this “provided a new arena for unnecessary controversy.” Hundreds of facts were asserted, and “became the focus of lengthy debates over relevance and admissibility.” Lawyers made sterile objections and trivial arguments over admissibility and relevance “that would never be made in a trial.” “[W]hat happened was an exponential increase in motions to strike.” But the procedure brought a clarity we were reluctant to abandon. The revised local rule requires that the movant include a statement of material facts not in dispute in the brief; the nonmovant is required to include in brief a statement of material facts in dispute. Both are required to support their positions by citations to the record. This works because the page limits on briefs curtail overlong statements.

08-CV-143, Stefano G. Moscato, Esq., for National Employment Lawyers Assn.: “The efficiency and cost of opposing motions for summary judgment” is important to NELA members, who mostly are sole practitioners or work in offices with no more than 3 attorneys and generally no paralegals. In point-counterpoint districts NELA members find that the procedure allows “(and even encourage[s]) motions which contain unrestricted statements of supposedly undisputed material facts.” The statements are “very lengthy, overly burdensome, abusive * * *.” “[T]he real merits get lost in the shuffle.” The defendant can begin preparing the motion long in advance. “The small-office plaintiff’s counsel, receiving a statement with more than 100 statements, supposedly all material, has no way of responding effectively * * *.” Admitting facts solely for purposes of the motion is too risky because a lawyer cannot predict what facts the judge will agree are immaterial. The nonmovant should be allowed to strike an entire statement that is not concise. (But point-counterpoint might work if there is an effective way to ensure that statements of fact are concise, to allow express arguments for inferences from both undisputed and disputed facts, and to allow a sur-reply.)

08-CV-144, Ralph A. Zappala, Esq.: Point-counterpoint can lead to efficient disposition by pushing the parties to recognize “what evidence exists and what evidence really matters to the case at hand.” “[I]n commercial litigation, too often general pleadings lead to expensive discovery based upon causes of action that will not stand the test of scrutiny.” Summary judgment can remove parts of the case, saving “large sums of money otherwise spent on discovery.” The procedure also can lead to better evaluation of the merits and thus settlement — in an action to collect on a contract claim, for example, a counterclaim for breach of the plaintiff’s obligations can have this effect.

08-CV-145, Professor Stephen B. Burbank: This comment, focused entirely on subdivision (c), cannot be adequately summarized — it fits into 13 pages as much content as a law review article of considerably greater length. The conclusion is that point-counterpoint procedure is too risky to adopt. Rule 56 has been put to uses never contemplated by its makers, but of itself that is not bad — Rule 56 operates in a litigation environment never contemplated by its makers. There is, to be sure, great disuniformity in practice now. But why impose a practice adopted by a minority of courts — and abandoned after experience by a few — on the much larger majority that have not adopted it? Good things may come from adopting good local rules into the national rules, but bad things also may happen — the 6-person jury is a classic example. Many of the comments show the costs of this procedure; 08-CV-72 is from “some seventy of the most prominent plaintiffs’ and defense lawyers in the country.” FJC data show that point-counterpoint procedure is associated with substantial delay in deciding — the risk of uncertainty about causal connections should be borne by those promoting this format. This procedure has a potential for abuse by strategic motion practice designed to extract favorable settlements from plaintiffs; at a minimum, the Committee should seek empirical data about the costs of preparing motions and responding under this procedure. The increased rate of dispositions shown by the FJC study, further, is offset not so much by fewer trials as by fewer settlements. And the FJC data show that the impact may not be neutral, but instead tends to more terminations by summary judgment, particularly in employment discrimination cases. For example, the FJC data show that within point-counterpoint districts, the “no disposition” rate is much lower in employment discrimination cases than in other types of cases. The high rate of disposition may result not from deserved differences but from the incentive this procedure furnishes “to take a partial and incomplete view of the relevant facts and/or to distort legal doctrine by subdividing it specifically for the purpose of enabling summary adjudication.” Summary judgment in employment discrimination cases, further, runs the risk of cognitive biases, of “cognitive illiberalism” blinding a judge to the view of the facts that would be taken by jurors whose life experiences better reflect the plaintiff’s experiences. In all, “the risks of uncertainty that proposed Rule 56(c) presents are far too serious to warrant proceeding with its adoption at this time.”

08-CV-146, March Buchanan, Esq.: Experience in employment discrimination law shows that the point-counterpoint procedure “would be nothing more than abusive, in that it allows the defendant to select the theme of the motion, and prevents the plaintiff * * * from submitting reasonable inferences from the facts.” How does a plaintiff point out that the weight of harassment accumulated over time? — is this fact, or inference? The plaintiff’s testimony of her experience would be challenged as inference, not fact, by a motion to strike; the procedure will spawn motions that seek to remake the law of evidence.

08-CV-147, Gene Graham, Esq.: The proposed changes put the movant in a very favorable position. “Plaintiffs in employment cases already have to overcome a very negative attitude toward civil rights cases in the 8th Circuit.” Plaintiffs should not be put in a straight jacket in responding to the motion.

08-CV-148, Thomas A. Packer, Esq.: A similar practice in California state courts has generally positive support from counsel and judges. “The reality faced by the courts and litigants is that undisputed material facts must be set forth in some fashion in any event. Having them set forth in

an orderly, clear manner benefits all. * * * [O]ne bringing a motion for summary judgment tends to err on the side of a smaller, rather than larger, list so that there are fewer facts for the opposition to contest.”

08-CV-149, Hon. H. Russel Holland: This summary is noted with Judge Holland’s first comment, 08-CV-028.

08-CV-150, Elizabeth J. Cabraser, Esq., for Public Justice: Point-counterpoint forces a binary approach — yes-no, on-off — to a factfinding process that is essentially analog. “The whole truth * * * is often greater than the sum of its parts.” “Erecting a haystack of [statements of uncontested facts] frustrates and obscures the search for that ultimate rarity: the truly material and genuinely undisputed fact on which a purely legal question turns.” The binary approach places a deep discount on “the central adjudicatory concepts of inference, credibility, and context.” It will add cost in time and dollars. Summary judgment can work well in the rare case “when the pertinent facts are well-defined and incontestable.” But that is not true of the complex disputes that are the province of the federal courts. The point-counterpoint procedure can work well in some cases, and can be required on a case-specific basis by invoking Rule 16 — but most often, its value cannot be determined until the moving papers, and perhaps the responses, have been filed.

08-CV-151, Joan Herrington, Esq.: In a pending case the separate statements in Rule 56 motions by plaintiff and defendant contain 457 material facts. “And this is a comparatively simple [employment] case in that Plaintiff is relying on direct evidence of retaliatory motive. * * * The proposed amendments * * * requiring point-counterpoint separate statements will exacerbate these problems.” The idea that summary judgment should be available to avoid discovery in supposedly unmeritorious cases is wrong. Summary judgment is fundamentally unfair if a party is denied access to potential evidence; “[t]his position is particularly egregious in employment rights litigation where the defendant employer holds almost all the evidence and the plaintiff employee must file motion to compel after motion to compel to gain access to it.”

08-CV-152, Jeffrey J. Greenbaum, Esq. (joined by 26 officers and members of ABA Section of Litigation, writing for themselves): When properly used, point-counterpoint statements “may facilitate the identification of key issues and significantly advance the resolution of an action.” But in many instances they are misunderstood or are misused “to overburden the other side with the need to respond to * * * far too numerous, detailed and complex fact statements * * *. Similarly, careful lawyers seeking to avoid any admission frequently try to deny facts that are genuinely not in dispute, as by challenging an adjective used or the phrasing of the statement.” Often the statement is prepared as a mechanical task after the brief is completed. This procedure can be salvaged by imposing a defined limit, such as no more than 20 facts per claim or cause of action; a movant or respondent should be allowed to seek relief from the limit, or from the point-counterpoint procedure as such.

08-CV-157, Margaret A. Harris, Esq.: “The proposed rule is unwieldy and would result in an inordinate increase in the amount of time spent by counsel * * * and, more importantly, result in the district court receiving, at minimum, four additional (and lengthy) documents that must be checked

and cross-checked against one another.” There is no such rule in S.D.Tex., and the lack has no adverse impact. But if there is to be a point-counterpoint procedure, it should stress the importance of limiting the statement to material facts by adding a (c)(1)(A)(iv): “If the non-movant establishes that any one or more of the identified material facts is disputed, the motion may not be granted as to that claim.” Inferences also should be brought in to the rule text: in (ii), the statement of facts “may not contain any inferences from any fact, and must be supported, wherever possible and in large part, by reference to the non-movant’s testimony or admissions.” So for the response: (B)(i): “ * * * or, as appropriate, state inferences from the facts that preclude summary judgment.” And (B)(ii) “may in the response concisely identify * * * additional material facts or inferences from the facts that preclude summary judgment.” And for the reply, (C)(i): “ a reply to any additional facts or inferences stated by the non-movant and show that no jury could reach the stated inference and rule in favor of the non-movant.”

08-CV-158, Professor Suja A. Thomas: Point-counterpoint procedure is not merely a matter of procedure; it will change the standard. The FJC study shows a higher rate of granting summary judgment in point-counterpoint courts; before adopting the procedure, there should be further study to show that this procedure is not the cause for the higher rate. This is particularly important as to the findings in several studies that the rate is higher still in civil rights cases, “some of the most factually intensive cases in the court system.” The point-counterpoint procedure also will add to the burden on courts, as shown by the greater time to disposition found by the FJC study — the effort to show there may not be a causal link shows only that there should be further study to ensure there is no time increase or that any increases are otherwise justifiable. The increased cost of this procedure also may lead to more pre-discovery motions to dismiss, and more grants. Finally, if this procedure is adopted the rule text should specify that pro se plaintiffs are exempt.

08-CV-160, Professor Stephen N. Subrin: “I concur with Professor Burbank’s opposition [08-CV-145] in every respect.” In addition, this proposal is of a piece with amendments that “continue to add steps to the process. * * * Each of these steps has the realistic potential of increasing time and expense.” There is no empirical support for adding another set of documents to the Rule 56 process.

08-CV-161, Federal Magistrate Judges Assn.: There should be national debate about forcing the point-counterpoint procedure as a uniform rule, but these comments assume it will be adopted. The provision that allows departure by order in the case will impose a burden on judges who decide to depart, and in the absence of a local rule will create greater uncertainties about procedures within a single district. The rule should permit districts and judges to *supplement* the procedures in Rule 56(c) by local rule or standing order.

08-CV-162, Federal Practice Comm., Dayton Bar Assn.: Point-counterpoint should not be forced on districts that, as the Southern District of Ohio, do not have it. “We endorse the well-written and compelling views of Judge Sedwick and Judge Wilken.” But if it is adopted, the rule should state that a nonmovant’s failure to address a fact stated by the movant “shall or should” be construed by the court as acceptance of that fact for purposes of the motion only.”

08-CV-163, 20 lawyers at Perkins Coie, endorsing letter by Hon. Robert S. Lasnik signed by all judges in W.D.Wash.: Point-counterpoint will substantially increase burden and expense without meaningful or identifiable benefit. Fully agrees with the letter from all the district and magistrate judges in W.D.Washington. The letter begins by observing that a typical motion begins with reciting the truly undisputed facts without citations because they are indeed undisputed. “The handful of facts that are truly contested becomes clear through the exchange of coherent narratives and a few well-chosen pieces of evidence.” The proposed point-counterpoint procedure will require far more. Each fact must be stated, “and evidence supporting each contention must be provided even if the contention is undisputed. The cold enumeration makes it very difficult for a party to present its narrative in context or to argue for reasonable inferences. The opposing party is even more disadvantaged * * *.” The nonmovant will feel the need to address every fact, for fear of waiver later in the proceedings. The lists of facts will become an issue, generating collateral fights. “A number of judges in this district have presided over cases utilizing the point-counterpoint procedure. Our experience with this cumbersome form of motion practice has been consistently unsatisfactory * * *. Over the years, we have revised our local rules to avoid” the duplication and waste entailed by point-counterpoint. A single moving paper is required, with strict page limits and pinpoint citations.

08-CV-164, Hon. Janice Stewart: D.Ore. has had a point-counterpoint local rule since well before 1993. “I now always waive the filing.” The practice has generated widespread dissatisfaction; the local rules committee is considering deletion of this rule unless national Rule 56(c) requires it. The statements do not assist the court. They do not seem to help the parties. “Because the moving party cannot know in advance what facts the opposing party will dispute, it is likely to create a longer statement of facts than is absolutely necessary.” The response disputes and adds more facts. “These competing fact statements become duplicative, time-consuming, confusing, disputes over semantics, and counterproductive to an understanding of the issues. This is especially true in employment disputes (a large source of summary judgment motions) where the parties rely primarily on reasonable inferences from a synthesis of facts.” The local rule sets a five-page limit for the statements, but parties routinely move to expand the limit. The separate statements usually duplicate the fact section of the legal memoranda — the narratives of the memoranda are much more useful. The memoranda, however, cite not to the record but to the citations in the statement, complicating the court’s task. And there is no point at all in having these statements in proceedings for review on an administrative record.

08-CV-165, Scott Jerger, Esq., with three more lawyers: Expresses complete agreement with Magistrate Judge Stewart’s comments about experience in D.Ore., 08-CV-164. The concise statement of facts required by the local rule “fails to context the dispute.” The fact section of the memoranda works much better. The concise statements frequently recite non-material facts and facts not needed to decide the motion. Proposed Rule 56(c) does not impose a page limit, making it possible to state hundreds of facts; the nonmovant must respond to each, for fear of having the fact considered not disputed; this “could lead to attorney gamesmanship.” If the rule goes forward, a five-page limit should be imposed.

08-CV-166, Hon. Sue L. Robinson, for D.Del. Judges: “Even if we assumed * * * that proposed Rule 56(c) had some merit, the Federal Rules of Civil Procedure were never meant to be a ‘best practices manual.’” Judges “should be credited with the wisdom, through experience, of using the procedures best suited to their cases, consistent with the culture of their court.”

08-CV-170, Karen K. Fitzgerald, Esq.: “In an employment discrimination case, much often turns on subtleties.” Defendants state facts in terms designed to be persuasive. “[T]he point-counterpoint system makes it even more difficult for the plaintiff to adequately correct some of the subtle misconceptions because the plaintiff is forced to respond within the confines of the defendant’s stated version of the story.” The plaintiff should be allowed to tell the story in a persuasive way.

08-CV-172, David L. Wiley, Esq.: “I’m against the point-counterpoint amendment for the same reasons cited by NELA * * *. [T]his process makes more burdensome a procedure that is already burdensome enough.”

08-CV-173, Committee on Federal Courts, New York City Bar, by Wendy H. Schwartz, Esq.: The Southern and Eastern Districts of New York have had point-counterpoint since at least the early 1960s. The Second Circuit has blessed it as a means of streamlining summary judgment, freeing judges from the need to hunt without guidance through voluminous records. The Advisory Committee aspires to an exchange of documents that concisely focuses the parties and the court on the important facts. “But this is often not how it works in practice, and there is no mechanism set forth in the proposed rule to force attorneys to use the procedures in this way.” Instead, the statement generally repeats the facts set forth in the memoranda of law or affidavits; the nonmovant often feels compelled to respond in terms more complicated than a simple “admit” or “deny,” so the response also duplicates the memoranda. “The end result is a parallel track set of duplicative summary judgment papers that is unnecessarily burdensome * * *.” Nor does the proposed rule include a mechanism to force the desired attorney behavior. The local rules in New York provide that facts are deemed admitted for purposes of the motion unless specifically controverted; proposed Rule 56(e) leaves it to the judge to decide whether to consider a fact undisputed. Finally, there is no need for a uniform national rule on this issue. Many courts have different practices, and the proposed rule allows wide variation by order in the case. There is no national consensus.

08-CV-174, Federal Bar Council, by Robert J. Giuffra, Jr., Esq.: Point-counterpoint “requires a high level of preparation, but we agree that a summary judgment motion should not be made — or resisted — without that preparation.”

08-CV-175, Hon. Marcia S. Krieger: “[I]t is difficult/inconvenient for counsel to decide what facts are truly material to a given issue. They want to tell the ‘whole story,’ that is why they prefer the narrative statement of the facts.” Judge Krieger attaches her Practice Standards, and urges a similar procedure for Rule 56: “1) the movant be required to identify the claim/defense on which a summary determination is sought, what party has the burden of proof, what the standard of proof is and what the elements are, and 2) the listing of material facts should be limited to those that are material to the claim/defense, or part thereof, which is the subject of the motion.”

08-CV-176, State Bar of California, Committee on Administration of Justice: Separate statements are beneficial for the reasons given by the Advisory Committee, and there is appropriate allowance for opting out. But a minority of the Committee believe that the choice of this procedure should be left to local rules or to individual judges.

08-CV-177, Paul R. Harris, Esq.: Joins the NELA comments. “[F]or certain the summary judgment device truly is broke and in great need of fixing, but adding this additional hurdle doesn’t fix anything. Far from streamlining the process, it just adds another layer of complexity and time. And it forces non-movants (overwhelmingly plaintiffs) to make a point by point response to any piece of information the movant decides to throw in there. This kind of requirement only adds to the disputes, the papers, and the contentiousness between the parties.”

08-CV-178, Alice W. Ballard, Esq.: Joins the NELA comments. “[I]n some motions, the listing of purportedly uncontested facts is quite persuasive, in and of itself. The facts in the listing look dry and neutral, but when you read them, they have theme, context, and a narrative structure that tells the defendant’s story well.” The plaintiff is forced to respond within the confines of the defendant’s story. “This gives the moving defendant not only primacy, but also remote control over the context and narrative structure of the story.” Judges know the jury will hear the plaintiff’s story first, but on some level “the extra persuasive edge * * * will inequitably color the judge’s view of how a reasonable juror will respond to the evidence.”

08-CV-179, Robert J. Wiley, Esq.: A tit-for-tat comparison works well for direct evidence. But with indirect, circumstantial evidence, four or five facts taken together may raise an inference that contradicts another fact. Most non-FLSA employment cases turn on circumstantial evidence. “In such cases, the effect of the proposed rule will be to prevent the court from seeing the forest for the trees.” The vast and overwhelming majority of courts, although free to adopt this procedure on their own, have chosen not to. It should not be imposed on them.

08-CV-180, U.S. Department of Justice: The Department generally supports this procedure, “already used in a number of districts, [as it] should bring clarity to resolving these motions.” But point-counterpoint is not appropriate when summary judgment is used as the vehicle to review an administrative decision on the administrative record. An exception should be written into the rule — for example, “The procedures for filing statements of material fact and responses to statements of material facts do not apply to cases involving challenges to agency action where judicial review is based on an administrative record.”

08-CV-181, Lawyers for Civil Justice, etc.: This comment supplements earlier comments, 08-CV-061. Point-counterpoint “ensures that the parties reach some shared reality regarding the merits of the case.” It can be made acceptable to most by placing numerical or page limits on the required statements, or by combining the statement and the brief or motion in one document. Or courts could be permitted to opt out by local rule.

08-CV-182, Amy Gibson, Esq.: The response to a summary-judgment motion in a First Amendment employment retaliation case ran 87 pages. “As a non-movant on a dispositive motion, I felt the need

to respond to any ground, even a no-evidence ground slipped into a footnote or some not expressly stated, yet vaguely argued, ground for the motion.”

08-CV-183, Professor Eric Schnapper: Point-counterpoint procedure is useful, if at all, only for “question-of-law summary judgment.” Such motions are truly controlled by a few simple facts that no one disputes — what was the date of the event that measures the limitations period is an example. But when the question goes to the sufficiency of the evidence of some fact — such as “negligence” — the motion typically “does not turn on ‘a small number of truly dispositive facts.’ There usually are no ‘dispositive facts’ favoring the party seeking judgment as a matter of law. The statements and responses offered with regard to an evidence-sufficiency summary judgment motion are lengthy because the parties are (quite properly) seeking to summarize the often lengthy evidence that would occur at a trial of a week, or far more; the documents are ‘unwieldy volumes’ because a dispute about the sufficiency of the evidence of the non-moving party calls upon both sides to present essentially the documentary evidence they would offer at trial. No sensible judge would propose that a Rule 50 motion refer only to ‘a small number of truly dispositive facts,’ or suggest that the court intends to ignore the ‘unwieldy volumes of materials’ in evidence at trial.”

08-CV-186, Allen D. Black, Esq.: Point-counterpoint “imposes an enormous amount of unproductive busywork on both the parties and the Court.” In complex cases the statements “almost universally list hundreds of facts * * *, many of which have only tangential impact on the core dispute. The non-moving party is then compelled to contest or at least re-cast hundreds of peripheral facts * * *.” In a recent antitrust case, the movant listed 156 undisputed facts, the nonmovant responded with 144 single-spaced pages contesting them; the total of these submissions was 556 separately numbered paragraphs and 228 single-spaced pages. A better procedure would be to require a conference with the judge before filing any summary judgment motion; plenty of experience with Rules 16 and 26 show that such conferences work. Alternatively, the number of facts could be limited, perhaps to 10, with provision for expansion by court order. The procedure, as it is, prompts the courts and parties “to look at each fact individually rather than looking at the case as a whole. This could have substantive impact in some cases, notably employment and antitrust.”

08-CV-187, Hon. Rebecca Beach Smith: Joins Judge Payne’s request, 08-CV-190, that point-counterpoint be deleted and left for regulation by local rule and individual judges.

08-CV-188, Hon. Leonie M. Brinkema: Joins Judge Smith, 08-CA-187, and Judge Payne, 08-CV-190, opposing point-counterpoint. “Setting clear limits on the length of submissions by counsel conserves limited judicial resources and actually improves the quality of the pleadings * * *.”

08-CV-189, Stuart R. Dunwoody, Esq., for Federal Bar Assn., W.D.Wash.: Point-counterpoint “will add burden and expense,” make Rule 56 practice “more complicated and expensive,” and “generate disputes concerning the admissibility of the evidence cited.” W.D.Wash. has no such requirement, and “summary judgment motions are typically resolved efficiently without separate fact statements.” The Ninth Circuit Representatives to the Western District of Washington also oppose point-

counterpoint. If this procedure is retained in Rule 56, districts should be allowed to opt out by local rule.

08-CV-190, Hon. Robert E. Payne: The local rule in E.D.Va. requires that the movant's brief "include a listing of undisputed facts with citations * * *. The responsive brief then must include a specifically captioned section listing all material facts contended to be in genuine dispute with citations * * *." The rule "helps focus the briefing." It works in conjunction with another local rule that limits opening and response briefs to 30 pages, and rebuttal briefs to 20 pages. Experience shows that if lawyers are allowed to file separate statements of fact with citations, they exercise no restraint. But the page limits on briefing accomplish the objectives sought in proposed Rule 56(c). Without these limits, proposed (c) "will make the job of judges much more difficult and indeed presents the very real risk that the process of dealing with summary judgments will overwhelm judicial dockets."

08-CV-191, James C. Sturdevant for National Assn. of Consumer Advocates: Rule 56, which cuts off the right to trial, "should not be amended in a way to create traps for the unwary." Statements of undisputed facts will "add enormous cost both in time and dollars to the litigation process," and "decrease the emphasis on the established concepts of credibility and inference." Some cases might benefit from this procedure, but "this would be the clear exception." Attorneys who have the advantage of hourly billing will have an incentive to use this procedure, adding burdens that do not crystalize issues or serve to identify material issues of fact in dispute or undisputed. "There are plenty of other ways, and motions, to weed out non-meritorious cases prior to trial." And the plaintiff should always have the last word.

08-CV- , Hon. Robert J. Faris, for Conference of Chief Bankruptcy Judges of Ninth Circuit: Some of the judges think that point-counterpoint forces counsel to think carefully and tends to improve presentation of summary-judgment motions. Others find the system "less than useful." Attorneys often do not do a good job of preparing statements and counterstatements, the procedure is hard to enforce, and the cost to the parties outweighs the benefits. Disagreeing about the merits of the technique, "we do agree that it should not be imposed as a uniform national practice." Courts that want to use it should be free to do so. Others should be free to adopt procedures that suit their local legal culture, the preferences of the judges, and the demands of their caseloads. Bankruptcy courts would face particular problems because they have a large number of small cases and only a small number of large cases. If point-counterpoint is adopted in Rule 56, the bankruptcy rules should be amended to allow bankruptcy courts discretion to opt out of the procedure, or modify it, "in some or all adversary proceedings and contested matters."

Claudia McCarron, Esq., Nov. 17, 5, 6-9: Has extensive experience both with point-counterpoint and with other submission practices, much of it in insurance coverage disputes. Often the lawyers for both sides agree that the case is suitable for decision on cross motions, and yet, without point-counterpoint, "I find that the advocate in each lawyer makes it nearly impossible to file a brief that really clarifies 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." It is protested that the motions "arrive in boxes. I get complaints that arrive in boxes." But the work is worth it. And "my

experience is, as a practical matter, those motions have not arrived in boxes * * *. [A]s an advocate you lose the advantage of the statement if you burden it with subsidiary facts.”

Leigh Schachter, Esq., Nov. 17, 26, 27-31: As in-house practitioner at Verizon Wireless finds summary judgment very important. Many cases “are at heart not so much fact cases * * * but are really purely legal cases” that can be decided promptly. It is important to have a system in which summary judgment is actually considered. And it is important to have a uniform rule throughout the country — it is difficult and inefficient to have to encounter differences in practice. Point-counterpoint “is a very useful tool for trying to identify and narrow what are the issues in the case.” It shows whether there is a genuine dispute as to a fact and, if there is, whether it is material. Yes, the statements can become so long as to be burdensome; it is important that bench and bar work together to make sure the statement is concise and limited to facts that are important. But as a practical matter the movant wants to limit the statement to a small number of facts — the more facts you present the greater the prospect that there will be a genuine dispute as to at least one fact that you have characterized as material.

Steve Chertkof, Esq., Nov. 17, 34-52: This testimony addresses inferences of intent in employment discrimination and retaliation cases. Addressing the response part of the point-counterpoint procedure, it is urged that the nonmovant need not rely on “material” facts, but should be able to point to “additional facts or inferences that preclude summary judgment.” The problem is that intent and state of mind often depend on inferences facts, no one of which seems “material.” The running illustration is clear: an employee who has been highly valued for 20 years goes to the company Equal Opportunity Office and makes a discrimination complaint against her supervisor. Two days later she comes to work 10 minutes late and is fired for being tardy. The first undisputed material fact is that she was 10 minutes late. The second fact will be that both the EEO office and the supervisor deny that the EEO office told the supervisor about the complaint. But being 10 minutes late seems a trivial offense. The facts may show that many other employees frequently arrived much later. These facts may warrant an inference that the supervisor had learned of the complaint, and that tardiness was not the reason for firing the plaintiff. But they are not facts identified as “material” by the rules that govern the substantive claim.

So, while point-counterpoint may be effective in cases where the ultimate issue is one of objective fact, it is less often useful, and can work against clarification of the issues, “where subjective intent and motivation are at issue.” It is very hard to get at motivation through point-counterpoint. The danger that the movant will state too many facts should be addressed by a rule provision that the motion must be denied if there is a genuine dispute as to any one fact the movant says is material and beyond genuine dispute. Some relief might be provided by the provision that allows a nonmovant to accept a fact only for purposes of the motion, but an employment plaintiff’s attorney might be too fearful of this course, “for fear of never getting the second chance.”

Credibility presents problems similar to inference problems. Summary judgments are granted on the basis of the statements of witnesses that a jury would not have to believe. Most of the witnesses are interested; they are aligned with the employer or not. Many of these cases are

“basically a conflict among several witness’s testimony. Employers frequently have more witnesses.” The plaintiff should not lose simply because of the number of witnesses.

That summary judgments against employment plaintiffs are often affirmed does not mean the judgments are right. “[T]here are rules and inferences being drawn against plaintiffs in this context that seem different than in other contexts.” Summary judgment is not warranted simply because the EEO officer says he never told the supervisor about the complaint and the supervisor said he never heard of it. The circumstances of firing a valued 20-year employee for being 10 minutes late two days after filing the complaint warrant an inference of intent. As nonmovant, the plaintiff should be able to respond to the motion with facts that are not independently material but that do support favorable inferences. Simply arguing inferences in the brief is not enough. The real material fact is the supervisor’s intent, and that can be reached only by inference. “I’ve never had a perfect employee” as plaintiff. There always will be some shortcoming that can be assigned as the reason for adverse action.

Prof. Edward J. Brunet, Nov. 17, 52 at 60-62: Point-counterpoint has a cost, but is helpful. “A good lawyer cites to the record and focuses the claim.” There are four advantages. It saves judicial time searching the record. It focuses the issues. Opposing counsel see the issues with greater clarity by being forced to search the record, “a vision that greatly facilitates case law promotion and settlement promotion.” And it aids appellate review “by mandating a more tidy and transparency in the summary judgment record.” By focusing on the record, it also enables more precise rulings and thus is related to the choice between should, must, may, or is. The Committee Note admonition against stating too many undisputed facts is good, but it should be given still greater prominence.

Professor Elizabeth Schneider, Nov. 17, 62 at 63-79: Point-counterpoint aggravates the tendency to “slice and dice” the record, looking at individual facts in isolation and losing sight of the whole picture. Summary judgment has become the do-or-die place in federal civil litigation. It has had a huge impact in removing cases from public adjudication. The proposals create an extensive process in cases where it often would be easier just to go to trial. It may affect the choice of forum — already, there is an impression that federal courts are courts for defendants. Nor is the procedure going to compensate by making judicial decision-making more effective. To be sure, it may push the lawyers to more effective marshalling of the facts. Good lawyers already cite to the record. But there are particular risks for civil rights and employment cases in the “impermissible disaggregation of legal issues.” The “integration, interrelationship of fact and law,” is being segregated out. The opportunity to argue the whole picture in the brief is not enough to offset this tendency. Nor is there enough protection in the provision that the court can order a different procedure on a case-by-case basis — that will make the process still more cumbersome by adding arguments about what the procedure should be. It would be better to require specific citations to the record in the briefs. The judges do want and need direction through the record, but allowing for integration of fact and law in the brief is better.

John Vail, Esq., Center for Constitutional Litigation, Nov. 17, 79, 80-88: Summary judgment is most often a defendant’s tool. The plaintiff has the trial burden, and at trial carries the burden by telling a story. The point-counterpoint procedure enables the defendant to deflect the story by focusing on

small pieces and requiring a response by small pieces. “The sum of an evidentiary presentation may well be greater than its constituent parts * * *. [F]acts can get in the way of finding truth when you don’t get the whole story.” “[Y]ou’re dealing with a problem of cognition, a problem of how people perceive facts[,] of how we come to know things * * *.” The opportunity to provide the narrative in the brief is not always adequate — page limits impose constraints, and the constraints may be severe when the case also presents meaty legal issues.

Joseph Garrison, Esq., Nov. 17, 97, 98-106: Uses point-counterpoint, and as a plaintiffs’ employment lawyer supports it. But there are motions that abuse the procedure by stating too many undisputed facts, including “supposed material facts which are not at issue.” Many plaintiff-side employment firms are firms of one, two, or at most three lawyers, and do not have the resources to respond. Accepting a fact for purposes of the motion is not a remedy. Indeed it may be worse than not responding at all — with no response, the court will take at least some look at the record. “[N]ot responding or admitting for purposes of the motion carries the risk of guessing wrong on materiality, and if you guess wrong, you could lose * * *. You have to respond to these because you can’t take that chance of guessing wrong. The remedy for the over-long statement of undisputed facts is a motion to strike. The motion should not be in a form that specifies that of the 250 facts 50 are hearsay, another 20 are irrelevant, 30 are background, and so on. That form of motion is ugly collateral litigation. There have to be boundaries on the motion to strike, just as on the statement of undisputed facts. It should suffice to point out that the motion goes beyond a concise statement of material facts. It is a blunt tool, but it’s better than nothing.

R. Matthew Cairns, Esq., Nov. 17, 114, 119-120: Has not encountered the “250-fact” statement. Such statements are a mistake — “you are not focusing the court where you need to be focusing the court.” The same is true of replies that throw everything up against the wall.

Stephen G. Morrison, Esq., Nov. 17, 120, 122: A summary-judgment motion provides an opportunity for speedy, just, and inexpensive resolution. “[T]he point-counterpoint puts a fine focus on that.”

Debra Tedeschi Herron, Esq., Nov. 17, 141-143: Point-counterpoint supports the “must” standard for granting, because it gives greater confidence in the process of identifying facts that cannot be genuinely disputed. It enables the court to provide a better statement of reasons for granting or denying the motion. And changing subdivision (h) to provide a remedy for statements or responses that are not objectively reasonable will avoid the over-long statements that include peripheral facts.

Latha Raghavan, Esq., Nov. 17, 143, 144-145: Judges know how to control point-counterpoint, avoiding the 200-fact statements. The procedure forces the attorneys to do the work by citing to the record, both in supporting and opposing the motion. If any concern remains, it can be addressed by enhancing the sanctions provision.

Hon. G. Patrick Murphy, Jan. 14, 10-23: The Southern District of Illinois had point-counterpoint. When the local rules were reconsidered a canvass of the bar showed overwhelming support for abandoning the procedure. A cottage industry developed “around what is disputed and what isn’t

disputed.” The nonmovant would respond to statements of undisputed facts by disputing them, and the movant would say they cannot be disputed. There were motions to strike and other procedural problems. “[T]he small players are going to be disadvantaged.” The local rule was adopted with the hope of speeding up disposition of summary-judgment motions. “[I]t just didn’t work for us.” The rule was revised. “[S]implicity works. Keep it simple. Have a few rules. Apply them ruthlessly and it will work.” “We still grant summary judgments at the same rate. * * * It just takes less time and less money.” Rule 56 is not underutilized; “I have never had a civil case where I didn’t get a Rule 56 motion.” “And it’s usually a pretty big job. * * * A summary judgment motion, it’s not unusual for it to be * * * 9 inches to a foot thick. I don’t know how you avoid that.” Nor does it help to allow use of a different procedure by order in the case — “[T]here should be a presumption against rules where the exception eats the rule.”

Malinda Gaul, Esq., Jan. 14, 23-27: In the Western District of Texas “what we practice is the shotgun method. Basically you get big summary judgment motions, everything’s thrown at the wall and the defense hopes that something sticks.” Point-counterpoint is interesting, but it should focus on the material facts that affect decision. “Not every single fact should be lined up. It shouldn’t be 200 point/counterpoints.” We need a definition of “material,” because “what we’re seeing is statements of facts that go on for pages and pages and pages.” Once the nonmovant raises something to dispute the fact, “that’s it.” The case should not be tried on paper.

Michele Smith, Esq., Jan. 14, 32, 37-40: Talking with others who have more experience with the practice, has been advised that point-counterpoint “does require more work on the front end,” but makes it harder for either side to hide the issues. By forcing attention on the issues it may dissuade a movant from making the motion at all. It may force the nonmovant to take a hard look before the hearing. Because the motion may educate your adversary, requiring a detailed motion may discourage some motions entirely.

Margaret Harris, Esq., Jan. 14, 44, 45-46, 51-59: Has not practiced with point-counterpoint, but her partner has. The movant filed 109 statements of material fact; most of the statements were paragraphs. Responding to the statements added 6.5 hours to the time required to respond, and the effort added nothing to the response. We don’t get oral argument to buffer the risk entailed by responding to only a few of the stated facts, asserting that disputes as to them defeat the motion. This is not plaintiff-friendly in employment cases. We have to respond to the motion, and then duplicate the effort in responding to the statement. It would be OK if the movant were limited to 4 or 5 facts. “I don’t feel comfortable telling a District Court judge I disagree with these nine, and not even say anything about that other 100.” This adds work for the judge as well as for the nonmovant. If point-counterpoint survives, the tendency to state too many facts should be diminished by adding a provision that if a genuine dispute is shown as to even one of the stated facts, the motion is denied. That would not be a “sanction.” It’s something like an estoppel — the movant, having identified the fact as material, cannot then back off and assert that it is not material and summary judgment still can be granted.

Wayne Mason, Esq., for Federation of Defense & Corporate Counsel, Jan. 14, 60, 63-66, 67-68, 70-71: Point-counterpoint “does force you to focus on the issues of your case * * *.” At times in a

point-counterpoint jurisdiction looking at the case in light of the rule has persuaded me not to file the motion. Busy practitioners have lots of work to do; it is good exercise to be forced to look at the case this way. To be sure, ““motion lawyers’ do dumping whether it’s point/counterpoint or not, and whether it’s a 109-page brief, or whether it’s a 109 points * * *.” I understand that some judges will not like to be told they must adhere to this procedure. National uniformity is valuable, but as a national practitioner I understand that a court does not have to change its practice for me just because I happen to travel around the country; I have to learn the local rules. A numerical limit on the number of facts claimed to be established beyond genuine dispute might prove difficult in complex cases, even with express recognition of the right to seek permission to state more facts. Another way to deal with it would be to impose cost-shifting on a party who states too many facts.

John H. Martin, Esq., Jan. 14, 82, 91-93, 96-99: Has practiced in courts that have point-counterpoint and in courts that do not. Is about to use it in a court that does not have the practice. Point-counterpoint forces counsel to “get analytical about it”; that can dissuade from filing any motion at all. And “it makes lawyers do a better job in filing a motion.” It saves costs. But it is not possible to say whether the procedure affects the rate of appellate affirmance of summary judgments. In trying mass tort cases all around the country, particularly air crash cases, a “300 undisputed facts” motion has never appeared. “I cannot conceive of filing one. I cannot conceive of filing a summary judgment motion that has more than a handful of undisputed facts that were material in support of a motion.” The absence of a rule requiring this format does not prevent counsel from using it. But national uniformity is important — not only because it may be difficult to learn local practice, but also for the intrinsic advantages of uniformity. Parallel cases are not always consolidated; it is useful to be able to file the same motion in the same form in different courts.

G. Edward Pickle, Esq., Jan. 14, 104, 111-113: One system that should be put aside, although it is practiced in some courts, requires the parties to submit a joint statement of material facts. It simply does not work. Point-counterpoint, on the other hand, refines the issues down to clear specifics. “I can’t conceive how that does not make a judge’s job easier, as opposed to a throw-it-up-against-the-wall motion * * *. [Y]ou know, if you’re the opponent to a summary judgment motion, your whole job is to simply try to muddy the waters, to make things as complicated as you possibly can * * *.” There is a problem in managing “material,” which is a pretty broad term. It may help to focus on the elements of claim and defense. “It shouldn’t require a thousand-page litany of material facts to deal with the specific issues, especially if we’re talking about a partial summary judgment motion.”

Cary E. Hiltgen, Esq., Jan. 14, 121-128: Keeps motions “simple. Very few statements of material facts. Now, I get a lot of counter responses with lots of facts because they’re trying to develop a fact in issue to keep it from summary judgment being sustained.” “I have never had a motion for summary judgment where I did not have point/counterpoint. Again, my statement of facts go right down the elements. I want it simple. Those complicated ones, that just gives you * * * the ability to say, Oh, there’s a question of fact.”

Stephen Pate, Esq., Jan. 14, 140, 144-145: Point-counterpoint is good. It forces attorneys for both sides to marshal their evidence and analyze the case. And a motion in this form “really helps to educate the judges.” It would be extremely foolish for a defense attorney to overplay his hand by

offering long lists of undisputed facts. “[W]hen I do it, I keep it short and simple and succinct.” “You got to do it right.”

Carlos Rincon, Esq., Jan. 14, 147, 152-155: Point-counterpoint is effective. It forces lawyers to sit down and evaluate the case. It is a lot of work, but you have to understand your case; this process “ultimately does save time.” The concern that defendants will impose huge and unwarranted burdens on small plaintiffs’ firms is not accurate. Corporate clients are savvy about monitoring litigation. Filing for summary judgment must be approved by in-house counsel. Firms are required to produce litigation budgets. “And as expensive a summary judgment in practice is, jury trial, and the preptime for jury trial * * * still makes up at least 45 percent of the entire litigation cost of many of the cases that I handle.”

Tom Crane, Esq., Jan. 14, 156, 157-158: Has done it a couple of times. The “uncontested facts” were largely irrelevant. The statements were never referred to or really used. And it is difficult to encapsulate inferences in a one- or two-sentence format.

Hon. Robert S. Lasnik, Feb. 2, 11-22: Very good trial judges find point-counterpoint helpful. “[B]ut the naysayers are not just people who say no to change. They are people who have tried the method and found it to be wanting for their purposes.” The change will have an impact in a significant number of cases; judges who are using Rule 56 as it is are not clamoring for uniformity, nor do they begrudge the districts that have adopted other procedures. Lawyers want good judges handling their cases in an efficient manner more than they want uniformity. The opportunity to opt out on a case-by-case basis is not an answer; “to make us do a standing order in 99 percent of our cases to avoid a local rule and to pretend that we have uniformity” is not an honest way to deal with the situation. If point-counterpoint made sense for the vast majority of cases, it would be different. But we have districts that have tried point-counterpoint and “found it wanting or * * * too cumbersome and too expensive.” The bar in the Western District of Washington is satisfied with current procedure. The federal judiciary, moreover, is likely to face increasing financial constraints. “[J]udges really don’t want to take on a procedure that they see as more expensive for the lawyers, more time consuming and, therefore, more expensive for themselves and less efficient * * *.”

Hon. David F. Hamilton, Feb. 2, 22-37: The Southern District of Indiana adopted a local rule much like the proposed point-counterpoint rule, including a separate statement of facts and a separate response. The rule was amended in 2002 to address the problems that arose in practice. The separate documents “provided a new arena for unnecessary controversy. We began seeing huge, unwieldy and especially expensive presentations of many hundreds of factual assertions with paragraphs of debate about each one of those.” In one case with a routine motion “the defendant tried to dispute 582 of the plaintiff’s 675 assertions of undisputed material facts.” Lawyers were arguing every conceivable evidentiary objection, making arguments that never would be made in trial. And there was an exponential increase in motions to strike. The cure was to require that the statements and responses, with pinpoint citations to the record, be included as part of the briefs. Brief limits are 35, 35, and 20 pages. Attorneys are forced to use their pages wisely. There is some flexibility as to format. But it is clear that if a party does not respond to an assertion, it will be treated as undisputed. To be sure, some people try to fix problems with their cases with lengthy

affidavits, but the problem is not as severe as the problem of having unlimited point-counterpoint statements. Adopting a page limit on the statements is not likely to be as effective as forcing the statements into the briefs. This system can work in cases that depend on inference. The counterpoint to the motion is “going to have to be: ‘See my whole brief. It’s all my evidence. It’s circumstantial.’” We recognize that, “for example, in a discrimination case the plaintiff can develop what [the Seventh Circuit] calls a convincing mosaic of circumstantial evidence to put the case together.”

Experienced lawyers can use point-counterpoint to beat up on the less sophisticated. Extra friction was generated by the opportunities to criticize the opponent’s failure to comply strictly with the rule. So we introduced a provision that says the court can for good cause excuse failure to comply strictly. That has been very helpful in telling lawyers they should not bother the court with minor deviations. Pro se litigants are given signals, and treated flexibly — the main thing we want from them is a signed affidavit of what they’re telling the court.

If point-counterpoint is adopted in the national rule as proposed, courts should be allowed to opt out by local rule.

Hon. H. Russel Holland, Feb. 2, 37-46: He and Chief Judge Sedwick have been hearing cases in Arizona for about ten years, taking a cross-section of civil cases from the regular draw. Arizona has a local rule quite similar to the proposed point-counterpoint procedure. Alaska does not. The Arizona procedure “typically results in a lengthy chronological explanation of what the case is about” that does not comport with a sensible assembling of the facts. The procedure doubles the number of documents the lawyers must prepare and the court must consider. “In Arizona we spend much more time doing summary judgment motion practice.” It does not facilitate the court’s work. It “requires an artificial separation of the material facts from issues that have to be decided.” The page limits on briefs are very useful. The practice also “spawns separate motion practice.” Between a third and a half of the cases involve a motion to strike something, usually in a squabble over evidentiary support for a statement; such motions are less common in Alaska. The Arizona rule does not include the proposed (c)(2)(A)(ii) limit to “only those material facts that cannot be genuinely disputed”; it seems likely that this attempt to curtail over-long statements of fact will itself generate subsidiary motion practice arguing that a fact is not material. Rule 56 should be left undisturbed.

Hon. Claudia Wilken, Feb. 2, 46-58: The Northern District of California had a point-counterpoint local rule from 1988 to 2002. Lawyers did not much object but the judges led the move to abandon it. The real problem is duplication. The judge reads the same things twice. The separate statement of facts cannot suffice on its own because it “is not a good way of telling a story, particularly if you’re trying to include only material undisputed facts and you’re not including the background facts.” You need to know facts that are not material to understand what happened. “[T]he best way to say it is in the narrative.” Now we have the statements and pinpoint citations in the briefs. “[Y]ou can compare both stories side by side, but each is a narrative. Each is a story that’s understandable.” The procedure is hardest on the nonmovant, because the movant can list the facts it wants and in the order it wants; the nonmovant must respond in order, leaving its own facts “stuck at the end and they are sort of out of order.”

If the proposed national rule is adopted, I will excuse the point-counterpoint procedure in every case. National uniformity is important, but it is better to have a uniform simple procedure, allowing point-counterpoint to be adopted on a case-by-case basis where it seems suitable.

If a party does not provide the required citations to the record, oral argument commonly affords an opportunity to ask for the citations. If there is no oral argument, an opportunity to comply may be given if it seems a meritorious case, but perhaps not if it seems a weak and frivolous case. Our local rule does not specifically say that failure to respond is a default, but it works that way. So long as the statement is supported by a citation, failure to respond with a citation supports taking the statement as true “unless it were frivolous or something.”

Michael R. Nelson, Esq., Feb. 2, 58-60, 64-66: It is not clear what the problem is that the judges see with point-counterpoint. “In a motion for summary judgment there is a statement of facts offered by the movant and then those facts are agreed to or not That has to happen in the process.” The fear of over-long statements of fact comes down to case management; complex cases will require longer statements. Uniformity is important. “It’s form over substance * * *. There is the law, there is the argument, and then there’s the facts. * * * Ultimately this all plays out in the argument section of whatever document you’re calling it.”

Kevin J. Dunne, Esq., Feb. 2, 80, 83: If judges want point-counterpoint, I’m happy to do it. “[W]e were doing it like crazy and getting good at it and efficient at it.” If judges do not want it, I’m happy not to do it.

Mary Massaron Ross, Esq., Feb. 2, 87, 92-93: Point-counterpoint is a useful tool. “What you want * * * is that the litigants be disciplined and the court be disciplined to look at record facts.” The nonmovant should be required to come forward with admissible evidence.

Sharon J. Arkin, Esq., Feb. 2, 94-98, 101-104: California has point-counterpoint in the state courts. “Over the years it has become a much more elaborate, time-consuming, resource-intensive prospect.” It should be allowed by order for good cause in a particular case. But the uniform base line should be a simpler procedure. Defense firms have become much more elaborate in the motions in the number of facts and precise nature of each single fact. I litigate complex cases. But “I think the defense firms increase the complexity deliberately in order to make it more difficult to oppose and more likely that it will be granted because it’s just so much to get through.” And point-counterpoint does not allow the narrative, where the inferential facts come in. California procedure “doesn’t afford the opportunity to explain why, while that fact is true, there’s actually a good reason why summary judgment shouldn’t be granted.” It is not helpful to the nonmovant, despite the apparent opportunity to respond with a long litany of disputed facts. The problem is that “the resultant workload increase because of point-counterpoint has been astronomical for plaintiffs who can least afford to do it.”

Elizabeth J. Cabraser, Esq., Feb. 2, 107-117: Experience with many summary judgment motions under point-counterpoint, and many under other procedures, shows a vast difference in the number of hours and dollars imposed on the parties and in the time and effort judges must take sifting

through the statements. An example is shown by a case in which a point-counterpoint summary-judgment motion took hundreds of hours to brief, and took the court many, many hours to consider and deny; the same issue was presented at trial in an hour and forty-five minutes. The procedure also slights the role of inference. “It is in the nuances that many disputes live and that the truth is most often to be found.” “By such a deconstruction, some truth is lost. Facts are the bones, but it is the connective tissue, the inferences that create a living body.” Rather than a summary-judgment motion, it is better for the parties to educate the judge at a pretrial conference. It often happens that after summary judgment is denied the trial turns up evidence of facts that are quite material but that were not enumerated, argued, or submitted on the motion. If adopted, the procedure should include a surreply brief — but the very need for an additional brief suggests the procedure is not desirable. Sufficient uniformity is achieved by the standard established by the Supreme Court in 1986. “If disputes were all uniform, then we certainly could have a uniform summary judgment * * * procedure, but the federal courts entertain such a vast and diverse array of cases” that it is difficult to see the advantage in a uniform point-counterpoint procedure. Judges know about the procedure. They can adopt it in a particular case where it fits. There is no need to remind them of this option in the text of Rule 56 — and there is a danger that the reminder would become the default procedure. The danger would not be avoided by adopting a “good cause” requirement for adopting point-counterpoint.

But it is appropriate to adopt a “pinpoint citation” practice. When the parties have evidence, it forces them to bring it to the court’s attention. And it saves the court’s time.

Stefano G. Moscato, Esq., for National Employment Lawyers Assn., Feb. 2, 117-136: Employment plaintiffs’ lawyers typically are solo practitioners or work in offices of three or fewer attorneys. Point-counterpoint is incredibly burdensome for them. It adds an extra layer to the unavoidable costs of summary judgment. Responding to each of hundreds of stated facts takes time away from dealing with the real merits of the motion. Of course it is appropriate to require pinpoint citations to the record. But there should be permission to strike the entire motion if it is too long — because cases vary it is not possible to set a numeric limit on the number of undisputed facts, but judges are able to recognize an overlong statement.

One reason for preparing over-long statements of fact is that many judges are hostile to employment discrimination plaintiffs. If a plaintiff has to respond to 600 facts, and is able to manage a meaningful response to only 400, that provides an opportunity to “latch on.” “[T]o just let some of those slide where we are fairly confident they are not the kind of facts that really should be decided in a summary judgment motion is really putting a lot of trust in the judge to agree with us.”

Inferences also are at risk. Employment cases rely particularly on inferences. Suppose it is undisputed that the plaintiff was late for work on one occasion, and asserted that the employer has a clear rule against tardiness. There may be many other things that affect the determination whether the plaintiff was fired for being tardy. Was the rule well known? Was the employer lax in enforcing it — even, perhaps, generally ignored the rule? As others have said, the facts that shape the inference are like a mosaic. The tiles do not look the same when picked apart and stacked by shape

or color. Point-counterpoint focuses dispute on the particular fact of tardiness, when meaning can be found only in other facts, both disputed and undisputed. Adding those facts in a long list of facts in the counterpoint may lose them in the shuffle. Yes, the story is told in the brief. And yes, many judges read the briefs first, using the point-counterpoint statements as a reference. But time devoted to the statements is time taken away from attempting to discern the mosaic. The inferences cannot be argued through the point-counterpoint. “At a minimum the non-movant should be expressly permitted to articulate in its response the reasonable inferences that might be drawn from those facts that are listed and to point out to other facts in the record that support those inferences so that that mosaic is right there for the judge * * *.”

Peter O. Glaessner, Esq., Feb. 2, 137, 145-148: Defending employment cases, finds that this procedure, familiar from practice in California courts, “serves one very valuable function.” The separate statement tells the court and everyone what the facts are. It allows for clarity, for focusing. Suppose the plaintiff has testified to three acts of sexual harassment. It is important to make the record clear that there are three and only three. Stories of 500-fact statements suggest a counterproductive practice. “Less is more. The fewer facts you need to put before the court and claim are material facts that are not in dispute that are necessary for the defendant to win, the stronger the motion.” The mosaic can be described in the brief.

Ralph A. Zappala, Esq., Feb. 2, 151, 153-155: Point-counterpoint has been practiced in California state courts for more than twenty years. It works. An example is a product liability case in which it can be shown that the product was not made by the defendant. “[Y]ou can lay that out in a point-counterpoint fashion that makes it abundantly clear what the material fact is.” We need a uniform approach, not “maybe we’ll do it in this case, maybe we won’t in another case.”

Marc E. Williams, Esq., Defense Research Institute, Feb. 2, 157, 173-174: Limited experience with point-counterpoint in some districts shows it to be a helpful aid. In districts that do not use the procedure, this still is the way to develop a case to determine whether to make a motion for summary judgment and to determine what is the best way to posture the facts when opposing a motion filed by the other side. Any problems that exist can be resolved by appropriate restrictions, by page limits, or by some other local rules provision.

Daniel J. Herling, Esq., Feb. 2, 175, 177-179: Many years of California practice show point-counterpoint is not an uncaged beast but a tool to present your side of the story. “[I]t enables or ensures that counsel hone their arguments.” Trials turn on five to ten, maybe eight main facts. A motion that asserts 12 undisputed material facts is a loser. In federal court, even though we do not call it point-counterpoint, my colleagues and I keep it in mind when we write the briefs. This is just one piece; it is not the mosaic, the overall story.

Thomas A. Packer, Esq., Feb. 2, 182, 189-190: “[O]ne attorney’s mosaic * * * is another attorney’s house of cards.” Point-counterpoint allows the movant to focus the court on the issues of material fact “so that the attorney trying to paint the mosaic, if you will, perhaps can run around the central facts, but they can’t hide from them * * *.”

Andrew B. Downs, Esq., Feb. 2, 190, 195-202: Practices in Nevada without point-counterpoint and in California with it. Point-counterpoint is a disciplinary tool. It provides intellectual structure. If it cannot be written, the motion is not filed. If response is not possible, the nonmovant will seek to settle. Long statements should not be a problem; they are invitations to deny the motion. Two judges in the Northern District of California at times utilize the state procedure; when they do, they require a single undisputed statement, and have a standing order that states a fact is disputed if the parties cannot agree on it. That does not work. The client may be unwilling to agree, or be patently unreasonable — that should not be the basis for denying summary judgment. But writing point-counterpoint into the national rule as an opt-in procedure might create more chaos than it cured. Pinpoint citations are properly required, but the brief limits must be sufficient to support them. As for inferences, “that’s why we write briefs.”

Michael T. Lucey, Esq., for Federation of Defense & Corporate Counsel, Feb. 2, 202, 207-208: The hearing seems to create an impression that defense attorneys are behind point-counterpoint. In California it was the courts that imposed it, not at the request of defense attorneys. The courts were led to it by failures to identify the material facts. What counts at the end of the day is whether there is a genuine issue of material fact. “As long as we get there, I don’t really care of the form of the process. * * * It’s self-policing, I think. The more facts you create, the more chance you have to be denied on that basis.”

Jeffrey J. Greenbaum, Esq., Feb. 2, 221, 224-235, 239-242: (This testimony reflects the views of officers and members of the council of the ABA Litigation Section, but is not ABA policy.) The basic position is that point-counterpoint is a good idea, but only if some combination of rule text and Committee Note effectively conveys the lesson that the movant must limit the number of undisputed facts. Perhaps 10 or 20 per cause of action should be the limit. Although the 300-fact statements are bad lawyering, they happen often enough to require control. Courts need not fear endless motions to increase the limit — most often, as with page limits on briefs or the number of depositions, the parties will work it out. And if an additional fact turns up, the judge will have discretion to allow it in.

It would be a terrible idea to describe point-counterpoint in the national rule as an opt-in procedure. That would be worse than the present situation, where local rules often establish a known procedure in a given district. “If I have to explain to a client that the practice on something as important as summary judgment will depend on whose name comes up on a wheel, that’s kind of hard to explain to a client * * *.” As for districts that have no local rule, but often standing orders and different practices, it’s one thing to have 93 local rules, “but I would hate to see a situation where we have 600 or a thousand.”

It might work to have the statement as a section of the brief; that could avoid much of the duplication that now exists between the separate statement and the brief. It would retain the opportunity to tell the story — to describe the mosaic — in the brief. But “give me back my pages. I want my full 40 pages for the old brief.”

Donald F. Zimmer, Esq., Feb. 2, 248, 250-251: Defense lawyers did not ask for the California point-counterpoint rule. It is instructive and it limits the number of issues. The weight of the motion may defeat it. “So I have not seen people file extraordinarily long statements * * * with any success.” If judges are dissatisfied with the procedure, perhaps an opt-in or opt-out procedure would be appropriate.

Raoul D. Kennedy, Esq., Feb. 2, 252-269: It is telling that as a defense lawyer I disagree with Elizabeth Cabraser and Sharon Arkin about nearly everything, but we all agree that point-counterpoint is not a good idea. Twenty-five years of experience in California show its defects. I have never won or lost a summary-judgment motion and thought that the separate statement either helped me or hindered me. “[B]ut it carries an incredible amount of baggage and expense.” Three different intermediate appellate decisions in California establish three different approaches — anything not in the statement must be completely disregarded; the court has a duty to look at all the evidence in the record; there is something in between. And courts disagree whether the statement can be amended to include something left out. The idea that good lawyers will automatically provide brief statements is wrong. In a current case in the Central District of California, using this procedure, very good lawyers have produced a motion with 130 undisputed facts, another motion with 60 undisputed facts, and another motion with 80. If you tell these lawyers they can have only 20 or 25 facts, the motion will look much the same, “except facts 1 through 6 are now going to be fact number 1. And you can then do a whole new round of law and motion about who’s cheating on combining more than one fact into a single number.” Lawyers fearing that only facts in the statement will be considered will not take chances. They will produce the 80-fact statement. “There is caution on the part of the lawyer.” And “lawyers just don’t do a very good job of conceding” — the responses to the 130 facts will not be “undisputed, undisputed, undisputed.” The responses are evasive, or the movant thinks they are and files a reply, giving the court a three-column document to trace across. “[I]t’s almost the equivalent of a request for admissions in interrogatories. Lawyers aren’t going to belly up and candidly say what’s involved.” “[Y]ou’ve got an imprecise issue with an imprecise response with an imprecise rejoinder. It’s like doing discovery.”

A solution would be to have the nonmovant submit a proposed order with the response, laying out specifically what the contested facts are. The movant would have to file a response to the proposed form of order.

A brief with page limits provides another possible approach. “We’re very good at writing point-counterpoint briefs against one another, but the statement of undisputed facts presupposes a certain amount of collegiality and joint participation * * *. You’re asking lawyers to do something most of us are genetically incapable of doing and giving us unlimited numbers of pages in which to do it.”

Writing point-counterpoint into Rule 56 as an opt-in is not wise. There is a risk that it would become the automatic default. And the California experience shows it is a practice that should not be encouraged. It was adopted by the legislature at the behest of plaintiffs’ trial lawyers, and although it has boomeranged legislative change is not likely.

(C)(2): ADD SUR-REPLIES

08-CV-046, Center for Constitutional Litigation (American Association for Justice), John Vail, Esq.: “Of special help with motions filed early in a case would be explicitly to permit sur-replies where the reply supporting summary judgment contains any factual matter beyond the scope of the response.”

08-CV-048, Stephen Z. Chertkof, Esq.: “Provide a right of sur-reply for the non-moving party so that the party with the burden of proof at trial is fully heard, rather than giving the moving party the first and last word and a disproportionate ability to frame the issues.”

08-CV-075, Mark Hammons, Esq.: Present practice allows a nonmovant to respond to new fact materials or new legal argument offered in a movant’s reply. This opportunity is essential; compare present Rule 56(c), which allows a nonmovant to serve opposing affidavits before the hearing day. The rule should provide that the movant’s reply may not contain new evidentiary materials or new legal arguments, but also provide that if the reply violates this restriction the court must either exclude the new materials and arguments or allow the nonmovant to respond.

08-CV-109, Ellen J. Messing, Esq., for Seven Massachusetts Lawyers: As summarized with the point-counterpoint comments — movants commonly raise new and central points that require a sur-reply.

08-CV-143, Stefano G. Moscato, Esq., for National Employment Lawyers Assn.: Sur-replies should be permitted, but both reply and sur-reply should be confined to responding to materials in the opposing submission. “NELA members have complained that they have been ‘sandbagged’ by primary brief which had provided abbreviated or unclear statements of facts or arguments, tactically written to prevent cogent or complete responses, with the Reply Brief clarifying or even adding arguments and providing additional authorities in support of those arguments.”

08-CV-150, Elizabeth J. Cabraser, Esq., for Public Justice: The plaintiff has the burden at trial, but the proposed structure gives a moving defendant the first shot and last shot. “A surreply opportunity, at the least, should be permitted, in this duel of ‘facts,’ to give each side the same number of shots.”

08-CV-156, Brian P. Sanford, Esq.: “To more closely simulate the burden of proof at trial, the court should allow the party with the burden of proof a sur-reply to a motion for summary judgment.” Often the motion relies on cross-examination of the plaintiff at deposition. “The plaintiff is not allowed to present his or her direct testimony until after defendant’s selection of plaintiff’s cross-examination and the plaintiff is chastised if gaps are filled, and punished if there is any change in testimony.”

08-CV-157, Margaret A. Harris, Esq.: A sur-reply should be added as a new (b)(4).

08-CV-179, Robert J. Wiley, Esq.: Plaintiffs usually go first at trial. In employment cases usually the defendant goes first on summary judgment. Plaintiffs should be allowed to surreply.

08-CV-183, Professor Eric Schnapper: The comment is supported by a lengthy paper. The paper develops a theme heard in many comments: often the movant adduces its most important evidence in supporting the reply. The sequence is a motion that ignores some or all of the evidence the nonmovant will rely on; a response that adduces the nonmovant's evidence; and a reply that spells out the defects the movant relies on to undermine the probativeness of the nonmovant's evidence. The nonmovant must have an opportunity to reply — Rule 56(b) should be modified to allow a fourth filing.

Brian Sanford, Esq., Jan. 14, 27 at 30-31: A defendant's motion for summary judgment "turns trial practice on its head." The defendant frames the issues, the plaintiff gets one chance to respond, and then the defendant has the last word. The Eastern District of Texas local rules provide an automatic sur-reply. This should be generally available.

08-CV-191, James C. Sturdevant for National Assn. of Consumer Advocates: The point-counterpoint procedure gives the movant — usually the defendant — the first and last word. But the plaintiff has the burden of proof. "[T]he plaintiff should always have the last word as s/he does at trial."

Steve Chertkof, Esq., Nov. 17, 34, 51: There should be a right of sur-reply. And oral hearings.

Hon. David F. Hamilton, Feb. 2, 22, 36: The majority of the court in the Southern District of Indiana believe there should be a right to surreply. "[W]e see all the time * * * reply briefs from moving parties that either raise new evidence or object to admissibility for the first time of a non-moving party's efforts. And it just seems to me basic fairness the non-moving party has to have an opportunity to respond to those. We keep it short. We keep it limited with a short time frame." And this makes it easier to avoid arguments after a nonmovant who failed to surreply loses on the motion.

Elizabeth J. Cabraser, Esq., Feb. 2, 107, 114: If point-counterpoint is adopted, it should include a surreply brief "to make sure that there is no injustice and that evidence is not left out." But the need for yet another brief is a good sign that point-counterpoint is not a good idea.

Stefano G. Moscato, for National Employment Lawyers Assn., Feb. 2, 117, 132-133, 135-136: Employment plaintiffs are "over and over * * * sandbagged by briefs that are providing abbreviated and unclear statements * * * essentially tactically being written to prevent a cogent response and then waiting for a reply brief * * *." Our members complain that they are not allowed to surreply. It would work to limit the surreply to new evidence provided in a reply, any new material.

(C)(3): ACCEPT FOR MOTION ONLY

08-CV-048, Stephen Z. Chertkof, Esq.: Rule 56(g), permitting a court to establish a fact as not genuinely in dispute is in irreconcilable tension with proposed Rule 56(c)(3), permitting acceptance

of a fact for purposes of the motion only. No one will be willing to accept a fact for purposes of the motion only.

08-CV-071, Hon. Paul J. Kelly, Jr.: Allowing a party to accept a fact only for purposes of summary judgment may make the summary judgment process more efficient, but it will have two undesirable effects. Cautious counsel will accept only for purposes of the motion, while accepting facts generally would make trial more efficient. And accepting facts only for purposes of the motion will reduce the effectiveness of proposed Rule 56(g) — a general acceptance would enable the court to find a fact not genuinely in dispute, while an acceptance for purposes of the motion only defeats this prospect.

08-CV-161, Federal Magistrate Judges Assn.: Allowing a party to accept or dispute a fact either generally or for purposes of the motion only is beneficial.

08-CV-174, Federal Bar Council, by Robert J. Giuffra, Jr., Esq.: To protect against trapping a party who accepts for purposes of the motion only, Rule 56(g) should be revised to provide that the court may not “state” a fact if a party accepted it for purposes of the motion only.

08-CV-175: Hon. Marcia S. Krieger: Rule 56 should provide for a joint stipulation of facts and a joint request for a legal determination. “I often offer this when the dispute is limited to an application of the law — ERISA, declaratory judgment/insurance coverage, contract interpretation cases, agency appeals.” The parties simultaneously file opening briefs, and simultaneously file reply briefs.

08-CV-176, State Bar of California, Committee on Administration of Justice: The Committee Note states that acceptance for purposes of the motion only does not provide a basis for an order under Rule 56(g), but this relationship is not clear from the rule text. Rule 56(g) should be revised “to make it clear that a conditional acceptance under subdivision (c)(3) cannot provide the basis for an order under subdivision (g).”

Sharon J. Arkin, Esq., Feb. 2, 94, 104-105: At times I have said that a fact is not disputed for purposes of the summary-judgment motion, and then it has “been turned around and I’ve been attacked at trial saying I stipulated to the facts.” The rule should be that a fact is undisputed for purposes of the motion only unless the party otherwise indicates that it is accepted for general purposes.

(C)(4): SUPPORTING MOTION AND RESPONSE

08-CV-037, Professor Adam Steinman: Proposed (c)(4)(A)(ii) allows a movant to show “that an adverse party cannot produce admissible evidence to support the fact.” **(1)** This language can be misread in ways that, contrary to the Committee’s intent, will change the moving burden. A party who bears the trial burden of production should not be able to prevail simply by showing that the nonmovant does not have evidence; the movant must show that it can carry its trial burden to the point of shifting the trial burden of production to the nonmovant. This part of the proposal is

intended to apply only to a motion by a party who does not have the trial burden of production; it should say so expressly. (Proposed rule language is included.) (2) A second shortcoming is that the proposed language may imply that the movant need not cite to any materials in the record. The Celotex opinion is clear that the movant always has the initial responsibility of identifying the materials that show there is no genuine dispute. (Again, proposed corrective language is included.)

08-CV-046, Center for Constitutional Litigation (American Association for Justice), John Vail, Esq.: Even after stating that material is not admissible, the response or reply must refute the fact as if the supporting material were admissible, lest summary judgment be granted. In fairness, there should be a ruling on admissibility before having to respond on the merits. (And it is asked whether the challenge must be stated in the brief, impairing the best use of limited pages.)

08-CV-183, Professor Eric Schnapper: The paper supporting this comment includes a draft of Rule 56 provisions, including detailed provisions for Celotex no-evidence motions. The starting point is that “the moving party demonstrates that at trial the non-moving party [who has the burden of proof] will not have legally sufficient evidence on the basis of which a reasonable jury could find for the non-moving party.” The motion must “(a) state with particularity the fact or facts regarding which the moving party asserts that the non-moving party will lack sufficient evidence at trial, (b) set forth the discovery undertaken by the moving party to identify the evidence regarding such facts which the non-moving party would have at trial, (c) set forth why the non-moving party bears the burden of proof regarding the fact or facts in question, and (d) be accompanied by an affidavit and/or documents reflecting any information in the possession of the moving party with regard to those fact or facts, including information that might lead to the identification of relevant admissible evidence. If the moving party has no such information, it shall so state in a sworn affidavit.” (Note that (d) would go part way back to the “heartburn” aspect of the initial disclosure rule in force from 1993 to 2000.)

08-CV-161, Federal Magistrate Judges Assn.: Expresses confusion as to the intended meaning of (c)(4)(A)(ii), and recommends that it be revised to be clearer.

(C)(4)(B): MATERIALS NOT CITED

08-CV-152, Jeffrey J. Greenbaum, Esq. (joined by 26 officers and members of ABA Section of Litigation, writing for themselves): A one-way notice provision makes little sense. “Notice to the parties should be required if the court goes beyond the material cited, whether doing so to grant or to deny summary judgment.”

Jeffrey J. Greenbaum, Esq., Feb. 2, 221, 224-235, 239-242: (This testimony reflects the views of officers and members of the council of the ABA Litigation Section, but is not ABA policy.) Notice should be required when the judge relies on record materials not cited by the parties, whether the judge relies on them to grant or to deny the motion.

(C)(5): STATE CITED MATERIAL NOT ADMISSIBLE

08-CV-037, Professor Adam Steinman: Summary-judgment materials need not themselves be in a form admissible at trial — an affidavit or declaration ordinarily is inadmissible hearsay, but suffices. Courts now divide on the use of material that is not in a form admissible at trial, but that can be reduced to a form admissible at trial — an affidavit that recounts the hearsay statements of a different witness is surely relevant if the proponent “indicates an intent to call at trial the individual who made the out-of-court statement.” The cure is to eliminate (c)(5) “[b]ecause the use of trial admissibility standards at the summary judgment phase is an open question under the current version of Rule 56 * * *.”

08-CV-098, E.D.N.Y. Committee on Civil Litigation: The language should be changed to parallel subdivision (c)(6): “ * * * may state that the material cited to support or dispute the fact would not be admissible in evidence.” This would make it clear that evidentiary determinations at the Rule 56 stage would be made “in anticipation of whether a foundation for admissibility will be available for the evidence at trial.”

08-CV-131, Gregory K. Arenson, Esq., for New York State Bar Assn. Commercial & Federal Litigation Section: Most courts agree that material may be considered so long as it can be reduced to an admissible form at trial. (c)(5) should be amended to allow a statement that material “could not be reduced to a form admissible in evidence at trial.”

08-CV-134, Prof. Bradley Scott Shannon: The rule should say explicitly that the court must not consider inadmissible materials, assuming proper objection is made.

08-CV-152, Jeffrey J. Greenbaum, Esq. (joined by 26 officers and members of ABA Section of Litigation, writing for themselves): A clear mechanism to challenge admissibility is useful. But there should be meaningful notice of the basis for the challenge. The rule should include: “together with a concise citation to or identification of the basis for the challenge.”

08-CV-162, Federal Practice Comm., Dayton Bar Assn.: Approves allowing an objection to admissibility without filing a separate motion to strike.

08-CV-174, Federal Bar Council, by Robert J. Giuffra, Jr., Esq.: To parallel (c)(6), and to clarify that rulings on admissibility anticipate whether a foundation for admissibility will be available for the proffered evidence at trial, this should be revised: “A response or reply to a statement of fact may state that the material cited by the adverse party to support or dispute the fact would not be admissible in evidence.”

Rule 56(d)

08-CV-008, Kenneth A. Lazarus, Esq. for American Medical Assn. and other medical associations: When a party seeks time for additional discovery, “we believe that it would be helpful to require some specification of the material facts that the opposing party expects to discover.”

08-CV-055, Gregory P. Joseph, Esq.: “There is no convincing reason why 56(f) has to be renumbered 56(d).” Future computer searches will be more complicated.

08-CV-082, Robert S. Mantell, Esq.: Points to First Circuit cases said to refuse an alternative response that both asserts the nonmovant has sufficient evidence to defeat summary judgment and also requests an opportunity for further discovery. A nonmovant’s request for Rule 56(d) relief should not be taken as a tacit admission that the nonmovant cannot defeat summary judgment without the relief. Nor should a response on the merits waive the right to request Rule 56(d) relief. This sentence should be added: “A nonmovant may seek relief under this provision while arguing in the alternative that the nonmovant has produced sufficient evidence requiring denial of the motion.”

08-CV-134, Prof. Bradley Scott Shannon: The nonmovant should allowed to show its reasons by sworn testimony in open court, not merely affidavit or declaration. If the required showing is made, the court should not deny the motion — the only appropriate accommodation is to defer consideration. Nor is there any need to carry forward the provision for “any other appropriate order. Finally, the three paragraphs should be separated by “and,” since the court may take more than one of these measures.

08-CV-142, Hon. David F. Hamilton: Some comments suggest a nonmovant should be permitted to respond in the alternative — the motion should be denied, but if the court is inclined to grant it I would have more time for discovery. “[I]f an alternative response is a permissible response, * * * I expect it will become the standard response.” A decision to grant summary judgment will become an advisory opinion — more time is allowed for discovery, the parties brief the motion anew, and the court will issue a second and real decision. “Please — make clear that this is not a permissible response.”

08-CV-157, Margaret A. Harris, Esq.: This provision, as present Rule 56(f), presents the problem that a nonmovant does not have a clear mechanism to obtain a ruling on the motion for more time before having to file a response to the Rule 56 motion. “And when there is a response on file, lower courts often see that as sufficient and thus deny the 56(f) motion — leaving the non-movant with a less-than otherwise available record should summary judgment be granted.”

08-CV-183, Professor Eric Schnapper: Present practice is clearly unsatisfactory. Things work well if a sensible order is imposed by a scheduling order. Otherwise the movant controls timing. There is every incentive to move before potentially inculpatory evidence has been discovered — and often the movant is the one who knows this. “Summary judgment thus operates as sort of a retroactive discovery cutoff * * *. The filing of a summary judgment motion summarily ends the record building process.” With only a short time to respond, the nonmovant is usually unable to do more than summarize the information it has in hand. “[T]he key weapon for preventing the disclosure of adverse information is delay * * *. A moving party’s control over the timing of summary judgment can be outcome determinative if it is used to stop the clock before the process has run its course.” The nonmovant ordinarily must respond at the same time as it litigates its request for additional time. “Such a system would be inconceivable in the process of creating a trial record. No court would

permit a litigant to control the trial date and keep it secret from the opposing party until a few weeks before trial.” Even making a Rule 56(f) request is discouraged by the need to divert precious time from preparing a response to the motion. Some lawyers may be discouraged by the fear that even asking for more time is inconsistent with the position that the nonmovant does have sufficient evidence. A number of courts, moreover, address Rule 56(f) requests by asking whether the nonmovant has been sufficiently vigorous in pursuing discovery — that is inconsistent with the safeguards built into the procedures for imposing discovery sanctions. “At best the Rule 56(f) process confers on the district judge discretion to cut off the record-building process.” That is fundamentally different from the process at trial. And at worst, the system “creates significant institutional pressures on the judge to proceed to decide the summary judgment motion on the merits (at the time of the moving party’s choosing), as it would any other motion, rather than start the process over again.” (This is followed by a longer plea for scheduling orders that establish “a structure more similar to the predictable and equitable record building process that precedes a JML motion.”) The supporting paper includes a draft rule provision: “within 30 days after the filing of a motion for summary judgment, the non-moving party shall either file a response to that motion, or submit a request under Rule 56(f) or otherwise for additional time for investigation of discovery. If such a request is made, a response to the motion itself shall be filed within the period determined by the court.”

Rule 56(e)

DEFECTIVE MOTIONS

08-CV-016, Joseph D. Garrison, Esq.: Proposes the rule should include a motion to strike an abusive submission. The motion would toll the time to respond. The problem is one encountered in representing plaintiffs in individual employment actions. It is illustrated by cases in which defendants submitted far too many allegedly material facts — the numbers encountered in his own practice have ranged from 92 through 107, 237 (a case involving 8 individual plaintiffs), 246, and 292. References were made to the record for each fact, “sometimes correctly, sometimes not.” The work of responding entails substantial costs to the clients. A motion to strike an abusive submission will, to be sure, lead to collateral litigation in the short term. But once defense firms learn the lesson, they will conform to sensible practices. Other sanctions are not needed — it is enough that the lawyer who presents an abusive motion “would have to confront the client with the need to do it over.”

08-CV-123, Hon. Barbara B. Crabb: The only reason for considering a fact undisputed is for purposes of deciding the motion. (2) and (3) should be combined “so that it is clear that the court will not only consider the fact undisputed but may proceed to grant summary judgment for the movant on the basis of that undisputed fact and others.” (It is not clear whether this assumes that the court will always consider the fact undisputed.)

08-CV-176, State Bar of California, Committee on Administration of Justice: “[S]upports the proposed amendments, for the reasons stated in the Advisory Committee report.”

Rule 56(f)

NOTICE

08-CV-123, Hon. Barbara B. Crabb: What kind of notice is contemplated? Would a local rule or procedure saying the court can do these things suffice? “Or would it be necessary to pause between deciding the motion and making it public to give specific notice to the litigants * * *? Does notice have to come from the court and does it have to be anything more than the losing party’s being ‘on notice that she had to come forward with all her evidence?’ *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986).”

(F)(1): GRANT FOR NONMOVANT

08-CV-121, Phil R. Richards, Esq.: (It is unclear whether this comment is submitted for the American College of Trial Lawyers.) “[T]he rule should provide that a court ‘should’ grant summary judgment for either party in the event that the motion and briefs show that they are entitled to it, either globally or on any specific issue, regardless of whether they are the movant or the respondent.”

08-CV-175, Hon. Marcia S. Krieger: It is unwise to require notice before granting summary judgment for the nonmovant. The movant takes that risk.

(F)(2): GRANT OR DENY ON GROUNDS NOT IN MOTION

08-CV-161, Federal Magistrate Judges Assn.: This provision requires notice and opportunity to respond before either grant or denial on grounds not raised by the motion. Proposed (c)(4)(B) requires notice before granting on materials not cited, but not before denying on materials not cited. The distinction is so subtle that it will give rise to arguments. “[T]hese two subsections should be consistent.”

(F)(3): CONSIDER ON COURT’S OWN

08-CV-046, Center for Constitutional Litigation (American Association for Justice), John Vail, Esq.: Codifying the practice that allows a court to initiate summary judgment without a party’s motion “would add greatly to whatever cost and delay the parties judged they could handle before the court intervened.” The parties may understand the facts far better than the court, and understand that the case is not appropriate for summary judgment.

08-CV-133, Sharon J. Arkin, Esq.: “One of the most frightening changes proposed is to permit judges to initiate summary judgment proceedings sua sponte.” “Because the parties know their case best, it is for them to determine whether a summary judgment motion is appropriate.”

08-CV-134, Prof. Bradley Scott Shannon: The court should not be permitted to grant summary judgment sua sponte. It suffices to invite a motion. All of subdivision (f) should be deleted.

08-CV-183, Professor Eric Schnapper: The supporting paper, but not the formal comment, expresses concerns that seem to reflect the risk of overlooking information not called to the court's attention because the motion did not present the issues the court addresses. The problem seems to be lack of notice and opportunity to respond, something proposed Rule 56(f) does require.

Rule 56(g)

08-CV-048, Stephen Z. Chertkof, Esq.: Rule 56(g), permitting a court to establish a fact as not genuinely in dispute is in irreconcilable tension with proposed Rule 56(c)(3), permitting acceptance of a fact for purposes of the motion only. No one will be willing to accept a fact for purposes of the motion only.

08-CV-123, Hon. Barbara B. Crabb: “[W]hat does the committee contemplate would be the relationship between facts treated as ‘established in the case’ and (c)(3), which talks of accepting or disputing a fact either generally or for purposes of the motion only”?

08-CV-134, Prof. Bradley Scott Shannon: “Must” should be used to describe the court’s obligation. “[I]f the rule provides for the possibility of partial summary judgment, the court should be obligated to grant partial summary judgment whenever appropriate.” And the rule should refer to the “action,” not the “case.”

08-CV-176, State Bar of California, Committee on Administration of Justice: (1) (g) seems properly limited to facts, not issues, claims, or defenses. If so, the title “Partial Grant of Motion” may be misleading — “Order Establishing Material Fact” would be better. (2) ~~“including an item of damages or other relief”~~ could be read to refer to something other than facts; these words should be deleted. (3) The Committee Note refers to “facts and issues”; the reference to issues should be deleted.

Rule 56(h)

08-CV-008, Kenneth A. Lazarus, Esq. for American Medical Assn. and other medical associations: “We would like to see some further explication of ‘expenses’ in the Rule or Committee Note and support the shifting of all out-of-pocket costs, where relevant, including printing fees, deposition expenses, travel and subsistence expenses, fees for experts, etc.”

08-CV-039, Professor Alan B. Morrison: Generally does not favor sanction motions. But if they are to be made, the problem is not bad-faith affidavits or declarations. “If there is a problem, it is that a motion for summary judgment is made (or in some cases an opposition filed) solely for purposes of delay, especially when made by defendants who have every incentive to delay. I would change ‘affidavit or declaration’ to ‘motion or response.’” The focus would be on the entire motion or response, not one part.

08-CV-040, Theodore B. Van Itallie, Jr., Esq.: Writing as Associate General Counsel in charge of global litigation for Johnson & Johnson, urges “a reasonable fee-shifting rule” to tax the losing party

when “summary judgment is defeated or deferred based on an assertion that can be said to be objectively unreasonable.”

08-CV-045, Debra Tedeschi Herron, Esq.: Rule 56 should “provide for a reasonable cost allocation when materials are submitted without reasonable justification, in place of the current ‘bad faith’ standard.”

08-CV-050, Stephen G. Morrison, Esq.: “[T]he Committee should adopt an objective tool in the form of an allocation of expenses triggered by a party’s submission of materials without reasonable justification.”

08-CV-055, Gregory P. Joseph, Esq.: By saying that the court “may” order sanctions if satisfied that an affidavit is submitted in bad faith or solely for delay, the rule “appears to contemplate that some bad faith or dilatory affidavits may be permissible.” “It is time to accept that Rule 56(h) is a relic. The area is covered by Rule 11 and multiple other sanctions powers. I would just retire it.”

08-CV-061, Lawyers for Civil Justice and U.S. Chamber Institute for Legal Reform: The statement of undisputed facts procedure of proposed Rule 56(c) may allow a case to survive too long through extensive discovery and motion practice. There may be “frivolous motions” by any party. A nonmovant may insist on discovery to search for facts that do not exist or are immaterial. An indisputable fact may be contested without support. “[A] party that is in a position to know the undisputed facts” but demands additional discovery should bear the costs imposed on the movant. A party who disputes facts without reasonable justification should bear the costs. It is a mistake to rely on subjective intent, as do the limited provisions of present Rule 56(g) and proposed Rule 56(h). The rule should provide that reasonable expenses, including attorney fees, may be awarded if “a motion, response, reply, affidavit or declaration under this rule is submitted without reasonable justification.”

08-CV-110, G. Edward Pickle, Esq.: Sanctions should be imposed for “non-responsive arguments and obfuscation.”

08-CV-124, Wayne B. Mason, Esq. for Federation of Defense & Corporate Counsel: “Courts are often disinclined to make a finding of bad faith based on a subjective intent.” The rule should provide for “cost shifting when summary judgment papers are submitted without reasonable justification.” Rule 11 provides sufficient basis for sanctions.

08-CV-127, Michael R. Nelson, Esq.: Sanctions should be expanded beyond bad-faith affidavits and declarations, authorizing the court to order payment of reasonable expenses, including attorney fees, if a motion, response, reply, or affidavit or declaration is submitted without reasonable justification.

08-CV-134, Prof. Bradley Scott Shannon: This provision “is pathetic, and an embarrassment to the profession.” There is no need to set out in the rule the obvious proposition that sanctions can be imposed for making an affidavit for improper reasons.

08-CV-162, Federal Practice Comm., Dayton Bar Assn.: Approves recognizing current practice treating sanctions as a matter of discretion.

08-CV-167, Michael T. Lucey, Esq., for Federation of Defense & Corporate Counsel: “We favor a cost shifting when summary judgment papers are submitted without reasonable justification.” The allocation should be “objective, reasonable and discretionary.” But Rule 11 should remain as the source of sanctions.

Theodore Van Itallie, Esq., Nov. 17, 105, 111-112: There should be an appropriate cost-shifting standard both for inappropriately made motions and for oppositions that are objectively unreasonable. Cost-shifting will lead to greater care in deciding whether to make the motion and in how to oppose it.

Stephen G. Morrison, Esq., Nov. 17, 120, 126-127: Rule 56(h) should be modified to include an objective standard for cost shifting. This would not be a punitive rule, not a bad-faith rule, not a subjective standard, but cost-shifting when motion or response is made “without reasonable justification.” “As you know, Rule 56(g), nobody ever finds bad faith on the part of the lawyers, and so it’s an ineffective rule.”

Debra Tedeschi Herron, Esq., Nov. 17, 141, 142-143: An objective reasonableness test should be adopted, providing consequences for over-long statements of undisputed facts or similar responses. That will make the point-counterpoint procedure effective.

Latha Raghavan, Esq., Nov. 17, 143, 145: If there is any lingering doubt about point-counterpoint procedure for fear of over-long statements or responses, “you may want to look at your sanction section,” rewording it so “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.”

Alfred W. Cortese, Jr., Esq., for Lawyers for Civil Justice, Nov. 17, 153, 161-162: Members are divided, 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 the filing of motions.” There is a fear that only “target defendants” would incur these orders for making objectively unreasonable motions, but the risk is worth it to achieve a discipline that encourages adherence to the rules, “particularly when we see many instances in which there are frivolous responses to motions, as well as in some instances frivolous motions * * *.”

Wayne Mason, Esq., for Federation of Defense & Corporate Counsel, Jan. 14, 60, 75-76: Cost-shifting is the best way to deal with the lawyer who files an unreasonably long statement of undisputed facts. This is not as a sanction — Rule 11 suffices for that. It compensates the other party if a motion or response is inappropriate.

G. Edward Pickle, Esq., Jan. 14, 104, 112: There should be a cost allocation mechanism for abuse of the system.

Staged Discovery

08-CV-008, Kenneth A. Lazarus, Esq. for American Medical Assn. and other medical associations: Rules 16 and 26 on scheduling orders, scheduling conferences, and pre-discovery conferences should be amended to direct the parties to at least consider the possibility of phased discovery, directing attention first to the “real frailties” in the case that may lead to disposition by summary judgment.

Style

08-CV-056, Hon Frank H. Easterbrook: “as to” is misused in draft 56(a). Make it: “no genuine dispute ~~as to~~ about any material fact.”

Other

08-CV-057, R. Matthew Cairns, Esq.: Not only should summary judgment be made mandatory by adopting “must” in the standard. “Must” “should also extend to state court claims that have been joined in the federal action, rather than having those claims remanded to the state court should the federal claims be dismissed * * *.”



MEMORANDUM

To: The Advisory Committee on Rules of Civil Procedure
From: The Advisory Committee on Rules of Bankruptcy Procedure
Re: Discharge in Bankruptcy in Fed. R. Civ. P. 8(c)
Date: March 27, 2009

In December 2005, the Advisory Committee on Rules of Civil Procedure recommended for publication a proposal to remove “discharge in bankruptcy” from the list of affirmative defenses in Fed. R. Civ. P. 8(c). The recommendation was published in August 2007, and the Department of Justice submitted the only comment opposing the proposed rule change. In connection with further consideration of questions raised by the DOJ, the Civil Rules Committee asked for a recommendation from the Advisory Committee on Bankruptcy Rules. At its March 26, 2009 meeting, the Bankruptcy Committee considered the issue, aided by a memorandum (dated March 4, 2009) from the DOJ, detailing its arguments against the proposed change to Rule 8(c). After a full discussion of the matter, the Bankruptcy Committee determined to recommend adoption of the proposed change. This memorandum sets out the basis for the Bankruptcy Committee’s recommendation and responds to the arguments made by the DOJ.

A. The central issue: whether discharge in bankruptcy is a waivable defense

Rule 8(c) sets out a list of affirmative defenses that “a party must affirmatively state.” The rule “require[s] the defendant to plead any of the listed affirmative defenses

that it wishes to raise or risk waiving them.” 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1270 (3d ed. 2008). Among the listed defenses subject to waiver if not affirmatively stated is “discharge in bankruptcy.” The proposal to eliminate this defense from Rule 8(c) is based on § 524(a) of the Bankruptcy Code (Title 11, U.S.C.) which provides as follows:

(a) A discharge in a case under this title —

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived

In proposing the change to Rule 8(c), the Civil Rules Committee determined that § 524(a) prevents the bankruptcy discharge of a particular debt from being waived and voids any judgment obtained on a discharged debt, despite a procedural default by the debtor. The DOJ has responded with arguments raising issues of statutory construction and policy, contending that § 524(a) is consistent with the Rule 8(c) requirement that a party plead discharge as an affirmative defense.

As discussed below, the DOJ’s statutory construction arguments conflict with the language and history of § 524(a) and are unsupported by any case law. Moreover, contrary to the DOJ’s policy arguments, eliminating “discharge in bankruptcy” from Rule

8(c) will not create procedural difficulties, but rather correct what is now a misleading provision.

B. The language of § 524(a)

The DOJ makes three arguments in support of its position that § 524(a) allows a waiver of discharge by failure to assert the discharge as an affirmative defense. Two appear on page 6 of its memorandum:

[1] New Code § 524(a)(1) . . . provides that a discharge “voids any judgment at any time obtained, to the extent that such judgment” is for a discharged debt. [I]t uses the present tense verb “voids.” Under the plain language rule of statutory construction, the present tense verb suggests that the “at any time obtained” language is referring to judgments entered either pre- or post-petition but prior to the discharge and not to future judgments.

[2] At the same time, the injunctive provision in § 524(a)(2) proscribes the continuation of a pre-discharge suit on a debt [only] if the debt was clearly discharged, and similarly forbids a new action unless the creditor had a colorable claim to an exception.

The third argument is set out in footnote 3 on page 3: “The invalidation of waivers in the final clause of § 524(a) . . . addresses contractual waivers, and not the failure of a debtor to plead a discharge in a future lawsuit”

None of these arguments can be reconciled with the actual language of § 524(a). First, the provision that a bankruptcy discharge “voids any judgment at any time obtained” necessarily affects judgments obtained after discharge as well as before; otherwise, instead of applying to judgments obtained “at any time,” the statute would refer

to judgments obtained “before the entry of discharge.” Similarly, the use of the present tense “voids” simply reflects the continuing effect of the discharge: it both “voids” judgments previously obtained and “voids” judgments obtained thereafter. The DOJ’s suggestion that a future tense is somehow required has no basis in grammar.

Second, the suggestion that § 524(a) applies only to debts that are “clearly” discharged, and not to debts subject to a “colorable claim” of nondischargeability, contradicts the statutory language. No such limitation appears in the statute; if a debt is discharged, it cannot be subject to an enforceable judgment. Nothing in the statute dictates a different result depending on the degree to which a debt might be subject to nondischargeability claims. Statutes should not be read to include unexpressed limitations. *See Felder v. Casey*, 487 U.S. 131, 148 (1988) (noting the Court’s refusal to add exhaustion requirements to civil rights legislation); *Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 998 (10th Cir. 2007) (observing that the Supreme Court “has counseled against adding extra-legislative requirements to statutory text”); *cf. Gardenhire v. United States Internal Revenue Serv. (In re Gardenhire)*, 209 F.3d 1145, 1148 (9th Cir. 2000) (“Close adherence to the text of the relevant statutory provisions and rules is especially appropriate in a highly statutory area such as bankruptcy.”).

Finally, nothing in the statutory language suggests that the anti-waiver provisions of § 524(a) apply to contractual waivers but not to waivers resulting from procedural default. The term “waiver” plainly encompasses the bar resulting from a defen-

dant's failure to plead an affirmative defense. *See, e.g., Jakobsen v. Mass. Port Authority*, 520 F.2d 810, 813 (1st Cir. 1975) ("The ordinary consequence of failing to plead an affirmative defense is its forced waiver . . ."). In providing that the debtor may not waive discharge, § 524(a) draws no distinction between contractual and procedural waivers, and again, it is improper to engraft limitations on a statute's general provisions. However, even if the DOJ's argument on this point were correct, it would not limit the principal effect of § 524(a), which is to void any judgment on a discharged debt.

Thus, none of the DOJ's arguments effectively challenges the reading that the Civil Rules Committee suggested in proposing the change to Rule 8(c): "A discharge voids any judgment obtained on the discharged debt even if the debtor defaults or appears but fails to plead the discharge. . . . Section 524 has superseded the role of discharge as an affirmative defense."¹

C. The legislative history of § 524(a)

Since the language of § 524(a) plainly provides that a discharge in bankruptcy cannot be waived, there is no need to explore its legislative history. However, if

¹ The DOJ does not argue that Rule 8(c) could somehow supersede § 524. That argument would be foreclosed by the fact that the Bankruptcy Code was enacted after the rule was in place. The more recent enactment, of course, is controlling. *See Mitchell v. Farcass*, 112 F.3d 1483, 1489 (11th Cir. 1997) (holding that "a statute passed after the effective date of a federal rule repeals the rule to the extent that it actually conflicts" (quoting and adopting the holding of *Jackson v. Stinnett*, 102 F.3d 132, 135 (5th Cir. 1996))).

the arguments in the DOJ memorandum were sufficient to raise some question about the meaning of § 524(a), its legislative history could properly be consulted. *See Fla. Power & Light Co v. Lorion*, 470 U.S. 729, 737 (1985) (when a statute is ambiguous, the court may seek guidance in the relevant legislative history): *United States v. Yellin (In re Weinstein)*, 272 F.3d 39, 48 (1st Cir. 2001) (where the Bankruptcy Code is ambiguous, the courts look to “its historical context, its legislative history, and the underlying policies that animate its provisions”).

The history of § 524(a) clearly demonstrates the nonwaivable character of discharge under the Bankruptcy Code. That history unfolds in four steps:

1. Before 1937, courts interpreted the Bankruptcy Act of 1898 to provide that a debtor’s discharge was indeed an affirmative defense. If a debtor did not raise a bankruptcy discharge in response to a collection action brought after the discharge was granted, the debtor waived that defense. *See In re Evans*, 289 B.R. 813, 826 (Bankr. E.D. Va. 2002) (discussing practice under the Bankruptcy Act).

2. Consistent with then-existing bankruptcy law, Rule 8(c), as originally enacted in 1937, made discharge in bankruptcy an affirmative defense. *See Francis v. Humphrey*, 25 F. Supp. 1, 3 (E.D. Ill. 1938) (setting out the original text of the rule). The substance of the rule has not changed since.

3. In 1970, Congress amended the Bankruptcy Act to include a new § 14f, making the discharge in bankruptcy self-effectuating and so eliminating the need for its asser-

tion as an affirmative defense.² The House Report accompanying the amendment made this point emphatically:

[T]he major purpose of the proposed legislation is to effectuate, more fully, the discharge in bankruptcy by rendering it less subject to abuse by harassing creditors. Under present law creditors are permitted to bring suit in State courts after a discharge in bankruptcy has been granted and many do so in the hope the debtor will not appear in that action, relying to his detriment upon the discharge. Often the debtor in fact does not appear because of such misplaced reliance, or an inability to retain an attorney due to lack of funds, or because he was not properly served. As a result a default judgment is taken against him and his wages or property may again be subjected to garnishment or levy. All this results because the discharge is an affirmative defense which, if not pleaded, is waived.

H.R. Rep. No. 91-1502, at 1-2 (1970), as reprinted in 1970 U.S.C.C.A.N. 4156, 4156.

4. With the adoption of the Bankruptcy Code in 1978, § 524(a) replaced former § 14f. New § 524(a) employed different terminology, but it did not contract the scope of the § 14f discharge. To the contrary, the legislative history indicates that Congress in-

² Former § 14f stated:

An order of discharge shall—

(1) declare that any judgment theretofore or thereafter obtained in any other court is null and void as a determination of the personal liability of the bankrupt with respect to any of the following: (a) debts not excepted from the discharge under subdivision a of section 17 of this Act; (b) debts discharged under paragraph (2) of subdivision c of section 17 of this Act; and (c) debts determined to be discharged under paragraph (3) of subdivision c of section 17 of this Act; and

(2) enjoin all creditors whose debts are discharged from thereafter instituting or continuing any action or employing any process to collect such debts as personal liabilities of the bankrupt.

Bankruptcy Act of 1898, § 14f, codified at 11 U.S.C. § 362(f), enacted by Pub.L. 91-467, § 3, 84 Stat. 990, 991 (1970).

tended the Bankruptcy Code to expand the discharge, with an absolute prohibition against enforcing any waiver of a particular debt:

Subsection (a) specifies that a discharge in a bankruptcy case voids any judgment to the extent that it is a determination of the personal liability of the debtor with respect to a prepetition debt, and operates as an injunction against the commencement or continuation of an action . . . to collect . . . any discharged debt as a personal liability of the debtor. . . whether or not the debtor has waived discharge of the debt involved. The injunction is to give complete effect to the discharge and to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts. This paragraph has been expanded over a comparable provision in Bankruptcy Act § 14f to cover any act to collect The change is . . . intended to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it. In effect the discharge extinguishes the debt, and creditors may not attempt to avoid that. The language “whether or not discharge of such debt is waived” is intended to prevent waiver of discharge of a particular debt from defeating the purposes of this section.

H.R. Rep. No. 95-595, at 365-66 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6321-22;

S. Rep. No. 95-989, at 80 (1978), as reprinted in 1978 U.S.C.C.A.N. 5787, 5866.

D. Decisions interpreting § 524(a)

The DOJ has argued that the “considerable majority of courts have applied Rule 8(c).” (Memorandum at 2.) The meaning of this assertion is unclear. Although, as discussed below, a number of courts have enforced waivers of the bankruptcy discharge under Rule 8(c), they have done so without considering whether § 524(a) required a different result. The decisions actually addressing the impact of § 524(a) have all held that failure to assert a bankruptcy discharge as an affirmative defense does not result in a waiver.

The leading case is *Lone Star Sec. & Video, Inc. v. Gurrola (In re Gurrola)*, 328 B.R. 158, 170 (B.A.P. 9th Cir. 2005), which details the history of § 524(a) summarized above and holds “that the defense of discharge in bankruptcy is now an absolute nonwaivable defense.” Thus, the decision notes, “Since 1970, [discharge in bankruptcy] has not been an affirmative defense.” *Id.* *Gurrola* has been cited with approval both in judicial opinions and in secondary sources, most recently in *In re Jones*, 389 B.R. 146, 161-65 (Bankr. D. Mont. 2008), and 4 *Collier on Bankruptcy* ¶ 524.02 [2] at 524-15 & n.6A (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2008) (citing *Gurrola* in observing that “Section 524(a)(1) is meant to operate automatically, with no need for the debtor to assert the discharge to render the judgment void,” so that “a creditor cannot claim that the voidness of the judgment was waived under a theory of estoppel when a debtor fails to raise the discharge as a defense”).

Even before *Gurrola*, the impact of § 524(a) was widely recognized. See, for example, *Braun v. Champion Credit Union (In re Braun)*, 141 B.R. 133 (Bankr. N.D. Ohio 1992), *aff’d and remanded*, 152 B.R. 466 (N.D. Ohio 1993), which both rejected a waiver argument based on the debtor’s failure to assert discharge as an affirmative defense and imposed sanctions for the creditor’s pursuit of its action. Recently, the Sixth Circuit cited *Braun* in holding that § 524(a) makes it unnecessary for a debtor to take any action in response to a post-discharge collection suit. *Hamilton v. Herr et al. (In re Hamilton)*, 540 F.3d 367, 373 (6th Cir. 2008) (stating that “a debtor need not raise his discharge in bank-

ruptcy as an affirmative defense, because thanks to § 524(a), such an affirmative defense is unnecessary and has been since 1970” (internal quotations omitted)). Many other decisions have reached the same conclusion.³

The decisions cited by the DOJ in no way contradict this interpretation of § 524(a). The first decision the DOJ cites is illustrative. *Bauers v. Board of Regents of Univ. of Wisconsin*, 33 Fed. Appx. 812, 2002 WL 486062 (7th Cir. 2002), an unsigned, non-precedential order, involved a debtor who brought suit against her former employer and failed to assert her bankruptcy discharge in response to counterclaim by the employer. The Seventh Circuit did indeed affirm the district court’s ruling that the debtor waived the defense of discharge in bankruptcy as a result, citing Rule 8(c). However, the decision does not discuss or even mention § 524(a), and so does not support of the

³See, e.g., *Roos v. Kimmel (In re Kimmel)*, 378 B.R. 630, 638 (B.A.P. 9th Cir. 2007) (holding that “the Chapter 7 discharge is absolute and, in light of the anti-waiver provisions of § 524(a), does not admit of an equitable exception that would permit it to be waived by postdischarge conduct”); *Pavelich et al. v. McCormick, Barstow, Sheppard, Wayte & Carruth LLP (In re Pavelich)*, 229 B.R. 777, 781-82 (B.A.P. 9th Cir. 1999) (“The affirmative nature of the defense of discharge in bankruptcy . . . was effectively outlawed in 1970. It became an absolute defense that relieved a discharged debtor from the need to defend a subsequent action in state court.”); *Gilberston v. PEI/Genesis, Inc.*, No. 06-3341, 2007 WL 2710437, at *2 (Bankr. D. Or. Sept. 12, 2007) (“[A]s a matter of federal bankruptcy law, debtor’s failure to raise the defense of discharge in the post-discharge state court fraud action did not constitute a waiver of that defense.”); *In re Bock*, 297 B.R. 22, 332 (Bankr. W.D.N.C. 2002) (finding that the debtor did not waive her discharge by failing to plead her bankruptcy discharge as an affirmative defense in a state court collection action); *Bishop v. Conley (In re Conley)*, Nos. 98-30339, 98-6363, 1999 WL 33490228, at *8 (Bankr. D. Idaho Dec. 10, 1999) (holding that “a Debtor need not assert the discharge injunction as an affirmative defense in order to later pursue the argument that the judgment is void under § 524”).

DOJ's position that § 524(a) allows waiver of discharge through non-assertion of an affirmative defense. The same is true of each of the decisions cited by the DOJ. None of them offers any analysis of § 524(a); each simply applies Rule 8(c) without considering the effect of § 524(a) on waiver of discharge.

It does not appear that any court has published an opinion construing § 524(a) in the manner that the DOJ advocates.

E. Practical considerations

The proper interpretation of § 524(a)—voiding all judgments that contradict a bankruptcy discharge and prohibiting waivers of the discharge—makes it clear that Rule 8(c)'s inclusion of discharge in bankruptcy as an affirmative defense has been superseded. But because the rule still includes the defense, a number of courts—as reflected in the decisions cited by the DOJ—have been misled into finding that debtors have waived their bankruptcy discharges by failing to plead them affirmatively in subsequent collection actions. The fact that the rule's present form causes erroneous rulings presents a powerful practical reason to adopt the change proposed by the Civil Rules Committee.

The DOJ suggests that practical problems will arise if discharge in bankruptcy is no longer listed in Rule 8(c). The simple answer is that changing the rule will not change the law: whatever practical problems the non-waivable discharge creates will exist whether or not the rule is changed. The only effect of changing the rule will be to

eliminate confusion by making the rule consistent with § 524(a), which is in fact the governing law.

Nevertheless, it is worth noting that § 524(a) does not cause significant difficulties in practice. The problems mentioned by the DOJ arise either from the nondischargeability of certain debts or from the failure of a debtor to give notice of the bankruptcy filing to a creditor pursuing collection. The general response to the DOJ's concerns is that questions of dischargeability can usually be determined by a non-bankruptcy court with no violation of the discharge injunction, and a creditor who inadvertently takes action that violates the discharge, without knowledge of the bankruptcy filing, will not be sanctioned for the violation.

The DOJ offers five scenarios to illustrate the effect of eliminating discharge in bankruptcy from Rule 8(c). Since each involves post-discharge collection actions by creditors, the simplest response is to lay out the three possibilities that exist in connection with any such action.

1. *The creditor obtains a determination of dischargeability before pursuing a collection action.*

Section 524(a) only applies to actions to collect a discharged debt, not to actions to determine whether a debt is excepted from discharge. Thus, a creditor may seek a determination of dischargeability without violating the discharge injunction. Certain types of debts—for fraud, breach of fiduciary duty, and willful and malicious injury, as defined in § 523(a)(2),(4), and (6) of the Bankruptcy Code—can only be excepted from

discharge during the bankruptcy case itself. All other kinds of nondischargeability—for student loans, domestic support obligations, and certain tax debts, among others—can be determined by any court of competent jurisdiction. If a creditor raises the question of dischargeability in an appropriate forum, and if the debtor defaults or if there is a ruling on the merits that the debt is in fact excepted from discharge, the creditor may proceed with collection. Rule 8(c) has no application in this situation.

2. The creditor pursues collection activity without a prior determination of dischargeability and the debtor never raises the discharge.

For several reasons, a creditor might pursue collection activity without first obtaining a ruling that the debt is excepted from the debtor's discharge. The creditor may not know the bankruptcy was filed; the creditor may be confident that the debt is in fact excepted from discharge; or the creditor may simply hope that the debtor will not assert the discharge. If the debtor knows that a particular debt is excepted from discharge—for example, a tax obligation that has previously been found to arise from a fraudulent return or a student loan that the debtor can clearly pay without undue hardship—it is unlikely that the debtor will raise the discharge in response to a collection action. Regardless of the reason, if the creditor pursues collection and the debtor never raises the discharge, the creditor will obviously be able to complete the proceeding with no application of § 524(a) or Rule 8(c).

3. The creditor pursues collection activity without a prior determination of dischargeability and the debtor asserts the discharge.

The final possibility is that the creditor pursues a collection action after the debtor's bankruptcy, and the debtor does raise the discharge, either as an affirmative defense at the beginning of the action or later, perhaps when the creditor seeks to enforce a judgment in the collection action. It is in this situation that § 524(a) and Rule 8(c) have their effect.

As discussed above, the effect of § 524(a)—like former § 14f—is that debtors cannot waive discharge and that all judgments on discharged debts are void, eliminating the possibility of debtors losing their discharge by failing to respond promptly to a collection action. This imposes no substantial additional burden on creditors or the courts. A debtor who has received a discharge in bankruptcy is unlikely to incur the expense and inconvenience of contesting a collection action on the merits without raising the discharge. Therefore, most collection judgments subject to collateral attack as violations of a bankruptcy discharge will be default judgments. Addressing the question of dischargeability of the debt after such a judgment will involve the same issues and impose the same costs as if the question had been addressed before the judgment was entered.

On the other hand, the effect of current Rule 8(c) has been to cause some courts to overlook § 524(a), allowing creditors to obtain judgments on potentially discharged debts simply because the debtor did not plead the discharge affirmatively. In such cases, Rule 8(c) may persuade the debtor—incorrectly—that there was in fact an effec-

tive waiver. But if the debtor seeks to challenge the finding of waiver, there will be substantial additional costs for all of the parties, in post-judgment motions or appeals, before the question of dischargeability can be addressed on the merits. There are no legitimate cost-savings as a result of retaining the misleading rule provision.

Finally, there is the question of sanctions. It would indeed be unfair to assess sanctions for violation of the discharge injunction against a creditor who pursues a collection action without knowing of the debtor's bankruptcy or otherwise in good faith. However, Rule 8(c) waivers are unnecessary to avoid this result. In ruling on debtors' requests to enforce the discharge, courts have consistently declined to sanction creditors acting in good faith. "[A]s long as a creditor has a good faith basis for believing that its debt was excepted from discharge or . . . had no knowledge of any such discharge, the creditor is not subject to sanctions for violating the discharge injunction when it proceeds in state court." *In re Everly*, 346 B.R. 791, 797-98 (B.A.P. 8th Cir. 2006).

Conclusion

Discharge in bankruptcy is not a waivable affirmative defense. The inclusion of the bankruptcy discharge in Rule 8(c) is incorrect as a matter of law and misleading in practice. Accordingly, the Advisory Committee on Bankruptcy Rules recommends adoption of the proposed amendment removing discharge in bankruptcy from Rule 8(c).



U. S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

April 16, 2009

MEMORANDUM

TO: Advisory Committee on Federal Rules of Civil Procedure
(Attn: Professor Edward Cooper, Reporter)

FROM: *MFH* Michael F. Hertz
Acting Assistant Attorney General

SUBJECT: Response to March 27, 2009 Recommendation of the Advisory
Committee on Bankruptcy Rules Procedure: Deletion of Discharge
in Bankruptcy as an Affirmative Defense in Civil Rule 8(c)

This responds to the March 27, 2009 recommendation of the Advisory Committee on Bankruptcy Rules Procedure ("BRC Memo") regarding the deletion of discharge in bankruptcy from the list of affirmative defenses in Rule 8(c) of the Federal Rules of Civil Procedure. Although we respectfully disagree with that recommendation, we appreciate the Bankruptcy Rules Committee's considering the Department's concerns.

We continue to believe that the proposed change is ill-founded. We recognize that § 524(a) of the Bankruptcy Code voids a judgment with respect to a debt discharged under the Code "whether or not discharge of such a debt is waived." If the proposed change were limited to post-discharge collection actions in which the application of the discharge could not reasonably be disputed, we would not have much difficulty with the proposed change, and suggest below an alternative amendment to Rule 8(c) that would limit rather than eliminate the applicability of the affirmative defense. But, given the remedies and even contempt sanctions available for violations of the discharge injunction, we believe such clear-cut cases are rare – and, if a judgment was entered in such a case, the judgment could be voided either under Rule 60(b) or by a proceeding in the bankruptcy court precisely because it violated the discharge injunction in § 524(a)(2). If the Committee rejects our more limited change and determines to eliminate the affirmative defense, we renew our request that changes be made to the proposed Committee Note to avoid inappropriate inferences that could encourage debtors to ignore post-discharge suits even in cases in which a debt may qualify for an exception to discharge.

The proposed Rule 8(c) change would implicate not only situations in which the application of the discharge is clear-cut, but also those in which it is unclear, due to the multiple

exceptions to discharge found in § 523(a) of the Bankruptcy Code.¹ Such debatable cases present a question that can, and should, be resolved by the court entertaining the subsequent collection action. Retaining discharge in bankruptcy as an affirmative defense assures, as a matter of pleading, that the issue is promptly joined in such cases and then addressed by the court and, when a judgment is entered, it is not subject to collateral attack. This promotes judicial efficiency and avoids opportunities for forum shopping or delay.

Our principal concern is that the proposed amendment, or its accompanying Committee Note, might be interpreted to suggest that debtors may ignore post-discharge complaints in non-bankruptcy courts even when it is clear that the creditor has plausible grounds for an exception. Or, worse, the change might be misconstrued to suggest that debtors may fully litigate the merits of a debt without mentioning the discharge issue until after a judgment and the exhaustion of appeals and then go to a bankruptcy court to undo years of litigation.

In this regard, our central thesis has always been and remains that, because § 524(a)(1) only voids judgments respecting *discharged* debts, it remains necessary to ascertain whether a non-bankruptcy court has jurisdiction to determine whether a debt was discharged and, if there is jurisdiction, discharge would logically be a justiciable defense subject to rules regarding preclusion.² In that regard, the BRC Memo cites several cases that stress legislative history to a 1970 amendment to the old discharge provision and observe that Congress in 1970 intended to give bankruptcy courts exclusive jurisdiction over certain dischargeability determinations. But, in 1978, Congress not only changed the language of the discharge provision, but also explicitly made bankruptcy jurisdiction “not exclusive” with respect to dischargeability determinations, and it reiterated this in 1984 when the jurisdiction provisions were completely revamped. 28 U.S.C. § 1471(b) (1978 to 1984); 28 U.S.C. § 1334(b) (1984 to present). Accordingly, non-bankruptcy courts have concurrent jurisdiction to determine whether exceptions to discharge apply to any particular debt, as numerous cases since 1978 have held. Normally, if a court has jurisdiction to determine a defense to judgment, the judgment operates as *res judicata* as to that defense whether it was raised or not.

We acknowledge that some courts interpreting § 524 continue to opine, notwithstanding the 1978 enactment of “not exclusive” jurisdiction, that bankruptcy courts have exclusive jurisdiction over dischargeability determinations, but those decisions almost invariably involve the

¹ This is not to suggest that § 524(a)(1)’s provision voiding judgments for discharged debts applies only to “clearly” discharged debts. Our point in this connection was only that § 524(a)(2), which separately enjoins post-discharge suits to collect a discharged debt, has widely been held *not* to bar a suit if the creditor has a colorable claim that an exception to discharge applies.

² The BRC Memo disagrees with our secondary argument that the present tense verb, “voids,” in § 524(a) suggests that the judgments voided are those existing when the discharge is entered (and that the “at any time obtained” language assures applicability to post-petition as well as prepetition judgments, bearing in mind that years often elapse between a petition and a discharge). This argument was peripheral to our main position that only judgments for “discharged” debts are voided and non-bankruptcy courts have jurisdiction to determine whether a particular debt was discharged or not.

class of dischargeability determinations for which creditors (who have notice of the case) must file a dischargeability complaint in the bankruptcy court during the bankruptcy case pursuant to § 523(c) – currently for debts described in § 523(a)(2), (4), and (6), which together generally encompass debts involving misrepresentations, fraud, and intentional torts. Some cases explicitly limit their holdings to state court judgments regarding these kinds of claims, while others are less careful. A good example cited in the BRC Memo is *In re Bock*, 297 B.R. 22, 32 (Bankr. W.D.N.C. 2002). In concluding that “the debtor did not waive her discharge by failing to plead her bankruptcy discharge as an affirmative defense in a state court collection action,” *Bock* acknowledged that the creditor had a good argument that the *Rooker-Feldman* doctrine required giving preclusive effect to the state court judgment, but held that the state court lacked subject matter jurisdiction to determine dischargeability only for the kinds of debts for which § 523(c) of the Bankruptcy Code requires the filing of a timely complaint in the bankruptcy case by a creditor having notice of the bankruptcy (which was true of the creditor in *Bock*). It therefore held that the state court complaint both violated the discharge injunction provided in § 524(a)(2) and was void under § 524(a)(1). *See also Rein v. Providian Financial Corp.*, 270 F.3d 895, 904 & n.15 (9th Cir. 2001) (“[b]ankruptcy courts and state courts have concurrent jurisdiction over all nondischargeability actions except those brought under § 523(a)(2), (4), (6) and (15)”)³. Even under pre-1978 law, before jurisdiction was made explicitly “not exclusive,” the Tenth Circuit had held that Congress only meant exclusive jurisdiction to apply to those issues requiring a timely complaint under old Bankruptcy Act § 17c – the analogue to current Code § 523(c). *Goss v. Goss*, 722 F.2d 599 (10th Cir. 1983). The Tenth Circuit therefore held that a state court judgment was *res judicata* barring a claim of discharge where the basis for an exception was not one requiring a complaint in the bankruptcy court.

While we urge that Rule 8(c) remain unamended, we have alternatively proposed, consistent with the reasoning in *Bock*, *Rein*, *Goss*, and similar cases, that discharge in bankruptcy at least be retained as an affirmative defense with respect to the kinds of debts for which a state court, or federal district court exercising non-bankruptcy jurisdiction, would undisputedly have concurrent jurisdiction to determine the applicability of an exception to discharge – *i.e.*, exceptions to discharge listed in § 523(a) other than those listed in § 523(a)(2), (4), or (6), for which § 523(c) requires a timely complaint to preserve the exception. In this regard, we expand somewhat upon

³ The BRC Memo (p. 9) and our March 4, 2009 Memorandum to the Bankruptcy Rules Committee (pp. 2-4) both treat as a “leading case” on the side of eliminating the affirmative defense the subsequent Ninth Circuit BAP decision, *In re Gurrola*, 328 B.R. 158 (BAP 9th Cir. 2005). It should be noted that *Gurrola* does not cite the Court of Appeals’ decision in *Rein*. As we noted, *Gurrola* can be explained by reasoning less sweeping than it employed. It involved a debt that was undisputedly discharged and the default judgment, although post-discharge, was premised upon a complaint and a default entry both filed in violation of the automatic stay of 11 U.S.C. § 362. Accordingly, the post-discharge motion for default judgment plainly violated § 524(a)(2) and the resulting judgment was plainly void for that reason alone.

our earlier, narrower, proposed amendment to Rule 8(c) by proposing to add the following parenthetical:

(c) Affirmative Defenses.

(1) *In General.* In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

* * *

- discharge in bankruptcy (unless the action is enjoined by 11 U.S.C. § 524(a)(2) or the party stating a claim for relief on a debt is precluded from asserting an exception to discharge by a prior judgment of dischargeability or by 11 U.S.C. § 523(c));

A Committee Note could clarify that this is not intended to preclude relief under Rule 60(b) even as to other kinds of debts if the debtor reasonably believed that he or she was not required to respond to the pleading.⁴

If the Committee is not inclined to reject the proposed change or adopt our more tailored version, we ask that, at a minimum, it modify its Committee Note in two respects.

First, the sentence, “The consequences of a discharge cannot be waived,” is a conclusion of substantive law which is unnecessary, and perhaps even misleading, for purposes of explaining the change. We do not believe that failing to raise a defense through litigation (or the failure to appear and defend) is identical with “waiving” the defense, and thus prohibited by the final clause in § 524(a)(1) of the Bankruptcy Code. For example, assume a creditor explicitly pleads that an exception to discharge applies and the debtor defaults (or admits the allegation and then, after a judgment is entered, changes his or her mind). If the anti-waiver language in § 524(a)(1) refers not merely to agreements in which the discharge of a particular debt is affirmatively waived but also to loss, through a tactical decision, procedural error or default in litigation, of the claim that the debt was discharged, a debtor could collaterally attack in the bankruptcy court any judgment involving a debt which arguably was discharged.⁵ The Supreme Court has recognized the distinction

⁴ Our March 4, 2009 memorandum to the Bankruptcy Rules Committee additionally suggested a possible new provision in Rule 60(d) to the effect that the rule does not limit a bankruptcy court’s power to “grant relief from the judgment under 11 U.S.C. § 105(a) if the judgment was obtained in violation of 11 U.S.C. § 524(a).” It also suggested a possible amendment to Rule 55(c)’s provision for relief from defaults to clarify that “Good cause may include that a defendant reasonably believed that 11 U.S.C. § 524 made it unnecessary to respond to the complaint” and/or to specify that “The court shall set aside a default if the complaint was filed or the default entered in violation of 11 U.S.C. §§ 362 or 524.”

⁵ In that regard, anything short of actual litigation could arguably be characterized loosely as a kind of “waiver” of the discharge defense, including failure to comply with a pretrial order requiring parties to file statements of all factual and legal issues to be tried. Indeed, some courts have gone still further and stated – we submit incorrectly – that even if a state court explicitly rules on dischargeability, a bankruptcy court may second guess the ruling. See *In re Hamilton*, 540 F.3d 367, 373 (6th Cir. 2008) (*dictum* endorsing the view of *In re Pavelich*, 229 B.R. 777, 781-84

between a waiver and the simple loss or forfeiture of a right. For example, in *Kontrick v. Ryan*, 540 U.S. 443, 458 & n.13 (2004), the Court considered whether a debtor could belatedly raise a time limitation barring a creditor's right to seek denial of the debtor's discharge. Agreeing that the issue was "more accurately described as one of forfeiture rather than waiver," the Court observed that, "Although jurists often use the word interchangeably, forfeiture is the failure to make the timely assertion of a right[;] waiver is the 'intentional relinquishment or abandonment of a known right.'" *Id.* (citations and some internal quotation marks omitted). Thus, it held that the time bar could be forfeited. The Supreme Court used this same reasoning when it considered another non-waiver provision in the Bankruptcy Code similar to that found in § 524(a)(1). *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007).⁶ Consistent with the reasoning of *Kontrick*, lower courts have held that a debtor who fails to raise discharge in a post-discharge suit loses the defense, at least in situations where a § 523(c) complaint was not required to preserve an exception to discharge.⁷

(B.A.P. 9th Cir. 1999), that "state courts are allowed to construe the discharge in bankruptcy, but what they are not allowed to do is construe the discharge incorrectly." *But see In re Ferren*, 203 F.3d 559 (8th Cir. 2000) (rejecting *Pavelich* insofar as it suggests that § 524(a) provides an exception to the *Rooker-Feldman* doctrine, permitting review of final state court judgments regarding dischargeability); *In re Toussaint*, 259 B.R. 96, 102 (Bankr. E.D.N.C. 2000) (stating that *Pavelich*'s "logic is flawed"). *Pavelich*'s statement also ignored prior binding precedent in that circuit. *See In re Siragusa*, 27 F.3d 406, 407-08 (9th Cir. 1994) (rejecting the argument that § 524 meant the bankruptcy court could second guess a state court's determination, after discharge, that a debt was nondischargeable alimony rather than a property settlement debt that would have been dischargeable as the law existed at that time). *See also Eden v. Robert A. Chapski, Ltd.*, 405 F.3d 582 (7th Cir. 2005) (debtor could not litigate dischargeability in an adversary proceeding after litigating it in state court; declining to construe bankruptcy court order as having precluded the state court from determining the issue, and expressing doubt over whether the bankruptcy court would even have the power to have reserved the issue to itself in light of the concurrent jurisdiction granted by Congress).

⁶ In *Marrama*, the Court considered whether a debtor's misconduct could cause him to lose his right under § 706(a) of the Bankruptcy Code to convert a bankruptcy case from chapter 7 to chapter 11, 12, or 13, notwithstanding the following language in that section: "Any waiver of the right to convert a case under this subsection is unenforceable." Finding that it could, it held, "A statutory provision protecting a borrower from waiver is not a shield against forfeiture." *Id.* at 374. Our March 4, 2009 memorandum to the Bankruptcy Rules Committee also discussed substantial legislative history indicating that the clause, "whether or not a discharge of such debt is waived," referred to *agreements* to waive dischargeability of debt.

⁷ *See, e.g. In re Scott*, 244 B.R. 885 (Bankr. E.D.Mich., 1999) (rejecting the argument that § 524 alleviated a debtor's need to respond to a post-discharge complaint given that the state court had subject matter jurisdiction to determine dischargeability and that Michigan law would treat a discharge defense as precluded by *res judicata* where the issue could have been raised); *In re Read*, 183 B.R. 107, 111-12 (Bankr. E.D.La. 1995) (because Florida court had determined that debtor was liable for alimony, and because debtor could have argued in that post-discharge proceeding that the claim was really one for a property settlement dischargeable under old § 523(a)(15) only if a timely § 523(c) complaint was commenced, Florida judgment was *res judicata* on the issue of

If the Committee believes it must refer to the waiver provision, we request that the Note explain that the change is primarily to assure that the defense of discharge is not lost merely by the failure to include it in an initial pleading, but then leave to substantive law questions such as whether a debtor may ignore a complaint that asserts an exception to discharge (other than one barred by § 523(c)), or that pleads facts which, if proven, would establish such an exception, and whether a debtor may appear to defend an action on a debt and not only fail to include discharge in a responsive pleading but also fail to raise it at any time prior to judgment, and still retain a right to assert discharge of the debt.

Second, we support the suggestion in the introduction to the Rule 8(c) matter in the agenda book proposing to delete the last sentence of the draft Committee Note since, as our prior memoranda have shown, it is widely recognized that bankruptcy and non-bankruptcy courts have concurrent jurisdiction to determine the application of most exceptions to discharge. In any event, this statement of substantive law is unnecessary to explain the proposed change in Rule 8(c).



**PROPOSED AMENDMENT TO THE
SUPPLEMENTAL RULES FOR ADMIRALTY OR
MARITIME CLAIMS AND ASSET FORFEITURE
ACTIONS¹**

**Rule E. Actions in Rem and Quasi in Rem: General
Provisions:**

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**(4) Execution of Process; Marshal’s Return; Custody
of Property; Procedures for Release.**

**(f) *Procedure for Release From Arrest or
Attachment.*** Whenever property is arrested
or attached, any person claiming an interest in
it shall be entitled to a prompt hearing at
which the plaintiff shall be required to show
why the arrest or attachment should not be
vacated or other relief granted consistent with
these rules. ~~This subdivision shall have no
application to suits for seamen’s wages when~~

¹New material is underlined; matter to be omitted is lined through.

14 ~~process is issued upon a certification of~~
15 ~~sufficient cause filed pursuant to Title 46,~~
16 ~~U.S.C. §§ 603 and 604 or to actions by the~~
17 ~~United States for forfeitures for violation of~~
18 ~~any statute of the United States.~~
19 [Supplemental Rule G governs hearings in a
20 forfeiture action.]

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COMMITTEE NOTE

Paragraph 4(f) is amended by striking the final sentence. The sentence referred first to statutory provisions applying to suits for seamen's wages; those provisions have been repealed. The sentence also stated that this "subdivision" — apparently referring to paragraph (f) — did not apply to actions by the United States for forfeitures for violating a United States statute. Supplemental Rule G, added in 2006, provides a comprehensive procedure for forfeiture actions in rem. [Supplemental Rule E applies only to the extent that Rule G does not address an issue. Rule G governs hearings in a civil forfeiture action. It is no longer necessary to state an exception in Rule E(4)(f).]

Although publication is recommended, it also is recommended that publication be deferred until some other Civil Rules are published for comment. There is no apparent urgency about this proposal.

Style changes may be appropriate, despite the decision not to extend the Style Project to the Supplemental Rules generally. A restyled rule might look like this:

(f) *Release From Arrest or Attachment.* A person claiming an interest in property that has been arrested or attached is entitled to a prompt hearing. The plaintiff must show cause why the arrest or attachment should not be vacated or [why] other relief [should not be] granted.



DRAFT MINUTES
CIVIL RULES ADVISORY COMMITTEE
APRIL 20-21, 2009

1 The Civil Rules Advisory Committee met in Chicago at the Northwestern Law School on
2 April 20 and 21, 2009. The meeting was attended by Judge Mark R. Kravitz, Chair; Judge Michael
3 M. Baylson; Judge David G. Campbell; Judge Steven M. Colloton; Professor Steven S. Gensler;
4 Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Hon. Michael F. Hertz; Peter D. Keisler, Esq.;
5 Judge John G. Koeltl; Chief Justice Randall T. Shepard; Anton R. Valukas, Esq.; Chilton Davis
6 Varner, Esq.; and Judge Vaughn R. Walker. Professor Edward H. Cooper was present as Reporter,
7 and Professor Richard L. Marcus was present as Associate Reporter. Judge Lee H. Rosenthal, Chair,
8 and Judge Diane P. Wood represented the Standing Committee, along with Professor Daniel R.
9 Coquillette, Standing Committee Reporter. Judge Eugene R. Wedoff attended as liaison from the
10 Bankruptcy Rules Committee. Laura A. Briggs, Esq., was the court-clerk representative. Peter G.
11 McCabe, John K. Rabiej, James Ishida, and Jeffrey Barr represented the Administrative Office.
12 Thomas Willging represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice,
13 was present. Andrea Kuperman, Rules Clerk for Judge Rosenthal, attended. Observers included
14 Alfred W. Cortese, Jr., Esq.; Joseph Garrison, Esq. (National Employment Lawyers Association
15 liaison); Jeffrey Greenbaum, Esq. (ABA Litigation Section liaison); Chris Kitchel, Esq. (American
16 College of Trial Lawyers liaison); Ken Lazarus, Esq. (American Medical Association); Professor
17 James Pfander; Lorna Schofield, Esq. (ABA Litigation Section); and John Vale, Esq. (American
18 Association for Justice).

19 Judge Kravitz opened the meeting by expressing thanks to Anton Valukas for helping to
20 make the arrangements for this meeting and to Northwestern Law School, particularly Dean David
21 Van Zandt, for providing the facilities and hospitality for the meeting. He noted that the Law School
22 has made wonderful progress under Dean Van Zandt's leadership. He also noted that two eminent
23 proceduralists, Professors Pfander and Redish, are here, and quoted from an article by Professor
24 Redish about the Rules Enabling Act. Dean Van Zandt welcomed the Committee, invited Committee
25 members to explore the school, and noted that its litigation program is one of the sources of special
26 pride at the Law School.

27 Judge Kravitz welcomed Acting Assistant Attorney General Michael Hertz, noting that
28 confirmation hearings for Tony West were to be held on this first day of the meeting.

29 Judge Kravitz also noted that this is the last official meeting for Judge Hagy, who is
30 completing his second term as a member. Judge Hagy has been an enthusiastic participant and
31 contributor whose thoughtful advice has made a difference at many points, most recently in his work
32 with the Rule 56 Subcommittee. Judge Rosenthal added that from his first meeting with the
33 Committee, Judge Hagy has provided helpful comments that are a fine blend of practical experience
34 with conceptual understanding. Judge Hagy responded that it has been an honor to work with the
35 Committee.

36 Judge Kravitz recalled that the January Standing Committee meeting had been described at
37 this Committee's February meeting in San Francisco. In March he and Judge Rosenthal addressed
38 the district-judge members of the Judicial Conference; the judges seemed relieved that the "point-
39 counterpoint" part of the current Rule 56 proposal is likely to be withdrawn from the
40 recommendation for adoption.

41 Judge Kravitz also noted that the Sunshine in Litigation Act has been introduced again in
42 Congress. The ABA has written a strong 3-page letter opposing enactment, urging that judges in
43 fact are acting appropriately in entering and supervising discovery protective orders. The Supreme
44 Court has adopted the Time Computation Rules, along with the other Civil Rules amendments
45 recommended by the Judicial Conference, and has sent them to Congress. Judge Rosenthal said that
46 legislation has been introduced to make the statutory changes recommended to complement the

47 Time Computation rules changes. The legislation seems to be making good progress. Congressional
48 staff are fully supportive.

49 *Minutes*

50 The Committee approved the draft Minutes for the November 2008 and February 2009
51 meetings, subject to correction of typographical and similar errors.

52 *Rule 56*

53 Judge Kravitz introduced Rule 56 by suggesting that this meeting may be the last session on
54 the current Rule 56 project. It has been a long and thorough inquiry. The issues have been clearly
55 focused with the help of extensive comments and testimony.

56 Judge Baylson began discussion by noting that the Rule 56 Subcommittee met twice by
57 conference call after the February Committee meeting. The Subcommittee reached
58 recommendations on some of the open issues and presented other issues for discussion without
59 recommendations.

60 Subdivision (a): “Fact”: The recommendation to delete the “point-counterpoint” aspect of published
61 Rule 56 led to transferring part of proposed (c)(2)(A)(i) to subdivision (a) — “A party may move
62 for summary judgment, identifying each claim or defense — or the part of each claim or defense —
63 on which summary judgment is sought * * *” Subcommittee discussion raised the question whether
64 “fact” should be included in the list: “each claim, fact, or defense * * *.” “Fact” is easily
65 encompassed as “part” of a claim or defense, and the Committee Note can comment on that. But
66 some Subcommittee members thought it desirable to call attention in rule text to the value of
67 summary judgment on even a single fact. A judge observed that it is not unusual to encounter a
68 motion for summary judgment on a single fact when the parties are unable to agree to it; the local
69 rules in the Central District of California provide for this. At the same time, several courts have
70 ruled that while present Rule 56(d) recognizes authority to establish a single fact in ruling on a
71 motion for summary judgment, it does not authorize a motion to establish a single fact. It may
72 suffice to say in the Note that a part of a claim or defense may be as simple as a single fact.

73 Further discussion observed that “fact” is used to signify different things. It can refer to a
74 historic fact. It also can refer to legal constructs — “negligence” and “intent” are often referred to
75 as questions of fact. So the question may be more elaborate — the question whether a defendant is
76 a statutory “employer,” for example, may turn on determining who is an “employee” for purposes
77 of determining whether there are fewer than 15 employees.

78 An alternative was suggested — the Committee Note could refer to determination of an
79 “element” of a claim or defense, rather than a “fact.” But again it may be asked what is an element?
80 Is it an element that the driver was negligent? That the defendant was the driver? That the vehicle
81 was driving 50 miles per hour in a 25-mile-per-hour zone, or only that it was driving faster than 25
82 miles per hour? Referring to an “element” may lead to conceptual wrangling that does nothing to
83 advance useful summary-judgment practice.

84 A different alternative was suggested — allow a motion on an “issue.”

85 Arguments were advanced to delete “fact” both from rule text and from the Committee Note.
86 Present Rule 56(d), revised as proposed Rule 56(g), authorizes disposition of a single fact when the
87 court does not grant all the relief requested by the motion. But Rule 56 should not invite motions
88 to establish a single fact. If it does that, lawyers may feel compelled to make motions they would
89 not now make. It is better to avoid motions on “Claim 1 and the following 36 facts * * *.” And if

90 “fact” is not in rule text, it may be better to leave it out of the Note for fear of encroaching on the
91 practice that a Note should not become an operational part of the rule.

92 A motion to insert “fact” in the rule text and Committee Note was defeated, 1 yes and all
93 others no.

94 Subdivision (a): “Shall”: In February the Committee concluded that “shall” should be restored,
95 despite the general style convention prohibiting any use of this word. Multiple comments on the
96 published proposal, which carried forward with “should” from the Style Project, show unacceptable
97 risks that either of the recognized alternatives, “must” or “should,” will cause a gradual shift of the
98 summary-judgment standard. Brief discussion reconfirmed the recommendation to restore “shall”
99 by unanimous vote.

100 Subdivision (a): “Identifying each claim, defense, or the part of each claim or defense — on which
101 summary judgment is sought”: An observer asked whether it was necessary to transfer this provision
102 into subdivision (a). It was drafted as part of the point-counterpoint procedure, to help focus the
103 motion. If point-counterpoint procedure is abandoned, as now proposed, it may invite more partial
104 motions. Perhaps the rule should fall back on the form as published: “A party may move for
105 summary judgment on all or part of a claim or defense.” A motion was made to take this step.

106 Referring to part of a claim or defense was defended on the ground that in practice there are
107 many motions for partial summary judgment. It is better to provide clear authority in the rule text.
108 To be sure, Rule 7(b)(1)(B) requires that any motion must “state with particularity the grounds for
109 seeking the order.” Added language in Rule 56 could be seen as redundant. But the emphasis is
110 different, and the reminder may be useful. If not here, where else would the incentive to brevity
111 appear?

112 Again it was suggested that the rule text could be shortened and supplemented by the
113 Committee Note, and again it was responded that anything that is important should be in the rule
114 text.

115 A judge observed that with some motions it is difficult to know what the movant is
116 requesting. “It will be useful to have something to point to in the Rule” when directing that the
117 motion be presented more clearly. Another judge agreed that such motions do appear. The direction
118 to correct the motion is to make it more specific.

119 An alternative was proposed: “identifying the basis on which summary judgment is sought.”
120 This alternative was resisted on the ground that “basis” is unclear, and can easily invite the movant
121 to make its arguments as part of the motion.

122 Another alternative was proposed: rearrange the same words, to read “A party may move for
123 summary judgment on all or part of a claim or defense, identifying each claim or defense — or the
124 part of each claim or defense — on which summary judgment is sought.”

125 The fear was again expressed that the focus on part of a claim or defense will invite more
126 motions on subparts of parts. A judge responded that summary judgments are sought so frequently
127 that it does not seem likely that a revised rule will lead to still more motions. Another judge offered
128 employment discrimination cases as an example. The employer, as defendant, “usually moves on
129 everything. Does it have to identify each piece”? Yet another judge observed that it is more likely
130 to be a plaintiff who moves for summary judgment on only part of a claim. Two other judges agreed
131 that a defendant is likely to move both for summary judgment on the entire action and also on
132 separate parts. The employer in a discrimination case, for example, is likely to argue the plaintiff

133 has failed to make a prima facie case, that the employer has articulated nondiscriminatory grounds
134 for the challenged action, and that the plaintiff has not shown pretext.

135 The subcommittee proposal was again supported on the ground that it avoids the motion that
136 “throws it all up against the wall.” The proposal requires the movant to identify clearly the basis
137 for the motion.

138 A motion to delete the reference to part of the claim or defense failed, 3 yes and 9 no. The
139 text will remain as proposed, minus “fact.”

140 Subdivision (a): “Shows”: The Subcommittee proposes that “show” be restored to the rule text. The
141 proposal focuses on the movant: the court shall grant summary judgment “if the movant shows”
142 there is no genuine dispute. Present Rule 56 directs that summary judgment be rendered if the
143 summary-judgment materials “show” that there is no genuine issue. “Show” has been in Rule 56
144 from the beginning. It helps to make clear that the movant has a summary-judgment burden. The
145 Celotex opinion requires even a movant who does not have the burden of production at trial to
146 “show” — that is, to point out — that there is no genuine issue.

147 It was pointed out that the emphasis in current Rule 56 is on what “the pleadings, the
148 discovery and disclosure materials on file, and any affidavits show.” That may seem at odds with
149 the decisions ruling, as proposed subdivision (c)(3) provides, that the court need consider only
150 materials called to its attention. It helps to focus on the showing made by the movant.

151 The question whether anything would be lost by deleting “the movant shows” was answered
152 by urging that this part of the Celotex opinion has acquired such meaning that it should be carried
153 forward in rule text.

154 It was agreed to retain “the movant shows.” It is useful as a reminder of the movant’s
155 burden.

156 Subdivision (a): Committee Note: Discussion turned to the draft Committee Note. Professor
157 Coquillette sounded a familiar theme with a reminder of the constraints imposed by the rule that a
158 Committee Note cannot be changed unless the rule is amended. It is important to avoid observations
159 that may become obsolete before there is any justification for changing the rule. One particular
160 manifestation of this constraint arises whenever specific cases are cited. Using cases as illustrations
161 is risky enough, but at times may be a permissible way of explaining a point. Using cases as
162 authority is riskier still. They may be modified or overruled. So the Note to subdivision (a) refers
163 to the three 1986 Supreme Court decisions as the source of contemporary summary-judgment
164 standards. That is accurate so long as “contemporary” is properly understood — it refers to the time
165 of the Committee Note. But if the Supreme Court expresses different approaches in later decisions,
166 there may be some confusion. The Note also quotes from two Supreme Court decisions in
167 explaining the change from “should” to “shall.” The very uncertainty of the debates about discretion
168 to deny summary judgment when there is no apparent genuine dispute of material fact suggests that
169 these opinions are likely to change.

170 The value of quoting the decisions on discretion to deny summary judgment was explained
171 by pointing to the Committee Note on the Style Project decision to substitute “should” for “shall.”
172 The Note cited the Kennedy case that is cited here in the quotation from Anderson v. Liberty Lobby.
173 It is important to provide a full explanation of the recommendation to restore “shall.” Further
174 support was expressed for this view, at the same time as further doubts were expressed about citing
175 the 1986 cases as the source of contemporary summary-judgment standards. But there also was

176 support for retaining the citations as the most important touchstone of current practice. “The most
177 important audience is today.”

178 A motion to delete citations of the three 1986 decisions as the source of contemporary
179 standards passed, 7 yes and 5 no. The quotations bearing on discretion will be retained.

180 On a finer point, it was thought awkward to refer to the Supreme Court decisions that seem
181 to touch on discretion — or perhaps to deny discretion — as “ambiguous and conflicting.” One
182 alternative might be “apparently ambiguous.” Further discussion led to deletion of “ambiguous and
183 conflicting.” The Note will explain that restoration of “shall” is suitable “in light of the case law
184 on whether the district court has discretion * * *.”

185 A final suggestion was to delete the part of the first sentence of the Committee Note stating
186 that Rule 56 is revised “to make the procedures more consistent with those already used in many
187 courts.” The suggestion was resisted on the ground that the current text of Rule 56 “little resembles
188 practice.” The proposal does improve the procedures, but it is even more about making them
189 consistent with common and better practices.

190 Subdivision (b): Time to Respond and Reply: As published, subdivision (b) set times to move, to
191 respond, and to reply. These times were an integral part of the point-counterpoint procedure in
192 proposed subdivision (c), which specified the separate steps of motion, response, and reply. As the
193 Time Project moved toward completion the Committee decided to take a chance on eventual
194 adoption of the point-counterpoint procedure by incorporating parallel time provisions in Rule 56.
195 If Congress does not act, on December 1, 2009, Rule 56 will include the times for response and
196 reply. The question is whether it is better to delete these times if, as proposed, the point-
197 counterpoint procedure is deleted from the national rule.

198 Deletion of national rule provisions on response and reply may alleviate the possibility of
199 confusion arising from setting times for steps that are not themselves specified in the rule. Although
200 subdivision (b) allows change by local rule, there still may be some interference with various
201 methods of presenting the motion. A court may, for example, direct simultaneous presentation of
202 motion and response in a form that facilitates identification of the fact contentions and
203 corresponding record materials. The rules do not generally reach this level of detail — times are set
204 for some motions, though not others, and times for response and briefing are left for other devices.
205 Deletion also will avoid the difficult question whether provision should be made for surreplies.

206 Deletion of these provisions, however, may be strategically unwise. There are constant
207 complaints that the rules are changed too often. Acting one year later to retract amendments the bar
208 has barely had time to master will add support for these complaints. The recommendation to restore
209 “shall” in subdivision (a), shortly after the Style Project adopted “should,” will add to a possible
210 sense the Committee is vacillating.

211 Several reasons were offered to show that retaining the times for response and reply will do
212 little harm. The proposal allows local rules to set different times. There are lots of local rules; if
213 the national-rule periods are incompatible with local summary-judgment practice, we can count on
214 local rules committees to set appropriate alternative periods. Case-specific orders also will be used
215 when needed. The times proposed in subdivision (b), moreover, are consistent with common local-
216 rule periods. And reactions to the rule as published did not reflect any significant anguish about
217 setting times for response and reply — most of the concerns that were expressed went to the time
218 for making the motion.

219 Discussion continued with the Subcommittee's suggestion that the Committee Note can
220 explain the reasons for the Time Project change and for retracting it. At the same time, there may
221 be little harm done by setting a 21-day period to respond. The time to "reply" may generate more
222 confusion, particularly in districts that do not follow a point-counterpoint procedure. In those
223 districts, this might seem to be a time for reply briefs.

224 The problem of surreplies was brought back. Many of the plaintiff-side lawyers who
225 commented argued forcefully that they should have a right of surreply. They note that at trial the
226 plaintiff has the right to open and close. When a defendant moves for summary judgment, it is
227 unfair to reverse the order so that the defendant gets to open and then to close by a reply that admits
228 of no surreply. Some of the comments reflected concern that defendants at times deliberately make
229 vague motions that elicit a clear response, only to follow up with a reply that for the first time
230 presents new facts and arguments that the plaintiff cannot respond to. Early drafts of the present
231 proposal included a time to surreply. The provision was deleted, however, out of concern that it
232 would invite undesirable proliferation of papers in cases that do not need so many steps.

233 One possible approach would be to provide that the time for steps after the motion must be
234 set by the court. But that would impose a specific scheduling order obligation for every case. Times
235 for motions are set in many courts by local rule; it would be undesirable to require case-specific
236 orders. One judge responded that his court has a local rule that sets times, but that he always
237 requires the parties to appear before a summary-judgment motion is made, and sets times for the
238 steps "irrespective of the local rule."

239 Support was offered for deleting the times for response and reply. In part, it was urged that
240 if there is a reply, the Committee must determine whether there should be a general provision for
241 surreplies. Further discussion led to an apparent consensus that it is better to delete the proposed
242 times for response and reply.

243 Weighing the values of adopting the better rule against the perception that the Committee
244 has fallen down in this particular recommendation is important. The balance seems clear to the
245 Committee. Part of the gain in simplicity is avoiding the need to confront the surreply question. A
246 rule that mandates a surreply opportunity is likely to elicit strong protests. The simple version
247 avoids that. And the perception of vacillating may not be much of a problem. The proposal
248 completely rewrites Rule 56. This change is one among many, tracing back to different times in the
249 life history of Rule 56. The Time Project, moreover, required coordination of all five advisory
250 committees. It could not be held back to match the uncertain but inevitably slower progress of the
251 Rule 56 proposal. It made sense to make the best prediction possible as part of the Time Project,
252 but to leave the way open to draft the best possible Rule 56. It took 40 years to consider serious
253 revision of Rule 56. It may be many years before it is again taken up. Memory of the short-lived
254 provisions added by the Time Project will fade away quickly. It is better to draft for the long run.

255 The Committee was reminded that the Department of Justice is concerned about losing the
256 specific part of published (b)(2) that set the time for response at "21 days after the motion is served
257 or that party's responsive pleading is due, whichever is later." The United States commonly has 60
258 days to answer. Absent a specific provision deferring the time to respond to a summary-judgment
259 motion, the summary-judgment response may be due well ahead of the answer. The Committee
260 Note might help, and most judges understand the problem, but the explicit rule text is desirable.

261 A motion to retain the response and reply time provisions in Rule 56(b) as published failed, 1
262 yes and 10 no. The tag line will be shortened: "Time to File a Motion, ~~Response, and Reply.~~"

263 Subdivision (b): Committee Note: The draft Committee Note on subdivision (b) includes in brackets
264 two sentences designed to explain the brief appearance and subsequent removal of provisions
265 governing the time for response and reply. The first suggestion was that there should be some
266 explanation of “the Time Project” if these sentences are retained. But it was suggested that the
267 sentences be deleted. All agreed. The explanation for the change can be set out in the Report to the
268 Standing Committee.

269 Subdivision (c)(1): The decision at the February meeting to omit the point-counterpoint provisions
270 in Rule 56(c)(1) and (2) as published leads to reorganizing the paragraphs in subdivision (c). The
271 reorganization begins by bringing the “pinpoint citation” requirements published as (c)(4) up to
272 become (c)(1). There was a broad consensus to carry this provision forward.

273 The Subcommittee divided on a suggestion that greater clarity would be achieved by adding
274 a few words: “An assertion in supporting or opposing a motion * * * must be supported by * * *.”
275 Others thought these words add little, unless it is to generate some confusion whether the support
276 or opposition is to be made part of the motion or part of a brief. Some districts now require that
277 citations to the record be made as part of a statement of undisputed facts. Other districts require that
278 it be in the brief. The requirement might be made part of the motion itself. “We do not want to
279 preempt local practice.”

280 This question relates, if only as a matter of drafting, to a second suggestion that the language
281 should be made active. The passive voice is permitted when it works better, but the active voice can
282 emphasize that parties’ responsibilities.

283 A motion to substitute an alternative suggested in the agenda materials passed without
284 opposition: “A party asserting that a fact cannot be genuinely disputed or is genuinely disputed must
285 support the assertion by: * * *.”

286 An observer suggested that it would be helpful to add a requirement of admissibility to the
287 citation requirement, something like; “citation to particular parts of the materials in the record that
288 would be admissible in evidence.” This is better than the negative in proposed (c)(2), allowing an
289 opposing party to challenge the admissibility of supporting or disputing evidence. A judge
290 responded that it is better to wait for objections, just as at trial. The parties may have good reasons
291 for not raising potential objections. Another judge added that some readers might be misled into
292 confusion about the role of affidavits, declarations, and depositions in summary-judgment practice.

293 Subdivision (c)(2): Admissibility Challenges: All agreed that there is no controversy about the
294 revised form of (c)(2), recognizing an assertion that the material cited to support or dispute a fact
295 cannot be presented in a form that would be admissible in evidence.

296 Subdivision (c)(3): Materials not Cited: The provision published as subdivision (c)(4)(B) has
297 become (c)(3). It provides that the court need consider only materials called to its attention under
298 Rule 56(c)(1). It further provides that the court may consider other materials in the record. The
299 published version required that the court give notice under Rule 56(f) before granting a motion on
300 the basis of record materials not cited by the parties, but did not require notice before denying a
301 motion on this basis. The American Bar Association recommended that notice be required before
302 granting a motion on this basis as well as before denying a motion. Discussion of this
303 recommendation led the Subcommittee to conclude that notice should not be required either for a
304 denial or for a grant. It was recognized that a court may err by relying on uncited materials while
305 failing to find still other materials that dispel the seeming effect of the materials it has found. But
306 there are common situations in which the court should not feel required to give notice. A party may

307 file an entire deposition transcript, for example, while citing to only part of it. The court should be
308 free to read the entire transcript and to evaluate the parts cited in light of the whole.

309 It was noted that proposed Rule 56(f) requires notice and a reasonable time to respond before
310 granting a motion on grounds not raised by the parties. Notice is not required only if the court relies
311 on uncited materials in the record to act on a ground that has been raised by the parties.

312 The Committee agreed to drop any notice requirement from subdivision (c)(3).

313 Subdivision (c)(4): Positions for Purposes of Motion Only: As published, proposed subdivision
314 (c)(4) provided that “A party may accept or dispute a fact either generally or for purposes of the
315 motion only.” Thoughtful comments suggested that there should be a “default” provision that
316 governs when a party fails to state whether its position is general or is limited to purposes of the
317 motion. The Subcommittee initially concluded that the rule should provide that the position is taken
318 for purposes of the motion only “unless the party expressly states that it is made generally.” But
319 doubts were expressed. One question was whether it would often happen that a party would
320 unilaterally agree to take a position for all purposes in the action. The first question put for
321 discussion was whether paragraph (4) should be omitted entirely.

322 The first comment was that there should be some provision recognizing the right to take a
323 position for purposes of the motion only. Litigants fear that “it will come back to bite me.” The rule
324 provision provides reassurance that a limitation on an acceptance is effective. “It’s a comfort
325 provision.” The reassurance also is valuable to protect against a ruling that taking a position for
326 purposes of the motion only authorizes the court to enter a subdivision (g) order that the fact is
327 established in the action.

328 The rejoinder was that elimination of the point-counterpoint provision removes the need for
329 an express limited-position provision. The original concern was that a party faced with a long
330 statement of undisputed facts may believe that many of the facts are not material, and find it better
331 to accept them for purposes of the motion than to face the time-consuming and expensive task of
332 offering a full pinpoint-citation response. The provision, moreover, will encourage parties to take
333 positions in motion practice that are fundamentally different from the positions that will be taken
334 at trial. A limited acceptance often will be followed by hot dispute at trial.

335 Elimination of this provision was further supported by noting that it is not necessary to
336 enable a party to both deny an asserted fact and to argue that it is not material. The problem of
337 overlong statements of facts in point-counterpoint practice has been described by many plaintiff-side
338 lawyers in employment cases. The same lawyers said that they would not accept a fact for purposes
339 of the motion only, that they cannot seem to accept a fact that they may want to dispute. Another
340 judge seconded this observation — a party can always respond “I deny, but even if true the fact
341 makes no difference.” The rule is cleaner without this provision.

342 Without a provision in rule text, it remains fair to recognize the limited position practice in
343 the Committee Note to subdivision (g). The Note can say that accepting a fact for purposes of the
344 motion only does not authorize the court, after refusing to grant all the relief requested by the
345 motion, to order that the fact is established in the case.

346 A motion to delete proposed subdivision (c)(4) passed, 10 yes and 1 no. A later motion to
347 reconsider failed for lack of any support.

348 Subdivision (c)(5): Affidavits or Declarations: This provision is drawn from present Rule 56(e)(1).
349 It has drawn no substantial criticism. It will be renumbered as subdivision (c)(4) to reflect deletion
350 of what had become (c)(4).

351 Subdivision (c) Committee Note: The Subcommittee brought up for discussion a tentative new
352 paragraph in the Committee Note. This paragraph observes that the pinpoint citations required by
353 subdivision (c)(1) can be provided by various methods. It may be asked whether any purpose is
354 served by reminding litigants and courts of this freedom. It was generally agreed that the reminder
355 serves a purpose. The alternatives may not be apparent to those who are familiar with only one
356 practice. They should, however, be framed as examples: “Different courts and judges have adopted
357 different procedures. Examples include providing citations in the motion, in a separate statement
358 of facts, in the body of a brief or memorandum, or in a separate statement of facts included in a brief
359 or memorandum.” The proviso that the court must give clear notice of its expectations was deleted
360 — it is no more than a nagging reminder of the requirements of Rule 83(b).

361 The next paragraph of the Note recognizes that a court may require preparation of an
362 appendix of the materials cited on the motion, and may require citation to the appendix rather than
363 other parts of the record. This paragraph will be integrated with the paragraph that gives other
364 examples of the methods of citation. The ordering of these two paragraphs will be considered
365 further.

366 The paragraph of the Note reflecting the limited-position provision of proposed subdivision
367 (c)(4) will be deleted, reflecting the decision to delete (c)(4).

368 Subdivision (d): “When Facts are Unavailable”: Proposed subdivision (d) carries forward present
369 Rule 56(f) with little change. It has drawn few comments and no changes are recommended.

370 Some of the comments urged that the rule should permit an alternative response: “summary
371 judgment should be denied on the present record, but if the court concludes that summary judgment
372 should be granted I should be allowed time for additional investigation and discovery.” This
373 provision would respond to the dilemma faced by a party who believes that it can defeat the motion
374 without further investigation or discovery, but who also believes that it can find facts that clearly
375 defeat the motion if need be. The difficulty, however, is that this alternative response essentially
376 asks the court both to decide the motion and then — if the decision is to grant the motion — to undo
377 its own decision by allowing more time, a further response, and then reconsideration. As one
378 comment put it, “No one wants seriatim Rule 56 motions.” The alternative-response suggestion was
379 rejected.

380 Subdivision (d): Committee Note: The Note includes a bit of practice advice — a party seeking time
381 to obtain affidavits or declarations or to take discovery may seek an order deferring the time to
382 respond to the summary-judgment motion. This brief sentence presents the common question
383 whether a Committee Note should include practice advice. The advice was defended on the ground
384 that it serves as a gentle reminder to the court that a party often should be spared the burden of
385 preparing a response while the time to respond winds down and it remains uncertain whether
386 additional time will be granted. But it was questioned by asking whether it is possible to ask for
387 additional time for investigation or discovery without also at least implicitly asking for additional
388 time to respond. This question was answered by judges who agreed that a good lawyer will
389 recognize the need to ask for more time to respond, but too many lawyers seem to assume that there
390 is an automatic extension. The advice is right, and will be helpful. It will remain in the Note.

391 Subdivision (e): Failing to Properly Support or Properly Respond: Subdivision (e) began as part of
392 the point-counterpoint proposal. It recognized that one of the proper responses to a failure to

393 comply with the requirements of pinpoint response or pinpoint reply can be that the court deems a
394 fact admitted. It generated little comment, and has been carried forward in part to ensure that local
395 rules providing for “deemed admission” — rendered as “consider the fact undisputed for purposes
396 of the motion” — are not invalid.

397 Deletion of the point-counterpoint provision has had the effect of somewhat broadening the
398 reach of subdivision (e). It now applies when a party “fails to support an assertion of fact or fails
399 to properly address another party’s assertion of fact.” Failure to support an assertion can occur in
400 a motion as well as in later stages. The failure in a motion will not support an order granting
401 summary judgment, nor will it support an order considering the fact undisputed as asserted by the
402 motion. But it will support an order affording an opportunity to correct the deficiency or another
403 appropriate order.

404 The “consider undisputed” provision is permissive; it says only that the court “may” consider
405 a fact undisputed for want of a proper response.

406 The initial rule text will be rearranged to read: “If a party fails to support an assertion of fact
407 or fails to properly address another party’s assertion of fact as required by Rule 56(c)(1) the court
408 may: * * *.”

409 The tag line will be revised to reflect the rule text: “Failing to Properly Support or Respond.”

410 Rule 56(e) Committee Note: The first paragraph of the proposed Committee Note includes a
411 statement that summary judgment cannot be granted by default. It was observed that the balance
412 of the Note makes the meaning clear, but agreed that it would help to begin: “As explained below,
413 summary judgment cannot be granted by default.” Other minor changes also were made.

414 Rule 56(f): Judgment Independent of Motion: Rule 56(f) reflects decisional law recognizing the
415 court’s authority to grant summary judgment without a motion or outside a motion. It drew few
416 comments.

417 Subdivision (f)(2) recognizes that a court may deny a motion on grounds not raised by a
418 party. That seems fine. But why require that the court give notice and a reasonable time to respond?
419 Why not limit this paragraph to granting the motion?

420 The first response was that it is useful to give notice because the parties often understand the
421 record better than the court does. Materials that seem to the court to require denial of the motion
422 may not mean what they seem to mean.

423 But it was asked what effect this provision has on denying a motion for procedural reasons.
424 Suppose the motion is filed after the deadline set by a scheduling order. The court should be able
425 to deny the motion without having to give notice. Or the motion may fail to comply with Rule 56(c).
426 Or the motion may be ridiculously overlong — the court should be able to deny it with directions
427 to submit a new and proper motion. And to whatever extent there is discretion to deny a motion
428 despite the apparent lack of any genuinely disputed fact, why should notice be required? How, in
429 short, should case-management problems be reflected here?

430 It was suggested that the rule might be limited to denying a motion “on the merits.” But it
431 was asked whether it is denial on the merits when the court concludes that information supporting
432 the motion would not be admissible in evidence?

433 One possibility is to leave the rule text as it is, addressing case-management authority in the
434 Committee Note. The Note might say that subdivision (f)(2) does not limit authority to enforce Rule
435 56 procedures and court orders.

436 Another possibility would be to delete subdivision (f). It can be seen as advisory in the sense
437 that courts do the things it describes and will continue to do them whether or not the rule describes
438 them. But it is helpful to give notice of these practices — lawyers may not be aware of them, and
439 may frame motions and responses differently when they are aware.

440 It was suggested that “deny” be omitted from (f)(2). The court should not be required to give
441 notice before denying, whether denial rests on procedural failure or on failure to carry the summary-
442 judgment burden.

443 Examples were given to illustrate the importance of notice before granting a motion on
444 grounds not stated. One judge granted a motion on limitations grounds, only to informed of facts
445 that defeated the limitations defense. A parallel might arise when the judge suspects there may be
446 grounds for equitable tolling and denies a motion despite an apparently good limitations defense.

447 Another perspective was offered. There are many pro se cases in which the court should be
448 able to deny a clearly inappropriate motion for summary judgment without having to give notice.

449 It was suggested that if “deny” is deleted, the Committee Note might include a reminder that
450 the court is of course free to give notice before denying the motion.

451 An observer urged that lawyers want the rule to be balanced as between grant and denial.
452 They fear that denial is the easy way out for the judge. Deletion of “deny” may seem to tip the scale
453 in favor of denial. Another observer suggested that “deny” should be kept “for transparency.” A
454 committee member responded that “this is not a problem of balance.” The case is not over — the
455 case continues after denial. “Deny” should be deleted.

456 Another alternative was suggested: the rule text might distinguish the grounds of denial,
457 omitting any notice requirement if denial rests on failure to satisfy the requirements of Rule 56, a
458 local rule, or a court order. On the other hand, the movant may benefit from notice no matter what
459 the reason for denial. The motion is the chance to avoid trial, or to shift the terms of settlement. It
460 is important. A committee member responded that “this is where a motion to reconsider makes
461 sense.” Another noted that “we cannot legislate against arbitrary action.” Two others suggested that
462 the main concern is with granting a motion on grounds not raised by the parties — the grant is more
463 serious. Notice protects against the risks of acting on a ground that a nonmovant can show is wrong.

464 A motion to delete “deny” from subdivision (f)(2) passed, 7 yes and 5 no.

465 Subdivision (f) Note: The Note will be amended to delete the reference to “deny” in subdivision
466 (f)(2).

467 The earlier suggestion that the Note might include a reminder that if it wishes to do so the
468 court can give notice before denying a motion on grounds not raised by the parties was renewed.
469 The suggestion was rejected as providing gratuitous advice. Courts are well aware of the authority
470 to give notice before acting.

471 Subdivision (g): Order Fact as Established: The tag line will be changed to better reflect the rule
472 text: “Failing to Grant all Relief.” It was noted that not granting all relief includes complete denial.

473 It was observed that the final line of subdivision (g) “is clunky.” It might be revised by
474 making two sentences. “ * * * stating any material fact * * * that is not genuinely in dispute, and

475 ~~treating the fact~~ A fact so stated must be treated as established in the case.” A motion to make this
476 change failed, 3 yes and 9 no.

477 Subdivision (g) Note: The decision to delete subdivision (c)(4) requires revision of the draft
478 Committee Note to remove references to (c)(4). Judge Baylson proposed substitution of these
479 sentences: “The court must take care that this determination does not interfere with a party’s ability
480 to accept a fact for purposes of the motion only. A nonmovant, for example, may feel confident that
481 a genuine dispute as to one or a few facts will defeat the motion, and prefer to avoid the cost of
482 detailed response to all facts stated by the movant. This position should be available without
483 running the risk that the fact will be taken as established under subdivision (g) or otherwise found
484 to have been accepted for other purposes.”

485 Judge Baylson explained that the Note would ensure that it is safe to accept a fact for
486 purposes of the motion only. It will work in the point-counterpoint setting as well as in others.

487 Discussion returned to deleted subdivision (c)(4). The intent of this Note is to make clear
488 that a subdivision (g) order cannot be based on acceptance of a fact only for purposes of the motion.
489 Why, then, not retain (c)(4)? A response was that as drafted, (c)(4) has not said whether acceptance
490 for purposes of the motion only includes acceptance for purposes of a subdivision (g) order.

491 It was noted that subdivision (c)(1)(A) specifically notes the possibility of stipulations made
492 for purposes of the motion only, and includes “admissions.” It might be possible to find two
493 meanings in “admissions” — not only a Rule 36 admission, but less formal admissions that could
494 be limited to purposes of the motion. But it was thought better to read “admissions” in (c)(1)(A) as
495 referring only to Rule 36 admissions. Parties do stipulate facts for purposes of the motion,
496 particularly when the real dispute goes to the law rather than the facts.

497 The question whether the reassurance provided by the Note is useful was renewed. Would
498 a lawyer ever turn around after denial of the motion and argue that an adversary’s acceptance for
499 purposes of the motion was an admission that supports a subdivision (g) order that the fact is
500 established in the case? Would a court accept the argument?

501 The motion to add the language quoted above passed, 10 yes and 2 no.

502 Consideration will be given to adding a sentence in the Note stating that denial of a motion
503 is included in “does not grant all the relief requested.”

504 Subdivision (h): Sanctions: Discussion began with an observation that many sanctions rules include
505 “or other appropriate sanction.” Adding those words to subdivision (h) “could increase options.”
506 This suggestion was elaborated by noting that it is useful to provide a reminder that other sanctions
507 may be considered in lieu of contempt.

508 The first response was that subdivision (h) is present subdivision (g), changed only to reduce
509 from “must” to “may,” and to require notice and a reasonable time to respond. The next response
510 was that Rule 11 is available to support sanctions for inappropriate Rule 56 practice.

511 Adding a reference to other sanctions won further support. Contempt is an extraordinary
512 sanction. The FJC study of present Rule 56(g) shows that contempt is almost never invoked. This
513 observation was turned back by a suggestion that adding a reference to alternative sanctions will
514 support arguments that the change shows an intent to further diminish resort to contempt sanctions.

515 A motion to add “or subject to other appropriate sanctions” at the end of subdivision (h)
516 passed, 11 yes and 1 no.

517 It was suggested that authorizing other sanctions makes it possible to delete the reference to
518 expenses and attorney fees. No action was taken on this suggestion.

519 Subdivision (h) Committee Note: The Note will be expanded to reflect that three changes have been
520 made from present Rule 56(g) and to refer to the new “other appropriate sanctions” language.

521 Rule 56: Republication Not Needed: Judge Kravitz raised the question whether the changes made
522 since publication warrant republication of the revised proposal for further comment. The revised
523 proposal looks quite different. It has been stripped down. But the request for comments squarely
524 invited comments on all of the issues that have proved important. The most significant changes
525 involve deletion of the point-counterpoint provisions and restoration of “shall” to displace “should”
526 grant in the Style Project version of what is to become Rule 56(a). Those questions were developed
527 at length in the request for comments.

528 Judge Baylson thought that republication is not necessary. All the concepts in the Rule as
529 revised were in the published rule.

530 This theme was developed further. The request for comments was more detailed than past
531 requests, including requests on complex and controversial proposals. This elaboration responded
532 to many questions raised by the Standing Committee. It worked well. The testimony and comments
533 were clearly focused, and addressed all of the central issues. This model is one that will be emulated
534 in future requests for comment on important and complex proposals.

535 A committee member suggested that it is “hard to imagine anything new.” Comments in
536 response to republication could only rehash the same themes that have been thoroughly developed
537 in the original comment period.

538 It was noted that the only issue that might be thought to warrant republication is withdrawal
539 of the mandate for point-counterpoint procedure. But courts that want to use this procedure remain
540 free to adopt it, as many have. What is lost is standardization, pursuit of nationwide uniformity. But
541 this goal was abandoned in large measure because many people, and particularly many courts, want
542 to shape presentation of Rule 56 motions in many different ways. And uniformity did not seem to
543 be as important as the Committee had thought it would be. Republication is not required on this
544 score.

545 Discussion of republication concluded with the observations that the Committees had given
546 sufficient notice of all the features that will go forward in the revised proposal, and that the
547 comments and testimony have provided sufficient guidance on what should be done. It would be
548 different if the Committee were recommending provisions that were not published. The path here,
549 however, has been away from a more prescriptive rule and toward a less prescriptive rule. That is
550 OK.

551 The Committee agreed unanimously that republication is not needed.

552 Rule 56: Recommendation to Adopt: The Committee voted unanimously to recommend that the
553 Standing Committee approve the revised Rule 56 proposal for adoption by the Judicial Conference
554 and the Supreme Court.

555 Judge Kravitz concluded the discussion of Rule 56 by praising the work as deliberative in
556 the highest traditions of the rulemaking process. The Committee listened to the comments and
557 testimony. The comments and testimony have had a significant impact on the proposal that is going
558 forward. Additional help was provided by Andrea Kuperman’s research and by the Federal Judicial
559 Center’s research. Judge Baylson provided outstanding leadership of the Rule 56 Subcommittee.

560 Judge Baylson noted that appreciation is due Judge Rosenthal for her support and guidance from the
561 beginning of the project.

562 **Rule 26: Expert Witnesses**

563 Judge Campbell launched the discussion of the expert-witness discovery proposals by
564 observing that a number of issues were raised by the public comments and testimony, even though
565 the total volume of comments and testimony was less than for Rule 56.

566 At the February meeting after the San Francisco hearing the Committee decided that the Rule
567 26 proposals should carry forward, subject to any improvements that may be found in light of the
568 comments and testimony. The Subcommittee has not reconsidered that decision. Among the issues
569 that remain to be explored, four are most prominent.

570 First is whether work-product discussion should be extended to communications between
571 an attorney and an employee expert trial witness who is not required to give a disclosure report
572 under Rule 26(a)(2)(B). The Subcommittee decided not to extend the protection, but the question
573 drew many comments and deserves the Committee's attention. Practical problems in litigation
574 prompted the proposal to protect communications with an expert who is required to provide a Rule
575 26(a)(2)(B) disclosure report because the expert is specially retained or employed to give testimony
576 in the case or is one whose duties as a party's employee regularly involve giving expert testimony.
577 Lawyers and experts avoid creating discoverable drafts and communications. Lawyers retain second
578 sets of "consulting" experts who are nearly immune from discovery. Other practical problems
579 follow. The proposal has been crafted with an eye on the New Jersey experience, which has been
580 a real help. The Committee had not talked about in-house experts, and was not informed about
581 possible inefficiencies arising from discovery of communications with them. And there are non-
582 employee experts that are not required to provide (a)(2)(B) reports. The Committee did not want
583 to protect communications by one party's lawyer with treating physicians, accident investigators,
584 and the like. An employee expert, moreover, may also be an important fact witness. Drawing
585 suitable lines to achieve an appropriate level of protection for communications with employee
586 experts could prove difficult. Finally, it seems likely that much of the interest in shielding
587 communications with employee experts arises from concern with the limits placed on attorney-client
588 privilege by states that employ a "control group" test to identify who is a client. It is not desirable
589 to create even an appearance of attempting to expand a privilege rule by way of a civil rule.

590 Second is how to express the intention to protect communications between a lawyer and the
591 expert trial witness's staff. The Subcommittee agreed that it suffices to provide a reminder in the
592 Committee Note.

593 Third is the problem arising from the published proposal that extends work-product
594 protection to drafts of any report or disclosure required by Rule 26(a)(2) "regardless of the form of
595 the draft." The Committee Note explained that this language included oral, written, electronic, and
596 other forms. But referring to oral drafts may create a problem — a party might seek to defeat
597 discovery of the attorney-expert communications that are not protected by proposed Rule
598 26(b)(4)(C) by arguing that the communications are oral drafts of the expert's report. The
599 Subcommittee proposed revising the rule text so that it protects only "written or electronic drafts."

600 Fourth is the next-to-last paragraph of the proposed Committee Note. This paragraph
601 recognizes that the proposed rule focuses only on discovery, but expresses an expectation "that the
602 same limitations will ordinarily be honored at trial." This paragraph drew protests that the
603 Committee Note was being used to accomplish changes in the Rules of Evidence, and perhaps even
604 to test the lines that require special procedures to adopt a rule that creates, abolishes, or modifies an

605 evidentiary privilege. The Subcommittee recommends that this paragraph be deleted. It is hoped,
606 as many comments have suggested, that protection in discovery will have the desired practical effect
607 of ending the cumbersome practices that now effectively defeat any effective discovery of draft
608 reports and attorney-expert communications.

609 Professor Marcus noted that the proposals drew broad support from many professional
610 organizations, representing lawyers on all sides of practice. What remains for debate is more a
611 matter of detailed implementation than broad concept.

612 Subdivision (a)(2)(C): Disclosure of “Non-Report” Expert: Some comments expressed a fear that
613 the proposed disclosure summarizing the facts and opinions that a “non-report” expert is expected
614 to testify to will override otherwise applicable attorney-client privilege and work product. That
615 concern seems rooted in the effects of adding the (a)(2)(B) report in 1993, but the situation is quite
616 different. The 1993 Committee Note seemed to expressly provide that privilege and other
617 protections do not apply to information considered by an expert required to provide an (a)(2)(B)
618 report. There is nothing like that in the present Committee Note. For that matter, the purpose of
619 adding proposed (b)(4)(B) and (C), and changing to “facts or data” in (a)(2)(B)(ii), is to supersede
620 the effects of the 1993 Note. There is no basis for the fear of waiver. This explanation was accepted
621 without further discussion.

622 Subdivision (a)(2)(C): Committee Note: The Note to (a)(2)(C) has been changed in a couple of
623 respects. It emphasizes that the disclosure is to include a summary of the facts supporting the
624 expert’s opinions. This emphasis responds to fears that things left out of the disclosure might be
625 excluded at trial. A lawyer preparing the disclosure may find that an expert such as a treating
626 physician or accident investigator will not cooperate fully in preparing the disclosure. It seems
627 useful to emphasize that only a summary is required. And separate new language is added to
628 emphasize that the disclosure obligation does not include facts unrelated to the expert opinion.

629 Subdivision (b)(4)(B): Draft Reports or Disclosures — Form: Rule 26(b)(4)(B) invokes work-
630 product protection for drafts of expert reports required by Rule 26(b)(2)(B) and expert disclosures
631 required by Rule 26(b)(2)(C). The Subcommittee recommends that the description of protected
632 drafts be changed from “drafts * * * regardless of the form of the draft” to “written or electronic
633 drafts.” The drafting problem arises because drafts often are electronic, while Rule 26(b)(3) itself
634 extends protection only to “documents and tangible things.” And the Committee Note referred also
635 to “oral” drafts. (A similar question arises under proposed subdivision (b)(4)(C), which refers to
636 communications “regardless of the form of the communication.”)

637 Several comments asked what is an “oral draft.” Is every interaction with the expert an oral
638 draft of the eventual report? Can the rule text, along with the Note, be read to destroy the exceptions
639 in proposed (b)(4)(C) that except three categories of communications from work-product protection?
640 The Subcommittee thought it better to draw back to “written or electronic drafts.” The reference
641 to “oral” drafts will be stricken from the Note.

642 An observer began by praising the proposed expert-discovery amendments as “very careful
643 work.” It is good to protect drafts regardless of form. Many lawyer organizations and other
644 organizations have supported the proposal. The proposal to draw back to protecting only written
645 or electronic drafts will generate arguments about oral drafts. Three of the observers each
646 independently had this same reaction. It is a mistake to narrow the protection; “regardless of form”
647 had it right. “Oral report is a concept that had life”; interrogatories inquiring about oral reports had
648 to be answered in New Jersey until the 2002 New Jersey rule amendments. Protecting oral draft
649 reports will not impinge on the discovery of attorney-expert communications allowed by (b)(4)(C).

650 A committee member asked why is an oral report not a communication with an attorney,
651 subject to the provisions that allow discovery of communications on three subjects? The response
652 was that creative lawyers will argue that an oral draft report is fully discoverable because it is
653 excluded from the protection of proposed (b)(4)(B); the protections for communications do not
654 apply. "Using words of limitation on the drafts that are protected will imply there is no protection
655 for others." The committee member rejoined that a report not in writing is a communication, and
656 thus protected by (b)(4)(C). Another member agreed that "communications" is broader than draft
657 reports, but asked why draft reports are not all protected as communications? A response was that
658 draft reports are a species of communication that should be protected by work-product principles
659 even when they address the topics that are excepted from work-product protection when addressed
660 by other forms of attorney-expert communication. And beyond that, there can be draft reports that
661 do not involve communication with the attorney. But anything oral will be a communication. The
662 draft report and communications categories overlap, but each also has independent meaning.

663 It was suggested that "written" is imprecise — does it mean anything that is "hard copy"?
664 The Subcommittee was worried about written reports, including the modern electronic equivalent
665 of writing.

666 A committee member recalled the "documents and tangible things" scope of Rule 26(b)(3)
667 and noted that proposed (b)(4)(B) seems to refer to something to be physically provided in
668 discovery. How do you turn over something that is not physical? A response was that inquiry at
669 deposition can achieve the same result. But it was protested that the deposition inquiry is
670 objectionable because it seeks a communication with the lawyer. And it was responded that there
671 can be oral discussions between expert and others who are not the lawyer — common examples are
672 the client, or the expert's staff. These communications might well address the form of the report the
673 expert will eventually reduce to written or electronic form.

674 An observer offered an example. Suppose the dispute involves valuation. The expert
675 initially thought \$1,000,000 was an appropriate value, but then raised it to \$2,000,000. Discovery
676 can appropriately inquire into the process that led to the \$2,000,000 valuation, including questions
677 whether different figures were considered and what process was followed in reaching the eventual
678 figure. There is no need to allow questions about what the expert witness said in developing the
679 report.

680 A committee member responded that this argument proves too much. The distinction
681 between work papers and draft reports will be blurred. The danger is too great — it invites endless
682 debates over the line between a protected draft of a report and working papers.

683 It was suggested that the rule might simply protect "drafts" without any further elaboration.
684 But concern was expressed that this might not protect electronic drafts because they are not
685 documents or tangible things.

686 It was asked whether sufficient guidance could be provided by saying in the Note that
687 proposed (b)(4)(B) does not restrict the exceptions in (b)(4)(C) — attorney-expert communications
688 about compensation, identifying facts or data the expert considered, or identifying assumptions the
689 expert relied upon, are not protected as draft reports. The response was that this advice is not so
690 much needed if the rule text is limited to written or electronic drafts. But it was noted that the Note
691 says that (b)(4)(C) protects an oral communication. "I think it's worth \$100,000,000" is protected.

692 A motion to restore "regardless of form" failed, 3 yes to 9 no.

693 Discussion returned to the suggestion that the rule text refer only to “drafts.” The
694 “documents and tangible things” limit of Rule 26(b)(3) was recalled again, observing that work
695 product in other forms is protected by the continuing “common-law” effects of Hickman v. Taylor,
696 not Rule 26(b)(3). Could the problem be solved by referring to “documentary or electronic drafts?”

697 An observer suggested that if the rule text is limited to “drafts,” “no lawyer will argue that
698 electronically stored information is not protected.” That can be said in the Note.

699 A motion to delete “written or electronic” passed, 9 yes and 4 no.

700 Continued concern was expressed about drawing the line between unprotected work papers
701 and protected drafts. Lawyers will not ask for oral drafts. Perhaps the rule could refer to drafts “in
702 some recorded form”?

703 The problem of redefining rule text in a Committee Note was brought into the discussion.
704 It is not a useful thing. It is important to make the rule text as clear as it can be. But the words to
705 use are not yet apparent. If lawyers fear that electronic drafts are not protected, rule language should
706 make sure the protection is provided. The need for some form of guidance was underscored by
707 suggesting that lawyers will seek to exploit any opportunity to go back to the regime that allows
708 discovery of draft reports, no matter how unproductive it has been.

709 It was suggested that “document” carries forward into many rules the Rule 34(a) reference
710 to electronically stored information. The 2006 Committee Note observes that “References to
711 ‘documents’ appear in discovery rules that are not amended * * *. These references should be
712 interpreted to include electronically stored information as circumstances warrant.” This suggestion
713 drew attention to language proposed for the Committee Note: protection applies to a draft “without
714 regard to whether it would be considered a ‘document or tangible thing’ within Rule 26(b)(3)(A).”
715 It was suggested that this Note seems to expand the meaning of (b)(3)(A), making it necessary to
716 expand the text of (b)(4)(B).

717 It was suggested that the problem might be solved by viewing Rule 34 as a somewhat
718 circular provision that defines “document” to include electronically stored information. Then Rule
719 26(b)(3) would itself apply to electronically stored information; this is an interpretation that
720 “circumstances warrant” within the intent of the 2006 Committee Note.

721 This suggestion was elaborated in different directions. The statement in proposed (b)(4)(B)
722 that Rule 26(b)(3)(A) and (B) protect drafts can be read to settle the matter, no matter what Rule
723 26(b)(3) might mean independently. (b)(4)(B) extends (b)(3), just as surely as if it were written in
724 pre-Style form: “Rule 26(b)(3) is hereby extended to protect drafts,” and so on. The Committee
725 Note can explain that this is the meaning of the rule text. Alternatively, there are compelling reasons
726 to read Rule 34(a) to include electronically stored information in the definition of “documents.”
727 Documents or electronically stored information are defined to include many things that may exist
728 either in hard form or in electrons; the examples conclude with “stored in any medium from which
729 information can be obtained either directly or, if necessary, after translation by the responding party
730 into a reasonably usable form.” One illustration of the importance of this approach is provided by
731 Rule 34(b)(2)(E)(i), which directs that a party produce documents “as they are kept in the usual
732 course of business or must organize and label them to correspond to the categories in the request.”
733 It will not do to reorder electronically stored information before producing it so as to make it more
734 difficult to use.

735 This discussion was summarized by a flat statement that electronically stored information
736 is protected as “documents or tangible things” within the meaning of Rule 26(b)(3).

737 But it was protested that the rule texts do not say that documents and tangible things include
738 electronically stored information. The Committee should not rely on a Committee Note to an
739 amended Rule 26(b)(4) to accomplish an amendment of Rule 26(b)(3). Nor does it seem appropriate
740 to propose that Rule 26(b)(3) be amended to include electronically stored information on a schedule
741 that could take effect at the same time as the proposed (b)(4) amendments only if public comment
742 is bypassed.

743 It also was observed that whatever is made of “oral drafts,” it is essential to protect oral
744 communications between attorney and expert witness in proposed (b)(4)(C).

745 The question was attacked from a different angle by asking whether electronically stored
746 information is a tangible thing. Then protecting “drafts” will provide the desired protection.

747 The question was renewed again: if the rule text refers only to “drafts,” should the discussion
748 of electronically stored information be withdrawn from the Committee Note? One answer was that
749 the Note can say that (b)(4)(B) applies to any draft, whether in written or electronic form. We are
750 determining by this rule what is protected. The Note can say simply that protection “applies to any
751 draft report or disclosure, in written or electronic form.”

752 A different suggestion was that the Note might say “regardless of the form in which the draft
753 is recorded.”

754 The need for explicit Rule text was again expressed. There is a long history of fighting over
755 discovery of expert reports. We need to foreclose entirely any argument that electronically stored
756 drafts are not protected. Referring to “recorded” in rule text would help. An observer suggested,
757 though, that it would be better to leave this in the Note, referring only to “drafts” in the rule text.
758 But a committee member who voted to reduce the text to “drafts” protested that he had assumed the
759 Note would cover this. At the same time, it would be better to address this in the rule text. Another
760 member agreed. “Rule text is better to make it as clear as possible. Rewriting Rule 26(b)(3) in this
761 Committee Note is not a good idea.”

762 A motion to amplify the rule text reference to drafts passed by unanimous approval. Subject
763 to further consideration, the rule text will read: “protect drafts of any report or disclosure required
764 under Rule 26(a)(2), regardless of the form in which the draft is recorded.” The Note can be revised
765 by the Subcommittee.

766 Subdivisions (b)(4)(B), (C): Combined?: Professor Kimble’s style comments included a suggestion
767 that words could be saved by combining subparagraphs (B) and (C). The Subcommittee and
768 Committee had already struggled long and hard in attempts to combine them and concluded that it
769 works better to set them out separately. It is difficult to draft an integrated provision in a way that
770 clearly limits to communications, and not drafts, the exceptions for discovery of exchanges about
771 compensation, facts or data provided by the attorney and considered by the expert, and assumptions
772 provided by the attorney and relied upon by the expert. The two subparagraphs use different
773 formulas to address the forms of draft reports and communications that are protected. All agreed
774 that it is better to keep the two subparagraphs separate.

775 Subdivision (b)(4)(C): Communications with “non-Report” Experts: The proposed protection for
776 attorney-expert communications is limited to expert trial witnesses who are required to provide
777 disclosure reports under Rule 26(a)(2)(B). The testimony and comments provided many suggestions
778 that the protection should extend to some or all of the expert trial witnesses who are not required to
779 give these reports. Some comments wanted to extend the protection to all. Other comments sought
780 to protect only communications with experts who also are a party’s employees. Drafting is easy if

781 we want to include all experts that must be identified by a Rule 26(a)(2)(A) disclosure. It will
782 present more difficult line-drawing problems if we stop short of that. What of communications
783 between employee and in-house counsel? With former employees? Contract “employees”? The
784 Subcommittee decided not to expand protection along any of these lines.

785 An observer noted that this question is very important to corporate defense counsel. They
786 strongly favor extending protection to communications with corporate employees. That will
787 reinforce protection for their work product. And all of the problems that have been expressed with
788 respect to experts retained or specially employed apply here. The problems were not as obvious
789 during the initial stages of this project because they are encountered by in-house counsel more often
790 than outside counsel, but they are just as severe. There is no reason to make this distinction. The
791 ABA Litigation Section supports extending the protection to communications with corporate
792 employees.

793 This observer continued that the arguments against extending the protection do not hold up.
794 The protection need not include retired employees or independent contractors. The hybrid fact
795 witness is interesting, but these problems are solved all the time — the facts the employee knows
796 are not protected simply because they have been communicated to counsel. The lawyer will not
797 designate as an expert witness an employee whose facts he wants to protect. The Note can say that
798 communications with an employee’s assistants are not protected. Nor need the drafting be tricky.
799 The protected communications can be those with an expert retained or employed by a party. The
800 timing of disclosure will not be a problem.

801 A committee member suggested that addressing communications with corporate employees
802 will stir concerns that the rule is intruding on the realm of attorney-client privilege, and intruding
803 for the purpose of expanding protection in states that limit privilege to communications with a
804 “control group.”

805 This comment led to the observation that the Subcommittee did think there was a danger that
806 extending protection this far would seem to be creating or extending a privilege. It also was noted
807 that a party anxious to protect attorney-expert communications might think about retaining the
808 employee expert on terms that come within the report requirements of (a)(2)(B) — at the cost of
809 disclosing a report, the result would be protection under (b)(4)(C) as proposed. Going further down
810 the road to protect communications with employee experts might engender greater resistance to the
811 proposed rule.

812 Turning away from employee experts, it was observed that a plaintiff can talk to the treating
813 physician. The defendant cannot. It is possible to argue that communications between the plaintiff’s
814 attorney and a treating physician should be protected. That is a tough issue, with good arguments
815 on both sides.

816 Returning to employee experts, a member noted that “this has been a balanced proposal from
817 the outset. Adding protection for communications with employee experts benefits one particular
818 constituency.” The addition could make the package vulnerable.

819 An observer suggested that the Committee specifically invited comment whether
820 communications with all witnesses expected to testify as experts should be protected. Extending
821 the protection would not depart from what was published. Lots of changes are being made; this one
822 could fit in readily. Juries view corporate employees with suspicion, as aligned with their
823 employers. Treating physicians are regarded as neutral.

824 Another observer noted that the ABA recommended splitting the difference. The purpose
825 is to focus on the quality of the testimony, not the process of developing it. New Jersey, however,
826 does not provide a model — it has not addressed the employee expert.

827 A third observer suggested there are obvious opportunities for mischief if communications
828 with employee experts are protected. Suppose a product case. An employee engineer participated
829 in all design decisions. How can we separate the sense impressions leading up to the final design
830 from the expert opinion at trial, and distinguish attorney-expert communications about one from
831 communications about the other? This is a big issue that requires more consideration that it can be
832 given now.

833 Discussion concluded with the observation that the Committee had devoted long
834 consideration to the question of employee experts. That is why the question was flagged in the
835 request for comments. The Subcommittee has reconsidered the question carefully, and rejected it
836 for fear of unintended consequences. No member responded to an invitation for a motion to extend
837 work-product protection to communications with employee experts.

838 Subdivision (b)(4)(C) Note: The proposed Note includes new language stating that communications
839 between a party's attorney and assistants to the expert witness are protected. "Assistants" seemed
840 a better word than "agents." No case law has been found on this topic. One witness at the San
841 Antonio hearing did address efforts to discover a lawyer's communications with an expert's
842 assistants. This language was approved without further discussion.

843 Other new language addresses the concern expressed by some comments that protecting
844 attorney-expert communications will impede implementation of the Daubert decision. This language
845 has been explored with Professor Capra, Reporter for the Evidence Rules Committee. It was agreed
846 that it is better to avoid elaborating on the topic. Simple is better. Thus there is a single sentence
847 stating that these discovery changes do not affect the gatekeeping functions called for by Daubert.
848 This change also was approved without further discussion.

849 The published Note included a paragraph recognizing that Rule 26(b)(4) focuses only on
850 discovery, but expressing an expectation that "the same limitations will ordinarily be honored at
851 trial." This paragraph was discussed at some length at the January Standing Committee meeting.
852 The Subcommittee recommends that this paragraph be deleted. It does not seem an orderly exercise
853 of the rulemaking process to address trial evidence rules by a Committee Note to a civil discovery
854 rule.

855 Other: Judge Campbell noted that the Federal Magistrate Judges Association's comment suggested
856 that Rule 26 might address the questions whether or when draft reports must be retained and whether
857 they must be included in privilege logs. The Subcommittee recognized that retention and log
858 requirements are important issues, but concluded that they are outside the scope of the current
859 project.

860 Committee Note: Length: It was observed that the draft Committee Note is rather long, and asked
861 whether it might be shortened. These amendments are trying to shut down unproductive forms of
862 discovery that have been widely indulged. We need to be very clear on how firmly we are closing
863 it down. Notes to the discovery rules generally tend to be longer than other Notes because they
864 address intensely practical issues that stir lively concern and great ingenuity.

865 Approval: The Committee unanimously approved the Rule 26 amendments with a recommendation
866 that the Standing Committee approve them for adoption by the Judicial Conference and the Supreme
867 Court.

868 Judge Kravitz thanked the Subcommittee for its great work, noting that Committee
869 discussions have followed the high tradition of “leaving clients at the door.” He expressed particular
870 thanks to Judge Campbell and Professor Marcus for their great effort and fine results.

871 *Rule 8(c)*

872 Judge Kravitz noted that in August 2007 the Standing Committee published for comment a
873 proposal to remove “discharge in bankruptcy” from the list of affirmative defenses offered as
874 illustrations in Rule 8(c). Only the Department of Justice expressed opposition. At the
875 Department’s request the Committee decided not to press ahead for adoption. The issues raised by
876 the Department seemed obscure and it was important to reach a full understanding. Judge Wedoff
877 discussed the questions with Department lawyers through the summer of 2008. The Department
878 provided memoranda to supplement its comment and suggested it might help to solicit the views of
879 others. It seemed better to instead ask the Bankruptcy Rules Committee for its views. The
880 Bankruptcy Rules Committee recommends that “discharge in bankruptcy” be removed from Rule
881 8 (c). The question is thus clearly framed: should the proposal now be recommended for adoption,
882 perhaps with some changes in the Committee Note, or should it be deferred a while longer to pursue
883 further dialogue?

884 Judge Wedoff described the Bankruptcy Rules Committee’s deliberations, based on a report
885 he prepared for their discussion. The recommendation to delete “discharge in bankruptcy” from
886 Rule 8(c) was nearly unanimous — only the Department of Justice representative dissented.

887 Section 524(a) of the Bankruptcy Code is inconsistent with Rule 8(c). A discharge enjoins
888 all sorts of efforts to enforce personal liability on a discharged debt. If an action goes to judgment
889 on a discharged debt, the judgment is void. Waiver by the debtor has no effect. Rule 8(c) creates
890 a real tension with the statute because the ordinary effect of failure to plead an affirmative defense
891 is that the defense is waived.

892 The plain language of the statute prevents treating discharge in bankruptcy as an affirmative
893 defense. But if there is any room to find ambiguity in the language, the history of statute and rule
894 make the result inescapable.

895 The 1898 bankruptcy statute made discharge an affirmative defense. When Rule 8(c) was
896 adopted in 1938 it reflected that reality. Then, in 1970, the 1898 statute was amended. Discharge
897 was transformed from a personal right to become an injunction, and any judgment on a discharged
898 debt was made void. The House Report, quoted in the agenda materials, notes that often a debtor
899 who has been discharged fails to appear in a subsequent action on the discharged claim, and suffers
900 entry of a default judgment that is then used to enforce the discharged claim. “All this results
901 because the discharge is an affirmative defense which, if not pleaded, is waived.” The purpose of
902 the statute was to change this result. This result was reconfirmed in the House Report describing
903 the 1978 amendments. The discharge injunction “is to give complete effect to the discharge and to
904 eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection
905 efforts.” The discharge extinguishes the debt. The language added to § 524 stating that the
906 injunction operates “whether or not discharge of such debt is waived” “is intended to prevent waiver
907 of discharge of a particular debt from defeating the purposes of this section.”

908 Courts have been clear in facing the statute and rule. Every decision that considers both §
909 524(a) and Rule 8(c) has ruled that discharge is not an affirmative defense that is lost by failure to
910 plead. The most recent decision is *In re Hamilton*, 540 F.3d 367, 373 (6th Cir.2008). Courts that
911 do not consider § 524(a), on the other hand, are misled by Rule 8(c). The very cases cited by the
912 Department of Justice are all cases that looked only to Rule 8(c) without considering § 524(a),

913 demonstrating that Rule 8(c) has misled them. And a debtor who failed to appear and plead also
914 might be misled into thinking that the effect of the discharge was forfeited by failure to appear and
915 plead.

916 The Department has pointed out that under § 523(a) there are debts that are not discharged.
917 These include a variety of things, including a debt to a creditor who was not notified of the
918 bankruptcy proceeding. Section 524 does not apply to questions of dischargeability — there are a
919 few questions of dischargeability that can be determined only by the bankruptcy court, but most can
920 be determined by another court. If a creditor seeks a determination whether a debt was discharged,
921 either by an adversary proceeding in the bankruptcy court or in an action to enforce the claim, the
922 debtor should respond. It will not often happen that a creditor who does not know of the bankruptcy
923 proceedings will sue on the claim and the debtor does not raise the discharge — the debtor has a
924 great incentive to raise the discharge. But even if that happens, § 524(a) controls. “There cannot
925 be a judgment as a result of failure to plead discharge as an affirmative defense” of the debt was in
926 fact discharged.

927 The Department responded that the Rule 8(c) treatment of discharge in bankruptcy as an
928 affirmative defense “has not caused much of a problem.” The Seventh Circuit has ruled, albeit in
929 an unpublished opinion that does not consider § 524(a), that failure to plead discharge loses the
930 defense. A creditor may file an action on a claim because it had no notice of the bankruptcy
931 proceeding or because it thinks the debt was not discharged. The debtor’s failure to plead the
932 discharge may be not a “waiver” in the true sense of knowing and voluntary surrender of a right; it
933 is more a matter of procedural forfeiture. The conclusion depends on what meaning should attach
934 to “waiver” in § 524(a).

935 Deleting “discharge in bankruptcy” from Rule 8(c) would “send the wrong message to
936 debtors who might fail to appear.”

937 The reference to the Seventh Circuit opinion was expanded by noting that it did cite to
938 another case that did include some discussion of § 524. The case involved a counterclaim against
939 a plaintiff who had been discharged in bankruptcy. (A later comment noted that the Seventh Circuit
940 really means its rule that a nonprecedential opinion is not precedent for anything.)

941 It was asked how these questions arise for the Department. Suppose the debtor appears,
942 pleads without raising discharge as a defense, no one inquires about discharge in discovery, and the
943 action goes through to judgment on the merits. It was answered that a creditor who has notice of
944 the bankruptcy will sue only if it thinks there is no discharge. But the question was put again: how
945 likely is it that the creditor will not be told, somehow, of the discharge? It was pointed out that the
946 likelihood may be substantially diminished by access to PACER to find the bankruptcy record of
947 a defendant. But it was responded that this problem can affect creditors who do not have the same
948 investigative resources as the Department. Some of the cases that consider § 524 together with Rule
949 8(c) involve egregious creditors who know of the bankruptcy and had no reason to think their claims
950 had not been discharged.

951 Further explanation of the procedures for determining whether a claim was discharged was
952 requested. Suppose an action on the claim: can the court where the collection action is filed
953 determine the discharge question? Judge Wedoff answered that the most common method to
954 determine discharge is by an adversary proceeding in bankruptcy. The bankruptcy proceeding can
955 be reopened for this purpose. It is better to get a determination of dischargeability before addressing
956 the merits. As compared to bringing an action on the claim, including a request for a determination
957 of dischargeability, resort to the bankruptcy court has the advantage of avoiding contempt of the

958 discharge injunction if the debt in fact has been discharged. This procedure is different from making
959 discharge an affirmative defense. If the debtor defaults the proceeding to determine dischargeability,
960 or litigates and loses on the merits of dischargeability, the debtor is bound.

961 It was asked why, if this problem has been around for 39 years, it is only being addressed
962 now? It was noted that there are other illustrations of failures to keep the Civil Rules in tune with
963 changes in substantive law. Rule 8(c), for example, continues to refer to “contributory negligence,”
964 despite the widespread substitution of comparative responsibility in its place. Rule E(4)(f), to be
965 discussed later at this meeting, is another example. Statutory changes are not always brought
966 promptly to the Committee’s attention.

967 The argument that it is misleading to characterize discharge as an affirmative defense was
968 countered by observing that it also is misleading to omit any warning that there are times when the
969 debtor really needs to appear.

970 The possibility of abuse came back into the discussion. Many bankruptcy debtors are
971 unsophisticated. The statutory provisions were adopted to prevent unscrupulous creditors from
972 attempting to recover on claims they know were discharged. Beyond that, how many tools should
973 any creditor have? No one is arguing that a debt not discharged is discharged. The question is how
974 the creditor should go about collecting a claim that has not been discharged. It is not at all clear that
975 discharge should be made an affirmative defense to afford another tool to creditors, given the
976 policies enacted in § 524.

977 In response to a question whether a discharge can be effective when the creditor has not been
978 notified of the bankruptcy proceeding, it was stated that in a “no-asset” case a discharge often is
979 effective even as to a creditor that had no notice. Lack of notice in a no-asset case makes a
980 difference only when dischargeability must be determined in bankruptcy court.

981 A committee member asked the Department of Justice member why it cares about
982 characterizing discharge as an affirmative defense when it only means to sue on claims that have not
983 been discharged. The answer was that the Department is most likely to be pursuing a “client
984 agency’s” claims that cannot be discharged. If it does not know of the bankruptcy proceeding, gets
985 a judgment, and then sues on the judgment, the judgment is void under a “so literal” reading of §
986 524. This answer was summarized by another member as suggesting that the Department wants “a
987 negative consequence to the debtor for failing to put on notice.”

988 It was suggested that Rule 8(c) seems in tension § 524, but § 524 has nothing to do with
989 exceptions to discharge. Rule 8(c) requires pleading of “any avoidance or affirmative defense.” The
990 list of examples is only that — a list of examples. Deleting discharge from the list of examples does
991 not really change the arguments or the outcome. This suggestion met the objection that deleting
992 discharge would clearly be intended to reflect a judgment that it is not an avoidance or affirmative
993 defense. In any event, it is wrong to list it as an affirmative defense if it is not. It may be that
994 discharged debtors will not be aware of the many years of including discharge as an affirmative
995 defense, nor of its deletion, but that is no reason to keep it in.

996 Bringing the discussion toward a conclusion, it was observed that the Committee had no
997 sense of urgency about this question when it was first raised — “discharge in bankruptcy” had
998 persisted in Rule 8(c) for many years after 1970 without causing any apparent problems. But the
999 Bankruptcy Rules Committee makes the point that courts in fact are being misled. That changes the
1000 urgency calculation. A sophisticated creditor can search for information about discharge outside a
1001 collection action, or by many means in a collection action, including a Rule 26(f) conference,
1002 pretrial conferences, and discovery.

1003 This summary was seconded by observing that courts are being misled by relying on Rule
1004 8(c). That is not right. A discharge defense is not lost for failure to plead it.

1005 A motion to recommend that the Standing Committee approve deletion of “discharge in
1006 bankruptcy” from Rule 8(c) for adoption by the Judicial Conference and the Supreme Court passed
1007 11 yes, 1 no.

1008 Discussion turned to the Committee Note. Judge Wedoff presented a draft. Changes were
1009 discussed. As revised, the Note would carry forward the first three sentences of the Note as
1010 published, delete the final two sentences, and add:

1011 For these reasons it is confusing to describe discharge as an affirmative defense. But
1012 § 524(a) applies only to a claim that was actually discharged. Several categories of
1013 debt set out in 11 U.S.C. § 523(a) are excepted from discharge. The issue whether
1014 a claim was excepted from discharge may be determined either in the court that
1015 entered the discharge or — in most instances — in another court with jurisdiction
1016 over the creditor’s claim, and in such a proceeding the debtor is required to respond.

1017 A Committee member asked whether it is desirable to explain at such length. Why not make
1018 it much simpler? One simplifying suggestion was that the Note could say simply that the change
1019 does not affect the methods for determining discharge.

1020 It was agreed that Judge Wedoff, the Reporter, and the Department representatives would
1021 work toward a suitably brief Note.

1022 *Supplemental Rule E(4)(f)*

1023 A working group of the Maritime Law Association has suggested that the time has come to
1024 eliminate the final sentence of Supplemental Rule E(4)(f). Rule E(4)(f) establishes the right to a
1025 hearing on a claim of interest in property that has been arrested or attached. The final sentence says
1026 that “this subdivision” does not apply to suits for seamen’s wages under 46 U.S.C. §§ 603 and 604,
1027 “or to actions by the United States for forfeitures for violation of any statute of the United States.”
1028 The two statutes were repealed in 1983. Supplemental Rule G, adopted in 2006, now governs
1029 forfeiture proceedings.

1030 The Department of Justice has expressed concern that simply deleting the reference to
1031 forfeiture proceedings may lead to arguments that Rule E(4)(f) has come to provide a right to a
1032 hearing in forfeiture actions. Rule G(1) provides that Supplemental Rules C and E also apply to
1033 forfeiture actions “[t]o the extent that this rule does not address an issue.” Rule G does not expressly
1034 address the question whether a hearing should be provided when an interest is claimed in property
1035 held for forfeiture. Rule E never has created a right to hearing in forfeiture proceedings, and we
1036 should make certain that no new right is created inadvertently. The Department proposes
1037 substitution of a new sentence at the end of Rule E(4)(f): “Supplemental Rule G governs
1038 proceedings regarding property subject to a forfeiture action in rem.” This language is better than
1039 the suggested alternative: “Supplemental Rule G governs the right to a hearing in a forfeiture
1040 action.” That alternative implies that there is a right to a hearing under G.

1041 Doubts were expressed about the Department’s drafting. It could be read to undermine the
1042 part of Rule G(1) that invokes Rule E to fill in gaps in Rule G. Perhaps more to the point,
1043 supplemental Rule G(8)(f) provides that a person who has filed a claim to property may petition for
1044 its release if the property is held for forfeiture under a statute governed by 18 U.S.C. § 983(f). That
1045 clearly implies a right to a hearing. Rule G(5) establishes a procedure to assert an interest in the

1046 defendant property and contest the forfeiture. That too implies a right to a hearing. The
1047 Department's concern, moreover, may be addressed by simplifying the final sentence to read:
1048 "Supplemental Rule G governs hearings in a forfeiture action."

1049 It was asked whether it would be better simply to delete the present final sentence without
1050 any proposed replacement. Comments could be invited. The discussion concluded by
1051 recommending that the proposal be published by including a new final sentence in brackets, inviting
1052 comment on the need to have any reference to Rule G and the form of the reference: "[Supplemental
1053 Rule governs hearings in a forfeiture action.]"

1054 The recommendation will include the suggestion that publication be deferred to a time when
1055 other Civil Rules also are published for comment. There is no urgency about fixing this residual
1056 anomaly in Rule E.

1057 *Rule 4(i)(3)*

1058 Rule 4(i)(3) governs service on a United States officer or employee sued in an individual
1059 capacity for an act or omission occurring in connection with duties performed on the United States'
1060 behalf. Service must be made on the United States. The employee also must be served under Rule
1061 4(e), (f), or (g). Rule 4(e) is the provision most likely to be invoked. Rule 4(e)(1) adopts state-law
1062 methods of service. (e)(2) allows service by personal delivery to the defendant, leaving a copy at
1063 the defendant's dwelling or usual place of abode with a suitable person who resides there, or
1064 "delivering a copy * * * to an agent authorized by appointment or by law to receive service of
1065 process."

1066 Judge Kravitz opened the discussion by describing the concerns that have grown up around
1067 this provision. It has been asked whether service on the United States should suffice. Alternatively,
1068 it has been asked whether it is possible to avoid the upset and occasional danger that accompany
1069 service at home, while walking down the street, and the like. These questions arise frequently in §
1070 1983 actions against state and local employees. Plaintiffs often want the government to accept
1071 service on behalf of an employee, particularly when the plaintiff cannot readily find the employee.
1072 A common example is an action by a prison inmate against a prison guard. The government
1073 commonly balks. But it often agrees to accept service when discovery of the employee's address
1074 is suggested. At the same time, the government may refuse to accept service because it may decide
1075 not to provide a defense for the employee, or may even plan to prosecute the employee. Apart from
1076 these problems, making the government accept service on behalf of a former employee would create
1077 other difficulties.

1078 The first response was that different approaches may be appropriate, distinguishing between
1079 the executive branch and the judiciary. This speaker, a former executive branch officer, said that
1080 there was not much visible concern about these questions during the time of his government service.
1081 He was personally served once while going to his car at home; "it was unpleasant." That was a case
1082 in which harassing individual government officials was part of the plaintiff's strategy. In most cases
1083 the plaintiff and the defendant have allied interests — the defendant authorizes the government to
1084 accept service, and the plaintiff easily accomplishes service. "This is routine for those who are
1085 automatic targets of suits" — they authorize an agent to receive service. And normally the plaintiff
1086 calls the Department of Justice and asks how to go about serving the defendant; "we work it out."
1087 At the same time, there would be problems if service could be made only on an agent and by
1088 requiring the employee to accept the government as agent. There may be risks of actual individual
1089 liability. And the problems with former employees may be mirrored by problems with employees
1090 who move from one agency to another. There may be conflicts of interest. And another member

1091 noted that in actions against low-level employees the Department often does not find out about the
1092 action.

1093 One possible approach, whether by court rule or by statute, would be to require service on
1094 the government in the first instance. The government would then have a period — perhaps 10 days
1095 — to provide the employee’s acknowledgment of service or appointment of a general agent for
1096 service. This could work in cases that do not involve a request for urgent, immediate relief.

1097 Court employees may face greater problems of security and harassment. And as compared
1098 to some executive branch agencies, there may be a higher level of trust among courts, judicial
1099 branch employees, and the Administrative Office. It might work to make the judge’s court the agent
1100 for service on the judge.

1101 An immediate question asked whether the Administrative Office would be comfortable
1102 accepting service for a judge in an action claiming direct, personal harassment by the judge?
1103 Administrative Office practice was described in response. The Office encourages courts to call
1104 immediately when a court official is sued. The office determines whether the Department of Justice
1105 will provide representation, and if not may retain a lawyer for the defendant.

1106 The next observation was that if harassment is part of a plaintiff’s tactics, protecting judges
1107 will work only if service on the court or the Administrative Office is made the exclusive means of
1108 service.

1109 It was noted that in many tort claims against government employees the government has to
1110 accept the burden of providing a defense. But it is difficult for the government to do much of
1111 anything within 10 days, such as finding the employee and securing an authorization to accept
1112 service. The problem is difficult. This observation was seconded in part by another Committee
1113 Member, who observed that he had often been sued while in government service. “The idea that the
1114 government can do anything in 10 days is ludicrous.” But this member continued to ask whether
1115 there is a real problem, and to wonder whether it is seemly to separate out government officials for
1116 special treatment. Why go into this?

1117 Another observation was that officials, including judges, may be sued in courts that
1118 manifestly lack personal jurisdiction. It is convenient to get rid of the case for lack of personal
1119 service. This observation led to a more general question: care should be taken to consider the
1120 consequences of any new rule for personal jurisdiction. Making the government an agent for service
1121 might seem to create nationwide personal jurisdiction.

1122 It was suggested again that judicial branch employees might be separated out, recognizing
1123 the greater security and privacy concerns they may face. The broad scope of judicial immunity,
1124 moreover, means that many actions against judges will be either frivolous or deliberately harassing.
1125 One possibility would be to make the United States Attorney or the clerk of court the judge’s agent
1126 for service.

1127 These views were supported by suggesting that the Committee should work on this. “There
1128 is an opportunity for harassment, and perhaps physical risk.” It needs to be determined whether
1129 service on the United States alone should suffice.

1130 Another committee member suggested that a low-level employee would worry about the risk
1131 of personal liability without personal service. There often are disputes whether an individual
1132 defendant’s conduct was in connection with duties on the United States’ behalf. Suppose the

1133 plaintiff does not serve the defendant personally — does the plaintiff lose the right to hold the
1134 defendant personally liable?

1135 The Committee agreed to carry this topic forward for further investigation. An initial focus
1136 will be on actions against judges for official acts. These actions tend to be brought by pro se
1137 plaintiffs. An effort will be made to find out from security agents and marshals how often they
1138 encounter problems arising from service of process.

1139 *Appellate-Civil Rules Questions*

1140 Judge Kravitz noted that the Appellate Rules Committee is working on projects that are
1141 likely to involve the Civil Rules. One of them raises the question whether Rule 58 should be
1142 amended to require entry of judgment on a separate document when the original judgment is altered
1143 or amended on one of the five post-judgment motions enumerated in Rule 58(a). Another asks
1144 whether the Civil Rules, the Appellate Rules, or both should be expanded to include some provisions
1145 for “manufactured finality.” Several past packages of amendments have demonstrated the
1146 advantages of coordinated work. The chairs of the Appellate and Civil Rules Committees have
1147 agreed that it will be useful to appoint a joint Subcommittee to work on these questions, and perhaps
1148 additional questions that may arise while the work continues. Three members from each Committee
1149 have been appointed. The Civil Rules Committee members are Judge Colloton, who will chair the
1150 Subcommittee, Judge Walker, and Peter Keisler.

1151 Judge Wedoff noted that the Bankruptcy Rules Committee is examining the Bankruptcy
1152 Rules provisions on appeals. There are likely to be fairly extensive revisions. They will coordinate
1153 with the Appellate Rules Committee. To the extent that Bankruptcy Rules issues overlap with issues
1154 being considered by the joint Subcommittee, the Bankruptcy Rules Committee will seek to
1155 coordinate on those issues as well.

1156 *Rule 45*

1157 Judge Campbell, reporting for the Discovery Subcommittee, noted that a year ago the
1158 Subcommittee was asked to begin studying Rule 45. The study has included a long memorandum
1159 by Andrea Kuperman surveying the secondary literature — much of it in bar-oriented publications
1160 — and communications with a number of bar groups.

1161 It is clear that Rule 45 is a long and complicated rule. “You have to work hard to find what
1162 it means.” Many judges say that it is a perfectly fine rule, that the problem is that lawyers do not
1163 understand it. A fine rule that lawyers cannot understand may deserve some clarification.

1164 Two issues have figured prominently in recent experience. Some courts have concluded that
1165 because the 100-mile limit in Rule 45(c)(3)(A)(ii) addresses only a person who is neither a party nor
1166 a party’s officer, a trial subpoena can command a party’s officer to appear anywhere in the country.
1167 That reading seems contrary to Rule 45(b)(2), but it continues to have real influence. Another
1168 problem arises when a deposition subpoena for a nonparty witness issues not from the court where
1169 the action is pending but from another court where the witness is. Rule 26(c)(1) allows the witness
1170 to apply to the main-action court for a protective order, but a motion to compel compliance can be
1171 filed only in the court that issued the subpoena. The resulting questions may be better suited to
1172 resolution in the court where the main action is pending, but the cases have divided on the power
1173 to transfer the question, and transfer may be a burden for the witness.

1174 Many other issues have been identified as well, including the contemporary wisdom of the
1175 100-mile limit that has remained in place from times before mechanized transportation was invented.

1176 For all of the questions, what Rule 45 does is remarkable. It covers most third-party
1177 discovery in the federal system. “There are many moving parts.” An attempt to address some of
1178 the issues that seem to present problems might create more problems than it solves. How broad
1179 should the Subcommittee’s inquiry be?

1180 Judge Kravitz seized the opportunity to express thanks to the American Bar Association
1181 Litigation Section, the American College of Trial Lawyers, Gregory Joseph, and others who
1182 provided thoughtful and helpful responses to Subcommittee inquiries.

1183 Professor Marcus introduced the list of possible Rule 45 issues by suggesting that a complete
1184 overhaul may be an overwhelming task. Rule 45 has been something of a stepchild. It is a very
1185 important part of private enforcement of the law in this country. It is not just a discovery tool. It
1186 applies at trial as well.

1187 The agenda memorandum lists 17 possible issues that emerged from reviewing two leading
1188 treatises. Andrea Kuperman’s survey of secondary literature discovered that Rule 45 has prompted
1189 a lot of writing, including additional issues. For purposes of introduction, the possible topics can
1190 be grouped.

1191 One set of issues involves cost and burden. The more aggressive position is that a nonparty
1192 must be compensated for every penny spent in complying, including attorney fees to review
1193 potentially responsive materials. This position may be qualified by arguing that reimbursement of
1194 anything is required only if the nonparty objects to the subpoena. Rule 45 does not really say either
1195 of these things. There may be something awkward in requiring reimbursement for the costs of
1196 weeding out materials that are not produced in response to the subpoena: “I have to pay for things
1197 I don’t even get to see?” These questions may raise the issue whether e-discovery should be treated
1198 differently from hard-copy discovery.

1199 A second set of issues asks whether Rule 45 should address preservation by a nonparty.

1200 A third set involves notice. Rule 45 was amended in 1991 to require notice to all parties
1201 before a document subpoena is served. It is not clear whether that has proved a good idea.
1202 Observers have raised the question whether the party who served the subpoena also should be
1203 required to notify other parties when documents are produced.

1204 A fourth set of questions go to location. Should the reach of a trial subpoena be different
1205 from the reach of a deposition subpoena? Should document subpoenas be treated separately? Is the
1206 100-mile limit still appropriate — and if there is a distance limit, should it be measured by air miles,
1207 most convenient route miles, shortest route miles, or something else?

1208 A fifth set goes to timing. Can Rule 45 be used to circumvent a discovery cut off? What
1209 should be the time to respond — Rule 45(c)(2)(B) may imply that the time to respond can be set at
1210 less than 14 days by requiring that objections be served before the earlier of the time specified for
1211 compliance or 14 days after the subpoena is served. And when must a privilege log be filed in
1212 relation to the time allowed to object?

1213 A sixth issue goes to sanctions for disobedience. The only sanction specified in Rule 45 is
1214 subdivision (e), which provides for contempt. Should there be other sanctions?

1215 A seventh issue asks whether a government agency is a “person” subject to subpoena. It may
1216 be that this issue has been generally resolved by the Court of Appeals for the District of Columbia
1217 Circuit.

1218 An eighth set of issues addresses subpoenas in aid of arbitration proceedings.

1219 Finally, is it possible to shorten and simplify Rule 45? To the extent that it may be
1220 ambiguous now, the goal of resolving ambiguities may conflict with the desire to shorten the rule.
1221 Ambiguities often are resolved by adding words.

1222 Globally, the question is whether Rule 45 needs a major overhaul. Gregory Joseph has
1223 advised that it is not generally a problem. Is that right?

1224 Discussion began with the reminder that Rule 45 is the only discovery rule that directly
1225 addresses nonparties. It is so complex that the recipient of a subpoena virtually has to consult a
1226 lawyer. But third-party discovery often makes the difference between winning and losing the case.
1227 A simpler and shorter rule would be better. Four concepts that can be covered in plain English may
1228 do the job. They will be elaborated as the work goes on. Agreement was expressed. The subpoena
1229 itself should include clear directions on what is required. Simply setting out the text of Rule 45(c)
1230 and (d), as required by 45(a)(1)(A)(iv), is no real help.

1231 The choice of court for resolving discovery issues was identified as an important issue. The
1232 court where the action is pending has a real interest. But there is a real tension when the dispute
1233 involves a nonparty subpoenaed in a different court. The nonparty may deserve protection against
1234 being sent elsewhere. An Illinois nonparty does not want to have to litigate objections or questions
1235 of compliance in California. Flexibility is important. Perhaps a system could be worked out for
1236 referring the issues to the court of the main action without sending the nonparty there. Arguing by
1237 remote communication systems may be a good compromise.

1238 The next observation was that “there is more control over discovery than is sometimes
1239 thought.” Discovery often does not start until the judge thinks the case is ready to go ahead. The
1240 court where the action is not pending may overemphasize the burden of compliance because it is not
1241 sufficiently familiar with the case and the importance of compliance. It may make sense to resort
1242 first to the main court, particularly as to disputes between the parties. After the main court has
1243 resolved any disputes between the parties, issues raised by the nonparty may be resolved in the court
1244 that issued the subpoena. The CM/ECF system can be used to send important file records to the
1245 court that issued the subpoena.

1246 Observers were invited to comment. One said that there are shortcomings in Rule 45. There
1247 should be a provision for notifying other parties that documents have been produced. It is important
1248 to address which court decides disputes. It may be possible to identify at least some of the factors,
1249 like costs to the person subpoenaed, to be weighed in determining what should be required.
1250 Privilege logs can be very burdensome. But generally the rule works well. Another said that the
1251 American College Civil Rules Committee has similar views. Rule 45 works well in most ways, but
1252 it might be improved. There is no sense of urgency about this. A third said that many employment
1253 lawyers feel that there are abuses in employment cases by subpoenas issued by employer defendants
1254 to former employers without giving plaintiffs the notice required by Rule 45. Another observer
1255 responded that in the types of cases he litigates the parties do comply with the Rule 45(b)(2) notice
1256 requirement. The second observer added that the problem of notice after documents are produced
1257 can be addressed in part by making a Rule 34 request to produce documents provided in response
1258 to a subpoena.

1259 A different set of questions was raised. The party who issued the subpoena may negotiate
1260 privately with the person served to determine what documents will be produced, without giving
1261 notice to other parties. A case-management order might address this, but it might be better to

1262 address the question in Rule 45 rather than depend on including these terms in a management order
1263 in every case.

1264 A judge noted that he simply orders parties to give to other parties the documents received
1265 under subpoenas. Otherwise Rule 34 requests are made.

1266 It was asked whether the Committee should venture into the problems and uncertainties
1267 arising from prehearing subpoenas issues by arbitrators. It was noted that these questions affect
1268 many constituencies in addition to the courts. The circuits have generated conflicts on some of the
1269 questions. These are not the kinds of issues that should be addressed by the Civil Rules.

1270 It also may be that preservation issues should not be addressed. There were many requests
1271 that the e-discovery rules address preservation, and the requests were resisted from concern that
1272 preservation is not a topic appropriate for the rules.

1273 Other issues may be put aside because there are workable pragmatic resolutions. The
1274 question whether a government agency is a “person” within Rule 45 is a good illustration.

1275 It was agreed that the Subcommittee should consider the question of trial subpoenas issued
1276 to officers of a corporate party. The problem “arises from different readings of the rule we wrote.”

1277 It was agreed that there seem to be enough issues that present practical problems in real
1278 practice to justify putting aside other possible issues that do not present practical problems. The
1279 Subcommittee will forge ahead with its Rule 45 project.

1280 *2010 Conference*

1281 Judge Kravitz introduced discussion of planning for the 2010 conference by boasting that
1282 it had been a terrific decision to ask Judge Koeltl to chair the planning committee. He also noted
1283 that the ABA Litigation Section has been a big help.

1284 Judge Koeltl confirmed that the conference will be held May 10 and 11, 2010, at the Duke
1285 University Law School. The purpose will be to explore the costs of litigation, especially discovery
1286 and e-discovery. Are there problems with the system? What are the possible solutions — new rules,
1287 judicial education, best practice advice for lawyers?

1288 Part I of the conference, focusing on empirical research, will be a cornerstone. The study
1289 by the American College of Trial Lawyers and the Institute for the Advancement of the American
1290 Legal System found widespread dissatisfaction with the federal discovery system. There are
1291 significant problems. That seems to be different from the results of the 1997 FJC study, which
1292 found that most lawyers did not have problems with the scope of discovery or proportionality. The
1293 FJC study did find problems in complex, high-stakes cases where relations between the lawyers
1294 were not as good. We need to find the current state of the system, measuring satisfaction and
1295 dissatisfaction. Is dissatisfaction limited to certain areas? Do we need systemic responses? More
1296 focused responses?

1297 The FJC will survey some 5,700 lawyers in more than 2,800 federal cases terminated in the
1298 last quarter of 2008. The survey will include e-discovery questions that were not asked in the 1997
1299 survey. The survey will be distributed in May; it is hoped that preliminary results will be available
1300 in the fall. There will be follow-up interviews with 20 or 30 lawyers to obtain responses at deeper
1301 levels.

1302 The ABA Litigation Section will, with some improvements, send the American College -
1303 IAALS survey to all its members. The survey will go out in June. Results are expected in
1304 November.

1305 It is not too early to express thanks for the work already done by the FJC and the Litigation
1306 Section.

1307 RAND has been working on e-discovery. Nick Pace is on the 2010 Conference planning
1308 committee. He has encountered some difficulty in getting the kinds of information he wants because
1309 there are proprietary concerns that make lawyers and clients reluctant to respond. Efforts are under
1310 way to persuade them that empirical research is important if they hope to support their complaints
1311 about the costs of e-discovery.

1312 Professor Theodore Eisenberg of Cornell has been asked to help. One possible topic for
1313 research would be whether fact-based pleading under the PSLRA actually streamlines litigation and
1314 reduces costs.

1315 It has been noted that California state court data seem to show a significantly higher rate of
1316 trials than found in federal courts in California. If that proves out, it would be interesting to explore
1317 the reasons. Is this due to federal pretrial procedures?

1318 These empirical inquiries can fill most of the morning of the first day.

1319 A second important part of the conference will be the overview papers. Great people already
1320 have agreed to produce some of these papers. They will be available relatively soon to help further
1321 development, but the authors will be free to revise them up to the time of the conference. Elizabeth
1322 Cabraser will address discovery. Gregory Joseph will address e-discovery. Arthur R. Miller will
1323 address pleadings and dispositive motions. Judge Patrick Higginbotham will address judicial
1324 perspectives. Justice Andrew Hurwitz will address state discovery — Arizona has rejected
1325 Twombly pleading, and has adopted expansive disclosure.

1326 Then there will be a series of panels on the papers. And a panel by users of the system,
1327 including representatives of general corporate counsel, the plaintiffs' bar, the Department of Justice,
1328 and public-interest firms. There also will be a panel of representatives from organized bar groups.
1329 They will be invited to spend the next year developing their views for presentation. And we hope
1330 to have a panel of alumni of the Rules process — Professor Miller, Judge Higginbotham, and
1331 perhaps two of the Duke faculty, Professor Carrington and Dean Levi.

1332 Thomas Willging described the nature of the FJC survey. The sampling design will include
1333 2865 cases. More than 5,700 attorneys will receive the survey. The sample will be selected at three
1334 levels, principally designed by Emery Lee. The sample will include every case that went to trial in
1335 the fourth quarter of 2008, October through December; that is 529 cases. It will include every long-
1336 pending case that took more than four years to be terminated; that is 321 cases. The rest is a random
1337 sample of 2,000 cases after filtering out cases not likely to have discovery — cases closed
1338 administratively, cases related to bankruptcy, and the like. Other excluded categories include social
1339 security cases, student loans, bankruptcy, condemnation, drug-forfeiture, asbestos, and cases
1340 transferred by the MDL panel.

1341 The final draft of the survey instrument has been prepared. Many people provided comments
1342 on initial drafts. The process is like a freight train — everyone wants to put something on board as
1343 it passes. Half of the questions address factors of the individual cases: what was discussed in the
1344 Rule 26(f) conference, and so on. (There are 28 possible responses to that question).

1345 It was noted that as compared to the American College survey, this instrument is very
1346 specific in terms of how many depositions, interrogatories, requests for documents, requests for
1347 admission, and so on. This specificity may help to flesh out the question whether there are problems
1348 with e-discovery.

1349 The FJC hopes the questions are engaging enough, and the topic important enough, that
1350 lawyers will make the effort to respond. The introduction is designed to make clear that the survey
1351 is important. The questions include what the judge did, what the costs were, and what were the
1352 stakes. Case characteristics and attorney characteristics are covered next. Then come questions
1353 addressed to reform proposals and “rules.” The reform proposals focus on ADR; on when the issues
1354 were narrowed in this case, and when are they narrowed in most cases. There also is a one-
1355 paragraph description of the simplified procedure model once developed for this Committee, asking
1356 whether the attorney would recommend such a system to a client. Other questions look to a
1357 comparison of costs in federal courts to costs in state courts, and to the desirability of changes in the
1358 rules to reduce all discovery or e-discovery or to increase case management.

1359 Lorna Schofield thanked Judge Rosenthal and Judge Kravitz for the productive relationship
1360 between the Committee and the Litigation Section, and to Judge Koeltl for including the Section in
1361 the program. Their encouragement for the survey has been welcome. The Section has e-mail
1362 addresses for 55,000 section members, who will receive the survey. A task force is being formed
1363 to explore problems of civil procedure, including not only topics that might be addressed by the
1364 Civil Rules but also topics that can be addressed only by other means.

1365 Judge Koeltl urged suggestions for people who would be good panelists. We should have
1366 a broad dispersion in terms of geography, youth and experience, plaintiffs and defendants.

1367 Judge Kravitz said that the Conference will be a big help for the Committee’s work. He
1368 expressed the Committee’s deep appreciation and thanks to Judge Rothstein for supporting the great
1369 help we are getting from the FJC.

1370 It was noted that individual responses to the FJC survey will not be made public.

1371 It also was noted that the spring 2010 Committee meeting probably will not be held in
1372 conjunction with the Conference. The Conference will be a lot of work on its own.

1373 Judge Koeltl expressed hope that the conference would result in directions for change. How
1374 specific recommendations for rules changes can be remains to be seen. We do need to guard against
1375 discussion that is too theoretical or too anecdotal to help advance specific reform responses.
1376 Concrete suggestions will be important, even when they involve things that can be done only by
1377 statute.

1378 The approaches taken by state courts will be part of the program. Judge Kourlis is working
1379 on this with the IAALS, and the work will be part of the program.

1380 Invitations will be extended to people who are not panelists, but there will be physical limits
1381 on the number of people who can be accommodated. The Conference will be public, as everything
1382 the Committee does. It was noted that the Seventh Circuit Bar Association recently arranged a
1383 relatively low-cost web cast of a program celebrating Lincoln’s 200th birthday. A DVD also was
1384 made. And it was suggested that the federal judiciary TV network might be hooked up. It also may
1385 be possible to create a camera link to screens in a room adjacent to the meeting room.

1386 One judge commented on the common tendency of lawyers at Committee hearings to testify
1387 to how things are done where they practice. Lawyers may respond to research questions in two

1388 ways, either by reacting on a hypothetical basis or by thinking of actual experiences. We do not
1389 want to be entirely self-referential. We aim get new data and to hear from new voices. And to be
1390 concrete about getting suggestions for things that can be accomplished in a lifetime.

1391 *Other Matters*

1392 A new Privacy Subcommittee has been formed with representatives from the Advisory
1393 Committees. Judge Raggi will chair the Subcommittee. Judge Koeltl is the Civil Rules nominee.
1394 Problems of the sort addressed by Civil Rule 5.2 persist, and new ones have arisen. Some court
1395 filings still have social security numbers and other personal identifiers. Identifiers not listed in Rule
1396 5.2 might be added to the list — alien registration numbers are often suggested. Current methods
1397 of implementing the rules are open to review. In criminal proceedings, questions arise about plea
1398 hearings and cooperation agreements; those questions are complicated. Maintaining public access
1399 to court records and protecting legitimate privacy concerns will be a problem for a long time. The
1400 problems will be exacerbated if PACER is made generally available without charge. The time to
1401 revisit these questions is upon us.

1402 The FJC continues to work on its CAFA study. Present work is focused on completing the
1403 coding of pre-CAFA case information. They hope to have a report in the fall. California has
1404 published information on class-action filings in both California state courts and federal courts in
1405 California. The data show a temporary decrease in filings after CAFA, and then a return.

1406 The Sealed Case Subcommittee continues its work. The analysis is very thorough. Quite
1407 a few sealed cases have been found. But many of them are magistrate-judge cases involving search
1408 warrants, applications for pen registers, and the like. There also are sealed appeals and sealed
1409 criminal cases. When courts are approached for information about cases that cannot be found in the
1410 docket, they often express surprise to discover that the cases remain sealed. As the information
1411 becomes complete, the Subcommittee will begin the task of considering what to make of it.

1412 *Next Meeting*

1413 The next meeting will be held on October 8 and 9 in Washington. The spring meeting in
1414 2010 may be held in Atlanta. Chilton Varner will explore the possibility of meeting at Emory
1415 University School of Law.

1416 Judge Rosenthal said that the meeting had been a real pleasure. It marks the apparent
1417 conclusion of the Committee's work on two important and difficult projects, summary judgment and
1418 discovery of expert trial witnesses. It has been a remarkable example of the rules process working
1419 very well. She also repeated her thanks to Judge Hagy for six years of fine work with the
1420 Committee.

Respectfully submitted,

Edward H. Cooper
Reporter



46 citations. The rule also could refer to a response brief and a reply brief, and say nothing about local
47 rules.

48 The discussion opened by these observations continued with a comment that the point-
49 counterpoint procedure had seemed attractive. But the testimony and comments seem to show that
50 this procedure can create unreasonable burdens — some litigants inflate the importance of the
51 statement, disputes about satisfactory implementation of the practice give rise to derivative motion
52 practice, and judges may not be able to police these problems at reasonable cost to the court and
53 parties. The Southern District of Indiana rule seems attractive. It requires a statement of undisputed
54 facts in the movant's brief, and a responding statement in the nonmovant's brief; because of page
55 limits on the briefs, the experience has been much more satisfactory than experience under that
56 court's earlier rule that provided for statements and responses as separate papers. The brief
57 procedure is better integrated than the separate statement procedure.

58 A question was asked as to how the statement of facts and narrative are integrated in the brief
59 under the practice in the Southern District of Indiana. Ms. Briggs responded that in practice, "all
60 the facts wind up in the statement."

61 It was observed that the Local Rule 56.1 statement and counterstatement work very well in
62 the Southern District of New York. The judge is likely to begin consideration of the motion with
63 the briefs, looking to the statement and counterstatement only after reading the stories of how the
64 facts fit into the case. It would be undesirable to write a national rule that requires a statement of
65 facts as part of the briefs — that would undermine the benefits of the direct point-counterpoint
66 process. The national rule should not establish a uniform practice that defeats the opportunity to
67 adopt point-counterpoint local rules. Lawyers do find ways to expand proceedings. The motions,
68 however, generally do not attack the statement directly. Instead, the motions attack the supporting
69 affidavits, arguing that the information in the affidavits cannot be produced in a form admissible at
70 trial. At the same time, it would be a shame to see the other advances embodied in proposed Rule
71 56 swamped by opposition to the point-counterpoint procedures in subdivision (c).

72 The question of preempting local rules was pursued further. Many districts require a point-
73 counterpoint procedure much like proposed Rule 56(c). A still greater number require a statement
74 of facts by the movant, but do not require a point-by-point response. And a plurality of districts do
75 not require either. It seems fair to assume that many districts prefer their current practices.
76 Opposition to the point-counterpoint procedure may raise sufficient doubts to defeat it as a national
77 requirement. But that does not mean that a different practice should be mandated by a national rule
78 that, in the name of uniformity, prevents local adoption of a point-counterpoint procedure. There
79 is likely to be significant opposition to any Rule 56 provision that would force uniformity in this
80 dimension of practice.

81 Another judge observed: "I have point-counterpoint and I don't want you to take it away
82 from me." No one fights "pinpoint citations." Nor is anyone fighting "deemed admitted" practice,
83 and that is very important. We protect pro se litigants by telling them they have to make the
84 counterpoint response. Some courts have local rules prescribing form notices that must be given to
85 pro se litigants. We should pursue a Rule 56 that does not refer to statements of fact in the rule text,
86 achieving uniformity in substance without referring to the number of documents comprising the
87 motion.

88 This discussion opened the question whether the Committee should shape its
89 recommendations according to its sense of what may prove acceptable in the later stages of the
90 Enabling Act process. The answer was that the Committee should attempt to draft the best rule it
91 can, recognizing the advantages of procedures that, because reasonably agreeable, will be readily
92 enforced by district judges.

93 Further discussion also suggested that the point-counterpoint provisions of proposed Rule
94 56(c) should be deleted. We cannot be sure, in light of the comments and testimony, that it is the
95 best practice. Whether or not it is the best practice, it is not so clearly the best practice as to justify
96 forcing it on reluctant courts. Nor is there a sufficient need for national uniformity to pick one point
97 on this spectrum and force it on all. There is much in the proposed rule that deserves adoption. It
98 should be protected by omitting any rule text reference to statements of fact. At the same time, it
99 is appropriate to preserve principles that people are not fighting about — the “considered
100 undisputed” provision is an example.

101 A parallel suggestion was that the least satisfactory procedure is one that would require the
102 judge to scour the record. The parties should be forced to identify the facts and to point to the
103 materials in the record that support or dispute the facts. There is not as much need to choose
104 between brief, separate statement, or other mode of presentation.

105 Yet another member suggested that there is a lot of good material even in proposed Rule
106 56(c). Paragraphs (1) and (2) — the point-counterpoint procedure and the authority to omit it —
107 should be deleted. The remainder of (c), with some reorganization, can preserve the pinpoint-
108 citation requirement and other useful procedures. These procedures will be uniform. There is no
109 need to adopt rule text that notes such matters as point-counterpoint procedure.

110 In a similar vein, it was noted that Rule 56 text should not of itself encourage local rule
111 experimentation. And that departure by an order in a particular case gives notice to the parties in
112 a way that local rules sometimes do not. There is a difference between prohibiting and inviting local
113 rules, especially when there is no apparent correlation to differences in local conditions such as case
114 loads, local culture, or local state practice. Lawyers and judges are enormously inventive. There
115 will be local rules. And judges will develop case-specific orders.

116 It was suggested that the Subcommittee might frame a draft that neither adopts nor forbids
117 point-counterpoint procedure.

118 A counter-suggestion was that perhaps there should be a draft that retains the point-
119 counterpoint procedure as a model for opting in. Opposition was expressed on the ground that the
120 model would become a default, inviting all the problems that have been encountered in districts that
121 have adopted and then abandoned similar procedures. The Committee Note can refer to point-
122 counterpoint as one way of framing summary-judgment motions; that would leave the districts that
123 want this procedure free to adopt it, with their own local variations. Of course districts that are
124 adamantly opposed will not adopt it. But if there is an opt-in model in Rule 56, some judges will
125 start to impose it, and with it impose added costs on the parties. This procedure does not change the
126 standard for summary judgment, but it does impose costs.

127 Another member confessed to liking point-counterpoint in practice. At first he was prepared
128 to force it through as a matter of uniform national practice. But the comments and testimony show
129 that those who oppose it have genuine and valid reasons. The opposition is more than distaste for
130 being dictated to. Although he would not change his local point-counterpoint rule, it cannot be said
131 that this practice is so clearly the best practice that it should be forced on all federal courts.

132 *Rule 56: “Should,” “Must,” “Shall,” or Finesse*

133 The Style Project adopted “should” grant summary judgment to replace “shall.” Proposed
134 Rule 56 carries forward “should” as the word in place from December 1, 2007. But the comments
135 and testimony, and discussion at the January Standing Committee meeting, continue to press the
136 question whether it was wise to replace “shall” with “should.” Many of the comments express a
137 preference for “shall,” often a strong preference, and view “must” as an alternative inferior to “shall”
138 but better than “should.” The issue remains very much alive, along with the question whether it is

139 better to finesse the question by omitting any direction to the court. Rather than say that the court
140 shall, should, or must grant summary judgment, the rule might say simply that a party may move for
141 summary judgment, asserting that there is no genuine dispute as to any material fact, etc.

142 A first observation was that the Rule 56 proposal is not intended to change the “substantive
143 law” of summary judgment. The concern with “should” is that it takes a definitive position on an
144 unsettled issue — what is the nature of “discretion” to deny summary judgment when a party shows
145 there is no genuine issue and that it is “entitled to judgment as a matter of law.” At best this is a
146 matter of dispute. The Supreme Court’s opinions are not clear — they include seemingly
147 inconsistent pronouncements and can be read to go either way. The best way to retain pre-2007 law
148 is to substitute “must.” Rule 56 uses mandatory language, and the Celotex opinion says that it
149 “mandates” summary judgment when an appropriate showing is made. “Must” avoids changing
150 that. To the extent that the Supreme Court has recognized discretion to deny, it has done so in the
151 context of a rule that, with “shall,” used mandatory language. The same discretion will remain with
152 “must” as mandatory language. If this discretion is eventually extended, then the Committee should
153 revisit the reference that the movant is “entitled” to judgment as a matter of law. Beyond that, none
154 of those offering testimony and comments have urged that summary judgment should be denied
155 when there is no genuine dispute. And it is better to avoid the alternative that finesses the issue by
156 removing all mandatory or directive language. The standard has been in the rule since 1938. If we
157 take it out, there is a real risk that we will be changing the law in ways that we cannot anticipate.
158 “Must” is better on the assumption that we will not be allowed to say “shall.”

159 It was urged in a similar vein that a lot of case law has developed around “shall.” Care is
160 required in tinkering with it. With “should,” the Style Project “launched something that people take
161 as changing the law.”

162 The finessing alternative was offered again. Rule 12 provides a model. It describes grounds
163 for various motions, but does not direct the court how to rule. But it was suggested again that
164 removing the familiar direction will open the door for unforeseeable developments. In 1938 Rule
165 56 directed that “[t]he judgment sought shall be rendered forthwith if [the supporting materials]
166 show that, except as to the amount of damages, there is no genuine issue as to any material fact and
167 that the moving party is entitled to a judgment as a matter of law.”

168 The long pedigree of “shall” led to the suggestion that our first choice should be to restore
169 “shall” to the rule. We should not yield to the impression that the Style Subcommittee conventions
170 are ironclad and unchangeable no matter what the justification for using “shall.”

171 Reversion to “shall” was offered as an illustration of the challenges that will confront a
172 Committee Note explanation of each of the several alternatives. The Note might well remain as
173 published if “should” is retained, leaving it to the Report to the Standing Committee to explain the
174 decision.

175 A Committee Note explaining a change to “must” will prove trickier. Some explanation
176 seems called for when the rule text as recommended for adoption departs not only from what was
177 published but from the text adopted in 2007 with a Committee Note explaining that there is
178 discretion to deny summary judgment even when the movant shows there is no genuine dispute as
179 to any material fact. The explanation might be misleading if it stated simply that there is no
180 discretion. There are many cases stating that there is discretion to deny. A supposed “entitlement”
181 to summary judgment would be no more than conditional — many cases say that when denial of
182 summary judgment is followed by trial, the question is the sufficiency of the trial evidence. If there
183 is sufficient evidence at trial to defeat judgment as a matter of law, the jury verdict stands even
184 though the summary-judgment record would not have sufficed to defeat judgment as a matter of law.
185 It should be recognized that a showing sufficient to carry the summary-judgment burden may turn

186 on matters of credibility better left for trial, particularly when inference and credibility
187 determinations may be interdependent. It might be useful to honor the frequent practice of avoiding
188 close calls on summary judgment, particularly when partial summary judgment leaves the way open
189 for trial on issues that will require consideration of substantially the same evidence as bears on the
190 issues that might be resolved by summary judgment. The relationship between the timing of the
191 motion and the progress of discovery, including the need for further discovery under present Rule
192 56(f) as slightly revised in proposed Rule 56(d), might be noted. It might be made clear that “must”
193 does not entail an obligation to defer trial in order to take the time required to decide a motion filed
194 too close to trial to support reasoned consideration before trial.

195 A Committee Note explaining some alternative that omits any direction about granting the
196 motion could present still greater challenges. The effort to say that the new form is intended to carry
197 forward whatever was meant by “shall,” without offering any direction to the court, could easily be
198 ignored in the early days and almost certainly would be overlooked in the future.

199 A Committee Note explaining restoration of “shall” could be reasonably straight-forward.
200 It would note the tide of adverse comments expressing the view that “should” will influence courts
201 toward a gradual and undesirable expansion of the discretion that has been recognized under “shall.”
202 It could add that the choice was viewed as a forced choice between “must” and “should,” but express
203 the view that the unique history of Rule 56, stretching back to the original language adopted in 1938,
204 cannot reasonably be captured in either word. Restoring “shall” here would not create any
205 ambiguity for other Civil Rules or any other set of rules, at least if it remains unique.

206 Further support for “shall” was expressed by asking what are the arguments against using
207 it? Restoring it would provide the best protection against changing practice by a forced choice
208 between the equally inadequate alternatives, “must” or “should.”

209 It also was noted that many of the comments suggest that “should” is a “thumb on the scale”
210 pushing for expanded discretion to deny summary judgment, or simply not to rule on the motion.

211 The alternative of dropping all words commanding or directing the court was raised again.
212 Since the Style Project shifted to the direct voice, several rules say that the court “must” do
213 something. But, as with Rule 12, it is possible to describe the grounds for a motion without
214 addressing the court’s action. The Committee Note could say that no change in burdens or standards
215 is intended. It was responded that a rule without some form of the traditional direction will spur
216 another round of litigation that seeks to challenge or recreate the standard.

217 The last comment continued by observing that the choice is made difficult by the dictate that
218 “shall” must never be used. “Shall” is the cleanest way to express the standard that it fostered over
219 a period of nearly 70 years. If we cannot have that, “must” is the better alternative.

220 Further support was expressed for “shall” as the best alternative. The Committee Note would
221 retract the 2007 Committee Note. Perhaps the Committee Note should say that the nature and extent
222 of the discretion to deny a motion that seems to show there is no genuine dispute as to any material
223 fact remain uncertain and are hotly disputed. The only way to allow natural evolution without
224 inviting unforeseeable — and therefore unintended — consequences is to go back to the traditional
225 word.

226 After agreeing that “shall” is the best choice, it was suggested that a way out might be found
227 by some expression such as “must, unless for good cause shown on the record.” This suggestion
228 was met by the counter that invoking “good cause” could easily be read to confer greater discretion
229 than “should.”

230 Yet another member urged that “shall” should be restored. This choice has in fact been
231 shown to be the best way to achieve the goals of the Style Project. The extensive comments and
232 testimony on the current proposal have shown that neither “should” nor “must” are capable of
233 carrying forward the meaning that has accrued to “shall” in Rule 56. This situation is unique within
234 the Civil Rules. “Shall” should be restored here, without any thought that it should be reconsidered
235 in other rules. To be sure, the present proposal is not confined by the goals of the Style Project.
236 Changes in the level of discretion are well within the reach of the ordinary amendment process. But
237 no one has expressed any desire or intent to change the pre-Style standard, not even at the level of
238 defining further the discretion to deny summary judgment when the established standard seems to
239 be satisfied.

240 This discussion concluded by noting that Rule 56 may present a case that falls within another
241 rule of the Style Project. “Sacred phrases” were carried forward without change, partly for the
242 reassurance of familiarity but often because any change in expression might change meaning. Had
243 the comments heard now been stimulated by the Style Project — which provoked very few
244 comments and only one hearing — the style question could have been fought out then. By
245 substituting “should” for “shall,” the Style Project may have inadvertently desecrated a sacred
246 phrase. Reconsideration may be proper in light of the determination that the present project also is
247 not an appropriate occasion to tinker with the element of discretion that has been recognized but not
248 defined as the law has evolved.

249 A different point was made to finish the Rule 56 discussion. Even Style Rule 56 refers to
250 materials that “show” there is no genuine issue. We should think about restoring this word as a
251 means of ensuring that the new rule does not inadvertently affect the still uncertain definition of the
252 Rule 56 moving burden after the Celotex decision. The choice may depend on how much of
253 proposed Rule 56(c) survives — (c)(4) identifies the “Celotex no-evidence” motion, and responses,
254 “showing” the required things. It might be good to balance these by restoring “show” to 56(a).

255 Discussion of Rule 56 concluded by noting that the Subcommittee will consider alternative
256 drafts, most likely by conference call early in March. The Subcommittee should have proposals for
257 consideration at the April Committee meeting. If all goes smoothly, the Committee will be able to
258 make recommendations to the Standing Committee for consideration at the Standing Committee’s
259 June meeting.

260 *Rule 26*

261 Professor Marcus opened discussion of the Rule 26 proposals. Although Daniel Girard is the
262 only Rule 26 Subcommittee member able to attend this hearing and meeting, it will be useful to
263 review the issues raised by testimony and comments with the Committee. The issues are raised in
264 the January 27 Memorandum on Pending Issues prepared by Professor Marcus for the Committee.

265 The first and most basic question is whether to carry forward with these proposals. The
266 proposals respond to pragmatic concerns that have been raised by practicing lawyers, most notably
267 by the Litigation Section of the American Bar Association. These concerns reflect a judgment,
268 based on widespread experience, that the extensive inquiries into the evolution of draft reports and
269 into attorney-expert communications seldom yield any useful information but impose high costs.
270 They do not necessarily reflect any abstract evaluation of what discovery might fit best in an ideal
271 world of relationships between adversary counsel and their trial-expert witnesses. From the
272 beginning, the Committee and Subcommittee have considered the objection that restoring the
273 discovery limits included in the proposed amendments implies acceptance of unworthy practices that
274 use experts as advocates rather than true witnesses. This objection has been expressed forcefully
275 in a comment signed by many law professors, 08-CV-070. Their concern is legitimate. But the
276 hearings and comments show that the bar in general supports the proposals. The changes wrought

277 by the 1993 amendment of Rule 26(a)(2) and the accompanying Committee Note were not for the
278 better. So the question: should the proposals be abandoned? By consensus the Committee
279 determined to proceed with the proposals.

280 A distinct question has been raised as to the possible effects of the proposed amendments on
281 Daubert determinations of admissibility. One tangential source of information is that the New Jersey
282 lawyers participating in the New Jersey miniconference unanimously agreed that the New Jersey
283 discovery rules similar to the Rule 26 proposals are a good thing, but disagreed about the wisdom
284 of the Daubert approach to expert testimony. No hint there that the discovery rule has had an effect
285 one way or the other on Daubert determinations. This question could be addressed by adding to the
286 Committee Note a statement that the discovery rules do not affect Daubert determinations: "These
287 amendments signal no retreat from the judicial gatekeeping function established by the decision in
288 *Daubert* * * *." The addition might be placed with the material at line 153 on p. 57 of the
289 publication book. No one has offered any reason to suppose that Daubert determinations will be
290 hampered by limiting discovery as the proposals would do. It was agreed that it would be desirable
291 to consult with Professor Capra, Reporter for the Evidence Rules Committee, about the form any
292 statement about Daubert might take.

293 Identifying the expert witnesses to be covered by the work-product protection for attorney-
294 expert communications also has been raised. Several commentators have urged that the protection
295 should extend to some or all of the witnesses that are not required to give a Rule 26(a)(2)(B) report
296 — the "disclosure" experts covered by proposed 26(a)(2)(C). These are witnesses not "retained or
297 specially employed to give expert testimony in the case," and "whose duties as the party's employee
298 [do not] regularly involve giving expert testimony." The broadest suggestion is to protect
299 communications with any witness who would be testifying under Evidence Rule 702. It would be
300 easy to draft the extended protection. Most of the comments, however, have focused on experts who
301 are employed by a party but do not regularly give expert testimony. It is argued that the lawyer must
302 be as free to communicate with such expert witnesses as with those retained or specially employed
303 as experts, or with those regular employees who regularly give expert testimony. It might be
304 somewhat more difficult to draft provisions extending work-product protection to employee experts,
305 given the prospect that former employees might well become involved. However that may be, all
306 of the pre-publication comments and discussion focused on outside experts. There was no
307 suggestion that discovery of employee experts presented similar problems, and indeed it was
308 suggested that the relationship between attorney and employee-expert is different from the
309 relationship with an independent expert.

310 An additional concern was expressed: often employee experts also have fact knowledge apart
311 from their expert evaluations. It could be difficult in practice to sort through the distinction between
312 discovery of fact knowledge and discovery aimed at communications in the course of preparing
313 expert testimony. It was pointed out, however, that extending the protection of proposed Rule
314 26(b)(4)(C) would not limit in any way discovery as to the employee's fact knowledge. It would
315 not limit discovery as to the development of the employee's expert opinion, apart from
316 communications with counsel. And discovery would be freely available as to communications with
317 counsel as to compensation, facts or data identified by counsel and considered by the expert, and
318 assumptions that counsel provided and the expert relied upon.

319 Beyond fact discovery, it was noted that several of the commentators sought work-product
320 protection because of uncertainties as to the reach of attorney-client privilege for communications
321 with a party's employees. Some states use a "control group" test that limits the number of
322 employees who come within the privilege. Former employees may or may not be within the
323 privilege. Employees who have independent counsel present similar issues. It is not clear that the
324 variability of state privilege law is an important consideration in shaping federal discovery rules.

325 Discussion pointed out that the proposal to extend work-product protection arose from
326 concern with the complexity and expense of expert-witness discovery that generally yields little
327 useful information and that impedes the development of expert opinions and testimony. Consensus
328 was reached as to draft reports or disclosures — all experts are protected. As to communications,
329 there are risks in attempting to freeze something in the rule as to employees or former employees.
330 Perhaps some general formulation could be found, giving discretion to the judge in a way that avoids
331 the need for complex drafting about propositions that are not firmly set. There is a risk of abuse if
332 we simply protect communications with all employees — an attorney, for example, might seek to
333 limit discovery by simply asserting that a former employee is an expert witness.

334 A different observation was that the present project was launched to undo the unanticipated
335 bad effects of the 1993 Committee Note. The proposal seeks to create a protection against the
336 problem the Note created. If we do not say anything about communications with employee
337 witnesses, there may be a negative implication that they are not protected by work-product doctrine.
338 This observation was met by the suggestion that before 1993, it would have been assumed that work-
339 product protection applies to all attorney-expert communications. The 1993 Committee Note never
340 purported to change that as to experts not required to make a Rule 26(a)(2)(B) report. But striking
341 “or other information” from Rule 26(a)(2)(B) has not seemed enough. Still, adding rule text “could
342 create headaches.” Perhaps the Committee Note could address this topic.

343 A committee member agreed that “it does seem a bit odd to deny protection for an in-house
344 expert.” But the proposal does a lot; it may not be wise to attempt to do everything. Many
345 employee experts will be “hybrid” fact and expert-opinion witnesses. There may be too many
346 permutations to address in rule text. The request for comments did address these questions, but no
347 specific rule text was proposed. Adding new rule text now might be risky. The three hearings on
348 the 2008 proposals show that we learn a lot from reactions to specific rule language. It may be wise
349 to let this possibility go by, waiting to see whether problems we did not hear about during the pre-
350 publication phase emerge.

351 Another committee member seconded the observation that, at least from a plaintiff’s
352 perspective, there is a potential for abuse if employee experts are brought within the work-product
353 protection of proposed Rule 26(b)(4)(C).

354 It was agreed that the Subcommittee will consider the question of non-Report, 26(a)(2)(C)-
355 disclosure, experts.

356 Another issue raised by many comments is whether the work-product protection for
357 communications should extend to communications with an expert’s assistants. This question seems
358 to arise with respect to independent, non-employee experts. An expert may rely on others to do a
359 lot of the work that supports the opinion. One event, probably common, is that the attorney
360 communicates with the expert through assistants who act as conduits. The Committee Note could
361 say that the protection extends to communications through a subordinate as conduit, or made directly
362 to the expert in the presence of a subordinate. One place for this statement would be on p. 57 of the
363 publication book, after line 167. A different sort of event, also probably common, is that the
364 attorney may want to talk with the subordinate as if, in substance, a consulting expert who will not
365 be testifying at trial. It is not clear how we should deal with this possibility.

366 The distinction between subordinate as conduit and subordinate as consulting expert was
367 taken up by suggesting that focus on the “conduit” function may be too narrow, an attempt to
368 squeeze too much into one word. We want to protect communications with the expert’s team. The
369 attorney is talking to the assistant as an agent of the expert; the situation is akin to the “common
370 interest” aspect of privilege doctrine.

371 The distinction was reiterated. It is easy to conclude that protection should extend to
372 communications with an assistant as conduit to the expert. But the lawyer may well talk to the
373 assistant understanding that the conversation may not go to the expert. The assistant still may be
374 acting as agent for the expert. The assistant as agent may exercise discretion in deciding what to
375 report to the “boss expert.” “The idea is to provide wide protection to avoid gymnastics.”

376 Agreeing that it makes sense to protect communications with the expert’s staff, it was asked
377 how often the question comes up? “Who notices a deposition of the staff person who has not been
378 designated as a trial-witness expert”? One witness at the San Antonio hearing said this had
379 happened, but the situation was not described in sufficient detail to advance understanding of
380 possible problems.

381 It was suggested that the staff-assistant question could be addressed by a simple sentence in
382 the Committee Note. But it also was noted that Committee Notes should be kept as short as
383 possible.

384 Another set of issues may be described as “logistical.” Suppose a person has already been
385 deposed for fact information and then is disclosed as an expert witness: must a party obtain consent
386 or an order for a second deposition to explore the expert opinion? Would a second deposition count
387 against the presumptive limit of 10 depositions per side? Draft Committee Note language urging
388 a reasonable approach to these questions was considered and dropped. It could be restored. But
389 “anything specific would be too specific.” Should we try to say something? Although good lawyers
390 have raised this concern, judges will work it out. It is likely that a Committee Note statement would
391 use quite a few words, and do little more than recommend flexibility. The Committee Note should
392 not become a practice guide. And even if an attempt were made to identify best practices, it would
393 be difficult to describe all the appropriate factors.

394 The comment from the Eastern District of New York committee urges reconsideration of an
395 issue already considered. The Advisory Committee debated a fourth exception that would take
396 outside the Rule 26(b)(4)(C) work-product protection communications “defining the scope of the
397 assignment counsel gave to the expert regarding the opinions to be expressed.” This exception was
398 rejected because it would be difficult to find language that does not expand the exception to a point
399 that destroys protection for any communication. The wide scope of discovery that remains as to the
400 origins and development of the opinion, including the three exceptions already built into (b)(4)(C),
401 seems enough. The Eastern District committee is concerned that as drafted the rule will not permit
402 the discovery described as permissible in the request for comment, see p. 47 in the publication book.
403 But the rule text as published does permit this discovery; it is only attorney-expert communications
404 outside the three exceptions that are protected. And even that protection is defeasible if a party
405 makes the showing required to defeat work-product protection. This discussion concluded without
406 anyone suggesting any interest in reconsidering this question.

407 The next-to-final paragraph of the proposed Committee Note notes that Rule 26 focuses only
408 on discovery, but expresses an expectation “that the same limitations will ordinarily be honored at
409 trial.” It was agreed that inclusion of this paragraph should be reconsidered. It has been used to
410 support arguments that Rule 26 is being used to create an evidentiary privilege that under § 2074(b)
411 can take effect only if enacted by Congress. Professor Capra, Reporter for the Evidence Rules
412 Committee, believes it unwise to address evidence rulings at trial in a Civil Rules Committee Note.
413 The Evidence Rules Committee shares that concern in some measure. This paragraph makes it more
414 difficult to understand that Rule 26 is only a discovery rule, not a privilege rule. Some will argue
415 to Congress that the Note shows the rules committees are resorting to subterfuge to evade Enabling
416 Act limits. The expectation stated in the Note, moreover, is not necessary to make the discovery
417 limits effective. There are practical reasons to avoid at trial the kinds of wasteful behavior found
418 in depositions — a judge will understand the unimportance of the information being pursued, and

419 a jury will quickly become impatient. In addition, most lawyers will prefer to avoid asking
420 questions with unknown answers.

421 The discussion of Rule 26 concluded by noting that the Discovery Subcommittee will
422 consider the testimony and comments and prepare a final proposal — perhaps with some alternatives
423 — for consideration at the April Advisory Committee meeting.

424 *2010 Conference*

425 Judge Kravitz noted that planning is under way for the conference to be held in 2010. The
426 conference will consider the basic structure of the notice-pleading/discovery/summary judgment
427 system created in 1938. Anxiety about discovery of electronically stored information continues to
428 grow to levels that demand reflection on the system within which discovery operates. This endeavor
429 will be important even if it does not lead to immediate attempts to revise the basic structure.

430 Judge Koeltl will chair the planning committee. The planning committee includes both some
431 Advisory Committee members and other members.

432 The Federal Judicial Center is moving forward on pulling together empirical data. Tom
433 Willging and Emory Lee are designing a new discovery survey. RAND is working on e-discovery.
434 Other researchers also are gathering empirical information.

435 The planning committee is considering whether to ask a few people to prepare initial “think
436 pieces,” of modest length, to help focus further planning and stimulate discussion by those who will
437 be recruited for the panels.

438 The Conference will be held at the Duke Law School, most likely in mid-May. Dean Levi,
439 former chair of the Advisory Committee and then the Standing Committee, is pleased to host the
440 conference.

441 *Adjournment*

442 Judge Kravitz noted that the Discovery Subcommittee is reviewing a list of questions that
443 arise from Rule 45; a progress report may be available for the April meeting.

444 Judge Kravitz thanked Andrea Kuperman for her valuable research in support of Committee
445 work. He also thanked the Administrative Office staff.

Respectfully submitted

Edward H. Cooper
Reporter