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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D C 20544

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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 9, 2008**

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

Introduction

The Civil Rules Advisory Committee met in Half Moon Bay, California, on April 7 and 8, 2008. Draft minutes of the meeting are attached. The Rule 56 Subcommittee held a conference call after the November 2007 Committee meeting and the Rule 26 Subcommittee held several conference calls and met in Phoenix on February 28, 2008. The fruits of the subcommittee activities are reported below in presenting recommendations to publish proposed amendments of Civil Rules 26 and 56 for comment

Several Civil Rules amendments were published for comment in August 2007, including the Civil Rules part of the Time-Computation Project. The comments were useful but not numerous All of the proposals, except for Rule 8(c), are recommended for adoption with a few modest revisions The Time-Computation Project proposals will be separated from the other proposals to facilitate discussion in conjunction with the Time-Computation Project proposals for other sets of rules

Parts I and II of this Report present the action items. Part I.A presents the Time-Computation Project proposals for adoption. Part I.B presents for adoption the other proposals published in August 2007, except for Rule 8(c). Part II A recommends for publication a thorough revision of Rule 56 that regulates the procedure for seeking summary judgment without changing the standard for granting summary judgment. Part II.B recommends for publication proposals that would amend parts of the Rule 26 provisions governing disclosure and discovery with respect to expert trial witnesses Both the Rule 26 proposal and the Rule 56 proposal were presented for preliminary discussion at this Committee's January 2008 meeting; the proposals have been improved by incorporating several responses to that discussion

Part III presents a few information items.

I ACTION ITEMS

A. Time-Computation Project

(1) "Template" — Civil Rule 6(a)

Civil Rule 6(a) was chosen as the vehicle for the "template" provisions that are adopted in as nearly uniform terms as possible by each of the different sets of rules that have time-computation provisions. The Civil Rules Committee recommends Rule 6(a) for adoption as set out below

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE[1]

Rule 6. Computing and Extending Time; Time for Motion Papers

~~**(a) Computing Time.** The following rules apply in computing any time period specified in these rules or in any local rule, court order, or statute:~~

~~**(1)** ***Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period.~~

~~**(2)** ***Exclusions from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.~~

~~**(3)** ***Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is filing a paper in court — a day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when~~

[1]New material is underlined, matter to be omitted is lined through

~~the clerk's office is inaccessible~~

~~(4) *"Legal Holiday" Defined.* As used in these rules, "legal holiday" means~~

~~(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and~~

~~(B) any other day declared a holiday by the President, Congress, or the state where the district court is located.~~

(a) **Computing Time.** The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) ***Period Stated in Days or a Longer Unit.*** When the period is stated in days or a longer unit of time

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays, and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal

holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) ***Period Stated in Hours.*** When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period,

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) ***Inaccessibility of the Clerk's Office.*** Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday, or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that

is not a Saturday, Sunday, or legal holiday

(4) ***"Last Day" Defined.*** Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone, and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event

(6) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

(B) any other day declared a holiday by the President, Congress, or the state where the district court is located.

* * * * *

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time. In accordance with Rule 83(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set The amendments thus carry forward the approach taken in *Violette v. P.A Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc* , 900 F 2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order) If, for example, the date for filing is "no later than November 1, 2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g.*, 2 U.S.C. § 394 (specifying method for computing time periods prescribed by certain statutory provisions relating to contested elections to the House of Representatives).

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. See, e.g., Rule 60(b). Subdivision (a)(1)(B)'s directive to "count every day" is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and the 10-day period not infrequently ended later than the 14-day period. *See Miltimore Sales, Inc v Int'l Rectifier, Inc* , 412 F 3d 685, 686 (6th Cir 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subdivision (a)(5) Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, new subdivision (a) refers simply to the "event" that triggers the deadline, this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods Many of those periods have been lengthened to compensate for the change. *See, e g* , Rule 14(a)(1).

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were generally retained without change.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours No such deadline currently appears in the Federal Rules of Civil Procedure But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2.17 p m) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2 17 p.m.) on the next day that is not a Saturday,

Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday, or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g.*, William G Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A L R. Fed. 259 (1996) (collecting cases). In addition, many local provisions address inaccessibility for purposes of electronic filing, *see, e g.*, D. Kan. Rule 5.4.11 ("A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.")

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1) Subdivision (a)(4) does not apply in computing periods stated in hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may,

for example, address the problems that might arise if a single district has clerk's offices in different time zones, or provide that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e g., Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

Subdivision (a)(5). New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C) The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e g.*, Rule 59(b) (motion for new trial "must be filed no later than 30 days after entry of the judgment"). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g* , Rule 26(f) (parties must hold Rule 26(f) conference "as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)"). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 30 days *after* an event, and the thirtieth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 21 days *before* an event, and the twenty-first day falls on Saturday, September 1, then the filing is due on Friday, August 31. If the clerk's office is inaccessible on August 31, then subdivision (a)(3) extends the filing deadline forward to the next accessible day that is not a Saturday, Sunday, or legal holiday — no later than Tuesday, September 4.

Subdivision (a)(6). New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivision (a). Subdivision (a)(6) continues to include within the definition of "legal holiday" days that are "declared a holiday by the President." For two cases that applied this provision to find a legal holiday on days when the President ordered the government closed for purposes of celebration or commemoration, see *Hart v Sheahan*, 396 F.3d 887,

891 (7th Cir 2005) (President included December 26, 2003 within scope of executive order specifying pay for executive department and independent agency employees on legal holidays), and *Mashpee Wampanoag Tribal Council, Inc v Norton*, 336 F 3d 1094, 1098 (D.C. Cir. 2003) (executive order provided that "[a]ll executive branch departments and agencies of the Federal Government shall be closed and their employees excused from duty on Monday, December 24, 2001"). Subdivision (a)(6)(B) includes certain state holidays within the definition of legal holidays, and defines the term "state" — for purposes of subdivision (a)(6) — to include the District of Columbia and any commonwealth, territory or possession of the United States. Thus, for purposes of subdivision (a)(6)'s definition of "legal holiday," "state" includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

(2) Civil Rules Time Provisions

Many Civil Rules containing specific time periods shorter than 11 days were published for comment on amendments extending the time periods to account for the impact of changing to a computation method that includes every day, abandoning the former practice of excluding intermediate Saturdays, Sundays, and legal holidays. As set out below, it is recommended that all of the proposals be adopted as published except for Rules 50, 52, and 59. The proposals to extend the time for motions under Rules 50, 52, and 59 from 10 days to 30 days have been scaled back to a 28-day period. The 28-day period was chosen in coordination with the Appellate Rules Committee to recognize the inconveniences that would arise from adopting the same 30-day period as the deadline for filing notices of appeal in most civil actions

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE**

Rule 6. Computing and Extending Time; Time for Motion Papers

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(b) Extending Time.

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(2) ***Exceptions.*** A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b); ~~except as those rules allow~~.

(c) Motions, Notices of Hearing, and Affidavits.

(1) ***In General.*** A written motion and notice of the hearing must be served at least ~~5~~ 14 days before the time specified for the hearing, with the following exceptions:

(A) when the motion may be heard ex parte;

(B) when these rules set a different time; or

**New materials is underlined, matter to be omitted is lined through

(C) when a court order — which a party may, for good cause, apply for ex parte — sets a different time.

(2) ***Supporting Affidavit.*** Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least ~~1~~ 7 days before the hearing, unless the court permits service at another time.

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Summary of Comments*

RULE 6(A)(5): BACKWARD COUNTING

07-CV-002: The E.D.N.Y. Committee on Civil Litigation suggests the Civil Rules should be amended to eliminate backward counting periods The time-computation amendments, by continuing to count backward when the last day of a period is an excluded day, exacerbate the bad effects of the proposals by shortening response periods still further. And the rules have no provision for extra days when service is by mail — "Nor is it clear how a workable rule could be drafted that would do this." Rule 6(c) is the most important of the backward-counting rules. E.D. & S.D.N.Y. Local Civil Rule 6.1 illustrates a way to eliminate backward counting. (It does this by not setting any time for serving a motion; it sets times only for opposing and for replying to the opposition.)

Recommendation: This proposal seems too complicated to be acted upon as part of the Time-Computation Project. Even if the project is deferred to coordinate statutory amendments, this question should be put on a separate track. Other backward-counting periods include disclosure periods set in days before trial; the Rule 26(f) conference set before the scheduling conference or order; notice before hearing on a default judgment; and Rule 68, noted below.

07-CV-013: Alexander J. Manners, Esq , notes that Rule 6(d) does not extend time when time is measured backward from an event Rule 6(c)(1) will allow a motion to be served by any means at least 14 days before the time specified for the hearing. The motion can be served by mail, and intervening weekends or holidays may mean that delivery is even more than 3 days after service There is less effective time to respond. One cure would be to set different times for service by any means other than in-hand service. He does not specify drafting language. The idea might be expressed in Rule 6(c)(1) like this: "A written motion and notice of the hearing must be served at least 14 days before the time specified for the hearing, or at least 17 days before that time if service is made under Rule 5(b)(2)(C), (D), (E), or (F), with the following exceptions * * *." A more

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*This is a partial summary of the comments on the Civil Rules Time-Computation Proposals published in August 2007 In the report for the Time-Computation Subcommittee Professor Struve has summarized the comments addressed to the general computation methods and questions shared by the several sets of rules This summary addresses the comments that particularly concern specific Civil Rules proposals

general approach might be to revise Rule 6(d), perhaps by designating the present subdivision as paragraph (1) and adding a new paragraph (2): "(2) When a party must make service within a specified time before a particular event and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added to the specified time." [This general approach would include such lengthy periods as the Rule 26(a)(2)(C) period for serving disclosures of expert testimony — 90 days before the date set for trial.]

Recommendation: The "3-day" rule is likely to be reconsidered, at least for electronic service. It may be better to consider this question together with Rule 6(d).

RULE 6(C): LENGTHENED TIMES

07-CV-002: The E.D.N.Y. Committee on Civil Litigation supports lengthening the time periods for moving and responding papers in Rule 6(c)(1) and (2). But it suggests that it might be better to set longer periods of substantive motions than for discovery motions. It points to E.D. & S.D.N.Y. Local Civil Rule 6.1. Rule 6.1 does not set times for moving; it does set times for opposing and for replying to the opposition.

07-CV-013: Alexander J. Manners, Esq.: Proposes revision of the 6(c)(1)(C) provision that allows a court to set a different time by order and addition of an authorization for local rules: "(C) When a ~~court order — which a party may, for good cause, apply for ex parte — sets a~~ different time is set by local rule or court order."

He also suggests a revision to account for backward-counting periods; see the Rule 6(a)(5) notes above.

Recommendation: Express authorization of local rules is little more attractive here than in many other settings. Distinction between substantive motions and discovery motions may merit consideration, but not because of the new computation method.

RULE 6(D): "3 DAYS ARE ADDED"

07-CV-008: Robert J. Newmeyer, Administrative Law Clerk, suggests that the "3 extra days" provision be "given a state funeral." It spawns confusion, debate, and needless motions. Three extra days are not needed after electronic service. (This comment also offers an illustration based on the Rule 6(c) backward-counting period for an affidavit opposing a motion; that period is not measured by service.)

Recommendation: This topic may move to the active agenda because of doubts about adding 3 days for service by electronic means. That will provide suitable occasion for reviewing service by other means.

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading.

(1) ***In General.*** Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows.

(A) A defendant must serve an answer·

(i) within ~~20~~ 21 days after being served with the summons and complaint, or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States

(B) A party must serve an answer to a counterclaim or crossclaim within ~~20~~ 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within ~~20~~ 21 days after being served with an order to reply, unless the order specifies a different time.

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(4) ***Effect of a Motion.*** Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within ~~10~~ 14 days after notice of the court's action, or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within ~~10~~ 14 days after the more definite statement is served.

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(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within ~~10~~ 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within ~~20~~ 21 days after being served with the pleading

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Committee Note

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days See the Note to Rule 6.

Rule 14. Third-Party Practice

(a) When a Defending Party May Bring in a Third Party.

(1) ***Timing of the Summons and Complaint.*** A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than ~~10~~ 14 days after serving its original answer.

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Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

Rule 15. Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course.

(A) before being served with a responsive pleading; or

(B) within ~~20~~ 21 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar.

(2) ***Other Amendments.*** In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave The court should

freely give leave when justice so requires.

(3) ***Time to Respond.*** Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within ~~10~~ 14 days after service of the amended pleading, whichever is later.

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Committee Note

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Note to Rule 6.

Summary of Comments

RULE 15(A)(2)

07-CV-006· Jack E. Horsley, Esq., recommends that an amendment increasing the ad damnum be allowed no later than 30 days before trial unless the defendant consents or the court orders a later time.

Recommendation: This question is not affected by the Time-Computation proposals. It does not seem to require immediate action.

Rule 23. Class Actions

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(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within ~~10~~ 14 days after the order is entered. An appeal does not stay proceedings in the district court unless

the district judge or the court of appeals so orders

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Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

Rule 27. Depositions to Perpetuate Testimony

(a) Before an Action Is Filed.

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(2) ***Notice and Service.*** At least ~~20~~ 21 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies.

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Committee Note

The time set in the former rule at 20 days has been revised to 21 days. See the Note to Rule 6.

Rule 32. Using Depositions in Court Proceedings

(a) Using Depositions.

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(5) ***Limitations on Use.***

(A) *Deposition Taken on Short Notice.* A deposition must not be used against a party who, having received less than ~~11~~ 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place — and this motion was still pending when the deposition was taken.

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(d) Waiver of Objections.

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(3) ***To the Taking of the Deposition.***

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(C) *Objection to a Written Question* An objection to the form of a written question under

Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within ~~5~~ 7 days after being served with it.

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Committee Note

The times set in the former rule at less than 11 days and within 5 days have been revised to 14 days and 7 days. See the Note to Rule 6.

Rule 38. Right to a Jury Trial; Demand

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(b) Demand. On any issue triable of right by a jury, a party may demand a jury trial by:

(1) serving the other parties with a written demand — which may be included in a pleading — no later than ~~10~~ 14 days after the last pleading directed to the issue is served; and

(2) filing the demand in accordance with Rule 5(d).

(c) Specifying Issues. In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable If the party has demanded a jury trial on only some issues, any other party may — within ~~10~~ 14 days after being

served with the demand or within a shorter time ordered by the court — serve a demand for a jury trial on any other or all factual issues triable by jury.

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Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 6.

Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

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(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than ~~10~~ 28 days after the entry of judgment — or if the motion addresses a jury issue not decided by a verdict, no later than ~~10~~ 28 days after the jury was discharged — the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

* * * * *

(d) Time for a Losing Party's New-Trial Motion. Any

motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than ~~10~~ 28 days after the entry of the judgment.

* * * * *

Committee Note

Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 28 days. Rule 6(b) continues to prohibit expansion of the 28-day period.

Summary of Comments

RULES 50, 52, 59: CHANGE TO 30 DAYS

07-CV-002: The E.D.N.Y. Committee on Civil Litigation supports lengthening the time for post-trial motions under Civil Rules 50, 52, and 59 from 10 days to 30. "[T]his is a more realistic time period."

07-CV-005. Patrick W. Allen, Esq., thinks that the proposed change to 30 days will lead to unnecessary delay; a party should be able to decide within 10 days (The comment apparently assumes continuation of the present rule that Saturdays, Sundays, and legal holidays are not counted in measuring 10 days.)

07-CV-010: Public Citizen Litigation Group, by Brian Wolfman, suggests that the period should be 21 days, not 30. (1) "Although the current 10-day period is tight, we have never found it unmanageable. We acknowledge, however, that the current deadline may make it difficult to file some post-trial motions, particularly those under Rule 50 and 52. Nevertheless, we are concerned that a 30-day period will unnecessarily delay the proceedings and may even encourage litigants to file unwarranted post-judgment motions." (2) 30 days is undesirable because that is the appeal time limit for most civil actions. The result will be many notices of appeal filed prematurely, and suspended, "significantly increas[ing] the number of instances in which appeals and post-judgment motions are pending simultaneously. At the very least, circuit clerks will have to send out forms to litigants prematurely, and litigants will have to fill them out prematurely." (This comment underscores the need to consider this question in tandem with the Appellate Rules Committee.)

07-CV-014: The New York City Bar Committee on Bankruptcy notes a problem of integration with the Bankruptcy Rules appeal period, now 10 days and proposed to become 14 days. simple incorporation of Rules 52 and 59 would set the time to move for reconsideration long after expiration of the appeal period. The Bankruptcy Rules incorporating Rules 52 and 59 should be amended to

limit the time periods to correspond to the appeal period in Bankruptcy Rule 8002.

07-CV-019· The National Bankruptcy Conference also notes that continuing incorporation of Civil Rule 59 into the Bankruptcy Rules would defer finality until expiration of the 30-day period for seeking a "new trial." This would severely impair the need for prompt finality and implementation of many forward-looking bankruptcy orders. This comment attaches and endorses a parallel comment by Professor Alan N. Resnick, former Reporter and member of the Bankruptcy Rules Committee.

Email from Professor Struve to Professor Cooper regarding Appellate Rules Deadlines Subcommittee conference call (March 5, 2008)·

To: "Edward H. Cooper" <coopere@umich.edu>
cc: "'Carl_Stewart@ca5.uscourts.gov'" <Carl_Stewart@ca5.uscourts.gov>, Mark_Kravitz@ctd uscourts gov, Jeffrey_Sutton@ca6.uscourts.gov, "Douglas Letter@usdoj.gov" <Douglas.Letter@usdoj.gov>, MAUREEN.MAHONEY@LW.com, "Levy, Mark" <MLevy@kilpatrickstockton.com>
Subject: Appellate Rules Deadlines Subcommittee views on Civil Rules deadlines for tolling motions

Dear Ed,

The Appellate Rules Deadlines Subcommittee held a conference call today and discussed, among other issues, the questions raised during the comment period concerning the Civil Rules Committee's proposal to extend to 30 days the deadlines for renewed motions for judgment as a matter of law under Rule 50(b), motions for a new trial under Rules 50(d) and 59(b), motions for amended or additional findings under Rule 52(b), and motions to amend or alter a judgment under Rule 59(e). I write to summarize the views expressed during our call; these views, of course, are only those of members of the Deadlines Subcommittee, and not the views of the Appellate Rules Committee as a whole. I trust that the Subcommittee members (who are cc'd on this email) will correct any misstatements!

Deadlines Subcommittee members are very sympathetic to the concern that setting the deadline for these motions at 30 days will prevent a potential appellant from knowing (at the time the notice of appeal is to be filed) whether another party will make a motion that will toll the time for appeal and suspend the effectiveness of a previously-filed notice of appeal. Though the group did not arrive at a concrete suggestion, the following views were expressed and may be useful as the Civil Rules Committee considers the question:

--The Subcommittee would be uncomfortable with a regime in which the tolling motion deadlines are set at 30 days It seems problematic for a potential appellant to have to file the notice of appeal without knowing whether a tolling motion will be filed.

--Even though the issue will only arise when more than one party is dissatisfied with a judgment, that situation is not all that rare, given the many cases in which there are more than just two parties. (The issue will not arise, though, in cases where FRAP 4(a)(1)(B) and Section 2107 provide a 60-day appeal deadline because the United States or its officer or agency is a party.)

--It was felt that in a number of cases 21 days would suffice to prepare post-judgment motions. On the other hand, members noted that often 21 days will not be enough. The federal government, for example, almost always would want more time than 21 days to prepare such a motion.

--Members discussed the fact that Civil has concluded that the current Civil Rules do not permit extensions of these motion deadlines, and that the proposed amendment to Civil Rule 6(b) underscores the fact that no extensions to those deadlines are permitted. Members recounted their experience that lawyers often feel that they need more time than the current Rules provide to prepare post-judgment motions, and recalled that one way in which district judges finesse the issue is to permit a barebones motion within the required time period, followed by a more detailed brief at a later point. (I noted that some district courts also might delay the entry of judgment as a way of finessing the point.)

--Members wondered whether, if the motion deadline were set at 21 days, it would be possible for the Rules to authorize the court to extend that deadline in a particular case. We discussed the fact that this question would be particularly fraught given the motions' function as tolling motions under Appellate Rule 4(a)(4). We noted the Ninth Circuit's recent conclusion that to the extent post-judgment motions function as tolling motions for purposes of civil appeal time, the deadlines for those motions are jurisdictional. See U S. v. Comprehensive Drug Testing, Inc., 513 F.3d 1085, 1100 -01 (9th Cir. 2008). Would a court in the Ninth Circuit find that a barebones motion within the deadline, later followed by more detailed briefing, qualified as "timely" for purposes of tolling under Rule 4(a)(4)?

--In the light of the concerns that might arise (post-Bowles) when rules authorize a court to extend a deadline that is considered jurisdictional, it would seem optimal for the Civil Rules to set a livable deadline for post-judgment motions so that extensions would not ordinarily be necessary. Perhaps this justifies departing from the 7-day-increment presumption and setting the deadline at something a bit longer than 21 days. Members noted that setting the deadline at 28 days might allow a would-be appellant to know whether a motion has been made before filing the notice of appeal (at least when CM/ECF is used) but did not advocate 28 days since that would in effect encourage appellants to wait to the next-to-last day to file their notice of appeal -- an undesirable practice. Perhaps 25 days might strike a middle point? No consensus was reached on this issue.

I hope that this is helpful!

Best regards,

Cathie

Discussion: The Committee recommends that 28-day periods be substituted for the 30-day periods in Rules 50, 52, and 59 as published.

The initial choice of 30-day periods began with the view that the 10-day periods in the present rules are too short in many complex cases. Courts often respond by one of two strategies. The simpler and safer is to delay entry of judgment; the difficulty with this strategy is that it induces feelings of guilt stemming from the Rule 6(b)(2) direction that these periods cannot be extended. The other strategy is to require timely filing within the 10-day period but allow an extended briefing schedule and permit wide latitude in developing arguments made in general terms in the motion

The Committee considered the possibility of amending Rule 6(b)(2) to permit extension of the Rules 50, 52, and 59 time periods on a case-by-case basis. Even putting aside the question whether that approach should extend to Rule 60(b) as well, permitting extension of time periods closely integrated with the time to appeal under Appellate Rule 4 seemed risky. It opted instead to extend the Rules 50, 52, and 59 periods to a length that should suffice in almost all cases. Picking the length of the periods began by recognizing that the present 10-day periods run for at least 14 days, and will run longer still if there is an intermediate legal holiday. An extension to 21 days did not seem to provide much relief. Adhering to the convention that chooses 7-day multiples only for periods of 7, 14, and 21 days, the choice was to recommend 30 days.

The comments and the advice of the Appellate Rules Committee showed that it is better to avoid a 30-day period because the time to file a notice of appeal in most civil actions also is 30 days The prospect that a notice of appeal filed on the last day will be made "premature" by a post-judgment motion filed on the same day is not attractive. Some parties will become confused and manage to mismanage the notice-of-appeal requirements at later stages. The Civil Rules Committee concluded that the period in Rules 50, 52, and 59 should be shortened. It concluded that 28 days would be better than 21 days if the Appellate Rules Committee should concur that this alternative would adequately reduce the risks that attend premature notices of appeal. The Appellate Rules Committee has concurred. This will become the only 28-day period in the Civil Rules — former 30-day periods were retained as 30-day periods, making 30 days the ceiling of the 7-day increments approach. The value of allowing this much time, however, outweighs the seeming eccentricity.

Changes Made after Publication and Comment

The 30-day period proposed in the August 2007 publication is shortened to 28 days.

Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings

* * * * *

(b) Amended or Additional Findings. On a party's motion filed no later than ~~10~~ 28 days after the entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly The motion may accompany a motion for a new trial under Rule 59.

* * * * *

Committee Note

Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 28 days. Rule 6(b) continues to prohibit expansion of the 28-day period.

Discussion: The Committee recommends shortening the 30-day period published for comment to 28 days. The reasons are given in the discussion of Rule 50

Changes Made after Publication and Comment

The 30-day period proposed in the August 2007 publication is shortened to 28 days.

Rule 53. Masters

* * * * *

(f) Action on the Master's Order, Report, or Recommendations.

* * * * *

(2) ***Time to Object or Move to Adopt or Modify.*** A party may file objections to — or a motion to adopt or modify — the master's order, report, or recommendations no later than ~~20~~ 21 days after a copy is served, unless the court sets a different time

* * * * *

Committee Note

The time set in the former rule at 20 days has been revised to 21 days. See the Note to Rule 6.

Rule 54. Judgment; Costs

* * * * *

(d) Costs; Attorney's Fees.

(1) ***Costs Other Than Attorney's Fees.*** Unless a federal statute, these rules, or a court order provides otherwise, costs — other than attorney's fees — should be allowed to the prevailing party But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on ~~1 day's~~ 14 days' notice. On motion served within the next ~~5~~ 7 days, the court may review the clerk's action

* * * * *

Committee Note

Former Rule 54(d)(1) provided that the clerk may tax costs on 1 day's notice. That period was unrealistically short. The new 14-day period provides a better opportunity to prepare and present a response. The former 5-day period to serve a motion to review the clerk's action is extended to 7 days to reflect the change in the Rule 6(a) method for computing periods of less than 11 days.

Rule 55. Default; Default Judgment

* * * * *

(b) Entering a Default Judgment.

* * * * *

(2) ***By the Court.*** In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least ~~3~~ 7 days before the hearing. The court may conduct hearings or make referrals — preserving any federal statutory right to a jury trial — when, to enter or effectuate judgment, it needs to.

* * * * *

Committee Note

The time set in the former rule at 3 days has been revised to 7 days. See the Note to Rule 6.

Rule 56. Summary Judgment

(a) By a Claiming Party. A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim ~~The motion may be filed at any time after~~

~~(1) 20 days have passed from commencement of the~~

~~action; or~~

~~(2) the opposing party serves a motion for summary judgment.~~

(b) By a Defending Party. A party against whom relief is sought may move ~~at any time~~, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) ~~Serving the~~ Time for a Motion, Response, and Reply; Proceedings. ~~The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day.~~

(1) These times apply unless a different time is set by local rule or the court orders otherwise:

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

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

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

(2) The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

30 * * * * *

Committee Note

The timing provisions for summary judgment are outmoded They are consolidated and substantially revised in new subdivision (c)(1). The new rule allows a party to move for summary judgment at any time, even as early as the commencement of the action. If the motion seems premature both subdivision (c)(1) and Rule 6(b) allow the court to extend the time to respond. The rule does set a presumptive deadline at 30 days after the close of all discovery.

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

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

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

Rule 59. New Trial; Altering or Amending a Judgment

1 * * * * *

2 **(b) Time to File a Motion for a New Trial.** A motion for
3 a new trial must be filed no later than ~~10~~ 28 days after the
4 entry of judgment.

5 **(c) Time to Serve Affidavits.** When a motion for a new
6 trial is based on affidavits, they must be filed with the motion.

The opposing party has ~~10~~ 14 days after being served to file opposing affidavits; ~~but that period may be extended for up to 20 days, either by the court for good cause or by the parties' stipulation~~. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than ~~10~~ 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than ~~10~~ 28 days after the entry of the judgment.

Committee Note

Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 28 days. Rule 6(b) continues to prohibit expansion of the 28-day period

Former Rule 59(c) set a 10-day period after being served with a motion for new trial to file opposing affidavits It also provided that the period could be extended for up 20 days for good cause or by stipulation. The apparent 20-day limit on extending the time to file

opposing affidavits seemed to conflict with the Rule 6(b) authority to extend time without any specific limit. This tension between the two rules may have been inadvertent. It is resolved by deleting the former Rule 59(c) limit. Rule 6(b) governs. The underlying 10-day period was extended to 14 days to reflect the change in the Rule 6(a) method for computing periods of less than 11 days.

Discussion: The Committee recommends shortening the 30-day period published for comment to 28 days. The reasons are given in the discussion of Rule 50.

Changes Made after Publication and Comment

The 30-day period proposed in the August 2007 publication is shortened to 28 days.

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) Automatic Stay; Exceptions for Injunctions, Receiverships, and Patent Accountings. Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken to enforce it, until ~~10~~ 14 days have passed after its entry. But unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

* * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

Rule 65. Injunctions and Restraining Orders

* * * * *

(b) Temporary Restraining Order.

* * * * *

(2) Contents; Expiration. Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry — not to exceed ~~10~~ 14 days — that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

* * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days See the Note to Rule 6.

Rule 68. Offer of Judgment

(a) Making an Offer; Judgment on an Accepted Offer. ~~More than 10~~ At least 14 days before the date set for trial ~~begins~~, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within ~~10~~ 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of

acceptance, plus proof of service. The clerk must then enter judgment

* * * * *

(c) Offer After Liability is Determined. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time — but at least ~~10~~ 14 days — before the date set for a hearing to determine the extent of liability.

* * * * *

Committee Note

Former Rule 68 allowed service of an offer of judgment more than 10 days before the trial begins, or — if liability has been determined — at least 10 days before a hearing to determine the extent of liability It may be difficult to know in advance when trial will begin or when a hearing will be held. The time is now measured from the date set for trial or hearing; resetting the date establishes a new time for serving the offer.

The former 10-day periods are extended to 14 days to reflect the change in the Rule 6(a) method for computing periods less than 11 days.

Summary of Comments

RULE 68

07-CV-013: Alexander J. Manners, Esq., points to a problem that exists in current Rule 68 equally with the proposed time revisions The evident purpose of the rule is to require a decision whether to accept a Rule 68 offer of judgment before trial starts. But there is a loophole Using the proposed times to illustrate, the offer may be served "at least 14 days before the date set for trial * * *. If, within 14 days after being served, the opposing party" accepts, it is accepted. But if service is made by any means other than in-hand, Rule 6(d) adds 3 days after the period expires. That could be during or even after trial. This question could be addressed in Rule 68: "If, ~~within~~ by the earlier of 14 days after being served or the start of trial, the opposing party serves written notice accepting the offer * * *."

Recommendation: This one is tempting But no one has suggested a practical problem. Perhaps the question should be carried forward with the general question of backward-counting periods

Rule 71.1. Condemning Real or Personal Property

* * * * *

(d) Process.

* * * * *

(2) ***Contents of the Notice.***

(A) *Main Contents.* Each notice must name the court, the title of the action, and the defendant to whom it is directed. It must describe the property sufficiently to identify it, but need not describe any property other than that to be taken from the named defendant. The notice must also state:

(i) that the action is to condemn property,

(ii) the interest to be taken;

(iii) the authority for the taking,

(iv) the uses for which the property is to be taken;

(v) that the defendant may serve an answer on the plaintiff's attorney within ~~20~~ 21 days after being served with the notice;

(vi) that the failure to so serve an answer constitutes consent to the taking and to the

court's authority to proceed with the action and fix the compensation; and

(vii) that a defendant who does not serve an answer may file a notice of appearance.

* * * * *

(e) Appearance or Answer.

* * * * *

(2) ***Answer.*** A defendant that has an objection or defense to the taking must serve an answer within ~~20~~ 21 days after being served with the notice. The answer must.

* * * * *

Committee Note

The times set in the former rule at 20 days have been revised to 21 days. See the Note to Rule 6.

Rule 72. Magistrate Judges: Pretrial Order

(a) Nondispositive Matters. When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within ~~10~~ 14 days after being served with a copy A party may not assign as

error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

(b) Dispositive Motions and Prisoner Petitions.

* * * * *

(2) ***Objections.*** Within ~~10~~ 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations A party may respond to another party's objections within ~~10~~ 14 days after being served with a copy Unless the district judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient.

* * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 6

Summary of Comments

RULE 72

07-CV-008. Robert J. Newmeyer, Administrative Law Clerk, urges that 28 U.S.C § 636(b)(1) must be amended to agree with the 14-day periods set by proposed Rule 72. He also suggests that 14 days is too short for objections to recommended disposition of a dispositive matter — the time should be 28 days, or 30.

Recommendation Amendment of § 636(b) is the one statutory recommendation firmly set for the Civil Rules list.

Rule 81. Applicability of the Rules in General; Removed Actions

* * * * *

(c) Removed Actions.

* * * * *

(2) ***Further Pleading.*** After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods:

(A) ~~20~~ 21 days after receiving — through service or otherwise — a copy of the initial pleading stating the claim for relief;

(B) ~~20~~ 21 days after being served with the summons for an initial pleading on file at the time of service; or

(C) ~~5~~ 7 days after the notice of removal is filed.

(3) Demand for a Jury Trial.

* * * * *

(B) *Under Rule 38.* If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within ~~10~~ 14 days after:

(i) it files a notice of removal; or

(ii) it is served with a notice of removal filed by another party.

* * * * *

Committee Note

The times set in the former rule at 5, 10, and 20 days have been revised to 7, 14, and 21 days, respectively. See the Note to Rule 6.

Rule B. In Personam Actions: Attachment and Garnishment

* * * * *

(3) Answer.

(a) By Garnishee. The garnishee shall serve an answer, together with answers to any interrogatories served with the complaint, within ~~20~~ 21 days after service of process upon the garnishee. Interrogatories to the garnishee may be served with the complaint without leave of court. If the garnishee refuses or neglects to answer on oath as to the debts, credits, or effects of the defendant in the garnishee's hands, or any interrogatories concerning such debts, credits, and effects that may be propounded by the plaintiff, the court may award compulsory process against the garnishee. If the garnishee admits any debts, credits, or effects, they shall be held in the garnishee's hands or paid into the registry of the court, and shall be held in either case subject to the further order of the court.

* * * * *

Committee Note

The time set in the former rule at 20 days has been revised to 21 days. See the Note to Rule 6.

Rule C. In Rem Actions: Special Provisions

* * * * *

(4) Notice. No notice other than execution of process is required when the property that is the subject of the action has been released under Rule E(5) If the property is not released within ~~10~~ 14 days after execution, the plaintiff must promptly — or within the time that the court allows — give public notice of the action and arrest in a newspaper designated by court order and having general circulation in the district, but publication may be terminated if the property is released before publication is completed The notice must specify the time under Rule C(6) to file a statement of interest in or right against the seized property and to answer This rule does not affect the notice requirements in an action to foreclose a preferred ship mortgage under 46 U.S.C. §§ 31301 et seq., as amended.

* * * * *

(6) Responsive Pleading; Interrogatories.

(a) Maritime Arrests and Other Proceedings.[****]

(i) a person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement

[****]A technical revision of Supplemental Rule C(6)(a) has been proposed for adoption without publication to take effect on December 1, 2008 That revision has no effect on the proposal to amend subparagraph (A) to extend the time to file from 10 days to 14 days

of right or interest:

(A) within ~~10~~ 14 days after the execution of process, or

(B) within the time that the court allows;

(ii) the statement of right or interest must describe the interest in the property that supports the person's demand for its restitution or right to defend the action;

(iii) an agent, bailee, or attorney must state the authority to file a statement of right or interest on behalf of another; and

(iv) a person who asserts a right of possession or any ownership interest must serve an answer within ~~20~~ 21 days after filing the statement of interest or right.

* * * * *

Committee Note

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Note to Rule 6.

Rule G. Forfeiture Actions In Rem

* * * * *

(4) Notice.

* * * * *

(b) Notice to Known Potential Claimants.

(i) Direct Notice Required. The government must send notice of the action and a copy of the complaint to any person who reasonably appears to be a potential claimant on the facts known to the government before the end of the time for filing a claim under Rule G(5)(a)(ii)(B).

(ii) Content of the Notice. The notice must state:

(A) the date when the notice is sent;

(B) a deadline for filing a claim, at least 35 days after the notice is sent;

(C) that an answer or a motion under Rule 12 must be filed no later than ~~20~~ 21 days after filing the claim; and

(D) the name of the government attorney to be served with the claim and answer.

* * * * *

(5) Responsive Pleadings.

* * * * *

(b) Answer. A claimant must serve and file an answer to the complaint or a motion under Rule 12 within ~~20~~ 21 days after filing the claim. A claimant waives an objection to in rem jurisdiction or to venue if the objection is not made by motion or stated in the answer.

(6) Special Interrogatories.

(a) Time and Scope. The government may serve special interrogatories limited to the claimant's identity and relationship to the defendant property without the court's leave at any time after the claim is filed and before discovery is closed. But if the claimant serves a motion to dismiss the action, the government must serve the interrogatories within ~~20~~ 21 days after the motion is served

(b) Answers or Objections. Answers or objections to these interrogatories must be served within ~~20~~ 21 days after the interrogatories are served

(c) Government's Response Deferred. The government need not respond to a claimant's motion to dismiss the action under Rule G(8)(b) until ~~20~~ 21 days after the claimant has answered these interrogatories

* * * * *

Committee Note

The times set in the former rule at 20 days have been revised to 21 days. See the Note to Rule 6.

Form 3. Summons.

(Caption — See Form 1.)

To *name the defendant*:

A lawsuit has been filed against you.

Within ~~20~~ 21 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure.

* * * * *

FORM 3

07-CV-016: FDIC Legal Division, offers an observation generated by the form of publication. The August publication uses asterisks to indicate that not all of Form 3 was published. The omitted part includes the very advice the FDIC thinks should be there — that the period is 60 days, not 21 days, if the defendant is the United States, a United States agency, etc.

Recommendation: None needed.

Form 4. Summons on a Third-Party Complaint.

(Caption — See Form 1.)

To *name the third-party defendant*:

A lawsuit has been filed against defendant _____, who as third-party plaintiff is making this claim against you to pay part or all of what [he] may owe to the plaintiff _____.

Within ~~20~~ 21 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff and on the defendant an answer to the attached third-party complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure.

* * * * *

Form 60. Notice of Condemnation.

(Caption — See Form 1.)

* * * * *

4. If you want to object or present any defense to the taking you must serve an answer on the plaintiff's attorney within ~~20~~ 21 days [after being served with this notice][from (insert the date of the last publication of notice)]. Send your answer to this address _____.

* * * * *

RULE 30(d)(1): 1 DAY OF 7 HOURS

07-CV-018. The Seventh Circuit Bar Association Committee on Rules of Practice & Procedure suggests that some means should found to state clearly whether the "hours-are-hours" approach supersedes the Committee Note to Rule 30(d)(1), which states that the 7 hours for a deposition is calculated by actual time taken, not including breaks. Some members suggested that if break time continues to be excluded, the Committee should consider revising Rule 30(d)(1) because it is difficult to fit 7 hours of actual deposition time into one day when breaks are excluded.

Discussion: The Committee concluded that there is no need to address this question by adding a comment to the Rule 6 Committee Note. The common-sense advice in the 2000 Committee Note should be sufficiently ingrained in practice to prevail without difficulty.

(3) Statutory Time Periods

Civil Rule 6(a) applies in calculating statutory time periods. The Time-Computation Subcommittee has coordinated the work of identifying statutory time periods that should be increased to offset the de facto reduction that will result from changing to a days-are-days computation method. Professor Struve compiled a long list of statutes that set periods less than eleven days. After studying the statutes that bear on civil actions, the Committee concluded that only one statute should be recommended for amendment. 28 U.S.C. § 636(b) sets the period for objecting to magistrate judge orders and recommendations at 10 days. Proposed Rules 72(a) and (b) extend the time from 10 days to 14 days, recognizing that under the present computation method 10 days has always meant at least 14 calendar days It is essential that § 636(b) be amended to allow 14 days so that statute and rule continue to operate in harmony as they always have.

The reasons for concluding that no other statutes need be recommended for amendment are summarized in the draft Minutes for the April Committee meeting.

B Amended Rules Published in August 2007

Proposed amendments to Rule 8(c), 13(f), 15(a), 48(c), and 81(d) were published for comment in August 2007. All but Rule 8(c)are recommended for adoption as published, apart from deleting references to "possession" from Rule 81(d)(2) and its Committee Note. Rule 8(c) will be held for further study in the Advisory Committee. Bankruptcy Judges have repeatedly advised that deleting "discharge in bankruptcy" from the Rule 8(c) list of affirmative defenses is both appropriate and long overdue. The Department of Justice has expressed reservations that require further attention.

AUGUST 2007 PUBLISHED PROPOSALS TO AMEND RULES 8(C), 13(F), 15(A), 48(C), 81(D)

Proposals to amend Rules 8(c), 13(f), 15(a), 48(c), and 81(d) were published for comment in August 2007. Comments were received on all but Rule 48(c). The proposals, summaries of comments, and recommendations are set out separately for each rule.

Rule 8. General Rules of Pleading

* * * * *

(c) Affirmative Defenses.

(1) In General. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including.

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- ~~discharge in bankruptcy;~~
- duress;
- estoppel;
- failure of consideration;
- fraud;

- illegality;
- injury by fellow servant;
- laches,
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

* * * * *

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. 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.

Summary of Comments

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.**

SUGGESTED ADDITION TO COMMITTEE NOTE TO RULE 8(c):

> Because the Bankruptcy Code provisions governing the effect of the discharge are self-executing, it is inappropriate to require that debtors affirmatively raise the discharge as a defense.

Recommendation: The Committee concluded that if the objections of the Department of Justice can be resolved in time for a recommendation of the Standing Committee, "discharge in bankruptcy" should be stricken from Rule 8(c), as published, and that the final sentence of the published Committee Note be replaced as set out below. Because the objections have not been resolved, it is recommended that this proposal be deferred for further study.

This recommendation rests on the structure of the bankruptcy statutes Rule 8(c) does not now address an action on a claim that has not been discharged in bankruptcy, and it will not address such an action after the amendment If a debt has in fact been discharged, however, it would be inconsistent with the statutes even to require the discharged debtor to plead the discharge, much less to waive the discharge by failure to plead it. A judgment on a discharged debt is void, and there is no reason to contemplate superseding the statute even if that could be done without abridging the substantive right created by the discharge. (It would do no good, and much mischief, to create a special category of affirmative defense that must be pleaded but is not lost by failure to plead and that voids the judgment.)

The last sentence of the Committee Note as published, however, offers advice on a topic — the relationships between the court where the action is filed and the bankruptcy court that entered the discharge — that is better left to be worked out by the courts in whatever circumstances present themselves. The concerns raised by the Department of Justice may deserve recognition by adding a few words in the next-to-last sentence and substituting a new final sentence as follows.

* * * These consequences of a discharge cannot be waived; the Bankruptcy Code

provisions governing the effect of a discharge are self-executing. ~~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.~~ This amendment does not address pleading by a claimant who believes that a claim is not barred by an adversary's discharge.

Rule 13. Counterclaim and Crossclaim

* * * * *

~~**(f) Omitted Counterclaim.** The court may permit a party to amend a pleading to add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires.~~

* * * * *

Committee Note

Rule 13(f) is deleted as largely redundant and potentially misleading. An amendment to add a counterclaim will be governed by Rule 15. Rule 15(a)(1) permits some amendments to be made as a matter of course or with the opposing party's written consent. When the court's leave is required, the reasons described in Rule 13(f) for permitting amendment of a pleading to add an omitted counterclaim sound different from the general amendment standard in Rule 15(a)(2), but seem to be administered — as they should be — according to the same standard directing that leave should be freely given when justice so requires. The independent existence of Rule 13(f) has, however, created some uncertainty as to the availability of relation back of the amendment under Rule 15(c). See *6 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure Civil 2d, § 1430*. Deletion of Rule 13(f) ensures that relation back is governed by the tests that apply to all other pleading amendments.

Summary of Comments

07-CV-015: Hon. Jeffrey S. Bucholtz, Acting Assistant Attorney General, supports the change

Discussion: That Rule 13(f) be recommended for adoption as published. No changes need be made in the Committee Note

Rule 15. Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course within:

~~**(A)** before being served with a responsive pleading;~~ 21 days after serving it, or

~~**(B)** within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar~~ if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

* * * * *

Committee Note

Rule 15(a) is amended to make three changes in the time allowed to make one amendment as a matter of course.

Former Rule 15(a) addressed amendment of a pleading to which a responsive pleading is required by distinguishing between the means used to challenge the pleading. Serving a responsive pleading terminated the right to amend. Serving a motion attacking the pleading did not terminate the right to amend, because a motion is not a "pleading" as defined in Rule 7. The right to amend survived beyond decision of the motion unless the decision expressly cut off the right to amend.

The distinction drawn in former Rule 15(a) is changed in two ways. First, the right to amend once as a matter of course terminates 21 days after service of a motion under Rule 12(b), (e), or (f). This provision will force the pleader to consider carefully and promptly

the wisdom of amending to meet the arguments in the motion. A responsive amendment may avoid the need to decide the motion or reduce the number of issues to be decided, and will expedite determination of issues that otherwise might be raised seriatim. It also should advance other pretrial proceedings.

Second, the right to amend once as a matter of course is no longer terminated by service of a responsive pleading. The responsive pleading may point out issues that the original pleader had not considered and persuade the pleader that amendment is wise. Just as amendment was permitted by former Rule 15(a) in response to a motion, so the amended rule permits one amendment as a matter of course in response to a responsive pleading. The right is subject to the same 21-day limit as the right to amend in response to a motion.

The 21-day periods to amend once as a matter of course after service of a responsive pleading or after service of a designated motion are not cumulative. If a responsive pleading is served after one of the designated motions is served, for example, there is no new 21-day period.

Finally, amended Rule 15(a) extends from 20 to 21 days the period to amend a pleading to which no responsive pleading is allowed and omits the provision that cuts off the right if the action is on the trial calendar. Rule 40 no longer refers to a trial calendar,** and many courts have abandoned formal trial calendars. It is more effective to rely on scheduling orders or other pretrial directions to establish time limits for amendment in the few situations that otherwise might allow one amendment as a matter of course at a time that would disrupt trial preparations. Leave to amend still can be sought under Rule 15(a)(2), or at and after trial under Rule 15(b).

Abrogation of Rule 13(f) establishes Rule 15 as the sole rule governing amendment of a pleading to add a counterclaim.

** This statement anticipates the December 1, 2007 effective date of pending Rule 40 amendments

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Summary of comments

07-CV-011: Robert M. Steptoe, Jr., Esq agrees that a responsive pleading and a motion to dismiss should have the same impact on the right to amend once as a matter of course. But he suggests that the result should be that service of either cuts off the right to amend as a matter of course. Leave is often granted when it is required. Requiring leave will encourage plaintiffs to take greater care in framing the first amended complaint; that will help defendants because of "the closer scrutiny" given a second or subsequent motion for leave to amend.

07-CV-012: Professor Bradley Scott Shannon suggests (1) that the right to amend should be cut off by either a responsive pleading or a Rule 12 motion. "[T]he balance would be better struck by placing more of a burden to avoid mistakes on the initial pleader." Even if the mistakes are fairly correctable, the court should retain discretion to grant or deny leave to amend. (2) "[A] court is all but compelled to defer consideration on a motion to dismiss until the 21 day period expires. That does not seem very efficient."

07-CV-015: Hon. Jeffrey S. Bucholtz, Acting Assistant Attorney General, supports the change.

07-CV-018: The Seventh Circuit Bar Association Committee on Rules of Practice & Procedure offers "strong support." "This promotes economy and eliminates delay where a Rule 12 motion is filed in response to the original complaint and the amendments ultimately do not alter the bases for the Rule 12 motion."

07-CV-020: The Jordan Center for Criminal Justice and Criminal Reform makes two suggestions. The second is that the period to amend once as a matter of course after service of a responsive pleading or a Rule 12 motion should be extended to 28 days; 21 days is not enough, particularly when the defendant points out deficiencies that require "further factual investigation that may dramatically affect the legal landscape of the action." The first rests on misinterpreting what is intended: the comment reads the proposal to create a gap that suspends and then revives the right to amend once as a matter of course — the right persists for 21 days after service of the pleading, disappears, and then reappears for 21 days after service of a responsive pleading or Rule 12 motion. The question raised by this suggestion is whether (a)(1)(A) should be revised: "(A) if the pleading is one to which a responsive pleading is not required, 21 days after serving it, (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion * * *."

Discussion: That Rule 15(a) be recommended for adoption as published. No changes need be made in the Committee Note. The Subcommittee and Committee considered many variations on the right to amend once as a matter of course and the events that cut it off. The argument that at least a responsive pleading should immediately terminate the right to amend was advanced vigorously in Standing Committee discussion. No new reasons have been suggested for reconsidering the recommendation. The suggestion made by the Jordan Center is a matter of style; the rule as published seems clear.

Rule 48. Number of Jurors; Verdict; Polling

(a) Number of Jurors. A jury must ~~initially have~~ begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c).

(b) Verdict. Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.

(c) Polling. After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity or assent by the number of jurors required by the parties' stipulation, the court may direct the jury to deliberate further or may order a new trial

Committee Note

Jury polling is added as new subdivision (c), which is drawn from Criminal Rule 31(d) with minor revisions to reflect Civil Rules Style and the parties' opportunity to stipulate to a nonunanimous verdict

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Summary of Comments: There were no comments on Rule 48(c).

Discussion: That Rule 48(c) be recommended for adoption as published. No changes need be made in the Committee Note.

Rule 81. Applicability of the Rules in General; Removed Actions

* * * * *

(d) Law Applicable.

(1) ***"State Law" Defined.*** When these rules refer to state law, the term "law" includes the state's statutes and the state's judicial decisions.

(2) ~~***District of Columbia***~~ ***"State" Defined.*** The term "state" includes, where appropriate, the District of Columbia and any United States commonwealth, or territory ~~[, or possession]~~. ~~When these rules provide for state law to apply, in the District Court for the District of Columbia:~~

~~(A) the law applied in the District governs; and~~

(3) ***"Federal Statute" Defined in the District of Columbia.*** ~~(B)~~ In the United States District Court for the District of Columbia, the term "federal statute" includes any Act of Congress that applies locally to the District.

Committee Note

Several Rules incorporate local state practice. Original Rule 81(e) provided that "the word 'state' * * * includes, if appropriate, the District of Columbia." The definition is expanded to include any commonwealth or territory of the United States. As before, these entities are included only "where appropriate." They are included for the reasons that counsel incorporation of state practice. For example, state holidays are recognized in computing time under Rule 6(a). Other, quite different, examples are Rules 64(a), invoking state law for prejudgment remedies, and 69(a)(1), relying on state law for the procedure on execution. Including commonwealths, territories[, and possessions] in these and other rules avoids the gaps that otherwise would result when the federal rule relies on local practice rather than provide a uniform federal approach. Including them also establishes

uniformity between federal courts and local courts in areas that may involve strong local interests, little need for uniformity among federal courts, or difficulty in defining a uniform federal practice that integrates effectively with local practice.

Adherence to a local practice may be refused as not "appropriate" when the local practice would impair a significant federal interest.

Summary of Comments:

07-CV-006: Jack E. Horsley, Esq., commenting on the Time-Computation proposals, suggests that Rule 81(c)(2) be amended: "After removal, repleading is unnecessary unless leave is granted on the party's motion or unless the court orders it."

07-CV-012: Professor Bradley Scott Shannon comments on 81(d)(1) — which was published only to indicate minor Style revisions — that the definition of state "law" is under-inclusive and might (for reasons not described) also be over-inclusive. Perhaps it should be deleted. As to (d)(2), "definitions framed only in terms of what is included, though perhaps helpful in resolving some ambiguities, can still leave a lot of unanswered questions. A better definition might be one that states specifically what is included (or, if not practicable, no definition)."

07-CV-015: Hon. Jeffrey S. Bucholtz, Acting Assistant Attorney General, supports the proposal but recommends that "possession" not be included. American Samoa is the only possible land that might fit within "possession." The Department of Justice is concerned that "'possession' might be interpreted — incorrectly — to include United States military bases overseas." Control over these bases is addressed through agreements with foreign nations.

Discussion: That Rule 81(d) be recommended for adoption with one change — the bracketed "[or possession]" be deleted. The Department of Justice has been concerned from the beginning that "possession" describes a presently null set and that it might generate confusion about such issues as the status of military bases on foreign soil. Rule 81(d)(2) would read:

> **(2)** ***"State" Defined.*** The term "state" includes, where appropriate, the District of Columbia and any United States Commonwealth; or territory ~~[or possession]~~.

Changes Made after Publication and Comment

The reference to a "possession" was deleted in deference to the concerns expressed by the Department of Justice.

C New Rule 62 1 Published in August 2007

The "indicative rulings" provisions of new Civil Rule 62.1 and new Appellate Rule 12.1 were worked out over a period of several years, culminating in parallel proposals published for comment in August 2007. It is recommended that Rule 62.1 be approved for adoption with modest wording changes.

Rule text: Rule 62.1 is recommended for adoption as published with one change. An accidental slip in transmission resulted in publication without a change in subdivision (c) that was submitted to the Standing Committee and approved for publication. As published, subdivision (c) refers to remand "for further proceedings." The version approved for publication refers to remand "for that purpose." This version is better for at least two reasons. It tracks the language of subdivision (a)(3). And it clearly limits (c) to a remand to act on the motion pending in the district court. The published reference to a remand for further proceedings could include remand after the court of appeals has decided not to remand for proceedings on the pending motion and has decided the appeal on grounds that both moot the motion and require further proceedings on other issues.

This recommendation is compatible with proposed Appellate Rule 12.1(b), which refers to remand "for further proceedings." The focus of Rule 12.1(b) and its Committee Note is on the scope of the remand, a question that concerns the court of appeals in the first instance.

Committee Note. The Committee Note should be revised to more accurately reflect the language of Rule 62.1(a)(3) and the distinction between limited and full remand. Rather than refer to remand of the "case" or "action," the Note should refer to remand "for that purpose " As shown below, the third sentence of the first paragraph would read: "But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the ~~action is remanded~~ court of appeals remands for that purpose or state that the motion raises a substantial issue." The first sentence of the fourth paragraph would read: "Often it will be wise for the district court to determine whether it in fact would grant the motion if the ~~case is remanded~~ court of appeals remands for that purpose."

Other changes are made in the Committee Note to conform to the Committee Note for proposed Appellate Rule 12.1. The lengthiest change is the addition of two new sentences in parentheses at the end of the first paragraph. These new sentences address a fine-point aspect of Appellate Rule 4: filing a notice of appeal does not establish a "pending" appeal if a timely post-judgment motion suspends the effect of the notice.

New Rule 62.1 is recommended for adoption:

Rule 62.1 Indicative Ruling on Motion for Relief That is Barred by a Pending Appeal

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer consideration of the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue

(b) Notice to the Court of Appeals. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) Remand. The district court may decide the motion if the court of appeals remands for ~~further proceedings~~ that purpose.

Committee Note

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the ~~action is remanded~~ the court of appeals remands for that purpose or state that the motion raises a substantial issue. Experienced ~~appeal~~ lawyers often refer to the suggestion for remand as an "indicative ruling." (The effect of a notice of appeal on district-court authority is addressed by Appellate Rule 4(a)(4), which lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

This clear procedure is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. Rule 62.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Rule 62.1 applies only when those rules deprive the district court of authority to grant relief without appellate

permission If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue. Remand is in the court of appeals' discretion under Appellate Rule 12.1.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the ~~case is remanded~~ court of appeals remands for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

Summary of Comments

07-CV-012: Professor Bradley Scott Shannon thinks the proposal "eminently pragmatic," but objects that a court that does not have jurisdiction should not be allowed to "decide" a matter. That "is improper, certainly as a matter of established principles of American legal process, if not also as a matter of constitutional justiciability."

07-CV-015: Hon. Jeffrey S. Bucholtz, Acting Assistant Attorney General, supports the proposed rule "It should be beneficial to practitioners, who generally do not know how to address motions issued while a case is pending on appeal, and it will provide clarity to both the district courts and courts of appeals in addressing such motions."

07-CV-018: The Seventh Circuit Bar Association Committee on Rules of Practice & Procedure thinks the rule is "aimed primarily or exclusively at motions pursuant to Civil Rule 60. If that indeed is the case, then the new rules or the comments might mention that fact, so as to avoid a variety of other motions being made under the new rules, such as motions for fees."

Discussion It is recommended that Rule 62.1 be adopted as published, with the change indicated in subdivision (c).

Changes Made After Publication and Comment

The rule text is changed by substituting "for that purpose" for "further proceedings"; the reason is discussed above.

Minor changes are made in the Committee Note to make it conform to the Committee Note for proposed Appellate Rule 12 1.

II RECOMMENDATIONS FOR PUBLICATION

The Committee recommends publication for comment of amendments to Rules 26 and 56. The Rule 26 amendments address disclosure and discovery of trial-witness experts The Rule 56 amendments completely rewrite Rule 56 to bring the procedures for seeking and opposing summary judgment into line with the better practices commonly — and often generally — observed in present practice. The standard for granting summary judgment is not affected by this proposal.

A Rule 56: Summary Judgment

Introduction

The Rule 56 proposals described here were presented in somewhat different form for initial discussion at the January meeting of this Committee They have been revised in later deliberations that were significantly advanced by suggestions made at the January meeting.

The proposals have been developed in a Rule 56 Subcommittee chaired by Judge Michael Baylson and refined in Advisory Committee discussions. The process was advanced by the valuable contributions of the many lawyers, judges, and academics who participated in two miniconferences in January and November 2007. Studies by the Federal Judicial Center also have provided important insights into the operation of present Rule 56. Memoranda on local rules by Jeffrey Barr and James Ishida of the Rules Committee Support Office demonstrated the widespread adoption and great variety of local rules. Andrea Kuperman contributed memoranda on two issues — discretion to deny summary judgment despite the apparent lack of a genuine dispute and the practice of "deeming admitted" a statement of fact to which there is no proper response as required by a local rule The materials attached to this report are limited to those that are new since January — the two Kuperman memoranda and the most recent FJC report.

The purpose of these proposals was described in presenting them last January. They represent an effort to improve the procedures for making and opposing summary-judgment motions, and to facilitate the judge's work in resolving them. From the beginning, the Committee has been determined that no change should be attempted in the summary-judgment standard or in the assignment of burdens between movant and nonmovant. The amendments are designed to be neutral as between plaintiffs and defendants. The aim is a better Rule 56 procedure that increases the likelihood of good motions and good responses, and deters bad motions and bad responses. No prediction is offered whether the result will be more or fewer motions, or more or fewer summary judgments Improved procedures may, for example, reduce strategic use of summary-judgment motions as a short-cut means to discover an adversary's positions and evidence or as unworthy means of increasing delay and expense. The need to identify clearly the facts the movant asserts cannot be genuinely disputed, and to point directly to the record materials that support the assertion, should discourage motions with little or no chance of success. Even if an ill-founded motion is made, clear presentation will facilitate an efficient response and prompt denial Improved procedures, on the other hand, may encourage well-founded motions and focused responses, facilitating well-informed decision.

Rule 56 has been held on the Civil Rules agenda for several years following an attempt at thorough revision that failed in 1992; a summary of that attempt was attached to the January report. It was brought back for active consideration both because of the integral relationships among pleading, discovery, and summary judgment and because of reasons intrinsic to evolving summary-judgment practice.

The Advisory Committee has worked on discovery, and has considered notice pleading, for many years Efforts to achieve fully satisfactory discovery practices have continued without surcease for forty years and show no sign of abating. Notice pleading, the gateway to discovery, has been the subject of puzzled attention for nearly twenty years, and has been brought back to the fore by the *Twombly* decision discussed in the insightful panel discussion last January Summary judgment is widely recognized as the third main component of the 1938 revolution that established notice pleading and sweeping discovery. The Subcommittee and Advisory Committee unanimously

agreed that improvements in summary judgment procedure, made without changing the standard for summary judgment or the related moving burdens, can improve the role of summary-judgment as the third leg of the notice-pleading, discovery, summary-judgment stool.

More concrete considerations supplemented these overarching concerns. Rule 56 has not been amended, apart from the Style Project, for many years Practice has grown increasingly out of touch with the present rule text. Most districts have adopted local rules to supplement the national rule. These local rules have provided ideas and experience that have played a central role in developing the proposed amendments The laboratories provided by individual districts, separately and collectively, have proved invaluable. At the same time, the local rules are not uniform, and at times mandate practices that are inconsistent from one district to another It is useful, and increasingly important, to restore greater uniformity through a national rule that builds on the most successful local rules as well as on proliferating interpretations of present Rule 56 text.

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

The importance of the preview discussion last January also bears repeating. The rule text has been improved at several points. The improvements are in part better expression of persisting concepts, but also in part better understanding of the relationships among the subdivisions. Following a brief descriptive overview, these improvements are highlighted in the detailed description of the proposal, along with suggestions of the most important topics for discussion. In addition to the changes in rule text, the Committee Note has been considerably shortened in response to the continuing emphasis on brevity.

Overview

Proposed Rule 56 and the accompanying Committee Note are set out below. The rule-text revisions are so extensive that a traditional comparison draft showing changes by over- and underlining would serve little purpose. A clean copy of present Rule 56 is provided for purposes of comparison.

Subdivision (a): This subdivision carries forward from present Rule 56(c) the familiar standard for summary judgment, changing only one word. "Genuine issue" becomes "genuine dispute " The Committee Note emphasizes that the change does not affect the summary-judgment standard. "Dispute" is chosen because it focuses directly on the question to be decided, and also because it facilitates drafting later subdivisions. Subdivision (a) also provides a clear statement that summary judgment may be sought on an entire action, on a claim or defense, or on part of a claim or defense. Finally, this subdivision provides an explicit direction that the court should state the reasons for granting or denying summary judgment.

Subdivision (b): This subdivision establishes the times for motion, response, or reply. It carries forward the times provided by the Time-Computation Project amendments, adapted to the new Rule 56 structure.

Subdivision (c): This subdivision establishes a comprehensive procedure for presenting and resisting a summary-judgment motion. The motion is presented in three parts — the motion itself, a statement of facts that cannot be genuinely disputed, and a brief; a response that addresses each stated fact and may state additional facts that preclude summary judgment, along with a brief, and a reply to any additional facts stated in the response, again with a brief Requirements are established for supporting positions on the facts. Common practice is recognized by stating that a court need consider only materials called to its attention by the parties, but may consider other materials in the record Provision is made for stating in a response or reply that materials cited to support a fact position are not admissible in evidence And the familiar provisions allowing consideration of affidavits or declarations are carried forward with some changes.

Subdivision (d): This subdivision carries forward with few changes the provisions of present subdivision (f) that protect a nonmovant who needs an opportunity for further investigation or discovery to support a response

Subdivision (e): This subdivision addresses the consequences of failing to reply, or replying in a way that does not comply with the requirements of subdivision (c). The first action listed is likely to be the first action in most cases — a reminder of the need to respond in proper form and an opportunity to do so. The second action is discretionary — the court may consider a fact undisputed The third action is to grant summary judgment if the facts, including facts considered undisputed, satisfy the summary-judgment standard. The fourth action is "any other appropriate order."

Subdivision (f): This subdivision recognizes well-established practices in granting summary judgment for a nonmovant, granting or denying a motion on grounds not raised in the motion or response, or considering summary judgment on the court's own. Notice and a reasonable time to respond must be provided.

Subdivision (g): This subdivision supplements subdivision (a)'s recognition of summary judgment on all or part of a claim or defense. The focus here is on a ruling that grants less than all the relief requested by the motion. The court first considers the motion, applying the summary-judgment standard as directed by subdivision (a). Then if the court does not grant all the requested relief the court has discretion to enter an order stating any material fact that is not in genuine dispute

Subdivision (h): This subdivision carries forward present subdivision (g) with one significant change. Rather than directing that the court "must" order sanctions, this provision says that the court "may" order sanctions

Rule 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment on all or part of a claim or defense The court should grant summary judgment if there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying summary judgment.

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

(1) a party may file a motion for summary judgment

at any time until 30 days after the close of all discovery;

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

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

(c) Procedures.

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

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

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

(i) a motion identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought;

(ii) a separate statement that concisely identifies in separately numbered paragraphs only those material facts that cannot be genuinely disputed and entitle the movant to summary judgment, and

(iii) a brief setting forth its contentions on the law or the facts

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

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

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

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

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

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

(ii) may file a reply brief.

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

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

(A) A statement that a fact cannot be genuinely disputed or is genuinely disputed must be supported by:

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

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

(B) The court need consider only materials called to its attention under paragraph (A), but it may consider other materials in the record:

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

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

(5) ***Assertion that Fact is Not Supported by Admissible Evidence.*** A response or reply to a

statement of fact may state without argument that the material cited to support the fact is not admissible in evidence

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

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

(1) defer considering the motion or deny it;

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

(3) issue any other appropriate order.

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

(1) afford an opportunity to properly respond or reply,

(2) consider a fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and

supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

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

(1) grant summary judgment for a nonmovant;

(2) grant or deny the motion on grounds not raised by the motion or response; or

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

(g) Partial Grant of the Motion. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case

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

Committee Note

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

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.

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.

Subdivision (a) also adds a new direction that the court should state on the record the reasons for granting or denying summary judgment. 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 statement may be dispensed with only when the reasons are apparent both to the parties and to an appellate court. 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.

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

The subdivision (c) procedure is designed to fit the practical needs of most cases. Paragraph (1) recognizes the court's authority to direct a different procedure by order in a case that will benefit from different procedures. The 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 identifies the methods of supporting the positions asserted, recognizes that the court is not obliged to search the record for information not cited by a party, carries forward the authority to rely on affidavits and declarations, and directs that contentions as to law or fact be set out in a separate brief.

Subparagraph (2)(A) directs that the motion must describe each claim, defense, or part of each claim or defense as to which summary judgment is sought. 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 include a statement that, by correspondingly numbered paragraphs, accepts, disputes, or accepts in part and disputes 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 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)(4)(A) addresses the ways to support a statement or dispute of fact. Item (i) describes the familiar record materials commonly relied upon and requires that the movant cite the particular parts of the materials that support the facts. 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. A party's direction to a specific location in an appendix satisfies the citation requirement. So too the court may find it convenient to direct that a party assist the court in locating materials buried in a voluminous record.

Subdivision (c)(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)(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. Consideration is more likely to be appropriate when uncited material shows there is a genuine dispute. 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)(5) provides that a response or reply also may be used to challenge the admissibility of material cited to support a fact. The challenge can be supported by argument in the brief, or may be

made in the brief alone. There is no need to make a separate motion to strike. If the case goes to trial, failure to challenge admissibility at the summary-judgment stage does not forfeit the right to challenge admissibility at trial

Subdivision (c)(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)(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 seeking 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) requirements or when there is no response or no reply to additional facts stated in a response. Summary judgment cannot be granted by default even if there is a complete failure to respond or reply, much less when an attempted response or reply fails to comply with all Rule 56(c) requirements Before deciding on other possible action, subdivision (e)(1) recognizes that the court may afford an opportunity to respond or reply in proper form.

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 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. Many courts take extra care with pro se litigants, advising them of the need to respond and the risk of losing by summary judgment if an adequate response is not filed. And the court may seek to reassure itself by some examination of the record before granting summary judgment against a pro se litigant.

Subdivision (f). Subdivision (f) brings into Rule 56 text a number of related procedures that have grown up in practice. After giving notice and a reasonable time to respond the court may grant summary judgment for the nonmoving party, grant or deny a motion on grounds not raised by the motion or response, or consider summary judgment on its own. In many cases it may prove useful to act by inviting 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.

If it is readily apparent that summary judgment cannot be granted the court 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 entering partial summary judgment on that fact. The court may conclude that it is better to leave open for trial facts and issues that may be better illuminated — perhaps at little cost — by the trial of related facts that must be tried in any event

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

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Current Federal Rule of Civil Procedure 56

Rule 56. Summary Judgment

(a) By a Claiming Party. A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after:

(1) 20 days have passed from commencement of the action; or

(2) the opposing party serves a motion for summary judgment.

(b) By a Defending Party. A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) Serving the Motion; Proceedings. The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any

material fact and that the movant is entitled to judgment as a matter of law

(d) Case Not Fully Adjudicated on the Motion.

(1) ***Establishing Facts.*** If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts — including items of damages or other relief — are not genuinely at issue. The facts so specified must be treated as established in the action.

(2) ***Establishing Liability.*** An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.

(e) Affidavits; Further Testimony.

(1) ***In General.*** A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to

interrogatories, or additional affidavits.

(2) ***Opposing Party's Obligation to Respond.*** When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading, rather, its response must — by affidavits or as otherwise provided in this rule — set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

(f) When Affidavits Are Unavailable. If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) deny the motion;

(2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or

(3) issue any other just order

(g) Affidavit Submitted in Bad Faith. If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the

other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.

Detailed Discussion and Questions

Subdivision (a): Motion

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment on all or part of a claim or defense. The court should grant summary judgment if there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying summary judgment.

Partial Summary Judgment — "All or part of a claim or defense": Courts and litigants regularly refer to "partial summary judgment," although that phrase does not appear in present Rule 56. This draft distinguishes two concepts. The first is "partial summary judgment," which may occur either because the movant seeks summary judgment only on part of the action — a claim, defense, or part of a claim or defense — or because a motion for summary judgment on the entire action is not granted in full. The second concept, expressed in proposed subdivision (g) and anchored in present Rule 56(d), addresses the situation in which the court, after applying the summary-judgment standard to the motion as presented, does not grant all the relief requested by the motion.

These concepts are implemented in two distinct steps. The first step, subdivision (a), invokes all the force of the direction that the court "should" grant summary judgment, a direction discussed next below. The court must make this determination before considering the second step. The second step, subdivision (g), invokes discretion to determine whether it remains useful to establish a material fact as not genuinely in dispute even though the court has not granted all the relief requested by the motion. Earlier drafts left this distinction in a state of some confusion, reflected by the Standing Committee discussion last January. The present draft is designed to express the distinction more clearly.

The question whether the rule should say "summary judgment on the whole action or on all or part of a claim or defense" has been discussed repeatedly. The question is purely one of style. The Style convention is that singular expression always embraces the plural: the text authorizes a motion on every claim or defense. The Committee Note says that summary judgment may be requested as to an entire case.

"Should" grant summary judgment — Discretion to deny: From 1938 to 2007, Rule 56(c) said that "the judgment sought *shall* be rendered forthwith * * *." Style Rule 56(c) translated "shall" as "should." The Committee Note observed. "'[S]hall' is changed to 'should.' It is established that although there is no discretion to enter summary judgment when there is a genuine issue as to any material fact, there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact. Kennedy v. Silas Mason Co., 334 U S. 249, 256-257 (1948) Many lower court decisions are gathered in 10A Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d, § 2728. 'Should' in amended rule 56(c) recognizes that courts will seldom exercise the discretion to deny summary judgment when there is no genuine issue as to any material fact Similarly sparing exercise of this discretion is appropriate under Rule 56(e)(2). Rule 56(d)(1), on the other hand, reflects the more open-ended discretion to decide whether it is practicable to determine what material facts are not genuinely at issue."

At least until December 1, 2010, Rule 56(c) will continue to say "should." Preliminary research has not uncovered any cases addressing reactions to this word

Some observers continue to argue that "should" should have been translated as "must," and ought to be changed to "must" in the new Rule 56. When pressed, they would prefer "shall" to "should." Their concern is that "should" may exacerbate what they see as an unfortunate tendency of some judges to delay or entirely omit any ruling on a summary-judgment motion in the hope that uncertainty will press the parties to settle. Their fall-back position is that at the very least the Committee Note should repeat and entrench the advice in the 2007 Committee Note that discretion should seldom be exercised to deny summary judgment when the motion and response show there is no genuine fact dispute.

The Subcommittee and Committee repeatedly considered and rejected the suggestion that "must" ought to be substituted for "should." This spring the Subcommittee asked Andrea Kuperman to research the cases that recognize discretion to deny summary judgment. Her memorandum is attached. It identifies a number of decisions supporting this discretion. Many of the cases that seem contrary are simply examples of routine statements of the general practice of reviewing summary judgment as a matter of law, made on appeal from orders granting summary judgment The only clear statement rejecting discretion on appeal from an order denying summary judgment was made in a case involving a defense of official immunity. Although the statement does not focus on the special substantive role of official immunity, the context is special Official immunity is established as a protection not only against liability but also against the burdens of trial and even the burdens of pretrial proceedings, including discovery It may well be that the substantive law of official immunity will develop into an explicit principle that eliminates discretion to deny summary judgment on one claim even when the same underlying facts must continue through pretrial and trial on closely related claims. That is a matter for substantive law, to be honored by procedural law.

Some measure of discretion seems indispensable. The clearest example is provided by motions or rulings that limit summary judgment to only part of a case The determination whether some part meets the "no genuine dispute" test may be close to the margin, uncertain as to grant or denial. Other parts may clearly be in dispute, and involve facts that closely overlap the part that might be appropriate for summary judgment. Trial on the parts that must be tried may require as much effort as trial on all parts, illuminate the facts in ways that show summary judgment would not be appropriate on any part, and protect against the risk that the partial summary judgment will be reversed after appeal from the final judgment at great cost in duplicating proceedings.

Short of abandoning "should" in the rule text, the Committee Note could be used to repeat the cautions expressed in the 2007 Committee Note. Earlier drafts did that. The Note also might be used to recognize that special substantive principles, such as official immunity, may defeat the general (but limited) discretion to deny summary judgment In the end it was considered unwise to use the Note for these purposes. Verbatim repetition of the 2007 Note would be redundant. Variations on the 2007 Note could easily be seen as an effort to change the meaning of the rule text without changing the text. And reflections on possible developments of substantive law should be offered in a Committee Note, if at all, only for compelling reasons.

Genuine dispute: Despite the good reasons for adhering to the iconic "no genuine issue as to any material fact" formula of present Rule 56(c), it has seemed better to change "issue" to "dispute." "Dispute" directly addresses the functional question. And it enables clear drafting throughout the rest of the rule

State reasons for acting: Many courts of appeals repeatedly remind trial courts of the need to explain the reasons for granting summary judgment The need to explain the reasons for denying summary judgment is not as frequently remarked, apart from official-immunity appeals where it is important to know what genuine disputes were found. The draft presented for discussion last January resolved Advisory Committee uncertainties by providing that the court "must" state the reasons for granting

summary judgment and "should" state the reasons for denying it. Further discussion led the Subcommittee to recommend, and the Committee to approve, the present proposal that the court "should" state the reasons for either granting or denying summary judgment. The Committee concluded that the reasons for granting summary judgment are so obvious in some cases that nothing would be gained by requiring the court to restate the obvious.

Subdivision (b): Time

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

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

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

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

Time: These time provisions are adapted from the provisions published as part of the Time-Computation Project. They are designed as "default" provisions to apply in cases not governed by a scheduling order. It is expected that most cases will be governed by scheduling orders entered "in a case."

Each of the time provisions is measured by filing, an explicit event easily identified. Filing also is used in the procedural provisions of subdivision (c).

Subdivision (c): Procedure

(c) Procedures.

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

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

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

(i) a motion identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought;

(ii) a separate statement that concisely identifies in separately numbered paragraphs only those material facts that cannot be genuinely disputed and entitle the movant to summary judgment; and

(iii)a brief setting forth its contentions on the law or the facts.

(B) *Response, Statement, and Brief by the Opposing Party* A party opposing summary judgment·

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

(ii) may in the response concisely identify in separately numbered paragraphs

additional material facts that preclude summary judgment, and

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

(C) *Reply and Brief* The movant.

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

(ii) may file a reply brief.

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

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

(A) A statement that a fact cannot be genuinely disputed or is genuinely disputed must be supported by:

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

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

(B) The court need consider only materials called to its attention under paragraph (A), but it may consider other materials in the record:

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

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

(5) ***Assertion that Fact is Not Supported by Admissible Evidence.*** A response or reply to a statement of fact may state without argument that the material cited to support the fact is not admissible in evidence.

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

"Orders otherwise in a case": Subdivision (c)(1) recognizes the authority to depart from the general procedures set out in paragraphs (2) through (6) by order in a case. The Committee believes that these procedures are well adapted to the needs of most cases But it is clear that some cases, particularly complex cases, will require different procedures tailored to particular needs. More generally, docket conditions, local practice, or the preferences of an individual judge may make it desirable to establish different procedures either through a scheduling order or pretrial conferences. The parties to a particular case also may find it desirable to agree on different procedures; their agreement may be confirmed by order, although the court remains free to reject an agreed order for reasons of effective case management

The Committee Note observes that one reason for entering a case-specific order may be to limit the number of facts a party may assert cannot be genuinely disputed. This possibility is noted with subdivision (c)(2)(A)(ii).

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

Authority to depart by order in a case also does not authorize "standing orders" that are entered in general terms but not specifically entered in a particular case. Rule 56, however, does not prevent a judge from entering in every case the same specific order departing from subdivision (c) procedures. Entry of the order in the specific case gives the parties clear notice of what is expected The parties as well as the judge are likely to be better served by procedures that work best for that judge But it is hoped that the subdivision (c) procedures will work well for most judges, obviating any need for routine orders establishing different procedures that do not respond to the particular needs of particular cases.

(c)(2)(A) — Motion: Subparagraph (A) adopts a three-document approach to the motion. The first document is a "motion" identifying the subjects on which summary judgment is sought. The second is a statement of facts that the movant asserts cannot be genuinely disputed. The third is a brief. These three documents establish the basic foundation for the subsection (c) procedure. They pave the way for a point-counterpoint practice in which the motion both identifies the facts and cites materials supporting them, to be met by a response that addresses the same facts and provides equally focused counter-citations.

The statement of material facts addresses facts "that the movant asserts cannot be genuinely disputed." Many local rules call for statements of "undisputed facts." Although this term is familiar, it has generated some conceptual confusion when addressing a "no-evidence" motion made by a party who does not have the trial burden of production. A statement that the facts cannot be genuinely disputed better describes a "no-evidence" motion, which can be made by listing one or more elements of the nonmovant's claim or defense and stating the nonmovant has no evidence to support its position.

Lawyers who regularly litigate complex cases have expressed important reservations about statements of facts that cannot be genuinely disputed. They refer to motions with more than a hundred pages of facts that are asserted to be beyond dispute, with still lengthier responses and huge volumes of supporting materials "The motions come in boxes." Suggestions that the rule establish a numerical limit on the number of facts that could be asserted were dismissed as too difficult to implement in any appropriate way. This problem is addressed by observations in the Committee Note, primarily as a reminder of the court's authority to take control under subdivision (c)(1)

(c)(2)(B) — Response: The response comes in two documents, not three. The first, the "response" itself, must include a statement that accepts, disputes, or accepts in part and disputes in part, each fact in the statement that accompanies the motion. The response must adopt the paragraph numbering used in the movant's statement. The response also may concisely identify, in separately numbered paragraphs, additional material facts that preclude summary judgment The second document is a brief.

(c)(2)(C) — Reply: The movant must reply to the response, but only to any "additional facts" stated in the response. The movant may file a reply brief even if there is no reply. The formal exchanges stop at this point.

(c)(3) — Fact positions limited to motion: Paragraph (3) recognizes that a party may accept or dispute a fact either generally or for purposes of the motion only. This provision is inspired in part by provisions in some local rules recognizing the opportunity to stipulate to facts solely for purposes of summary judgment.

(c)(4)(A) — Citing support: Subdivision (c)(4)(A)(i) is an essential element of the point-counterpoint procedure. It does not suffice to assert that a fact cannot be genuinely disputed. The most common additional step is to rely on record materials that show the fact cannot be disputed. The same step is commonly taken in a response that disputes a fact. Item (i) identifies the variety of materials commonly relied upon to support summary-judgment positions. It is important to carry forward the familiar authority to rely on affidavits or declarations because they otherwise might be excluded from consideration as inadmissible at trial. The same proposition holds for many of the discovery materials listed — they may, but also may not, be admissible at trial

The materials cited must be "in the record." Earlier drafts explicitly required that a party file materials not already on file. That function is satisfied, however, by limiting citation to materials in the record — the party must file them in order to cite them. For similar reasons, the rule text omits the direction in present subdivision (e)(1) to attach to an affidavit a paper referred to in the affidavit If the paper is not in the record, it cannot be cited to support a party's position.

(c)(4)(A) — Disputing support: Subdivision (c)(4)(A)(ii) is a necessary complement to (A)(i). A party opposing summary judgment is not obliged to cite to any new parts of the record; it suffices to respond that the materials cited by the movant do not show the fact cannot be genuinely disputed. And a party who does not have the trial burden of production on a fact may move for summary judgment by "showing" that the nonmovant cannot produce admissible evidence to support the fact. This showing is not an argument — arguments are to be made in the brief — but a statement based on the record and anything the nonmovant has relied on to identify and support its position. This rule text does not attempt to resolve the continuing uncertainty among some courts and the bar as to just what "showing" is required to carry the "Celotex no-evidence" motion. An attempt to resolve that vexing question once and for all would, at least to some minds, alter the summary-judgment moving burden in a way that effectively changes the standard for granting summary judgment. This problem is deliberately left for resolution in evolving case law.

(c)(4)(B) — materials not cited: This subdivision begins with an explicit statement of the well-accepted proposition that a judge is not required to ferret through all materials in the record before deciding a summary-judgment motion. The parties are responsible for directing the court to the relevant materials under subdivision (c)(4)(A) and the judge need inquire no further. The rule further recognizes, however, that the judge has discretion to consider materials of record not called to its attention under (c)(4)(A). The more common event will be the court's recall of, or voluntary search for, materials that defeat summary judgment. But the court also has authority to grant summary judgment on the basis of record materials not cited to support the motion. Before granting summary judgment by relying on materials not cited, however, the court must give notice under Rule 56(f) Notice will provide an opportunity both to point to still other record materials that show a genuine dispute and to add such materials to the record.

(c)(5) — Inadmissibility of cited material: Many lawyers at the November 2007 miniconference asked for explicit direction on the proper formal procedure for presenting the position that material cited to support a fact is not admissible in evidence. They did not much care what the procedure might be, so long as the rule is clear. Subdivision (c)(5) provides that a response or reply can state this position "without argument." Argument is for the brief The Committee Note adds detail: the point can be made in the brief without separately including it in the response or reply. Either way, there is no need to make a separate motion to strike. And failure to raise the point at the summary-judgment stage does not forfeit the right to challenge admissibility at trial.

(c)(6) — Affidavits or declarations: Subdivision (c)(6) carries forward the requirements for summary-judgment affidavits established by present Rule 56(c)(1) The Committee has restored the reference to "declarations" rejected by the Style Subcommittee on reviewing an earlier draft. The Style Subcommittee concern is that referring to declarations only in Rule 56 may create negative implications for other rules that refer only to affidavits. The Committee, however, fears two nearly opposing risks One is that younger lawyers habituated to using declarations under 28 U.S.C. § 1746 will wonder what an affidavit might be. The other is that lawyers long accustomed to dealing with the more cumbersome affidavit procedure of a formally witnessed oath will overlook the alternative opportunity to rely on a declaration.

Subdivision (d)

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

(1) defer considering the motion or deny it;

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

(3) issue any other appropriate order.

Present Rule 56(f) largely unchanged: The Committee considered the possibility of adding some additional guidance as to the factors to be considered in determining whether to allow time for additional investigation or discovery. A survey of the case law by Matt Hall, Judge Levi's rules clerk, persuaded the Committee that the attempt would be unwise. It would be difficult to capture in rule text the wide variety of factors courts consider. The decisions, moreover, seem to reflect basically sound procedure

"Defer consideration": Proposed subdivision (d) basically tracks present Rule 56(f), with some further style changes proposed by the Style consultant. It does add one element, explicitly recognizing the authority to defer consideration as well as to deny the motion. Earlier drafts of the Committee Note explained the purpose in language that has been deleted: It may be better to deny a motion that is clearly premature, without prejudice to filing a new motion after further discovery. Further discovery may so change the record that both the statement of material facts required by subdivision (c)(2)(A)(ii) and the record citations required by subdivision (c)(4)(A) will have to be substantially changed. Ordinarily the denial will be without prejudice to renewal when the record is better developed, although a pressing need for prompt decision may mean that a case should proceed to trial without the delay occasioned by consideration of summary judgment. Rather than deny the motion, it may be feasible to defer consideration if there is a prospect that it can be addressed without substantial change after further discovery.

Subdivision (e). Missing or Noncomplying Response or Reply

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

(1) afford an opportunity to properly respond or reply;

(2) consider a fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

Noncomplying motion: Some participants in the November 2007 miniconference protested that it seemed one-sided — and that one side is pro-defendant — to address only noncomplying responses and replies without also addressing noncomplying motions. The Committee considered a draft that added noncomplying motions to the rule text without adding much complexity. In the end it decided that there is no need to add unnecessary provisions simply to add an apparent reassurance that no favoritism is implied. Courts have ample experience in dealing with improperly presented motions of all sorts. They have equally ample resources to deal with them. Noncompliance, moreover, can come in many forms The appropriate responses take as many forms, beginning with a decision to overlook the noncompliance just as noncompliance in a response or reply may be passed by in favor of addressing the substance of the positions advanced, however unartfully

As an alternative to rule text, the Committee considered, but decided against, expanding the Committee Note to identify these issues by adding this language: "The rule text does not address defective motions because courts have general approaches to dealing with defective motions of all kinds, and because there are a variety of defects that may call for different responses. Among many different defects, the movant may make two documents where there should be three; make compound or unclear statements of fact; fail to file cited materials not already on file; or fail to cite supporting materials clearly or at all. A wrong choice to combine motion and statement of facts in a single document might easily be overlooked. Failure to cite supporting materials ordinarily will be met by an order to provide the citations or by denying the motion. Failures of intermediate seriousness may be met by different measures. Any provision in rule text would be incomplete and potentially misleading." The advice came to seem purely gratuitous.

Opportunity to comply: Subdivision (e)(1) recognizes the response that is likely to be the first resort of most courts in most cases. A party who has failed to make a timely response or reply will be directed to respond or reply. A party who has attempted to respond or reply but who has not succeeded in complying with Rule 56(c) will be directed to correct any deficiencies that impede the court's ability to consider the motion. These responses are particularly common in actions that involve a pro se party.

Consider undisputed: Subdivision (e)(2) addresses a central question raised by the local rules that establish point-counterpoint procedures similar to the procedures set out in subdivision (c). The local rules commonly provide that failure to respond to the statement of "undisputed facts" point-by-point, with appropriate references to the record, authorizes the court to "deem admitted" the facts not addressed by a proper response The memorandum prepared by Andrea Kuperman illustrates the variety of approaches taken by the courts of appeals in reviewing summary judgments that rest in part on facts deemed admitted. Some decisions clearly require the court to examine the materials cited by the movant to determine whether those materials support the fact asserted. Others seem to imply that the court can deem the fact admitted without examining the movant's cited materials

The Committee's approach to this problem evolved through a series of drafts. The earliest drafts required the court to apply the ordinary summary-judgment standard to the materials cited by the movant, allowing summary judgment only if the movant had carried the full summary-judgment burden. On this approach the only price for failing to respond, or to respond in proper form, was loss of the opportunity to have the court consider other materials that might show a genuine dispute. These drafts gave way to an approach that attaches more serious consequences to the nonmovant's failure to respond in compliance with subdivision (c) This approach, as reflected in the present draft subdivision (e)(2), establishes discretionary authority to consider the fact undisputed. The court may adjust its approach to the circumstances of the case

Alternatives were considered at length. One would have attempted to provide a specific formula. A fact might be considered undisputed "if: (i) supported by citation to record materials that would satisfy the movant's burden of production at trial, or (ii) supported by an apparent showing that the nonmovant could not satisfy its burden of production at trial." This formula would not

require that the full summary-judgment burden be satisfied. A plaintiff, for example, might support a statement that the defendant went through a red light by citing the plaintiff's own deposition testimony A jury would not be required to believe the plaintiff at trial, summary judgment for the plaintiff would not be proper if the defendant responded, even with a simple (and correct) statement that the material cited did not show that the fact cannot be disputed. The question is a bit trickier for the "no-evidence" motion made by a party who does not have the trial burden; to distinguish the showing required to support a "considered undisputed" finding from the showing required to win summary judgment over a properly framed response, the requirement is reduced to an "apparent" showing

The conceptually clean formulation found little or no support. Conceptual clarity does not always translate to ready understanding and application. The practical world of summary judgment is difficult enough without forcing application by unfamiliar concepts

An alternative considered at greater length resorted to some measure of deliberate ambiguity In one set of words or another, it would have allowed the court to consider a fact undisputed if the fact "is supported by the record" or "is supported by the materials cited by the movant." These formulas seek to seize the value that occasionally attaches to ambiguous drafting. The court is directed to look for "support," but no attempt is made to capture the factors that measure the adequacy of that support. Champions of this approach urge that it strikes exactly the right note. Courts will understand that discretion is properly informed by many considerations, some of them difficult to articulate. This is, after all, discretion in determining the consequences of a failure to discharge the obligation to assist the court by a proper response or reply; all discretion whether to grant summary judgment vanishes on filing a proper response or reply.

Those who resisted adding a direction to consider the movant's support for a fact not properly responded to thought it inappropriate to add an open-ended direction to do what courts will do in any event. Courts will administer the discretionary authority to consider a fact undisputed in light of all the circumstances and experiences of the case up to the time of the summary-judgment motion. Why add a direction that some courts might read as implying unintended limits on wise administration?

The question whether to add a direction to look for support was closely debated. Public comment will be particularly helpful.

(e)(3) — Grant summary judgment. This subdivision has been revised to address uncertainties expressed during the discussion last January. The uncertainties arose from a drafting history that had not quite caught up with the development of Committee positions. As noted above, the position embodied in the early drafts eschewed any opportunity to consider a fact undisputed; the court could find a fact established beyond genuine dispute only on determining that the movant's cited materials carried the full summary-judgment burden Development of the authority to consider a fact undisputed was not clearly matched by the text of (e)(3). The current draft seeks to state clearly the role of facts considered undisputed

Taking one or more facts as undisputed is only one step toward granting summary judgment. Failure to respond properly, or at all, does not warrant summary judgment by default. There may have been a proper response as to other facts, or the court may decline to consider some facts undisputed even when it could do so. Facts considered undisputed thus may need to be combined with other facts that will be established for purposes of summary judgment only if the movant has carried the full summary-judgment burden. Once these basic facts are established, the court must apply the ordinary summary-judgment rule by determining the outer limit of permissible inferences favoring the nonmovant. Care must be taken at this stage to separate the historic facts considered undisputed from the inferential facts that are not the subject of any direct evidence The combination of basic facts and permissibly inferred facts must then be measured against the applicable substantive law.

This, then, is the purpose of adding these new words to the draft. "grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it." The facts considered undisputed, after whatever level of examination was afforded under subdivision (e)(2), become simply one part of the foundation for deciding whether the summary-judgment standard has been met.

(e)(4) — Other appropriate order: Subdivision (e)(4) is deliberately open-ended, leaving the way for other creative responses. The Committee Note observes, underscoring subdivision (e)(1), that "[t]he choice among possible orders should be designed to encourage proper responses and replies."

Subdivision (f): Judgment Independent of Motion

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

(1) grant summary judgment for a nonmovant;

(2) grant or deny the motion on grounds not raised by the motion or response; or

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

Notice and time to respond: Case law recognizes each of the three categories of action listed in subdivision (f), and regularly notes that the court should give notice and an opportunity to respond before acting independently of, or contrary to, the motion It is useful to assure that parties are aware of these possible responses by explicit rule provisions.

Invite motion: Discussion last January asked whether it would be better to invite a summary judgment motion — or a better-focused motion or response — rather than act on the court's own. The Committee Note observes that often it will be useful to invite a motion in order to trigger the full procedure established by subdivision (c). But the Committee believes that the procedure should not be limited to inviting a motion. The running illustration assumed an action against a public official and the official's municipal employer. The official's motion for summary judgment on official-immunity grounds is granted on finding there was no violation of the asserted constitutional right. The employing municipality could not have moved for summary judgment on the immunity ground. There may be no advantage in inviting a new motion, the plaintiff is sufficiently protected by notice that the court is considering summary judgment for the municipality and an opportunity to be heard on the reasons why the municipality might be liable independently of the official's conduct.

Subdivision (g) Findings after Partial Grant

(g) Partial Grant of the Motion. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

Not partial summary judgment: The evolution of subdivision (g) has been described in part with subdivision (a). It began as an attempt to express the familiar concept of partial summary judgment. The drafts, however, inadvertently provoked some deserved confusion, as illustrated by the discussion last January Subsection (a) seemed to say the court "should" grant summary judgment on even a part of a claim or defense if there is no genuine dispute of material fact. Subsection (g), as drafted, growing out of present subdivision (d), seemed to say the court should grant partial summary judgment only "if practicable." Exploration of this inconsistency led to the conclusion that partial summary judgment should be anchored entirely in subdivision (a)

Subdivision (g) is now limited to circumstances in which the court, honoring the direction that it should grant summary judgment if there is no genuine dispute as to any material fact, does not grant all the relief requested by the summary-judgment motion. It establishes discretion to establish a fact as not genuinely in dispute for purposes of the action. This discretion is more open than the discretion to deny summary judgment even though the movant has carried the full summary-judgment burden. The reasons for establishing open-ended discretion reflect familiar concerns The work of sifting through the record for specific facts and applying the often indeterminate summary-judgment standard may be far greater than the burden of trial. The risk that mistaken application of the summary-judgment standard may require costly appeals and retrials is real. And there is often a real prospect that the need to consider essentially the same evidence means that trial will not be shortened by setting some facts off-limits Indeed trial might be less effective if understanding the questions that remain to be tried requires informing the jury of the facts taken as established, engendering confusion when the evidence seems to undercut those facts.

The Committee considered the offsetting risk that submitting to the jury a fact that could have been resolved by the summary-judgment standard will open the door to admitting prejudicial evidence that otherwise would not be admissible. It concluded that this risk can be taken into account in exercising the court's discretion.

Subdivision (h): Bad-Faith Affidavits or Declarations

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

Discretion added: Subdivision (h) is taken directly from Style Rule 56(g), with two changes. The present rule says that the court "must" order payment of reasonable expenses. The Committee asked the Federal Judicial Center to determine whether courts actually honor the imperative command of "must." It found essentially complete disregard; sanctions are almost never imposed under this rule.

The second change adds an explicit reminder of the obligation to provide notice and a reasonable time to respond before ordering a sanction.

The Committee considered abrogation of this subdivision as an essentially inoperative supplement to the sanctions authorized by Rule 11 and 28 U.S.C. § 1927. Although the question seemed close, no compelling reason could be found to abandon this provision. The contempt authority is unique, and might be useful in a case of flagrant abuse.

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April 2, 2008

Memorandum

To: Judge Michael Baylson

From: Joe Cecil, George Cort, and Pat Lombard

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

Purpose: The Advisory Committee on Civil Rules asked the Federal Judicial Center to examine summary judgment practice across federal district courts as a means of assessing the potential impact of the proposed amendments to Rule 56. Those proposed amendments will, among other things, require the movant to "state in separately numbered paragraphs only those material facts that the movant asserts are not genuinely in dispute and entitle the movant to judgment as a matter of law," and require the respondent to address each one of those facts in similarly numbered paragraphs. We compare summary judgment practice across three groups: (1) districts with local rules that place similar requirements on both the movant and respondent; (2) districts with local rules that place similar requirements only on the movant; and, (3) districts with no similar requirement in their local rules. We examine both the nature and outcome of individual summary judgment **motions** (Tables 1 through 5), and the **cases** in which the summary judgment motions are filed and resolved (Tables 6 through 12). Each table first reports the results for all cases in each of the three groups of districts, and then reports the results separately for five broad types of cases – contracts, torts, employment discrimination, other civil rights, and other remaining cases.

Summary of Findings: Our analyses found very few meaningful differences in summary judgment practice in districts that have local rules that require a structured format for the motion and response similar to the proposed rule.[1] (For purposes of this

[1] This report builds on a preliminary report submitted to the Advisory Committee on November 2, 2007 and includes data from an additional eight federal districts that could not be included in the preliminary report due to distinctive district coding practices. Two differences were of particular concern in the preliminary analysis -- districts with local rules that are similar to the proposed amendment required more time to resolve summary judgment motions and had a higher percentage of employment discrimination cases terminated by summary judgment. The difference in median weeks to disposition (Table 5) remains sizeable but may be explained by differences in other characteristics of the three groups of districts as

discussion we arbitrarily designate a meaningful difference as a difference that exceeds five percentage points between the districts with such local rules and either of the other two district groups These differences are indicated in the tables in bold print The Advisory Committee may determine that a greater or lesser difference constitutes a meaningful difference.)

Summary judgment motions are filed at approximately the same rate by plaintiffs and defendants across all three groups (Tables 6 through 9) In districts with the structured format for the movant and respondent, defendants are somewhat more likely to file a summary judgment motion in torts cases and somewhat less likely to file in civil rights cases (Tables 6 and 7), a difference that is difficult to interpret We found no meaningful differences across the three groups of districts in the percentage of cases with summary judgment motions granted (Tables 10 and 11) and in the percentage of cases terminated by summary judgment (Table 12)

When we examine individual summary judgment motions rather than cases, it appears that motions are more likely to be resolved in districts that require a structured format for movants and respondents, with a tendency for more motions to be granted (Table 3). However, if we consider only those motions resolved, there is no meaningful differences across groups in the percentage of motions granted and denied (Table 4) More time is required to resolve motions in districts that require a structured format for the movant and respondent (see Table 5). However, a supplementary analysis indicated that the longer time to disposition in such districts may be related to characteristics of those districts unrelated to their summary judgment local rule. Such districts have higher median weighted caseloads, greater numbers of pending cases per judge, and require more time to reach a disposition in all cases, including cases that do not have motions for summary judgment (Appendix B)

Methodology: We sorted each federal district court into one of three groups based on the districts' local rules governing summary judgment, relying on the analysis of local rules by Jeffrey Barr and James Ishida to guide this classification [2] The first group consisted of twenty federal districts that have local rules with summary judgment requirements similar to those of the proposed amendment. In general, local rules in these districts require the moving party to include a statement of undisputed facts with its motion for summary judgment, and require the non-moving party to respond to the movant's statement, fact-by-fact We refer to these districts as having local rules that require a structured format for the movant and respondent We assumed that summary judgment practice in these districts follows a pattern that will become common in other federal districts if the proposed amendments are adopted.

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indicated in Appendix B The difference in the percentage of employment discrimination cases terminated by summary judgment (Table 12) has dropped to less than five percentage points across the groups and does not meet our test for a meaningful difference

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

The second group consisted of thirty-four federal district courts with local rules that require the moving party to include a statement of undisputed facts, but do not require the respondent to address each fact We refer to these districts as having local rules that require a structured format for the movant only. We believe that summary judgment practice in these districts may have some, but not all, of the characteristics of summary judgment practice under the proposed amendment.

The third group consisted of thirty-seven federal district courts that do not require the moving party to submit a statement of undisputed facts with its motion, either because these districts do not have a local rule governing summary judgment practice or because the districts' local rules do not address the manner in which the motion should be presented.[3] We refer to these districts as having local rules that do not specify the structure or response to a motion for summary judgment. We believe that summary judgment practice in this third group may be most affected by the proposed amendment A list of the districts in each of the three groups is presented in Appendix A. Characteristics of the three groups of districts are presented in Appendix B

We began by identifying summary judgment motions in the 276,120 civil cases terminated the federal district courts in Fiscal Year 2006. We used Case Management / Electronic Case Filing (CM/ECF) data to identify 62,938 summary judgment motions and related court orders Where necessary, we recoded these orders to indicate the final action taken by the court We then determined, for each case, the number and type of summary judgment motions, number of motions by plaintiffs and defendants, number of motions granted in whole or in part, number of motions denied, the number of motions in which the court took no action, whether the case was terminated by summary judgment, and the time required to resolve the motion.

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

[3] For this analysis we reclassified the Eastern District of Pennsylvania as a district with no summary judgment local rule, thereby correcting an earlier misclassification James Ishida has examined our classification of other districts and confirmed that the districts are correctly classified

useable CM/ECF data and local rule information from three districts -- Western District of Wisconsin, District of the Northern Marianas Islands, and District of the Virgin Islands -- and excluded these districts from the analyses Data from all other federal districts were included in the analyses

After these exclusions, we were left with 155,803 cases, or 56 percent of cases terminated in FY 2006. Of these cases, 23,725 contained at least one motion for summary judgment In total, we analyzed 46,633 separate motions for summary judgment

Commentary: In general, we found few differences in summary judgment practice across the three groups of districts Most notably, we found no meaningful differences across the groups in the likelihood that cases are terminated by summary judgment (Table 12). Even where differences exist, it is difficult to determine if the differences are due to the local rule governing summary judgment practice or other characteristics shared by the district that have adopted such rules, as noted above. Districts with local rules requiring a structured format for the movant and respondent also have greater weighted case filings, more pending cases per judge, fewer case terminations per judge, and longer case disposition times. These district characteristics may have a greater effect on summary judgment practice than the structure of the local rule

We also found that summary judgment motions are more likely to be decided in districts with a structured format for the movant and respondent Perhaps the structured format leads to better motions; perhaps judges find such motions easier to resolve; or perhaps this too is related to district characteristics unrelated to the structure of the local rule

As in previous research,[4] we found great variation in summary judgment practice across individual districts Some of these differences are due to differences in types of cases filed in the districts, but there still exists great variation across districts in the same types of cases Courts clearly vary in local culture and practice regarding summary judgment in ways that are not revealed by differences in local rules.

While we found few differences in employment discrimination cases related to the type of summary judgment local rule, the expansive role of summary judgment in such cases is striking Across all three groups summary judgment motions by defendants are far more common in employment discrimination cases than in any other type of case (Table 7), are far more likely to be granted in whole or in part (Tables 10 and 11), and such cases are more likely to be terminated by summary judgment (Table 12). Perhaps summary judgment motions are more common in employment discrimination litigation due, in part, to the number of defendants who often are named and the frequent presence of collateral state claims Summary judgment then is used as a procedure to narrow the issues on which the court must rule Of course, this does not explain the higher rate of employment discrimination cases terminated by summary judgment

[4] Joe S Cecil, Rebecca N Eyre, Dean Miletich, and David Rindskopf, A Quarter-Century of Summary Judgment Practice in Six Federal District Courts, 4 *Journal of Empirical Legal Studies*, 861–907 (2007)

Table 1 Party Moving for Summary Judgment

Motions in		Local Rule Requires Structured Format by Movant & Respondent	Movant Only	Not in Local Rule	Total Motions
All Cases	Defendant	71%	72%	68%	32,779
	Plaintiff	26%	26%	23%	11,546
	No Moving Party	**3%**	2%	**9%**	2,304
Contracts	Defendant	56%	60%	57%	
	Plaintiff	**42%**	40%	**35%**	
	No Moving Party	**2%**	0%	**8%**	
Torts	Defendant	85%	85%	87%	
	Plaintiff	14%	14%	12%	
	No Moving Party	1%	1%	1%	
Employment Discrimination	Defendant	90%	90%	91%	
	Plaintiff	9%	9%	9%	
	No Moving Party	1%	1%	0%	
Other Civil Rights	Defendant	82%	82%	84%	
	Plaintiff	17%	17%	16%	
	No Moving Party	1%	2%	1%	
Other	Defendant	58%	59%	62%	
	Plaintiff	40%	39%	37%	
	No Moving Party	2%	3%	1%	

Table 2 Type of Summary Judgment Motion

Motions in		Local Rule Requires Structured Format by Movant & Respondent	Movant Only	Not in Local Rule	Total Motions
All Cases	Summary Judgment	**91%**	**85%**	89%	39,824
	Partial Summary Judgment	9%	14%	11%	5,198
	Rule 54 Motion	0%	1%	0%	220
Contracts	Summary Judgment	**87%**	**79%**	85%	
	Partial Summary Judgment	**12%**	**21%**	15%	
	Rule 54 Motion	1%	1%	1%	
Torts	Summary Judgment	**90%**	**84%**	87%	
	Partial Summary Judgment	**10%**	**16%**	13%	
	Rule 54 Motion	0%	1%	1%	
Employment Discrimination	Summary Judgment	96%	92%	95%	
	Partial Summary Judgment	4%	7%	5%	
	Rule 54 Motion	0%	0%	0%	
Other Civil Rights	Summary Judgment	94%	90%	92%	
	Partial Summary Judgment	6%	10%	8%	
	Rule 54 Motion	0%	0%	1%	
Other	Summary Judgment	88%	83%	88%	
	Partial Summary Judgment	11%	16%	12%	
	Rule 54 Motion	1%	1%	0%	

Table 3. Action on Summary Judgment Motion

Motion in		Local Rule Requires Structured Format by: Movant & Respondent	Movant Only	Not in Local Rule	Total Motions
All Cases	Denied	17%	14%	15%	7,005
	Grant in Whole	**24%**	**18%**	**19%**	9,219
	Grant in Part	8%	5%	7%	2,963
	Adopt Mag R&R	0%	0%	0%	6
	Moot	2%	2%	2%	842
	No Disposition	**50%**	**62%**	**58%**	26,594
Contacts	Denied	17%	16%	18%	
	Grant in Whole	18%	14%	15%	
	Grant in Part	8%	5%	7%	
	Adopt Mag R&R	0%	0%	0%	
	Moot	3%	1%	2%	
	No Disposition	**55%**	**64%**	59%	
Torts	Denied	17%	16%	17%	
	Grant in Whole	19%	18%	20%	
	Grant in Part	7%	4%	5%	
	Adopt Mag R&R	0%	0%	0%	
	Moot	2%	3%	2%	
	No Disposition	55%	60%	57%	
Employment Discrimination	Denied	14%	12%	12%	
	Grant in Whole	**37%**	**27%**	**25%**	
	Grant in Part	9%	8%	10%	
	Adopt Mag R&R	0%	0%	0%	
	Moot	2%	1%	1%	
	No Disposition	**39%**	**52%**	**53%**	
Other Civil Rights	Denied	**15%**	**9%**	13%	
	Grant in Whole	**27%**	**20%**	24%	
	Grant in Part	9%	6%	8%	
	Adopt Mag R&R	0%	0%	0%	
	Moot	2%	1%	3%	
	No Disposition	**48%**	**65%**	51%	
Other	Denied	20%	16%	18%	
	Grant in Whole	**20%**	**14%**	20%	
	Grant in Part	6%	5%	6%	
	Adopt Mag R&R	0%	0%	0%	
	Moot	3%	2%	2%	
	No Disposition	**51%**	**64%**	54%	

Table 4 Outcome of Summary Judgment Motions Granted or Denied

		Local Rule Requires Structured Format by			
Motions in		Movant & Respondent	Movant Only	Not in Local Rule	Total Motions
All Cases	Denied	35%	38%	37%	7,005
	Grant Whole or Part	65%	62%	63%	12,182
Contracts	Denied	41%	46%	45%	
	Grant Whole or Part	59%	54%	55%	
Torts	Denied	40%	43%	41%	
	Grant Whole or Part	60%	57%	59%	
Employment Discrimination	Denied	23%	26%	25%	
	Grant Whole or Part	77%	74%	75%	
Other Civil Rights	Denied	30%	26%	29%	
	Grant Whole or Part	70%	74%	71%	
Other	Denied	44%	45%	41%	
	Grant Whole or Part	56%	55%	59%	

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

	Local Rule Requires Structured Format by			
	Movant & Respondent	Movant Only	Not in Local Rule	Total Motions
Motions in				
All Cases	23	17	15	18,625
Contracts	22	16	14	
Torts	22	13	12	
Employment Discrimination	25	17	16	
Other Civil Rights	21	19	15	
Other	23	18	16	

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

	Local Rule Requires Structured Format by			
	Movant & Respondent	Movant Only	Neither Party	Total Cases
All Cases				
No Motions	85%	83%	86%	132,078
At Least One Motion Filed	16%	17%	14%	23,725
Types of Cases with at Least One Motion				
Contracts	15%	18%	19%	
Torts	**13%**	13%	**5%**	
Employment Discrim	35%	35%	37%	
Other Civil Rights	**20%**	25%	**27%**	
Other	9%	12%	13%	

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

	Local Rule Requires Structured Format by			
	Movant & Respondent	Movant Only	Neither Party	Total Cases
All Cases				
No Motions	87%	86%	88%	135,647
At Least One Motion	13%	14%	12%	20,156
Types of Cases with at Least one Motion by a Defendant				
Contracts	10%	13%	14%	
Torts	12%	11%	5%	
Employment Discrim	35%	34%	37%	
Other Civil Rights	19%	23%	25%	
Other	7%	9%	10%	

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

	Local Rule Requires Structured Format by			
	Movant & Respondent	Movant Only	Neither Party	Total Cases
All Cases				
No Motions	95%	94%	96%	147,887
At Least One Motion	5%	6%	4%	7,916
Types of Cases with at Least one Motion by a Plaintiff				
Contracts	9%	10%	11%	
Torts	2%	2%	1%	
Employment Discrim	3%	4%	3%	
Other Civil Rights	4%	6%	5%	
Other	5%	7%	7%	

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

	Local Rule Requires Structured Format by			
	Movant & Respondent	Movant Only	Neither Party	Total Cases
All Cases				
No Motions	97%	97%	98%	151,328
At Least One Motion	3%	3%	2%	4,475
Types of Cases with at Least one Motion by a Plaintiff and One by a Defendant				
Contracts	5%	5%	6%	
Torts	1%	1%	0%	
Employment Discrim	3%	3%	3%	
Other Civil Rights	3%	4%	4%	
Other	3%	4%	4%	

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

	Local Rule Requires Structured Format by			
	Movant & Respondent	Movant Only	Neither Party	Total Cases
All Cases				
No Motions	94%	95%	96%	148,253
At Least One Motion	6%	5%	4%	7,750
Types of Cases with at Least one Motion Granted in Whole				
Contracts	5%	5%	5%	
Torts	4%	3%	1%	
Employment Discrim	16%	13%	12%	
Other Civil Rights	8%	8%	9%	
Other	3%	3%	4%	

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

	Local Rule Requires Structured Format by			
	Movant & Respondent	Movant Only	Neither Party	Total Cases
All Cases				
No Motions	93%	94%	95%	146,447
At Least One Motion	7%	6%	5%	9,356
Types of Cases with at Least one Motion Granted in Whole or Part				
Contracts	6%	6%	7%	
Torts	5%	4%	2%	
Employment Discrim	20%	16%	16%	
Other Civil Rights	10%	10%	12%	
Other	4%	4%	5%	

Table 12: Cases Terminated by Summary Judgment

	Local Rule Requires Structured Format by			
	Movant & Respondent	Movant Only	Neither Party	Total Cases
All Cases				
Not Terminated by Summary Judgment	96%	97%	97%	150,952
Terminated by Summary Judgment	4%	3%	3%	4,851
Types of Cases Terminated by Summary Judgment				
Contracts	3%	3%	3%	
Torts	2%	2%	1%	
Employment Discrim	13%	10%	9%	
Other Civil Rights	5%	5%	6%	
Other	2%	2%	3%	

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

Appendix A: Classification of Individual Districts*

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

* The districts of the Virgin Islands, Wisconsin – Western, and Northern Marianas Island were excluded from the analyses due to missing data or missing information on local rules

Appendix B: Median Characteristics of the Districts in Three Groups

Median Characteristics	Local Rule Requires Structured Format by Movant & Respondent	Movant Only	Not in Local Rule
Weighted Case Filings per Judge	455	430	426
Pending Cases per Judge	404	375	371
Case Terminations per Judge	413	439	472
Months from Filing to Disposition	10	9	9
Percent Civil Cases over 3 yrs old	7	5	6

MEMORANDUM

DATE: April 1, 2008

TO: Judge Michael Baylson
Professor Edward Cooper
Judge Mark Kravitz
Judge Lee H. Rosenthal

FROM: Andrea Kuperman

SUBJECT: Use of "Deemed Admitted" Provisions in Local Summary Judgment Rules

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This memorandum addresses research regarding proposed amendments to FED R CIV. P. 56(e), particularly with respect to the proposal to permit a court to deem facts uncontested where the nonmovant fails to respond to the motion for summary judgment or fails to respond in the proper format required by the rule. Specifically, the question has been raised as to whether deeming facts admitted could be considered to be inconsistent with the current summary judgment standard—*i e*, that a movant is entitled to summary judgment only if there is no genuine dispute as to any material fact and the party is entitled to judgment as a matter of law. Many districts have implemented local rules that contain similar provisions to the proposed amendments to Rule 56, including provisions that permit courts to deem facts admitted. The Subcommittee requested that I research case law regarding how courts have implemented such rules with "deemed admitted" provisions and the reaction that the appellate courts have had to such local rules. In looking at the cases, I also examined whether the courts in districts that permit uncontested facts to be deemed admitted have automatically deemed facts admitted where the response was not in proper form or whether they

have required support for the facts before deeming them admitted.[1]

I. Courts Approving of Use of "Deemed Admitted" Practice

Most of the circuit court cases I reviewed approved of local rules that permit courts to deem facts admitted in the absence of a proper response to a motion for summary judgment.

The Supreme Court briefly addressed this issue in *Beard v Banks*, 548 U.S. 521, 126 S Ct. 2572 (2006). Although the issue before the Court was not directed to the propriety of a local summary judgment rule permitting the deemed admission of facts, the Court did note that such a rule had applied and did not express concern regarding such a rule. In *Beard*, a prisoner brought suit under the First Amendment against the Secretary of the Pennsylvania Department of Corrections, asserting that the Department had violated the rights of a certain group of inmates by restricting access to newspapers, magazines, and photographs. 126 S. Ct. at 2577. The Secretary moved for summary judgment, and filed a "Statement of Material Facts Not in Dispute," in accordance with Western District of Pennsylvania's local rule. *Id* The applicable local rules provided that facts asserted in a statement of material facts submitted in support of a summary judgment motion are deemed admitted if not controverted by the opponent.[2] The plaintiff (who was represented by counsel) failed to respond to the Secretary's statement of facts, and instead filed his own crossmotion for summary judgment. *Id* The plaintiff did not dispute any of the facts set forth by the Secretary's

[1] Because a search for cases addressing the deemed admitted standard in summary judgment turned up thousands of results, I have focused my research on a sampling of the more recent cases that have substantively addressed the practice of deeming facts admitted in summary judgment I have also largely focused on appellate cases because I found that many of those often discussed both what was done at the district court level as well as what was done at the appellate level, and sometimes also discussed whether the implementation of local rules comported with the national summary judgment standard

[2] The local rule at issue provides, in part "Alleged material facts set forth in the moving party's Concise Statement of Material Facts or in the opposing party's Responsive Concise Statement, which are claimed to be undisputed, will for the purpose of deciding the motion for summary judgment be deemed admitted unless specifically denied or otherwise controverted by a separate concise statement of the opposing party " W D PENN L R 56 1(E)

statement, and the Secretary argued that the plaintiff ought to be deemed to have admitted the Secretary's facts, based on the applicable local rule. The district court deemed the facts admitted and granted summary judgment. *Id.* This holding was reversed at the Third Circuit, which held that the prison's regulation could not be supported as a matter of law by the record in the case. *Id* The Supreme Court reversed the Third Circuit, in a plurality opinion authored by Justice Breyer and joined by Chief Justice Roberts, Justice Kennedy, and Justice Souter,[3] finding that it was appropriate for the uncontroverted facts to have been deemed admitted. The Court noted: "The upshot is that, if we consider the Secretary's supporting materials, i.e., the statement [of material facts] and deposition, by themselves, they provide sufficient justification for the [prison's] Policy." *Id.* at 2580. The court focused on the fact that the plaintiff had not provided any fact-based or expert-based evidence to refute the summary judgment motion in the manner provided by the rules. *Beard,* 126 S. Ct. at 2580 (citing FED R. CIV. P. 56(e)). Instead, in the plaintiff's crossmotion for summary judgment, the plaintiff asserted that the Policy was "unreasonable as a matter of law." *Id* at 2581. The Court held that the Third Circuit had "placed a high summary judgment evidentiary burden upon the Secretary, *i e* , the moving party," and that the Circuit court's conclusion offered "too little deference to the judgment of prison officials . . ." *Id.* The Court concluded: "Here prison authorities responded adequately through their statement and deposition to the allegations in the complaint. And the plaintiff failed to point to "'specific facts'" in the record that could 'lead a rational trier of fact to find' in his favor." *Id.* at 2582 (quoting *Matsushita Elec. Indus Co v Zenith Radio Corp* , 475 U.S 574 (1986) (quoting FED. R. CIV P. 56(e))).

[3] Justice Alito took no part in the decision, and Justice Thomas, joined by Justice Scalia, wrote a concurring opinion

Justice Ginsburg wrote a dissenting opinion in *Beard*, noting that "[a]s the plurality recognizes, there is more to the summary judgment standard than the absence of any genuine issue of material fact, the moving party must also show that he is 'entitled to a judgment as a matter of law.'"[4] *Beard*, 126 S. Ct. at 2592 (Ginsburg, J., dissenting) (citing FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S 242, 249–55 (1986)). Justice Ginsburg continued: "Here, the Secretary cannot instantly prevail if, based on the facts so far shown and with due deference to the judgment of prison authorities, a rational trier could conclude that the challenged regulation is not 'reasonably related to legitimate penological interests.'" *Id.* (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). Justice Ginsburg noted that the Secretary's support for summary judgment was slim, and that the statement of undisputed facts contained a broad assertion that the regulation at issue served to "'encourage . . progress and discourage backsliding.'" *Id* Justice Ginsburg disagreed with the plurality that such statements were sufficient to show that the regulation was reasonably related to inmate rehabilitation, and stated that deference to the views of prison authorities "should come into play, pretrial, only after the facts shown are viewed in the light most favorable to the nonmoving party and all inferences are drawn in that party's favor." *Id* at 2592–93 (citing *Liberty Lobby*, 477 U.S. at 252–55, *cf Reeves v Sanderson Plumbing Products, Inc* , 530 U.S. 133, 150–51 (2000)). Although not addressed in her dissenting opinion, Justice Ginsburg's view would seem consistent with the idea that even if a movant's facts are to be deemed admitted as a result of an improper response to a summary judgment motion, those facts could not be the basis for granting summary judgment without some showing in the record to support those facts.

[4] Justice Stevens wrote a separate dissenting opinion, joined by Justice Ginsburg, but that opinion focused on the Fourteenth and First Amendment issues, rather than the summary judgment standard

A. Discretion to Enforce Local Rules

One key factor that appellate courts have expressed in reviewing district court opinions that deem facts admitted in the summary judgment context is the deference given to district courts' application of local rules. The appellate courts review those determinations only for an abuse of discretion and thus do not seem to have difficulty affirming a district court's decision to deem facts admitted in accordance with local rules. *See, e.g.*, *CMI Capital Market Inv., LLC v. Gonzalez-Toro*, No. 06-2623, 2008 WL 713577, at *3 (1st Cir. March 18, 2008) (where the nonmovants failed to submit a separate statement of material facts in accordance with the local rule, "[t]he district court was . . . within its discretion to deem the facts in the [movant's] statement of material facts admitted."); *Ríos-Jiménez v. Principi*, No. 06-2582, 2008 WL 651630, at *4 (1st Cir. March 12, 2008) ("In the event that a party opposing summary judgment fails to act in accordance with the rigors that such a [local summary judgment] rule imposes, a district court is free, in the exercise of its sound discretion, to accept the moving party's facts as stated.") (citations omitted); *John S. v. County of Orange*, No. 05-55021, 2007 WL 625249, at *1 (9th Cir. Feb. 26, 2007) (unpublished) ("It was not error for the district court to deem the material facts submitted by defendants as admitted and to grant summary judgment on procedural grounds.") (citing C.D. CAL. L.R. 56-3); *Libel v. Adventure Lands of Am., Inc.*, 482 F.3d 1028, 1033 (8th Cir. 2007) ("The district court was not obliged to scour the record looking for factual disputes. Therefore, the district court committed no abuse of discretion when it deemed admitted Adventure Lands's statements of undisputed facts where Libel's responses violated Local Rule 56.1."), *Kelvin Cryosystems, Inc. v. Lightnin*, No. 05-4880, 2007 WL 3193731, at *3 (3d Cir. Oct. 29, 2007) (unpublished) ("We have long recognized

that deemed admissions 'are sufficient to support orders of summary judgment.'")[5] (quoting *Anchorage Assocs v. Virgin Islands Bd of Tax Review*, 922 F.2d 168, 176 n.7 (3d Cir 1990)), *Mariani-Colón v. Dep't of Homeland Sec*, 511 F.3d 216, 219 (1st Cir 2007) ("This court has previously held that submitting an 'alternate statement of facts,' rather than admitting, denying, or qualifying a defendant's assertions of fact 'paragraph by paragraph as required by Local Rule 56(c),' justifies the issuance of a 'deeming order,' which characterizes defendant's assertions of fact as uncontested.") (citing *Cabán Hernández v Philip Morris USA, Inc.*, 486 F.3d 1, 7 (1st Cir. 2007)); *Reasonover v. St Louis County, Mo*, 447 F 3d 569, 579 (8th Cir 2006) ("District courts have broad discretion to set filing deadlines and enforce local rules," and "[w]ith Resonover failing to file a timely response [to the summary judgment motion], the district court did not abuse its discretion in deeming facts set forth in Officer Pruett's motion admitted.") (citing E.D. Mo L.R. 7-4.01(E)); *Hill v. Thalacker*, No. 06-1265, 2006 WL 3147274, at *2 (7th Cir. Nov. 1, 2006) (unpublished) ("[T]he district court acted within its discretion when it ignored Hill's proposed findings of fact and deemed Thalacker's facts admitted, given Hill's failure to follow the court's summary judgment procedures.")[6] (citing *Smith v. Lamz*, 321 F.3d 680, 683 (7th Cir. 2003)); *Mercado-Alicea v P.R. Tourism Co*, 396 F.3d 46, 50, 51 (1st Cir. 2005) (affirming the district court's decision to deem facts

[5] On appeal, the appellants did not contest the district court's treatment of the movant's statement of uncontested facts as admitted after the appellants had failed to submit a statement in response, but argued that the district court erred in refusing to consider the facts alleged by appellants *Kelvin Cryosystems*, 2007 WL 3193731, at *3 The Third Circuit rejected that argument because the district court had stated that it considered the facts alleged in the appellant's opposition brief and "found the arguments relating to those facts 'unpersuasive'" *Id*

[6] The nonmovant was pro se, but the court found that "even pro se litigants must follow procedural rules of which they are aware, and district courts have discretion to enforce those rules against such litigants" *Hill*, 2006 WL 3147274, at *2 (citing *Metro Life Ins Co v Johnson*, 297 F 3d 558, 562 (7th Cir 2002), *Greer v Bd of Educ of Chicago*, 267 F 3d 723, 727 (7th Cir 2001)) The court concluded that even if the district court had considered the affidavits submitted by the nonmovant in response to the summary judgment motion, "it would not have changed the ultimate outcome" *Id*

admitted and noting that "'[d]istrict courts enjoy broad latitude in administering local rules,'" and "[d]istrict courts are not required to ferret through sloppy records in search of evidence supporting a party's case.") (citations omitted); *Cosme-Rosado v Serrano-Rodriguez*, 360 F.3d 42, 45 (1st Cir. 2004) ("We have consistently upheld the enforcement of this [local summary judgment] rule, noting repeatedly that 'parties ignore [it] at their peril' and that 'failure to present a statement of disputed facts, embroidered with specific citations to the record, justifies the court's deeming the facts presented in the movant's statement of undisputed facts admitted.'")[7] (citing *Ruiz Rivera v Riley*, 209 F.3d 24, 28 (1st Cir. 2000)); *Espinoza v. Northwestern Univ.*, No 03-3251, 2004 WL 1662281, at *2 (7th Cir. July 20, 2004) (unpublished) (the district court did not abuse its discretion in deeming the movant's facts admitted and in granting summary judgment upon the nonmovant's failure to respond to a summary judgment motion without excuse) (citing *Ammons v. Aramark Uniform Servs., Inc* , 368 F.3d 809, 817 (7th Cir. 2004); *Dade v. Sherwin-Williams Co* , 128 F 3d 1135, 1139–40 (7th Cir 1997)); *Northwest Bank and Trust Co. v. First Ill Nat'l Bank*, 354 F.3d 721, 724–25 (8th Cir 2003) (finding no abuse of discretion where the district court, "[a]s a sanction for noncompliance [with the local summary judgment rule], . . ordered that Northwest be deemed to have admitted all of FINB's Statement of Material Facts," and limited its consideration of the nonmovant's "Statement of Additional Material Facts" to those that were specifically referenced by the nonmovant in its opposition brief to the extend they did not contradict the facts submitted by the movant).

[7] The court noted that the District of Puerto Rico amended its local rules in September 2003, but since the lawsuit was brought before the amended rules' effective date, the case was analyzed under the pre-amended version *Cosme-Rosado*, 360 F 3d at 44 n 4

B. Approval of Local Rules Simplifying Summary Judgment Procedure

Some appellate courts have gone further than finding that the district court has discretion in applying local rules, and have also affirmatively commented on the value of local rules providing structured summary judgment procedures that permit courts to deem facts admitted as a sanction for noncompliance. For example, in *CMI Capital Market Inv., LLC v. Gonzalez-Toro*, No. 06-2623, 2008 WL 713577, at *3 (1st Cir. March 18, 2008), the appellants had submitted an opposition to a summary judgment motion, but did not include an opposing statement of material facts as required by the local rule.[8] 2008 WL 713577, at *2. In commenting on what it termed "the anti-ferret rule," the First Circuit stated that "[t]he purpose of this rule is to relieve the district court of any responsibility to ferret through the record to discern whether any material fact is genuinely in dispute." *Id.* The court explained that "[t]he deeming order is both a sanction for the parties and a balm for the district court: the parties are given an incentive to conform to the rule (provided they wish to have their version of the facts considered), and the district court is in any case relieved of the obligation to ferret through the record." *Id.* at *2 n.2. The court also noted that "[w]hen summary judgment is granted after a deeming order, [the First Circuit is] bound by the order as well, provided it was not an abuse of the district court's discretion." *Id.* at *3.

In *Ríos-Jiménez v. Principi*, 2008 WL 651630 (1st Cir. March 12, 2008), the First Circuit

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[8] The local rule at issue, the District of Puerto Rico Local Rule 56(c), provided

> A party opposing a motion for summary judgment shall submit with its opposition a separate, short, and concise statement of material facts. The opposing statement shall admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts and unless a fact is admitted, shall support each denial or qualification by a record citation as required by this rule.

D.P.R. L.R. 56(c). The rule also provides: "Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, *shall be deemed admitted unless properly controverted*." *CMI Capital Market Inv., LLC*, 2008 WL 713577, at *2 (quoting D.P.R. L.R. 56(e)) (emphasis added by court).

again acknowledged the importance of local rules simplifying summary judgment:

> "Such rules were inaugurated in response to this court's abiding concern that without them, 'summary judgment practice could too easily become a game of cat-and-mouse.' *Ruiz Rivera v. Riley*, 209 F.3d 24, 28 (1st Cir. 2000) Such rules are designed to function as a means of 'focusing a district court's attention on what is—and what is not—genuinely controverted.' *Calvi v Knox County*, 470 F.3d 422, 427 (1st Cir. 2006). When complied with, they serve 'to dispel the smokescreen behind which litigants with marginal or unwinnable cases often seek to hide [and] greatly reduce the possibility that the district court will fall victim to an abuse.' *Id.*
>
> Given the vital purpose that such rules serve, litigants ignore them at their peril. In the event that a party opposing summary judgment fails to act in accordance with the rigors that such a rule imposes, a district court is free, in the exercise of its sound discretion, to accept the moving party's facts as stated."

Rios-Jiménez, 2008 WL 651630, at *4 (quoting *Cabán Hernández*, 486 F 3d at 7). The court in *Rios-Jiménez* concluded that the local rule was "intended to prevent parties from shifting to the district court the burden of sifting through the inevitable mountain of information generated by discovery in search of relevant material." *Id.*; *see also Euromodas, Inc v. Zanella, Ltd.*, 368 F.3d 11, 14–15 (1st Cir. 2004) (noting that the local rules such as the District of Puerto Rico's local rule regulating summary judgment practice have been adopted pursuant to the First Circuit's suggestion and that the First Circuit has consistently upheld the use of such rules).

Similarly, in *Northwest Bank and Trust Co v First Ill Nat'l Bank*, 354 F.3d 721, 724 (8th Cir. 2003), the Eighth Circuit approved of Local Rule 56.1 used in the Northern and Southern Districts of Iowa That rule provides that the moving party must file a concise statement of material facts supported by citations to an appendix, and the opposing party must file a response to that statement that "'expressly admits, denies, or qualifies' each of the movant's material facts," and that cites to an appendix for any fact not expressly admitted. *Id* (citing IOWA L R. 56.1) The opponent

is also required to file its own statement of material facts with citations to an appendix *Id* (citing IOWA L.R. 56 1). The Eighth Circuit approved of the rule, stating "[t]he concision and specificity required by Local Rule 56 1 seek to aid the district court in passing upon a motion for summary judgment, reflecting the aphorism that it is the parties who know the case better than the judge." *Id.* at 725 (citing *Waldridge v Am Hoechst Corp.*, 24 F.3d 918, 922 (7th Cir. 1994)) The court further explained that "Local Rule 56.1 exists to prevent a district court from engaging in the proverbial search for a needle in the haystack." *Id.*

C. Necessity of Finding Support in the Record Before Deeming Facts Admitted

Several appellate courts have commented as to whether the facts to be deemed admitted must actually have support in the record in order for courts to rely on them in granting summary judgment For example, in *Espinoza v. Northwestern Univ* , No. 03-3251, 2004 WL 1662281, at *2 (7th Cir. July 20, 2004) (unpublished), the Seventh Circuit found no abuse of discretion in the district court's decision to deem facts admitted, noting that the movant's facts were "supported by the record, including affidavits . . . ," and that the nonmovant had not offered an excuse for failure to respond to the motion for summary judgment. While not an express statement that district courts must find support in the record before deeming facts admitted, *Espinoza*'s holding supports the proposition that it is more appropriate to deem facts admitted if there is support for those facts.

Similarly, in *Cosme-Rosado v Serrano-Rodriguez*, 360 F.3d 42, 45 (1st Cir. 2004) , the First Circuit affirmed the district court's decision to deem admitted "properly supported facts set forth in [the movant's] statement" of material facts. The district court had found that the nonmovants had "failed to provide a supported factual basis for their claims against Serrano . . . ." *Id.* at 44–45. After deeming the movant's facts admitted and properly-supported, the district court had found that there

was no genuine issue of material fact and granted summary judgment. *Id* The appellate court affirmed, finding that "summary judgment rightly followed" the deemed admission of the movant's facts *Id.* at 46 The First Circuit quoted *Tavarez v Champion Prods , Inc* , 903 F. Supp. 268, 270 (D.P.R Nov 1, 1995), for the proposition that "'[a]lthough [failure to comply with Local Rule 311.12] does not signify an automatic defeat, it launches the nonmovant's case down the road toward an easy dismissal.'" *Cosme-Rosado*, 360 F.3d at 46 Thus, the court seemed to indicate that the facts deemed admitted require support in the record and that the nonmovant's failure to comply does not result in an automatic grant of summary judgment, but also indicated that once the nonmovant fails to comply with the local rule, it is much easier for the movant to obtain summary judgment.

In *Mariani-Colón v. Dep't of Homeland Sec* , 511 F.3d 216, 219, 219 n.1 (1st Cir. 2007), the First Circuit upheld the district court's decision to treat the movant's statement of facts as uncontested after the nonmovant failed to respond to the summary judgment in the manner required by the relevant local rule, but the court explained that a party is not necessarily entitled to summary judgment by having its facts admitted. The court stated· "'This, of course, does not mean the unopposed party wins on summary judgment; that party's uncontested facts and other evidentiary facts of record must still show that the party is entitled to summary judgment.'" *Mariani-Colón*, 511 F.3d at 219 n.1 (quoting *Torres-Rosado v Rotger Sabat*, 335 F 3d 1, 4 (1st Cir 2003)). While this explanation does not necessarily mean that the court is required to search for support for the uncontested facts before deeming them admitted, it does require the district court to ensure that the facts show entitlement to judgment before granting summary judgment This requirement may prompt the district courts to examine whether the "uncontested facts" have support in the record.

The Eighth Circuit has also indicated that facts should not be deemed admitted without some

support in the record and that the nonmovant's failure to properly respond to a summary judgment motion does not automatically entitle the movant to judgment. In *Reasonover v. St Louis County, Mo.*, 447 F.3d 569, 579 (8th Cir. 2006), the defendant failed to file a timely response to a summary judgment motion, as required by the federal rules and the Missouri local rule on summary judgment. The Eighth Circuit rejected an argument that the district court's order deeming the facts set forth in the motion for summary judgment admitted amounted to a default judgment. *Id* The Eighth Circuit explained that "[t]he [district] court considered the admitted facts in light of the relevant law and ruled based on the merits." *Id.* (citing *Bennett v. Dr Pepper/Seven Up, Inc* , 295 F.3d 805, 809 (8th Cir. 2002)). Based on the uncontroverted facts in the motion, the circuit court found that summary judgment had been appropriate. *Id* As in *Mariani-Colón*, the *Reasonover* court did not specifically state that the district court was required to find the facts to be supported by the record before deeming them admitted. However, the fact that the court noted that the district court's decision to deem facts admitted did not amount to a default judgment because it had ruled on the merits after deeming facts admitted, may imply that there ought to be some support for the deemed admitted facts before a grant of summary judgment is based on such facts.

In *Magee v Earl*, 122 F.3d 1056, 1995 WL 595547 (2d Cir. 1995) (unpublished), the Second Circuit concluded that deemed admission of facts had been appropriate under the local rules because the facts were both supported and uncontested. In that case, the defendants moved for summary judgment and submitted a statement of material facts as required under the local rule *Id* at *2. The Second Circuit explained that the local rule required that the moving party submit a statement of facts and that "[f]acts thus *asserted and supported* as required by FED. R. CIV. P. 56(e) are deemed admitted unless controverted by the party opposing summary judgment in a submission pursuant to

[Local] Rule 3(g)."[9] *Id.* at *1 (emphasis added). The district court granted summary judgment, and the Second Circuit affirmed because the defendants' asserted facts had been uncontested and were supported by references to the plaintiff's deposition, and were therefore properly deemed admitted. *See id* at *2 After the deemed admission of the defendants' facts, there was no evidence on which a rational jury could find for the plaintiff and summary judgment was appropriate *Id.*

In *Doe v. Todd County School Dist.*, No. 05-3043, 2006 WL 3025855, at *7–8 (D.S.D. Oct. 20, 2006), the court applied the local rule regarding deemed admission where both parties had failed to comply with the requirements of the rule, and ultimately determined that even when a motion is unopposed, it cannot be granted without sufficient support in the record. In that case, the plaintiff claimed that the defendants' statement of undisputed facts did not comply with the requirements of the local summary judgment rule, while the defendants argued that the plaintiff's response to their summary judgment motion failed to comply with both Fed. R Civ. P 56(e) and with the local rule because the plaintiff did not respond to the substance of the defendants' motion or include a statement of material facts.[10] *Doe*, 2006 WL 3025855, at *7 The court held that "[t]he failure to comply with a local rule requiring that a motion for summary judgment be accompanied by a concise

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[9] Similar language was used in *Rand v United States*, 818 F Supp 566, 571 (W D N.Y 1993) "When a party has moved for summary judgment on the basis of asserted facts *supported as required by FED R CIV P 56(e)* and has served a concise statement of the material facts as to which it contends there exist no genuine issues to be tried, those facts will be deemed admitted unless properly controverted by the nonmoving party " *Id* at 571 (quoting *Glazer v Formica Corp* , 964 F 2d 149, 154 (2d Cir 1992)) (emphasis added)

[10] The local rule at issue provided

> [U]pon any motion for summary judgment there shall be annexed to the motion a separate, short, and concise statement of material facts as to which the moving party contends there is no genuine issue to be tried Each material fact in this Local Rule's required statement shall be presented in a separate, numbered statement with an appropriate citation to the record in the case

Doe, 2006 WL 3025855, at *7 (quoting D S D L R 56 1(b))

statement of material facts which the movant contends are not genuinely in dispute is a sufficient basis on which to deny a motion for summary judgment." *Id.* (citations omitted). However, the court explained that while "[t]he usual sanction for noncompliance with this [local] rule is the [other party's] facts being deemed admitted for purposes of the motion," the deemed admission "is not fatal since the standard of review for summary judgment requires the Court to view the facts in the light most favorable to the party opposing the motion and to give that party the benefit of all reasonable inferences to be drawn from the underlying facts disclosed in the pleadings and affidavits." *Id.* at *8. (citation omitted). The court stated that where the court reviews the entire record, the failure to comply with the local rules is "'of little consequence.'" *Id* (quoting *Hansen v Actuarial and Employee Ben Servs Co.*, 395 F. Supp. 2d 881, 884 n.2 (D.S.D. 2005)). The court concluded that "[u]nder either the sanction or the summary judgment standard the result is the same, the plaintiff's facts are deemed admitted for purposes of the motion. Thus, the material facts from the plaintiff's complaint will, for the purposes of this motion for partial summary judgment, be treated as undisputed " *Id.* However, because the plaintiff failed to submit a statement of material facts, the defendants' statement of material facts was to be deemed admitted. *Id.* "For the sake of the motion, the defendants' statement of facts is the plaintiff's complaint. This is the same set of facts the Court is compelled to employ by the summary judgment standard. Therefore, the facts stated in the plaintiff's complaint are deemed admitted for the purposes of this motion " *Doe*, 2006 WL 3025855, at *8 The court noted, however, that "'even when a defendant's motion for summary judgment is not opposed by plaintiff, the district court must satisfy itself that, on the record before it, there are no genuine issues of material fact as to at least one of [the] necessary elements of plaintiff's case.'" *Id* (quoting *Noland v Commerce Mortg Corp* , 122 F.3d 551, 553 (8th Cir. 1997)).

Some other courts have implied that relying on deemed admitted facts without searching for support for those facts in the record might be acceptable, but I did not find many cases supporting this proposition. For example, in *John S v. County of Orange*, No. 05-55021, 2007 WL 625249, at *1 (9th Cir. Feb. 26, 2007) (unpublished),[11] the Ninth Circuit approved a grant of summary judgment where an inadequate opposition to the summary judgment motion was filed. The court found that the opponent's "untimely, unsworn, and conclusory 'supplemental statement' did not comply with the district court's explicit instructions or the local rules. C.D. CAL. L.R. 56-2. It was not error for the district court to deem the material facts submitted by defendants as admitted and *to grant summary judgment on procedural grounds.*"[12] *John S*, 2007 WL 625249, at *1 (emphasis added). The Ninth Circuit also noted that granting summary judgment on the merits was not erroneous. *Id.* The fact that the court had reviewed the merits makes it unclear whether summary judgment could have been granted based on deemed admitted facts without finding support in the record, but the court's approval of summary judgment on "procedural grounds" implies that facts could be deemed admitted without finding support for them in the record.

Given that courts have approved of local rules deeming facts admitted for the very reason that it avoids requiring the district court to search through a voluminous record to ensure that there is no

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[11] The court did not publish its decision and it was labeled as not precedential *John S*, 2007 WL 625249, at fn **

[12] In another case using similar language, the magistrate judge recommended dismissal for failure to prosecute, but also found that "the plaintiff's failure to respond to the defendants' statements of material fact [submitted with defendants' summary judgment motion] constitutes an admission of each of those facts *See* FED R CIV P 56(e), LR 56 1(b)(4) Accordingly, the defendants are entitled to summary judgment *on procedural grounds*" *Stewart v Kautzky*, No C05-3030-MWB, 2006 WL 1594186, at *1 (N D Iowa June 6, 2006) (unreported) (emphasis added) The court also found that summary judgment would be appropriate in view of the claims, the facts in the complaint, the deemed admitted facts, exhibits and affidavits submitted in support of summary judgment, and statements from a motion for extension of time *Id* Thus, although the case noted that judgment on procedural grounds would be appropriate, it also found that the record supported judgment as a matter of law

material issue of fact, it may follow that some courts would approve of deeming facts admitted in the absence of a proper response, without requiring the court to search for proper support for those facts. *See, e g., Ríos-Jiménez*, 2008 WL 651630, at *4 ("Should the Court excuse this blatant non-compliance [with the local summary judgment rule], the district court would be forced to 'grope unaided for factual needles in a documentary haystack.'") (quoting *Cabán Hernández*, 486 F.3d at 8). However, most courts seem to emphasize the importance of the summary judgment standard, finding that deemed admitted facts are not sufficient to support summary judgment without an evaluation of whether the standard has been met. This emphasis implies that it would be appropriate for the court to find support for the facts to be deemed admitted before relying on them for purposes of granting summary judgment.

D. Consideration of Additional Facts Presented by Nonmovant

Another issue that has been addressed by some courts considering the propriety of deeming facts admitted in summary judgment motions is whether a nonconforming response prevents consideration of additional facts submitted by nonmovant. For example, in *Euromodas, Inc v Zanella, Ltd* , 368 F.3d 11, 14–15 (1st Cir 2004), the First Circuit considered whether the district court had erred in analyzing the defendant's summary judgment motion by restricting consideration of the plaintiff's evidence on the basis of the plaintiff's failure to comply with the local rules *See Euromodas*, 368 F.3d at 15 The defendant's motion complied with the local rule, but the plaintiff's response omitted a separate statement listing the controverted material facts *Id.* The district court found this to be a violation of the local summary judgment rule and both deemed the facts listed by the movant to be admitted and limited the summary judgment record to those facts *Id* (citing *Euromodas, Inc. v. Zanella, Ltd.*, 253 F Supp. 2d 201, 203–04 (D.P.R. 2003)). The plaintiff did not

object to the district court deeming the defendant's facts admitted, but argued that the court should have taken the plaintiff's facts in its opposition into account as well. *Id.* The First Circuit agreed that the district court had erred in its interpretation of the local rule because the rule did not require the summary judgment motion's opponent to put forth its version of the facts in a separate statement. *Id.* A separate statement was required under the rule only if the nonmovant sought to controvert any of the facts listed in the movant's statement of facts. *Id* The court explained that in this instance, the plaintiff did not take issue with the defendant's statement of facts, but believed they were incomplete and wished to submit additional facts. *Euromodas*, 368 F.3d at 15. The First Circuit stated that the local rule, as it existed at the time,[13] did not require additional facts to be presented in any particular form. *Id.* The First Circuit concluded that "[b]ecause those additional facts [submitted by the nonmovant] were supported by the record, the lower court should have considered them (while at the same time accepting the facts set forth in the movant's Local Rule 311.12 statement)." *Id* at 15–16.

In *Northwest Bank & Trust Co. v. First Ill. Nat'l Bank*, 354 F.3d 721, 724 (8th Cir. 2003), after the defendant filed a summary judgment motion, the plaintiff filed an opposition that included both a "Response to Defendants' Statement of Material Facts," and a "Statement of Additional Material Facts Precluding Summary Judgment." The district court found that neither of the plaintiff's statements of material facts complied with the local rule requirements, and sanctioned the plaintiff by deeming admitted all of the facts in the defendant's statement and by limiting consideration of the plaintiff's statement of additional facts to only "those facts that were specifically referenced by [plaintiff] Northwest in its brief in opposition to summary judgment to the extent that

[13] The local rule had been amended since the filing of the summary judgment motion, and the First Circuit reserved its view as to what the new language required *Euromodas*, 368 F 3d at 15 n 3

they did not contradict those of [defendant] FINB " *Northwest Bank & Trust*, 354 F 3d at 724–25 (citing *Northwest Bank & Trust Co v. First Ill Nat'l Bank*, 221 F. Supp 2d 1000, 1003–06 (S D. Iowa 2002)) The court found that the district court's holding was not an abuse of discretion, and that the court had actually been lenient in considering the specific facts referenced in the plaintiff's brief. *Id.* at 725.

In *CMI Capital Mkt Invest , LLC v González-Toro*, No. 06-2623, 2008 WL 713577 (1st Cir. March 18, 2008), the court noted that it had previously held that "failure to set forth a paragraph-by-paragraph admission or denial of the movant's material facts justifies a deeming order even where the opposition does propound other facts." 2008 WL 713577, at *3 n.3 (citing *Hernandez v Philip Morris USA, Inc* , 486 F.3d 1, 7 (1st Cir. 2007)). The court continued, "*Hernandez* leaves open the possibility that facts marshaled in opposition might be accepted to 'augment' the facts contained in movant's statement of material facts, rather than contradict them." *Id* (citing *Hernandez*, 486 F.3d at n.2). However, the court did not decide that issue, instead evaluating the record as though the facts had been accepted by the district court to augment the movant's facts, and finding that they did not change the result. *Id* The First Circuit noted that although the opposition to the summary judgment contained some facts, they would only be considered to the extent that they did not contradict the facts deemed admitted by the district court, because the nonmovant failed to satisfy the "anti-ferret" rule *Id* at *5. The court stated that "the district court would likely have been free to disregard the facts in the opposition itself," but did not decide that question because the district court had not explicitly rejected or accepted those facts and because the facts made no difference to the outcome *Id* at *5 n.4.

The Seventh Circuit considered whether failure to properly cite supporting evidence in an

opposition to a summary judgment motion warrants both deeming the movant's facts admitted and ignoring the facts proposed by the nonmovant in *Hill v Thalacker*, No. 06-1265, 2006 WL 3147274, at *2 (7th Cir. Nov. 1, 2006) (unpublished). In *Hill*, the district court's summary judgment rules required that each controverted or additional fact that a party proposed had to be accompanied by specific, supporting evidence. *Id.* at *1. In the plaintiff's response to the summary judgment motion, he attached supporting affidavits, but failed to refer to them specifically, instead "allud[ing] vaguely to unspecified 'attached' material." *Id.* The district court deemed the defendant's facts admitted because of the plaintiff's failure to comply with the summary judgment procedure, and granted summary judgment for the defendant. *Id.* at *2 The Seventh Circuit concluded that "the district court acted within its discretion *when it ignored Hill's proposed findings of fact* and deemed Thalacker's facts admitted, given Hill's failure to follow the court's summary judgment procedures." *Id* (citing *Smith v. Lamz*, 321 F.3d 680, 683 (7th Cir 2003); *Tatalovich v City of Superior*, 904 F.2d 1135, 1140 (7th Cir. 1990)) (emphasis added) . Thus, in the context of an opposition submitting additional facts without following the procedure, the court concluded that those facts could be ignored by the district court.

II. Disapproval of Deeming Facts Admitted

A. Cases Finding Deemed Admission Inappropriate Under the Facts of the Case

Although many appellate courts have approved of the use of local rules to deem facts admitted in summary judgment, others have disapproved of the application of deeming facts admitted in certain circumstances.

For example, in *Deere & Co. v. Ohio Gear*, 462 F.3d 701, 703 (7th Cir 2006), the Seventh Circuit held that the district court had abused its discretion by deeming facts admitted under the

procedural posture of the case. In that case, the plaintiff had request additional time to take expert witness discovery and respond to a motion for summary judgment, which was granted by the court. *Deere*, 462 F 3d at 703. The defendant moved for an extension of the new expert witness discovery deadline, and the motion went undecided for several months. *Id.* As a result, the defendant's experts were not deposed and the plaintiff missed the deadline for responding to the defendant's summary judgment motion. *Id* The court did not address the pending discovery dispute, but did find the plaintiff's failure to respond to the summary judgment motion to be an admission of the facts submitted in support of the defendants' summary judgment motion, and granted summary judgment for the defendant. *Id.* On appeal, the Seventh Circuit found this to be an abuse of discretion because although the plaintiff took the risk of having facts deemed admitted by failing to respond to summary judgment in the time permitted, "[t]he history of the motions practice in this case was such that the court should not have bypassed all the accumulated discovery motions to grant summary judgment on the basis of procedural default." *Id* at 706–07.

In *Chidester v Utah County*, No. 06-4255, 2008 WL 635361, at *10–11 (10th Cir. March 6, 2008) (unpublished), the Tenth Circuit also held that the circumstances at issue did not warrant the deemed admission of facts. In that case, the neighbors of a residence that was a target for a police raid sued police officers for violation of their Fourth Amendment rights. *Id.* at *1 The officers moved for summary judgment on the ground of qualified immunity, which the district court granted for some of the defendants but denied for two others. *Id* On appeal, the appellant argued that District of Utah Local Rule 56-1(c) required the district court to accept as fact the appellant's version of the facts, and that summary judgment was required under those facts. *Chidester*, 2008 WL 635361, at * 10. The local rule at issue provided that "'[a]ll material facts of record meeting the

requirements of FED. R. CIV. P. 56 that are set forth with particularity in the statement of the movant will be deemed admitted for the purpose of summary judgment, unless specifically controverted by the statement of the opposing party identifying material facts of record meeting the requirements of FED. R. CIV. P. 56.'" *Id* (quoting D. UTAH CIV. R 56-1). The Tenth Circuit summarily rejected the argument that the local rule required summary judgment on qualified immunity grounds simply because the movant argued that the plaintiffs had not put forth any evidence to prove that the movant had "'manufactured the fact[s]'" giving rise to his qualified immunity claim. *Id* at *11.

B. Concern Regarding the Practice of Deeming Facts Admitted

The research uncovered a few cases that have expressed concern regarding local rules that permit facts to be deemed admitted in the summary judgment context. In *DeRienzo v Metro Transport. Auth* , No. 05-7021-cv, 2007 WL 1814277 (2d Cir. June 20, 2007) (unpublished), the plaintiff failed to follow the applicable local rule by failing to file a counterstatement to the defendants' statement of material facts. 2007 WL 1814277, at *1 The district court deemed the defendants' facts to be admitted and declined to consider additional facts presented by the plaintiff. *Id.* On appeal, the Second Circuit noted that "[t]he fact that Plaintiff failed to comply with Local Rule 56.1 'does not absolve the party seeking summary judgment of th[is] burden of showing that it is entitled to judgment as a matter of law, and a Local Rule 56 1 Statement is not itself a vehicle for making factual assertions that are otherwise unsupported in the record.'" *Id* (quoting *Giannullo v City of New York*, 322 F.3d 139, 140 (2d Cir. 2003)) The court held that even assuming it had not been error to deem the facts from the Defendants' Rule 56.1 statement admitted and to consider only those facts on summary judgment, the district court had still erred in granting summary judgment under the facts . *Id.* at 645 The Second Circuit suggested that the district court on remand

ought to decide whether it would be proper to consider only the facts in the defendants' statement of facts, or "in an exercise of its discretion," to consider other facts in the record. *Id* at 646. The court said that it "note[d] for future guidance that the district court erred in concluding that *Giannullo v City of New York*, 322 F.3d 139 (2d Cir. 2003), overruled *Holtz* [*v Rockefeller & Co*, 258 F.3d 62 (2d Cir 2001),] and established a new rule that the district court must deem the facts contained in a Rule 56.1 Statement admitted whenever the opposing party fails to contest them in a properly-filed Counterstatement. The panel in *Giannullo* was not empowered to overrule *Holtz's* holding that a district court had discretion to overlook a party's failure to comply with Local Rule 56.1, . . ., nor did it purport to do so." *Id* at 646–47 (internal citations omitted) The court noted the potential for conflict between the local summary judgment rule and the national one: "[W]hile DeRienzo's submission failed to comply with Local Rule 56.1, it may have met the requirements of FED. R. CIV. P 56 On remand, the district court should address whether a refusal to consider any of the facts proffered by DeRienzo would constitute an impermissible application of Local Rule 56.1, by putting the Local Rule in conflict with the Federal Rule." *Id* at 647 (citing 28 U.S.C. § 2071(a)).

In *Mutual Fund Investors, Inc. v. Putnam Mgmt. Co*, 553 F.2d 620 (9th Cir. 1977), the Ninth Circuit questioned whether a local summary judgment rule could conflict with the national summary judgment rule In that case, after the movant had made a sufficient showing for summary judgment, the nonmovants did not file any opposing affidavits "'because the factual bases for the (appellants') opposition are amply set forth in the affidavits filed by (appellees) and by deposition testimony of (appellees[']) representatives.'" *Putnam*, 553 F.2d at 624. The local rule for the Central District of California at the time provided: "In determining any motion for summary judgment, the court may assume that the facts as claimed by the moving party are admitted to exist without controversy

except as and to the extent that such facts are controverted by affidavit filed in opposition to the motion." *Id.* at 625 (citing C D. CAL. L.R. 3(g)(3)) [14] The court noted that Rule 56 of the federal rules (in effect at the time) "provides that a party opposing a summary judgment motion need not file contravening affidavits where the movants' own papers demonstrate the existence of a genuine issue of material fact." *Id.* (citing *Hamilton v Keystone Tankship Corp* , 539 F.2d 684, 686 (9th Cir. 1976 (citing *Island Equipment Land Co. v. Guam Econ Dev Auth* , 474 F.2d 753 (9th Cir. 1973); Advisory Note of 1963 to Subdiv. (e), Rule 56)). The court did not resolve whether there was a disparity between the local rule and the national rule because the district court had based its decision on an examination of the whole record, rather than deeming facts admitted. *Id.* The court stated: "we caution that it is highly questionable whether the district court can mandate the entry of summary judgment solely on the failure of the adverse party to file opposing papers 'where the movant's papers are themselves insufficient . . or on their face reveal a genuine issue of material fact.'" *Id* (quoting *Hamilton*, 539 F.2d at 686 n.1, *Wang v Lake Maxinhall Estates, Inc.*, 531 F.2d 832, 835 n.10 (7th Cir. 1976) (Stevens, J.)).

III. Conclusion

In sum, the courts of appeals generally seem to grant broad discretion to district courts in applying local rules to streamline the summary judgment process. There has been quite a bit of emphasis on the need to avoid requiring the district court to scour the record to determine if there is a genuine issue of material fact. Courts of appeals have often approved of the sanction of deeming

[14] The current local rule that seems to have replaced this older version provides: "In determining any motion for summary judgment, the Court will assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the "Statement of Genuine Issues" and (b) controverted by declaration or other written evidence filed in opposition to the motion." C D CAL L R 56-3

the opponent's facts admitted in the absence of a proper response in order to further that goal. Nonetheless, it appears that the courts do not often simply grant the movant's motion on the basis of an improper response The cases often imply that the court has determined that the facts have some support in the record and that the movant is entitled to summary judgment before granting a motion based on facts that have been deemed admitted pursuant to a local rule.

MEMORANDUM

DATE: February 19, 2008

TO: Judge Mark Kravitz

FROM: Andrea Thomson

CC: Judge Lee H. Rosenthal
Judge Michael Baylson
Professor Edward Cooper

SUBJECT: Discretion to Deny Summary Judgment

This memorandum addresses research regarding FED. R. CIV. P. 56 and whether there is a circuit split regarding discretion to deny a motion for summary judgment when the movant meets the requisite standard in Rule 56.

A law review article from 2002 evaluated some of the case law on this issue. *See* Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91 (2002) In the article, the authors state that "the notion of judicial discretion to deny an otherwise appropriate summary judgment motion has been evidenced in judicial opinion since the earliest decisions regarding summary judgment under the Federal Rules." *Id* at 96. The article notes that federal courts are split over whether judges are required to grant summary judgment if it is technically appropriate. *Id.* at 104. According to the article, "[t]he majority of federal courts have held that judges have discretion to deny a motion for summary judgment, even if the parties' submissions would justify granting the motion. The First, Fourth, Fifth, Eighth, and Federal Circuits have each adopted this view Moreover, various district courts in these and other circuits also have accepted this position." *Id.*

I. *Anderson v. Liberty Lobby, Inc.*

The confusion about the discretion to deny summary judgment may stem from a key Supreme Court case regarding summary judgment, in which the Court used conflicting language to describe the discretion given to trial court judges in considering motions for summary judgment. *See generally Anderson v. Liberty Lobby, Inc* , 477 U.S 242 (1986). In parts of the majority's opinion, the Court implied that there is little or no discretion to deny a motion for summary judgment if the movant has met his burden. For example, the Court stated that "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id* at 248 (citing 10A C. WRIGHT, A. MILLER, & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2725, pp. 93–95 (1983)). This language implies that a district court may not deny a properly supported summary judgment motion unless the court finds a material factual dispute. The Court also noted that "Rule 56(e)'s provision that a party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting *First Nat'l Bank of Ariz v Cities Serv. Co* , 391 U.S. 253 (1968)) (additional internal quotation marks omitted). Further, the Court found that after the opponent to a motion for summary judgment sets forth facts showing that there is a genuine issue for trial, "the trial judge shall then grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law." *Id* at 250. The Court analogized to a motion for directed verdict in the criminal context, noting with approval that it has been held that upon a motion for directed verdict of acquittal, if the judge "'concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion, or to

state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted '" *Id* at 253 (quoting *Curley v. United States*, 160 F.2d 229, 232–33 (D.C. Cir. 1947)). All of this language taken together seems to imply that a district court does not have discretion to deny a motion for summary judgment if the requisite standard is met—the judge must grant the motion upon the proper showing by the movant.[1]

However, the *Anderson* Court later suggested just the opposite: "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 where there is reason to believe that the better course would be to proceed to a full trial." *Id* at 255 (citing *Kennedy v Silas Mason Co.*, 334 U.S. 249 (1948)) Indeed, *Anderson* has been cited both for the proposition that district courts have discretion to deny summary judgment, *see, e g , United States v Certain Real Estate and Personal Prop Belonging to Hayes*, 943 F.2d 1292, 1297 (11th Cir. 1991), as well as for the proposition that they do not, *see Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994) (per curiam), *aff'd on other grounds*, 515 U.S. 304 (1995). Thus, there is language in some cases showing potential disagreement as to whether there is discretion to deny a well-supported motion for summary judgment. The arguably conflicting language regarding discretion to deny summary judgment is discussed in more detail below. Overall, it may be that the circuits are generally in agreement that

[1] The language implying a lack of discretion to deny a motion for summary judgment is consistent with statements made by the Court in *Celotex Corp v Catrett*, 477 U S 317 (1986), decided the same day as *Anderson See* Friedenthal et al , 31 HOFSTRA L REV at 101–02 In *Celotex*, the Court stated "'[T]he 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 '" *Id* at 102 (quoting *Celotex*, 477 U S at 322) In Friedenthal's article, the authors note that after *Celotex*, "[t]he Court's apparent position limiting judicial discretion would thus seem crystal clear were it not for another case in the trilogy, *Anderson v Liberty Lobby Inc* , decided on the same day as *Celotex*, that included language completely contrary to that quoted above " *Id*

a court should grant a summary judgment motion if the movant has met his burden, but that there are some rare instances in which it would be appropriate for the court to deny even a well-supported motion.

II. Cases Recognizing Discretion to Deny Motions for Summary Judgment

A. Circuit Court Opinions

Most of the circuits examining this issue have concluded that there is discretion to deny summary judgment.[2] *See, e.g* , *NMT Med., Inc v. Cardia, Inc* , No 2006-1645, 2007 WL 1655232, at *6 (Fed. Cir. June 6, 2007) (unpublished) ("This court defers to the district court's denial of summary judgment.") (citing *SunTiger, Inc. v. Sci. Research Funding Group*, 189 F.3d 1327, 1333 (Fed. Cir. 1999)); *Lind v. United Parcel Serv , Inc* , 254 F.3d 1281, 1285–86 (11th Cir. 2001) (holding that denial of a motion for summary judgment is not reviewable after a trial on the merits, and noting that the Supreme Court has held that "'even in the absence of a factual dispute, a district court has the power to 'deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.'"') (quoting *Black v. J.I. Case Co.*, 22 F 3d 568, 572 (5th Cir 1994) (quoting *Anderson*, 447 U.S. at 255), and citing *United States v. Certain Real and Personal Prop. Belonging to Hayes*, 943 F.2d 1292 (11th Cir. 1991)); *Kunin v Feofanov*, 69 F.3d 59, 62 (5th Cir. 1995) (per curiam) (affirming the district court's opinion, which stated· "even if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that 'a better course would be to proceed to a full trial.'") (quoting *Anderson*, 477 U.S at

[2] Many of the circuits have issued opinions that state in their boilerplate language regarding the legal standards for analyzing summary judgment motions that the motion must be granted upon the proper showing However, in cases where the discretion issue truly arises and is substantively evaluated, such as where a circuit court is reviewing a district court's denial of a summary judgment motion, most circuits have leaned towards finding that there is discretion to deny

255–56), *United States v Certain Real and Personal Prop Belonging to Hayes*, 943 F 2d 1292, 1297 (11th Cir. 1991) ("A trial court is permitted, in its discretion, to deny even a well-supported motion for summary judgment, if it believes the case would benefit from a full hearing. Trial courts may 'deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.' A trial court's discretion to *deny* summary judgment is reviewed only for an abuse of discretion.") (internal citations omitted), *Veillon v. Exploration Servs., Inc* , 876 F.2d 1197, 1200 (5th Cir. 1989) (finding no error in refusal to grant a motion for summary judgment because "[a] district judge has discretion to deny a Rule 56 motion even if the movant otherwise successfully carries its burden of proof if the judge has doubt as to the wisdom of terminating the case before a full trial.") (citing *Marcus v. St Paul Fire and Marine Ins. Co* , 651 F 2d 379, 382 (5th Cir. 1981); C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2728 (1983)); *Franklin v Lockhart*, 769 F 2d 509, 510 (8th Cir. 1985) ("This Court has previously noted that even if the district court 'is convinced that the moving party is entitled to [summary] judgment the exercise of sound discretion may dictate that the motion should be *denied*, and the case fully developed.'") (quoting *McLain v Meier*, 612 F 2d 349, 356 (8th Cir. 1979)); *Forest Hills Early Learning Ctr , Inc v. Lukhard*, 728 F.2d 230, 245 (4th Cir 1984) ("Even where summary judgment is appropriate on the record so far made in a case, a court may properly decline, for a variety of reasons, to grant it We think this is such a case .") (citing 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE· CIVIL § 2728 (1983)); *Marcus v. St Paul Fire and Marine Ins. Co* , 651 F.2d 379, 382 (5th Cir 1981) ("Even if St. Paul were entitled to summary judgment, the sound exercise of judicial discretion dictates that the motion should be denied to give the parties an opportunity to fully develop the case This is particularly true in light of the posture

of the entire litigation. A district court can perform this 'negative discretionary function' and deny a Rule 56 motion that may be justifiable under the rule, if policy considerations counsel caution.") (citing *McLain v Meier*, 612 F.2d 349, 356 (8th Cir. 1979), *after remand*, 637 F.2d 1159 (8th Cir. 1980)), *McLain v Meier*, 612 F.2d 349, 356 (8th Cir. 1979) ("The court has no discretion to Grant a motion for summary judgment, but even if the court is convinced that the moving party is entitled to such a judgment the exercise of sound judicial discretion may dictate that the motion should be Denied, and the case fully developed.").

In addition, several circuit courts have explained that an order denying a motion for summary judgment is reviewed only for abuse of discretion, implying approval of the proposition that a district court has discretion to deny a motion for summary judgment. *See SunTiger, Inc. v Sci Research Funding Group*, 189 F.3d 1327, 1333 (Fed. Cir. 1999); *Romstadt v Allstate Ins. Co.*, 59 F.3d 608, 615 (6th Cir. 1995) ("This court reviews a district court's decision to *deny* a motion for summary judgment for an abuse of discretion.") (citing *Southward v S. Cent Ready Mix Supply Corp* , 7 F 3d 487, 492 (6th Cir. 1993); *Pinney Dock & Trans Co v Penn Cent. Corp* , 838 F.2d 1445, 1472 (6th Cir. 1988)). In *SunTiger*, the court rejected the argument that the district court had erred by denying summary judgment of patent invalidity, explaining:

> When a district court *grants* summary judgment, we review without deference to the trial court whether there are disputed material facts, and we review independently whether the prevailing party is entitled to judgment as a matter of law. By contrast, when a district court *denies* summary judgment, we review that decision with considerable deference to the court

SunTiger, 189 F.3d at 1333 (internal citations omitted) (emphasis in original) The court continued:

> "The trial court has the right to exercise its discretion to deny a motion for summary judgment, even if it determines that a party is entitled to it if in the court's opinion, the case would benefit from a

> full hearing. The court can perform this 'negative discretionary function' and deny summary judgment if policy considerations so warrant; absent a finding of abuse, the court's discretion will not be disturbed."

Id. (quoting 12 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE § 56.41[3][d] (3d ed. 1999)). The court also held that "[t]o disturb the decision by the trial court, we would have to find that the facts were so clear that the denial of summary judgment was an unquestioned abuse of discretion." *Id* at 1334. Judge Lourie dissented in *SunTiger*, noting that "[t]he rule of deference [to the trial court's denial of summary judgment] is a good one, soundly based. However, the rule is not absolute." *Id* at 1337 (Lourie, J., dissenting). Judge Lourie thought the patent at issue should have been held invalid in light of the fact that validity is a question of law for the court and that the facts were clear that denial of summary judgment was an abuse of discretion. *Id.* at 1337–38.

Thus, at least the Fourth, Fifth, Sixth, Eighth, Eleventh, and Federal Circuits have recognized the discretion to deny a motion for summary judgment by expressing approval of discretionary denials or by expressing that denials should be reviewed only for an abuse of discretion. The First Circuit has also commented that "in some relatively rare instances in which Rule 56 motions might technically be granted, the district courts occasionally exercise a negative discretion in order to permit a potentially deserving case to be more fully developed." *Buenrostro v. Collazo*, 973 F.2d 39, 42 n.2 (1st Cir. 1992). The *Buenrostro* court held that generally "[d]istrict court orders granting or denying brevis disposition are subject to plenary review," but reserved its opinion on whether the use of negative discretion could work in qualified immunity cases, and on what the proper standard of review might be *Id* at 42, 42 n.2.

B. District Court Opinions

District courts have also explained that they have discretion to deny motions for summary judgment even if the standard in Rule 56 is met. For example, in *Martin Ice Cream Co v Chipwich, Inc* , 554 F. Supp. 933 (S.D.N.Y. 1983), the court stated:

> Were this [claim of price discrimination] the only claim before the Court, we would undoubtedly grant summary judgment. However, in this case, in which the other antitrust claims are to go forward and the discovery required to develop them is virtually the same as that which would be required to develop the price discrimination claim, granting summary judgment at this point would serve no purpose Such a disposition would save the defendants no costs in time, effort, or money and would deprive the plaintiff of whatever opportunity it may otherwise have to build a foundation under the claim, which has at least been adequately pled. Since the facts are exclusively in the possession of the moving party and discovery has barely begun, it appears desirable for the Court to exercise its discretion and deny the motion with leave to renew when discovery is complete

Martin Ice Cream, 554 F. Supp. at 944 (citing *Schoenbaum v Firstbrook*, 405 F.2d 215, 218 (2d Cir 1968); 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2728, at 557 & n.56 (1973 and Supp. 1982)). Likewise, the Eastern District of Pennsylvania has described the discretion to deny summary judgment motions:

> Despite this seemingly compulsory language [of Fed. R. Civ. P. 56(c)], the Supreme Court has recognized a district court's discretion to deny a summary judgment motion whenever there is "reason to believe that the better course would be to proceed to full trial." This discretion remains "even if the movant otherwise successfully carries its burden of proof if the judge has doubt as to the wisdom of terminating the case before a full trial." Moreover, although the Third Circuit has not ruled on this question, most other Courts of Appeals have refused to review denials of summary judgment, finding that a district court judgment after a full trial on the merits supersedes earlier summary judgment proceedings

Payne v. Equicredit Corp. of Am , No. CIV.A 00-6442, 2002 WL 1018969, at *1 (E.D. Pa. May 20, 2002) (internal citations omitted), *aff'd on other grounds*, Nos. 02-2706, 02-2771, 2003 WL 21783757 (3d Cir Aug. 4, 2003) (per curiam) (unpublished); *see also Lyons v. Bilco Co.*, No 3:01CV1106(RNC), 2003 WL 22682333, at *1 (D. Conn. Sept 30, 2003) ("Judicial discretion to deny summary judgment in favor of a full trial has been approved by most courts of appeals.") (citing Friedenthal et al., *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. at 104; Arthur R. Miller, *The Pretrial Rush to Judgment Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day In Court and Jury Trial Commitments?*, 78 N.Y U.L. REV. 982 (2003)).

Other district courts in various circuits have described their discretion to deny summary judgment in certain circumstances. *See, e g , Lister v Prison Health Servs., Inc.*, No. 8:04-cv-2663-T-26MAP, 2007 WL 624284, at *2 (M.D. Fla. Feb. 23, 2007) (denying summary judgment because of lack of clarity regarding material factual disputes, and noting that the court was exercising "its discretion to deny summary judgment, *even assuming the absence of a factual dispute . . . .*") (emphasis added); *Taylor v. Truman Med. Ctr* , No. 03-00001-CV-W-HFS, 2006 WL 2796389, at *3 (W.D. Mo. Sept. 25, 2006) (denying a motion for summary judgment with respect to a claim for which the court "would not be comfortable in ringing down the curtain . . .," and for which the court found the exercise of its "negative discretion" to deny summary judgment when the record is inconclusive to be appropriate) (citing *Roberts v Browning*, 610 F.2d 528, 536 (8th Cir. 1979)); *Propps v 9008 Group, Inc.*, No. 03-71166, 2006 WL 2124242, at *1 (E D. Mich. July 27, 2006) (holding that in light of the voluminous record and the complexity of the proposed facts, the effort necessary to determine whether genuine issues of fact existed was "not a productive use of [the

court's] time," that even if the movants had carried their burden, the court doubted the wisdom of terminating the case prior to trial, and that a court has discretion to deny a motion for summary judgment); *Lyons*, 2003 WL 22682333, at *1 ("Because summary judgment has this effect [of cutting off a party's right to present his case to the jury], trial courts must act with caution in granting it and may deny it in the exercise of their discretion when 'there is reason to believe that the better course would be to proceed to a full trial.'")[3] (quoting *Anderson*, 477 U.S. at 255); *United States v. T.J. Manalo, Inc.*, 240 F. Supp. 2d 1255, 1261 (Ct Int'l Trade 2002) (declining to grant summary judgment despite the fact that there was no dispute as to any material fact because it was not clear that the Government was entitled to judgment as a matter of law and because "even where a movant has met its burden, a court retains the discretion to deny summary judgment notwithstanding the seemingly mandatory language of Rule 56(c) . . . . Rule 56 is thus 'far less mandatory' than the language of the rule would indicate."[4]; *New York v. Moulds Holding Corp.*, 196 F. Supp. 2d 210, 219 (N.D N.Y. 2002) (denying summary judgment on certain claims because of the poor factual record and the necessity of difficult scientific evidence on the CERCLA claim, and noting that the exercise of discretion to deny was appropriate) (citing *Anderson*, 477 U S. at 255–56); *Butler v. CMC Miss., Inc.*, No CIV.A. 1.96CV349-D-D, 1998 WL 173233, at *7 (N.D Miss. March 18, 1998) (denying summary judgment because a fact issue existed, but noting that the court "has the discretion to deny motions for summary judgment and allow parties to proceed to trial and more fully develop the

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[3] The court also noted that in *Kennedy v Silas Mason Co* , 334 U S 249, 256–57 (1948), the Supreme Court had "recognized that summary judgment may not be the most appropriate way to resolve complex matters, even if the motion for summary judgment technically satisfies the requirements of Rule 56 " Lyons, 2003 WL 22682333, at *1 n 1

[4] The court also noted that "'[t]here is long-established doctrine holding that a court may deny summary judgment if it believes further pretrial activity or trial adjudication will sharpen the facts and law at issue and lead to a more accurate or just decision, or where further development of the facts may enhance the court's legal analysis '" *T.J Manalo, Inc* , 240 F Supp 2d at 1261 (quoting 11 MOORE'S FEDERAL PRACTICE § 56 32[6])

record for the trier of fact") (citing *Kunin v Feofanov*, 69 F 3d 59, 61 (5th Cir. 1995); *Black v J I Case Co* , 22 F 3d 568, 572 (5th Cir. 1994); *Veillon v Exploration Servs , Inc* , 876 F.2d 1197, 1200 (5th Cir. 1989)); *Morris v VCW, Inc* , No 95-0737-CV-W-3-6, 1996 WL 429014, at *1 (W.D. Mo. July 24, 1996) (denying summary judgment because of "necessarily limited consideration and the need for a quick ruling," noting that "[c]aution is the rule of judicial practice in . . cases [seeking summary judgment late in the case]" and that "there is a 'negative discretion' to deny summary judgment even when 'technically' justifiable, when the ends of justice appear to favor full development of the facts at trial, in order that a fact-finder may acquire a sound 'feel' for the issues.") (citing *Roberts v Browning*, 610 F.2d 528, 536 (8th Cir. 1979); *McLain v Meier*, 612 F.2d 349, 356 (8th Cir. 1979)); *Caine v. Duke Commc'ns Int'l*, No. CV-95-0792 JMI (MCX), 1995 WL 608523 (C.D. Cal. Oct. 3, 1995) (granting a motion for summary judgment, but stating in boilerplate language that "[t]here is no absolute right to a summary judgment in any case. The court has discretion to deny summary judgment wherever it determines that justice and fairness require a trial on the merits.") (citing *Anderson*, 477 U S. at 249–55); *McDarren v Marvel Entm't Group, Inc* , No. 94 CV. 0910 (LMM), 1995 WL 214482, at *5 (S.D.N Y April 11, 1995) (denying a motion for summary judgment on a breach of contract claim on the basis that an interpretation of the "best efforts" contract clause in light of circumstances had to be made by the fact finder, but also noting that "[w]here an issue is closely intertwined with an issue to be tried, a court has discretion to deny summary judgment even if the issue is 'ripe' for summary judgment.") (citing *Citibank v. Real Coffee Trade Co* , 566 F Supp. 1158, 1165 (S.D.N Y. 1983); *Berman v Royal Knitting Mills, Inc* , 86 F.R.D. 124, 126 (S.D N Y. 1980)); *Wilson v Studebaker-Worthington, Inc.*, 699 F. Supp 711, 718–19 (S.D. Ind 1987) (denying summary judgment and stating, "It has been repeatedly held that

despite all that may be shown, the Court always has the power to deny summary judgment if, in its sound judgment, it believes for any reason that the fair and just course is to proceed to trial rather than to resolve the case on a motion. Thus, an appraisal of the legal issues may lead the Court to exercise its discretion and deny summary judgment motions in order to obtain the fuller factual foundation afforded by a plenary trial.")[5] (citing *Kennedy v. Silas Mason Co* , 334 U.S. 249 (1948); *Flores v. Kelley*, 61 F.R.D. 442 (D. Ind. 1973); *Western Chain Co. v. Am. Mut Liab. Ins Co* , 527 F.2d 986 (7th Cir. 1975))

III. Cases Limiting Discretion to Deny Motions for Summary Judgment

A. Circuit Court Opinions

Despite the existence of the circuit opinions clearly stating that there is discretion to deny a motion for summary judgment, other circuit opinions have consistently repeated language that implies that there is little or no discretion to deny. *See, e.g* , *Soremekun v Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir 2007) ("A motion for summary judgment *must be granted* when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'") (quoting FED. R. CIV. P. 56(c)) (emphasis added); *Rease v. Harvey*, No. 06-15030, 2007 WL 1841080, at *1 (11th Cir. June 28, 2007) (unpublished) (same), *Chicago Title Ins Corp v. Magnuson*, 487 F.3d 985, 994 (6th Cir. 2007) (same); *Guilbert v*

[5] The *Wilson* court's description of discretion to deny is seemingly at odds with a later Seventh Circuit opinion in *Jones v Johnson*, 26 F 3d 727, 728 (7th Cir 1994) (per curiam), where the Seventh Circuit held that "[s]ummary judgment is not a discretionary remedy " While the *Wilson* case has not been expressly overturned, the subsequent decision in *Jones* may call *Wilson*'s language regarding discretion to deny summary judgment motions into question However, it is also possible that the holding in *Jones* was not as broad as it may seem The appellate court in *Jones* reviewed the denial of the summary judgment motion on an interlocutory appeal regarding the defense of qualified immunity The Seventh Circuit commented that immunity claims ought to be resolved as early in the case as possible, *id* , and it may be that the reason for the court's statement regarding lack of discretion was that the appeal related to a defense that needed to be immediately resolved.

Gardner, 480 F.3d 140, 145 (2d Cir. 2007) (same); *Loggins v Nortel Networks, Inc* , No 06-10361, 2006 WL 3153471, at *1 (5th Cir. Nov. 2, 2006) (unpublished) (same), *Mambo v Vehar*, No. 05-2356, 2006 WL 1720211, at *1 (10th Cir. June 23, 2006) (unpublished) ("The familiar standard *requires that summary judgment be granted* . . ." if the Rule 56(c) standard is met.) (emphasis added); *Warner-Lambert Co v. Teva Pharms USA, Inc.*, 418 F.3d 1326, 1335 (Fed Cir. 2005) ("Summary judgment *must be granted* . . " if the Rule 56(c) standard is met) (emphasis added); *Watson v Eastman Kodak Co.*, 235 F.3d 851, 854 (3d Cir 2000) ("[S]ummary judgment *is to be entered* if the evidence is such that a reasonable fact finder could find only for the moving party.")[6] (citing *Anderson*, 477 U.S. at 248; *Doherty v Teamsters Pension Trust Fund*, 16 F.3d 1386, 1389 (3d Cir. 1994)) (emphasis added); *Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994) (per curiam) ("Summary judgment *is not a discretionary remedy.* If the plaintiff lacks enough evidence, *summary judgment must be granted.*") (citing *Anderson*, 477 U.S. at 249–51; *Celotex*, 477 U.S. 317) (emphasis added), *aff'd on other grounds*, 515 U.S. 304 (1995); *Real Estate Fin. v Resolution Trust Corp.*, 950 F.2d 1540, 1543 (11th Cir. 1992) (per curiam) ("A district court must grant summary judgment if the moving party shows that there is no genuine dispute regarding any material fact and it is entitled to judgment as a matter of law ") (citing *Celotex*, 477 U.S. at 322).

In sum, at least the Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and Federal Circuits have issued opinions that contain language seeming to mandate the entry of summary judgment if the movant shows that he is entitled to judgment. However, most of the cases containing this language have the language in the boilerplate section reciting the legal standard for review of

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[6] The court also noted that "[a] party's failure to make a showing that is 'sufficient to establish the existence of an element essential to that party's case, and on which that party will bear th burden of proof at trial' *mandates the entry of summary judgment* " *Watson*, 235 F 3d at 857–58 (quoting *Celotex Corp v Catrett*, 477 U S 317, 322 (1986)) (emphasis added)

summary judgment orders. Very few of the cases with this language appear to actually apply the standard to an order denying summary judgment.[7] Of the cases cited in the previous paragraph, for example, only one of them definitively applied the rule that motions must be granted if the Rule 56(c) standard is met. *See Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994) (per curiam) (finding that the district court was mistaken in determining that "because the excessive force claim had to be tried, and because the plaintiff might come up with more evidence before trial, the false arrest claim should also be tried"), *aff'd on other grounds*, 515 U.S. 304 (1995). The remainder of the cases cited in the previous paragraph involved review of a grant of summary judgment, and thus the courts did not have occasion to apply the standard used for review of a denial of summary judgment, despite discussion of that standard in the "legal standards" portion of the opinions.

B. District Court Opinions

Various district court cases also contain statements that summary judgment is mandatory if the movant has shown entitlement to summary judgment. *See, e g , Starns v Health Prof'ls, Ltd ,* No 04-1143, 2008 WL 268590, at *1 (C.D. Ill. Jan. 29, 2008) ("'Summary [judgment] is not a discretionary remedy. If the plaintiff lacks enough evidence, summary [judgment] must be granted.'") (quoting *Jones*, 26 F.3d at 728)[8]; *Levine v. Children's Museum of Indianapolis, Inc* , No IP00-0715-C-H/G, 2002 WL 1800254, at *1 (S.D. Ind. July 1, 2002) (granting summary judgment

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[7] Finding appellate cases actually disapproving of a discretionary denial has proven to be difficult, perhaps because denials of summary judgment are rarely appealable Most of the appellate cases substantively reviewing a denial of summary judgment have concluded that discretion to deny exists

[8] A Westlaw search reveals that the *Jones* case has been cited in other cases 113 times for the proposition that summary judgment is not a discretionary remedy All of these citations have been by district courts within the Seventh Circuit I have surveyed a selection of these cases, and they appear to generally use this language as boilerplate language in the legal standards section of the opinion Within the sampling of cases I reviewed, I did not see any cases where the district court expressed a desire to deny the motion but felt compelled to grant it in view of a standard that granting summary judgment is mandatory if the movant has shown entitlement

where the plaintiff had failed to come forward with sufficient evidence, and stating in the section describing the legal standards that "[s]ummary judgment is not discretionary; if a party shows it is entitled to summary judgment, judgment must be granted.") (citing *Jones*, 26 F.3d at 728), *aff'd*, No 02-3013, 2003 WL 1545156 (7th Cir. March 24, 2003) (unpublished); *In re Lawrence W. Inlow Accident Litig.*, No. IP 99-0830-C H/K, 2002 WL 970403, at *3 (S.D. Ind. April 16, 2002) ("Summary judgment is not a discretionary remedy. If a party shows it is entitled to summary judgment, the court must grant it.") (citing *Tangwall v Stuckey*, 135 F.3d 510, 514 (7th Cir. 1998)), *aff'd sub nom. First Nat'l Bank & Trust Corp v Am Eurocopter Corp* , 378 F.3d 682 (7th Cir. 2004); *Gates v. L R. Green Co* , No. IP 00-1239-C H/G, 2002 WL 826394, at *1 (S.D. Ind. Mar 20, 2002) ("Summary judgment is not a discretionary procedure, though. When the moving party has shown it is entitled to summary judgment, the court must grant it. To do otherwise would be to condemn the parties, witnesses, and jurors to spend time, money, and energy on a trial that could have only one just result."); *Acceptance Assoc of Am., Inc. v Various Underwriters of Lloyds of London*, CIV. A. No. 88-6816, 1989 WL 25146, at *2 (E.D Pa. Mar. 16, 1989) (granting summary judgment after finding no genuine issue of material fact and citing 18A COUCH ON INS. 2d § 77.16 (Rev'd ed. 1983) for the proposition that "when undisputed documents show that the insurer is entitled to summary judgment, the court must grant the motion regardless of other facts in the record that may be in dispute "), *aff'd*, 884 F.2d 1382 (3d Cir 1989); *Martinez v. Ribicoff*, 200 F. Supp. 191, 192 (D.P.R. 1961) ("It, therefore, follows that there is no genuine issue as to any material fact and that defendant's motion for summary judgment must be granted, defendant being entitled to judgment as a matter of law ").

Most of the district court cases I reviewed that state that summary judgment must be entered if the movant is entitled state this standard in the "legal standards" section of the opinion, and it is not clear if the court ultimately granted the summary judgment because it had no choice if the movant met its burden or because the court felt no need to exercise discretion to deny the motion under the facts of the case.[9] The *Acceptance Assoc. of Am.* and *Martinez* cases use the mandatory language within the analysis portion of the opinions, as opposed to in a separate section describing legal standards, but even in those cases, it is not clear whether the court felt compelled to grant summary judgment simply because it was mandatory if the movant met its burden or if the court granted the summary judgment because it viewed granting as the best option after the movant had met its burden.

C. Letter Asserting Lack of Discretion to Deny Summary Judgment

A January 10, 2008 letter from Lawyers for Civil Justice and the U.S. Chamber Institute for Legal Reform ("the Letter") insists that the current standard is that summary judgment is mandatory when a litigant has met the burden of demonstrating the absence of a genuine issue of material fact. However, most of the cases cited in the Letter for this proposition do not actually evaluate the denial of a motion for summary judgment, making any boilerplate language that summary judgment is required less persuasive than the Letter indicates. The Seventh Circuit *Jones* case cited in the letter may be an anomaly with its strict language stating that "[s]ummary judgment is not a discretionary remedy If the plaintiff lacks enough evidence, summary judgment must be granted " *Jones*, 26 F.3d

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[9] A search in Westlaw for cases stating that summary judgment is mandatory or must be granted if the standard is met turns up many cases However, a review of a sampling of these cases reveals that few of them actually apply the proposition that summary judgment is mandatory if the standard is met, and merely contain language to that effect in the "legal standards" portion of the opinion Finding district court cases granting summary judgment based on an alleged lack of discretion to deny once the standard is met has proven difficult, possibly because courts may not express a desire to deny the motion at the same time the court is granting the motion

at 728 Notably, the *Jones* court emphasized that the issue on summary judgment involved a defense of immunity, stating that "[i]mmunity claims should be resolved as early in the case as possible—and by the court rather than the jury " *Id.* (citing *Elder v. Holloway*, 510 U.S. 510, ___, 114 S Ct 1019, 1023 (1994); *Harlow v Fitzgerald*, 457 U S. 800, 818 (1982); *Elliot v Thomas*, 937 F 2d 338, 344–45 (7th Cir. 1991)). In *Jones*, the defendants filed an interlocutory appeal asserting a defense of qualified immunity. *Id* at 727. The district court had denied the defendants' summary judgment motion both with respect to the plaintiff's false arrest claim and with respect to the plaintiff's excessive force claim. With respect to the excessive force claim, the Seventh Circuit held that it had no appellate jurisdiction because the district court had found that an issue of fact existed as to whether the defendants beat the plaintiff while he was in custody, an issue that had to be "resolved in the district court before it could be reviewed on appeal." *See id.* at 727–28 With respect to the false arrest claim, the district court had held that "because the excessive force claim had to be tried, and because the plaintiff might come up with more evidence before trial, the false arrest claim also should be tried " *Id* at 728. The Seventh Circuit rejected that conclusion, finding that summary judgment should have been granted in favor of the defendants with respect to the false arrest claim because there was no genuine issue of fact and summary judgment is not a discretionary remedy. *Id.*

One could argue that *Jones* creates a circuit split as to whether there is discretion to deny summary judgment However, despite its broad language disapproving of discretion to deny, the *Jones* court may have been particularly focused on the importance of resolving immunity claims early in the litigation.[10] A persuasive argument can be made that the need to resolve immunity issues

[10] The Seventh Circuit has repeated the language regarding the mandatory nature of granting summary judgment if the movant meets his burden *See Anderson v P A Radocy & Sons, Inc* , 67 F 3d 619, 621 (7th Cir 1995) ("Summary

played a strong role in the court's opinion, particularly given the absence of discussion distinguishing cases from other circuits that had recognized the existence of discretion to deny fully-supported summary judgment motions.

Other than the *Jones* case, the cases cited in the Letter do not substantively evaluate the discretion to deny summary judgment motions, despite having language stating that summary judgment is mandatory. For example, the Letter cites *Watson v Eastman Kodak Co*, 235 F.3d 851, 857–58 (3d Cir. 2000), for the proposition that "[a] party's failure to make a showing that is 'sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of trial' mandates the entry of summary judgment" However, in *Watson*, the court affirmed a grant of summary judgment where the non-movant failed to make the required evidentiary showing. Because the Third Circuit affirmed a grant of summary judgment on the basis that the requisite showing was not made and because the case did not involve review of a denial of summary judgment (or of a grant of summary judgment where the court felt compelled to grant the motion despite wanting to deny it), the language stating that summary judgment is mandatory does not carry as much weight as suggested by the Letter.

Similarly, the Letter cites *Real Estate Fin v. Resolution Trust Corp*, 950 F.2d 1540, 1543 (11th Cir 1992) (per curiam), for the proposition that "[a] district court must grant summary judgment if the moving party shows that there is no genuine dispute regarding any material fact and it is entitled to judgment as a matter of law." However, the cited language appears in the section of the opinion entitled "The Standards Governing Summary Judgment," and is not applied to the merits

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judgment is not a remedy to be exercised at the court's option, it must be granted when there is no genuine dispute over a material fact") (citing *Anderson v Liberty Lobby, Inc*, 477 U S 242, 248 (1986)) However, in *Anderson*, the Seventh Circuit reviewed a grant of summary judgment rather than a denial

because the case involved review of a grant of summary judgment, rather than a denial. The court affirmed part of the grant of summary judgment, but found that the non-movant had presented sufficient evidence to avoid summary judgment on one of the claims. Thus, the court had no reason to address whether there would have been discretion to deny summary judgment if there had not been sufficient evidence. The language regarding the mandatory nature of granting summary judgment is further weakened by the fact that a subsequent Eleventh Circuit decision involving an attempted appeal of a denial of summary judgment recognized discretion to deny summary judgment motions. *See Lind v United Parcel Serv., Inc* , 254 F.3d 1281, 1285 (11th Cir. 2001).

The Letter argues that the version of Rule 56 effective prior to the Style Amendments, containing the statement that "the judgment sought shall be rendered . . .," has language commanding mandatory action. However, the cases simply have not always interpreted the language that way. *See, e.g., Payne v. Equicredit Corp of Am.*, No. CIV.A. 00-6442, 2002 WL 1018969, at *1 (E D. Pa. May 20, 2002) ("Despite this seemingly compulsory language [of Fed. R. Civ. P. 56(c)], the Supreme Court has recognized a district court's discretion to deny a summary judgment motion whenever there is 'reason to believe that the better course would be to proceed to full trial.'"), *aff'd on other grounds*, Nos. 02-2706, 02-2771, 2003 WL 21783757 (3d Cir Aug. 4, 2003) (per curiam) (unpublished), *see also* EXCERPT FROM THE REPORT OF THE JUDICIAL CONFERENCE, COMMITTEE ON RULES OF PRACTICE & PROCEDURE at 10, http //www.uscourts gov/rules/supct1106/Excerpt_JC_ Report_CV_0906.pdf (stating that the restyled rules "minimize the use of inherently ambiguous words," such as "shall," which "can mean 'must,' 'may,' or 'should,' depending on context"), FED. R Civ. P. 56 advisory committee's note (2007 Amendment) (stating that "shall" is changed to

"should" in light of case law establishing that "there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact").

The assertion in the Letter that discretion to deny summary judgment would "run[] headlong into the concern expressed in *Anderson v Creighton*, 483 U.S. 635, 643 (1987)[,] that conscientious public officials would lose the 'assurance of protection that [] is the object' of summary judgment," is misplaced The quotation is taken slightly out of context because it omits the remainder of the sentence, which reveals that the quoted language was used in the case to describe the purpose of the doctrine of qualified immunity [11] Nonetheless, it follows that requiring summary judgment regarding qualified immunity defenses would also further the assurance of protection that qualified immunity is intended to provide. However, even if courts may have less discretion to deny summary judgment in certain contexts, such as qualified immunity, *see Jones*, 26 F.3d at 728, it does not necessarily follow that it is mandatory in all circumstances where the Rule 56 standard is met

IV. Conclusion

Most of the case law substantively evaluating whether there is discretion to deny a motion for summary judgment has determined that discretion to deny summary judgment exists when the movant has made the proper showing. The discretionary power of a court to deny a properly-supported motion for summary judgment has been summarized as follows:

> Although the court's discretion plays no role in the granting of summary judgment, since the granting of summary judgment under FRCP 56 must be proper or the action is subject to reversal on appeal, the court may deny summary judgment as a matter of discretion even where the criteria for granting judgment are technically satisfied Denial of summary judgment is appropriate where the court has

[11] The full sentence actually reads "An immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide " *Anderson*, 483 U S at 643

> doubts about the wisdom of terminating the case before a full trial or believes that the case should be fully developed before decision. For example, denial of summary judgment may be appropriate where the court has received inadequate guidance from the parties, where further inquiry into the facts is deemed desirable by the court to clarify the application of the law, where the motion is tainted with procedural unfairness, where a case involves complex issues of fact or law, or a question of first impression, or where summary judgment would be on such a limited basis or on such limited facts that it would be likely to be inconclusive of the underlying issues. In a case involving multiple claims, the court may exercise its discretion to deny summary judgment where it finds it better as a matter of judicial administration to dispose of all the claims and counterclaims at trial rather than to attempt piecemeal disposition, or where part of the action may be ripe for summary judgment but is intertwined with another claim that must be tried.

27A FED. PROC., LAW ED. § 62:683 (2007)

Although there is plenty of case law with boilerplate language stating that a court must grant summary judgment if the Rule 56 standard is met, most of those cases at the appellate level do not involve review of a denial of a motion for summary judgment. Likewise, a review of a selection of some of those at the district court level reveals that most do not express that a motion is granted simply because of mandatory language in the rule when the court believes that the motion should be denied for administrative or other reasons. The one case the research uncovered that substantively involved review of a denial of summary judgment and that disapproved of that denial arguably may be limited in its application because it involved a request for summary judgment on qualified immunity grounds. While the court's language was broad, it also emphasized that immunity claims ought to be resolved early in the case, perhaps giving a stronger reason to remove discretion to deny a motion in that case than in the case of other summary judgment motions.

B Rule 26(a)(2) and (b)(4) Expert Trial Witness Discovery

Introduction

These related proposals were discussed to great benefit at the Standing Committee meeting last January, providing a preliminary view of what might be coming and gaining the benefit of advance advice. The first proposal creates in Rule 26(a)(2)(C) a new obligation to disclose a summary of the facts and opinions of a trial-witness expert who is not required to provide a discovery report under Rule 26(a)(2)(B). (A conforming amendment is proposed for present Rule 26(a)(2)(C), to be redesignated as (D), addressing the time to disclose expert testimony.) The second set of interrelated proposals restrict some aspects of discovery with respect to trial-witness experts in response to the lessons of experience, not as a matter of high theory. The core changes extend work-product protection to drafts of Rule (a)(2)(B) expert reports and 26(a)(2)(C) party disclosures and also to attorney-expert communications. But three exceptions allow discovery as a matter of course of the parts of attorney-expert communications relating to compensation, identifying facts or data the attorney provided to the expert and that the expert considered in forming the opinions to be expressed, and identifying assumptions that the attorney provided to the expert and that the expert relied upon in forming the opinions to be expressed. A parallel change is made in Rule 26(a)(2)(B)(ii), directing that the expert's disclosure report include "the facts or data ~~or other information~~ considered by the witness * * *."

Party Disclosure: Rule 26(a)(2)(A) requires a party to disclose the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. The witness is required to provide a Rule 26(a)(2)(B) report 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." But some courts have required witness reports even as to experts outside these express limits.

It might be useful to expand the report requirement beyond the limits established in 1993, but requiring a report from every witness who presents expert testimony would also impose substantial burdens. The burdens are particularly acute with respect to physicians who have treated a party; cooperation even in discovery and at trial can be uncertain, and many lawyers fear they could not induce the physician to provide a report meeting the detailed requirements of (a)(2)(B). Similar problems can arise when an employee who does not regularly give expert testimony is an important witness, often as much for facts as for opinions. Still other witnesses, such as a public accident investigator, may be the same.

The proposed addition of new Rule 26(a)(2)(C) represents a balance between these competing forces. If a witness identified under (a)(2)(A) is not required to provide an (a)(2)(B) report, the party must disclose the subject matter of the expected expert testimony and a summary of the facts and opinions to which the expert is expected to testify. This disclosure will support preparation for deposing the witness, and in some settings may satisfy other parties that there is no need for a deposition.

Draft Reports and Attorney-Expert Communications: The background for these proposals traces back to the 1970 amendments that added an express work-product provision, Rule 26(b)(3), and at the same time made Rule 26(b)(3) "subject to the provisions of subdivision (b)(4)." Rule 26(b)(4), also new in 1970, provided for "[d]iscovery of facts known and opinions held by experts * * * acquired or developed in anticipation of litigation or for trial, * * * only as follows." What followed was a right to ask by interrogatory for the substance of the facts and opinions to which the expert trial witness is expected to testify; "further discovery by other means" could be ordered by the court. Many lawyers and courts found the interrogatory discovery an inadequate basis for preparing for trial; in many courts depositions of trial-witness experts became routine

In 1993, building on experience with the 1970 amendments, expert trial-witness discovery was changed dramatically. The disclosure provisions of Rule 26(a), added for the first time, included the familiar (a)(2) expert disclosure requirements. A party must disclose "the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705." This disclosure must be supplemented by a report prepared by the expert, but only if the expert falls into one of two categories: "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." An expert required to give this report may be deposed only after the report is provided.

The Rule 26(a)(2)(B) report is to include "(ii) the data or other information considered by the witness in forming [the opinions the witness will express] " The 1993 Committee Note included this statement:

> The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts 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.

Time has obscured the intended meaning of these words. They may have been meant only to say that discovery may be had of "the data or other information considered by the expert" no matter whether they were provided by counsel. But whatever was intended, they have taken on a far broader meaning Moved by the disclaimer of "privilege[] or other[] protec[tion]," most courts now allow free discovery of draft expert reports and all communications between attorney and expert witness as "information considered by the expert."

As an abstract proposition, it may seem attractive to allow free discovery of all communications between counsel and an expert trial witness, and also to allow discovery of all draft reports. Any influence of counsel on the evolution of the opinions bears on the credibility of the opinions as the expert's independent view, not mere transmission of an advocate's position. An articulate minority of the lawyers who participated in the Discovery Subcommittee's first miniconference on this subject expressed that view forcefully. If it seems odd to limit privilege by a Committee Note to a Civil Rule, without invoking the special Enabling Act limits that require an Act of Congress to approve a rule creating, abolishing, or modifying an evidentiary privilege, 28 U.S.C. § 2074(b), it might be explained that the Note simply reflects an understanding of privilege rules as they were and as they would be applied in the new context established by the expert's duty to provide a disclosure report.

Consequences that surely were unforeseen in 1993 have demonstrated the pragmatic failure of any hope that expert opinions would be better tested by sweeping discovery of draft reports and attorney-expert communications. The result has been a regime that does not provide the anticipated information. It does not provide that information because attorneys and expert witnesses go to great lengths to forestall discovery. These strategies generally defeat discovery of valuable information, but lawyers persist in devoting costly deposition time to the vain quest for communications or drafts that may undercut an expert's opinions. Perhaps worse, these strategies impede effective use of expert witnesses. Effective use is impeded as to the opinion testimony because lawyers restrict free communications that might lead to more sophisticated and helpful opinions. Effective use also is impeded because lawyers hesitate to use a trial-witness expert for assistance with such responsibilities as understanding an adversary's expert's report and preparing for deposition or cross-examination at trial, or in evaluating a case for settlement. Additional cost flows from an offsetting practice of hiring "consulting" experts who, because they will not testify at trial, are protected against discovery by Rule 26(b)(4)(B) The consulting experts are used for the free explorations that are too risky to pursue with a trial-witness expert. A party who cannot afford the expense of a dual set of experts is put at a disadvantage

One measure of these consequences is telling. Many outstanding lawyers have told the Committee that they routinely stipulate out of discovery of draft reports and attorney-expert communications. They find the costs of engaging in such discovery far higher than the infrequent small benefits that may be gained Preliminary discussion at the January meeting demonstrated this reaction in convincing fashion

The American Bar Association, acting on a recommendation by the Section on Litigation Federal Practice Task Force, has recommended amendment of federal and state discovery rules to address the problems that have emerged. The problems it described include these: Experts and counsel often go to great lengths to avoid creating draft reports, creating drafts only in electronic or oral form, deleting all electronic drafts, and even scrubbing hard drives to prevent subsequent discovery. Lawyers and experts often avoid written communications or creating notes by the expert, encumbering attorney-expert communications and the formulation of effective and accurate litigation opinions. Litigants often engage in expensive discovery seeking to obtain draft reports or attorney-expert communications, but gain nothing useful by it. Parties often retain two sets of experts, one for consultation and the other for testimony. Additional problems include reluctance to hire potentially superb experts who have not become professional witnesses, for fear that discovery of the necessary conversations that tell them how to behave as witnesses will destroy their usefulness. And many lawyers feel disheartened to have to pursue tactics — knowing their adversaries are doing the same — that they believe are necessary to protect against discovery but bring the litigation system into disrepute.

The encouragement provided by the ABA has been supported by experience under a New Jersey rule that limits discovery of draft reports and attorney-expert communications. The Discovery Subcommittee met with a group of New Jersey lawyers drawn from all modes of practice, private and public. The lawyers — who agreed that they disagree about many discovery problems — were unanimous in praising the New Jersey rule. Their enthusiasm leads them to extend protection beyond the formal limits of the rule, and often to agree to honor the state-court practice when litigating in federal court.

The proposals that have been developed through miniconferences, subcommittee meetings, countless conference calls, several Advisory Committee meetings, and the preliminary presentation to this Committee, seek to improve the use of expert testimony by correcting the unforeseen consequences that have emerged in the wake of the 1993 amendments. The seeming availability of broad discovery into draft reports and attorney-expert communications has failed to yield useful information in practice because lawyers and experts have developed coping strategies that generally defeat discovery efforts. Those strategies have entailed increased costs, most notoriously by increasing the simultaneous use of consulting experts and testifying experts. They also contribute in some cases to diminishing the quality of expert testimony because attorney and expert fear to engage in the open and robust discussions that would lead to better mutual understanding. In addition, they may diminish the opportunity to effectively challenge an adversary's expert when a party cannot afford to explore cross-examination and rebuttal with a consulting expert, and — fearing the possibility of discovery — refuses to consult with its trial-witness expert.

The proposed protection is not absolute. It invokes work-product standards that allow discovery of draft reports or attorney-expert communications on showing substantial need for the discovery to prepare the case and an inability, without undue hardship, to obtain the substantial equivalent by other means. In addition, free discovery is allowed of attorney-expert communications in the three categories noted above: communications as to compensation, facts or data considered by the witness in forming opinions, and assumptions provided by counsel and relied upon by the expert.

This balance between protection and discovery is calculated to provide at least as much useful discovery as occurs now, and at the same time to reduce practices that, fearing overbroad discovery, now impede the best use of expert trial witnesses.

Overview

The proposed amendments of Rules 26(a)(2) and 26(b)(4)(A) are set out below in traditional over- and underline form, along with a Committee Note.

The proposals are so brief as to require no further summary beyond the Introduction. The major points for discussion are described in the Detailed Discussion and Questions.

Rule 26. Duty to Disclose: General Provisions Governing Discovery

(a) Required Disclosures

* * * * *

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

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

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

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

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

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

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

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

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

(C) *Disclosure Regarding Testimony of Witnesses Who Do Not Provide a Written Report* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report the disclosure must state.

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

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

(DC) *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial, or

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

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

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(b) Discovery Scope and Limits

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(4) Trial Preparation; Experts.

(A) ***Expert Who May Testify.***

(i) *Deposition of expert witness* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(ii) *Trial preparation protection for draft reports or disclosures* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form of the draft.

(iii) *Trial preparation protection for communications between party's attorney and expert witnesses* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to

provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

- Relate to compensation for the expert's study or testimony;

- Identify facts or data that the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed; or

- Identify assumptions that the party's attorney provided to the expert and that the expert relied upon in forming the opinions to be expressed

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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 from 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)(A) 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), many courts read the provision for disclosure in the report of "data or other information considered by the expert in forming the opinions" to 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. Experts might adopt strategies that protect against discovery but also interfere with their effective work, such as not taking any notes, never preparing draft reports, or using sophisticated software to scrub their computers' memories of all remnants of such drafts. In some instances, outstanding potential expert witnesses may simply refuse to be involved because they would have to operate under these constraints.

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)(A) 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 as one ground for requiring disclosure of all attorney-expert communications and draft reports The amendments to Rule 26(b)(4)(A) 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, as opposed to theories or mental impressions of counsel At the same time, the intention is that "facts or data" be interpreted broadly to require disclosure of any material received by the expert, from whatever source, that contains factual ingredients. 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 disclosures regarding the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B). 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, 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 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)(1)(A) and provide the disclosure required under Rule 26(a)(2)(C) with regard to their expert opinions.

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)(A): Rule 26(b)(4)(A)(ii) 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(b)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form of the draft, 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)(A)(iii) 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)(A)(iii) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of 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. The rule 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). It does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

Rules 26(b)(4)(A)(ii) and (iii) 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)(i), but the protections of (A)(ii) and (iii) apply to all forms of discovery.

Rules 26(b)(4)(A)(ii) and (iii) 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

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 is involved in a number of suits about a given product or service, and that a particular expert witness will testify on that party's behalf in several of the cases. In such a situation, 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)(A)(iii), 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, 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 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), 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 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, 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 that certain testimony or evidence is true, or 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.

The amended rule does not absolutely prohibit discovery regarding attorney-expert communications on subjects outside the

three exceptions in Rule 26(b)(4)(A)(iii), 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 No such discovery may be obtained unless the party seeking it can make the showing specified in Rule 26(b)(3)(A)(ii) -- that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be 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 contention that required disclosure or discovery has not been provided is not a ground for broaching the protection provided by Rule 26(b)(4)(A)(ii) or (iii), although it may provide grounds for a motion under Rule 37(a).

In the rare case in which a party does make 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)(A)(ii) and (iii) 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).

Detailed Discussion and Questions

Rule 26(a)(2)(C). Party Disclosure of Expert Testimony

(C) *Disclosure Regarding Testimony of Witnesses Who Do Not Provide a Written Report* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report the disclosure must state:

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

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

(~~C~~D) *Time to Disclose Expert Testimony* * * * Absent a stipulation or court order, the disclosures must be made. * * *

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

Evidence Rules 702, 703, or 705 All discussions have concluded that it would be unwise to add Evidence Rule 701 to the list, whether for disclosing the identity of a witness who may testify to an opinion or inference under Rule 26(a)(2)(A) or for disclosing a summary of the facts and opinions.

No (a)(2)(B) Report: Many categories of witnesses who will present expert testimony at trial are not required to provide a disclosure report under Rule 26(a)(2)(B). The witness may be an employee whose duties as an employee do not regularly involve giving expert testimony. Or the witness may be a public official, such as an accident investigator Treating physicians regularly provide testimony, and frequently present difficulties because testimony about such matters as prognosis and the cost of future care is challenged for failure to provide the report required when a witness crosses the line to become one retained or specially employed to provide expert testimony in the case. Often these and other witnesses present "hybrid" testimony that combines testimony provided as an actor or viewer of the events in suit with expert testimony.

A substantial number of reported cases have responded to the advantages that flow from Rule 26(a)(2)(B) expert reports by requiring reports from witnesses who are not covered by subparagraph (B). These decisions overlook the difficulties that may be encountered in attempting to persuade the witness to provide the report. Treating physicians are the example most frequently cited. They have busy careers devoted to purposes — caring for their patients — they may deem more important than preparing a detailed report that satisfies all six requirements of a (B) report. Another example is a highway patrol officer testifying to an accident investigation. A party's employee may present fewer problems of persuasion, but the report is likely to be dominated by the attorney in ways that make it no more useful than a summary.

A Summary of Facts and Opinions: The proposal bridges the divide between requiring no report and requiring a full (a)(2)(B) report. The party, not the witness, is required to disclose the subject matter of the expected evidence and a summary of the facts and opinions to which the witness is expected to testify. Many lawyers have assured the Committee that a summary will provide an adequate basis for preparing to depose the witness, and perhaps for examination at trial without incurring the expense of a deposition.

The draft discussed with the Standing Committee in January called for disclosure of the "substance" of the facts and opinions. This has been changed to "summary" in response to concerns that "substance" invites haggling over the level of detail required for adequate disclosure.

Later Subcommittee discussion addressed the question whether practical difficulties may arise from requiring even a "summary" of facts. One possible concern is that when a witness is expected to testify both on facts underlying the opinion and also on facts that are not related to the opinion, the rule might be read to require a summary of facts that are not involved in the opinions to be expressed. A second concern, less easily addressed by drafting changes, is that some witnesses will not be willing to devote enough time to informing counsel about the facts supporting their opinions Two examples were a treating physician and a state accident investigator. The Subcommittee concluded that it is useful to require a summary of facts. There is little risk that facts will be required in addition to those that the witness relied upon in forming the opinions. And there is little risk that courts will exclude testimony when counsel has not been able to get a full summary from the witness — Rule 37(c)(1) enables sensible accommodation These questions, however, will benefit from public comment.

Time To Disclose The time to disclose an expert rebuttal witness should be the same, for the same reasons, whether the witness to be rebutted has provided an (a)(2)(B) report or a party has provided an (a)(2)(C) disclosure.

Incidental Points: The Committee decided that it would be unwise to clutter the rules by addressing two technical questions. A "hybrid" witness may have been deposed before a party discloses a

summary of expert testimony that was not explored at the deposition. It might be argued that a second deposition to explore the expert testimony can be had only with the court's permission under Rule 30(a)(2)(A)(ii), and also under Rule 30(a)(2)(A)(i) if the result is more than 10 depositions by the plaintiffs, or by the defendants, or by third-party defendants The Committee anticipates that these issues will be resolved by common-sense application of the rules.

Rule 26(a)(2)(B)(ii): Disclose "Facts or Data"

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

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

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

"Facts," not "Information". The proposed change in Rule 26(a)(2)(B)(ii) is designed to support the proposed revisions of Rule 26(b)(4)(A). As described in the Introduction, the 1993 Committee Note and the reference to "information" in the rule text have led to the general view that attorney-expert communications and even draft disclosure reports are discoverable as information considered by the expert in forming the opinions to be expressed. Although Rule 26(b)(4)(A) will expressly apply work-product protection, it is better to clear away the history by deleting the reference to "information." The reference to "data" is retained. "Facts" might seem to embrace all data, but it is useful to cover abstract compilations of "data" that do not draw from the historic events in suit and that may rely on nonfactual statistical extrapolation from a set of fact observations smaller than the universe described by the data set.

Rule 26(b)(4)(A): Work-Product for Attorney-Expert Communications and Draft Reports

(b) DISCOVERY SCOPE AND LIMITS.

(4) *Trial Preparation: Experts*

(A) *Expert Who May testify*

(i) Deposition of expert witness. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(ii) Trial preparation protection for draft reports or disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form of the draft

(iii) Trial preparation protection for communications between party's attorney and expert witnesses Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the

communications, except to the extent that the communications:

- Relate to compensation for the expert's study or testimony;
- Identify facts or data that the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed, or
- Identify assumptions that the party's attorney provided to the expert and that the expert relied upon in forming the opinions to be expressed.

(A)(i): Deposition before Rule 26(a)(2)(C) party disclosure: The rule text presented here as item (i) is taken unchanged from the present rule; only the tag line is new That means that an expert not required to provide an (a)(2)(B) report may be deposed before a party makes the disclosure required by proposed (a)(2)(C). In many circumstances one party may depose a witness for fact information before another party discloses that witness as an expert and makes the disclosure. Familiar examples include treating physicians, a party's employee who has non-expert fact information, and a state accident investigator. The result may be two depositions of the same witness, and an increased need to take more than ten depositions. But as compared to an expert retained or specially employed, or an employee who regularly provides expert testimony, it seems unwise to attempt to regulate the sequence of deposition and party disclosure.

(A)(ii): Work-Product protection for draft reports: The proposal adopts work-product protection for drafts of any disclosure or report required under Rule 26(a)(2) Absolute protection might be too much — there may be circumstances (probably rare) in which a party has substantial need of a draft report Even if the court orders discovery, the command of Rule 26(b)(3)(B) applies: the court must protect the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

For the same reasons, work-product is proposed to measure the protection of attorney-expert communications in item (iii).

(A)(ii): Regardless of the form of the draft: Invoking Rule 26(b)(3) presents a minor drafting challenge because it protects only documents and tangible things as trial preparation materials. The "common-law" doctrine established by Hickman v. Taylor is the only source of protection for other forms of work product. Earlier versions protected "drafts in any form." The same expression appeared in (A)(iii) That version was unclear to some readers. The present proposal uses more words, but should be clear· "regardless of the form of the draft "

(A)(iii) Communications between the party's attorney and expert· Earlier drafts referred to communications between "retaining counsel" and the expert witness. Uncertainties about this term focused on such matters as communications with an attorney for a coparty, or even between house counsel and an expert retained by independent counsel. The term becomes even more uncertain when dealing with a party's employee who regularly gives expert testimony These doubts led to borrowing "the party's attorney" from Rule 26(b)(3)(A), where "the other party's attorney" has been used for many years without causing problems. The Committee Note explains, with brief examples, that this term should be interpreted functionally.

(A)(iii). Witness required to give (a)(2)(B) report The purposes of ensuring work-product protection for attorney-expert communications focus on communications with a witness retained or specially employed to provide expert testimony or one whose duties as a party's employee regularly involve giving expert testimony. They are the witnesses required to provide reports under Rule 26(a)(2)(B), and the ones involved in the communications protected by the proposal There is less need to protect

an attorney's communications with witnesses in the many other categories of experts. Communications with a client's employees often will be privileged. There is little reason to extend independent protection under (b)(4)(A) to such other witnesses as a treating physician or a state accident investigator. They do not have the same relationship to counsel as those who are protected.

(A)(iii): Communications not protected: Three exceptions to the work-product protection for attorney-expert communications are established. A single exchange between attorney and expert may touch on many matters, some within the work-product protection and others within one of the exceptions. Each exception applies only to the extent that the communication relates to or identifies matters falling into the exception. Discovery can, for example, reach facts or data identified by the attorney and considered by the expert, but communications discussing the meaning of the facts or data are protected by the work-product tests

It is important to remember that the exceptions are relevant only to withdraw the work-product protection that otherwise would apply under item (iii). Discovery of matters outside an attorney-expert communication is not affected by item (iii). As one example, an expert might properly be asked how much compensation had been earned by testifying in other cases for this lawyer.

(A)(iii): Communications not protected — compensation. Communications that relate to the expert's study or testimony are the first of the three exceptions "Relate to" has a broad reach A running example of a communication relating to compensation has been the veiled offer of future work — "if you do well in this case, I have many more like it." Thus compensation for the expert's study or testimony is not limited to study or testimony "in the case," and includes compensation to the expert's firm even though it covers work done by others in the firm to support the expert's study or work.

(A)(iii): Communications not protected — facts or data: The expert report required by Rule 26(a)(2)(B) must contain the facts or data considered by the expert in forming the opinions to be expressed. Discovery properly extends to the source of those facts or data, including those identified by the attorney, in order to test the credibility of the opinions.

Repeated discussions always concluded that it is better to extend discovery to all facts or data "considered" by the expert, rather than only those "relied upon." It is important, both in discovery and at trial, to allow questions such as: "Did you consider X? If so, did it affect your opinion? If it did not affect your opinion, why not? If you did not consider X, why did you not consider it?"

It will not always be easy to answer the question whether an expert considered facts or data identified by the lawyer. An attorney might, for example, forward a complete medical history. The expert might quickly discard most of the file as irrelevant to the questions in the case. The rule text does not attempt to answer all questions in marking the point at which disregard means that facts or data identified by the attorney have not been considered.

(A)(iii): Communications not protected — assumptions for opinion: The third category held outside work-product protection is communications that identify assumptions the party's attorney provided to the expert and that the expert relied upon in forming the opinions to be expressed. The attorney may, for example, instruct the expert to assume the facts that the attorney will undertake to prove through other witnesses, or to assume an opinion to be expressed by a different expert.

Work-product protection is withdrawn only as to assumptions the expert relied upon in forming the opinions to be expressed It is important to know the origin of the assumptions that underlie the opinions. A communication identifying an assumption that was considered and rejected by the expert, however, is left within the general work-product protection for attorney-expert communications. The exploration of assumptions the expert does not rely upon falls within the purpose to foster full and free discussion in developing the opinions.

(A)(iii) Communications not exempted from protection — Scope of the expert's assignment The Committee discussed a fourth possible exception that would allow free discovery of communications "defining the scope of the assignment counsel gave to the expert regarding the opinions to be expressed." This possible exception never gained sufficient support to justify refined redrafting. The Committee feared that as drafted for illustration the exception would effectively defeat any protection for communications. More importantly, the Committee concluded that the other three exceptions will support all appropriate discovery. Discovery of facts, data, and assumptions identified by the party's attorney will define the scope of the expert's assignment for all practical purposes. As noted above, protection for communications does not bar such questions as "Did you consider X in forming your opinion?" "Have you ever considered X in considering similar questions?" "Why did you not consider X this time?" If the expert answers the last question by saying "I cannot tell you why I did not consider X," the expert's credibility is destroyed. The expert remains free to answer instead "because the lawyer told me not to consider X."

Committee Note

The final paragraph of the Committee Note, addressing the impact of discovery limitations at trial, reflects difficulties frequently encountered in determining a Note's proper function.

As a discovery rule, Rule 26(b)(4)(A) does not directly address examination at trial about drafts of a disclosure or report of expert testimony, or about attorney-expert communications. The policies that underlie work-product protection, however, often carry over to examination at trial. A research paper on this topic by Andrea Kuperman, Judge Rosenthal's rules clerk, is attached Among the reasons for incorporating work-product protection in (b)(4)(A)(ii) and (iii) is the expectation that courts will adopt the same approach in defining the limits of examination at trial. Many of those who have participated in developing these proposals believe that unless the protection is carried forward to trial lawyers will continue to engage with experts in the costly and inefficient ways that now impede effective development of expert testimony.

The Committee Note expresses an expectation that does not appear in the Civil Rule text — that "the same limitations will ordinarily be honored at trial." This statement raises the common question whether even this limited anticipation crosses the line that prohibits rulemaking by Note rather than rule text. New Civil Rules cannot properly usurp the role of the Evidence Rules. Rule text aimed at trial examination would be out of place. But the point is important

A subsidiary question is presented by the final sentence, a "cf." reference to the Supreme Court decision stating that work-product protection applies at trial. Citing specific decisions in a Committee Note is approached with care. If a case is worth no more than a "cf." signal, its value is properly questioned. But there are good reasons both for including the citation and for guarding it. In one way the case provides particularly strong support — it was a criminal prosecution, adding weight to recognition of work-product protection at trial because there is no work-product provision in the Criminal Rules. But the protection was found waived in circumstances that cloud the extent of protection at trial. The decision is useful for indicating a general direction, but does not provide ready answers to specific questions.

The Committee concluded that it will be useful to include the final paragraph for publication, hoping that comments will provide further guidance.

MEMORANDUM

DATE: December 3, 2007

TO: Professor Richard Marcus

FROM: Andrea Thomson

CC: Judge Lee H Rosenthal

SUBJECT: Protection of attorney-expert communications at trial

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This memorandum addresses certain research questions that arose during the November 2007 Civil Rules Advisory Committee meeting with respect to potential changes to rules governing disclosure of attorneys' communications with testifying experts. The primary issue that has been the focus of my research thus far deals with the application of work product protection at trial. In particular, when discussing potential protections to attorney-expert communications, the question arose as to whether any such protection in Rule 26 could extend to trial because a protection that did not endure through the trial may not effectively deter the behaviors that such protections would be designed to avoid (*i e.*, the retention of multiple experts and the artificial means of communicating with experts to avoid creating discoverable documents). In 1975, the Supreme Court dealt with the issue of protection of attorney work product and expert work product at trial in *United States v Nobles*. However, as noted in your email and memorandum, a lot has happened since that case was decided, including the adoption of the Federal Rules of Evidence and the possible pertinence of Rule 612(2) of those rules Your memo regarding the application of work product protections at trial identified outstanding questions on this issue, including: (a) whether *Nobles* has been followed, (b) whether a revision to Rule 26(b)(3) would also apply at trial (versus *Hickman v Taylor* itself), (c) whether interactions with an expert should be regarded as protected by *Hickman* itself, and (d)

whether there are any cases involving invocation of work product protection at trial to limit questioning of an expert witness This memo provides an overview of the results of my initial research on these issues, and a discussion of some of the case law I have found that may provide some guidance on these issues is described below

I. Whether *Nobles* Has Been Followed

In *U S. v. Nobles*, 422 U.S. 225 (1975), the Supreme Court recognized that work product protection extends to trial. In that case, the defense had hired an investigator who interviewed the prosecution's key witnesses. The investigator created a report, which was largely inaccessible to the government's attorneys The defense called the investigator as a witness, and the court ordered that the report be produced to the prosecution *Id* at 229. The defense refused to produce the report, and the court then refused to permit testimony from the investigator regarding his interviews with the prosecution's witnesses. *Id* Regarding the protection of work product at trial, the court stated:

> Moreover, the concerns reflected in the work-product doctrine do not disappear once trial has begun. Disclosure of an attorney's efforts at trial, as surely as disclosure during pretrial discovery, could disrupt the orderly development and presentation of the case. We need not, however, undertake here to delineate the scope of the doctrine at trial, for in this instance it is clear that the defense waived such right as may have existed to invoke its protections.

Id at 239 On the waiver issue, the court found that "[r]espondent, by electing to present the investigator as a witness, waived the privilege with respect to matters covered in his testimony."[1]

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[1] On this point, it has been noted that while testimonial use of privileged information may waive an evidentiary privilege, it is not proper to refer to the waiver as a waiver of work product protection *See* Jeff A Anderson et al , *The Work Product Doctrine*, 68 CORNELL L REV 760, 889 (1983) Anderson suggests that waiver of work product should not occur when a party discloses work product materials *Id*

> In a case where a party makes testimonial use of work product materials, a court would still hold that the party has waived protection of the documents involved, but only as to an evidentiary privilege, not as to work product immunity The distinction is significant The inherent unfairness associated with

Id Justice White concurred, but wrote separately to express his view that *Hickman v Taylor* had been viewed as a limit on the ability to obtain pretrial discovery, but not as a limit on the discretion of a judge to enter evidence at trial. *Id* at 244, 246.

While the concurrence's strong disagreement in *Nobles* with the proposition that work product protection is available at trial may be enough to give at least some pause as to the doctrine's continued applicability at trial, at least some courts have subsequently followed the majority's view that work product protection extends beyond pre-trial discovery. For example, in *Nichols v Bell*, 440 F. Supp. 2d 730 (E.D Tenn. 2006), the court acknowledged that *Nobles* had recognized that work product protection extends to trial, but noted that no Supreme Court cases have since determined its scope at trial. *Id* at 815. The *Nichols* court found that requiring disclosure of the memoranda prepared by the defendant's testifying medical expert was not a violation of the attorney work-product doctrine because the expert had testified on behalf of the habeas petitioner during the sentencing phase of trial. The court found: "Applying the principles of *Nobles* to the instant case, the state court's conclusion preventing petitioner from arguing the work-product doctrine to sustain a unilateral testimonial use of work product was not contrary to, nor an unreasonable application, of federal law." *Id* at 816. Thus, in addition to approving of *Nobles*'s holding that work product protection extends to trial, the court also seemed to approve of the *Nobles* holding that testimonial use of work product at trial will waive any protection In this case, the "testimonial use" seemed to involve testimony at trial regarding the expert's examination of the petitioner and interviews with

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'testimonial use' of privileged materials that necessitates waiver of evidentiary privilege is not present when disclosures are made to third parties in the course of trial preparation Calling such a waiver of evidentiary privilege a waiver of work product immunity is a misnomer

Id

others. In light of this testimonial use, the court found it appropriate to require disclosure of memoranda prepared by the expert in connection with the litigation. The issue in the *Nichols* case was whether the memoranda prepared by the expert were discoverable when the expert was to take the stand, so that court did not delve into the question of how far questioning could extend at trial with respect to the expert's communications with the retaining attorney or what other documents created by the expert, if any, might still be covered by work product protection.

In addition to finding no violation of work product protection by the disclosure of the memoranda, the *Nichols* court also approved of the state court's requirement that the petitioner turn over memoranda prepared by the testifying expert regarding his interviews with witnesses on the basis that the expert had failed to prepare a report and that the petitioner had failed to notify the prosecution that he intended to call a psychologist until after trial had begun. *Id* at 816–17. The court found that the prosecutor had a substantial need for the material because he was prevented from rebutting the expert's testimony by retaining his own expert and that the state court had authority to impose a sanction. *Id* at 817.

Other courts have likewise appeared to follow the *Nobles* holding that work product extends through trial, although some have done so simply by recognizing that testimony would waive any work product protection, rather than by explicitly stating that work product extends through trial. For example, in *Holder v Gold Fields Mining Corp* , 239 F R.D 652 (N.D Okla 2005), the defendant's consulting expert was listed as a potential testifying *fact* witness, and the opposing party sought to discover any documents related to the expert's proposed testimony. The defendants claimed that the requested documents were protected by the work product doctrine and that they would not know if and how the expert would testify at trial until after the plaintiffs had completed

their case-in-chief. *Id* at 657. The court held that the documents were not *yet* discoverable because there would be no waiver *until the witness took the stand* *See id.* at 659. The court concluded, however, that once the witness testified, documents he relied on in forming his opinion would become discoverable. The court stated that "clearly a witness cannot offer testimony based on documents that he simultaneously claims are protected work-product " *Id* (citing *Nobles*, 422 U.S. at 239–40). The court held that "[i]f a witness testifies in reliance on work-product documents, a waiver of work product will be found." *Id* However, the court concluded that simply listing the expert as a witness was not sufficient to find waiver, seeming to rely on the fact that until there was testimony, there was no disclosure of the work product such that it placed at issue all documents relating to the same subject matter *Id.* at 659–60. The court seemed to imply that the result might have been different if the consultant had been listed as a proposed testifying expert witness (rather than a testifying fact witness) because under Rule 26(a)(2) all documents he considered in forming his opinion would be discoverable. *See Holder*, 239 F.R.D. at 660. The court concluded that if there was any doubt as to whether the witness was acting as a consultant or expert when he considered particular documents, it would be resolved in favor of discovery. *Id* Thus, the court seemed to recognize that work product protection extended to trial, but that there could be a waiver through testimonial use of work product. The court seemed to believe that with respect to testifying expert witnesses, that waiver would extend to anything considered in forming the opinion,[2] but with respect to fact witnesses, the waiver might extend to documents related to the subject matter of the testimony.

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[2] Because the court relied on Rule 26(a)(2) in reaching this conclusion, it is not clear that the result would be the same in the absence of the language in that rule providing for broad discovery of testifying expert witnesses

In another analogous case, the court distinguished *Nobles* on the grounds that the expert in the case at bar did not testify at trial *See John Doe Co. v United States*, 350 F 3d 299 (2d Cir. 2003). In that case, the government filed a motion to compel the production of notes taken by the attorneys for the company being investigated by the grand jury during meetings with officials from the Bureau of Alcohol, Tobacco, and Firearms ("ATF"). *See id* at 300. After the investigation began, the company's attorneys submitted a letter to the U.S. Attorney's Office, arguing that the company had proceeded in good faith and that it had relied on statements made by ATF officials. *Id.* at 301. The government argued that this letter constituted a waiver of any privilege attaching to attorney notes made in connection with meetings with ATF officials. *Id* The court held that there was no unfairness in preventing discovery because unlike in the scenario where the witness is providing testimony that needs to be rebutted, the government was not prejudiced when the company submitted its letter to the U.S. Attorney's office. *Id.* at 304. The court distinguished *Nobles* because the company had not offered testimony *as part of its defense at trial*, and held that telling the U.S. Attorney of its position was not sufficient to waive any privilege. *Id* at 304–05. Although the *John Doe Co.* case did not address waiver of work product with respect to a testifying expert, its holding that there was no waiver of the attorney's work product here because there was no testimony at trial regarding the work product seems to reinforce the *Nobles* holding that work product protection does in fact extend through trial absent waiver (which can be accomplished by testimonial use of the work product, among other things).

In sum, it would appear that several courts have followed the holding in *Nobles* that work product protection extends past discovery and into trial, although the scope of the protection at trial remains unclear The courts that recognize that work product protection extends to trial also seem

to acknowledge that "testimonial use" of work product will waive the protection. However, it is not entirely clear exactly what "testimonial use" entails and how broad the waiver will be when there is "testimonial use." For example, it may be that there is no waiver until the expert actually testifies (as opposed to when he is identified as a potential witness). As another example, it is not clear if putting an expert witness on the stand will open cross-examination up to anything and everything that the expert knows or whether it is simply with respect to material "regarding the same subject matter" as the testimony, or otherwise limited to facts and data considered by the expert.

One difficulty lies in the fact that courts tend to protect the right to cross-examine an expert witness to determine how he arrived at his opinion, and such cross-examination would not necessarily be limited to the facts and data considered. For example, a cross-examiner might inquire into the extent of the retaining attorney's involvement in developing the expert's opinion or suggestions made by the retaining attorney, arguing that these issues are relevant to bias and/or the credibility and validity of the expert's opinion. It seems unlikely that all courts would limit this type of cross-examination on an objection based on work product, because most courts are likely to find that any work product protection that extended to trial was waived by putting the expert on the stand, at least with respect to any inquiries into the credibility/validity of the opinion. Given the freedom that courts grant counsel in cross-examination of an expert witness, it seems unlikely that a court will allow the party presenting the witness much latitude in claiming work product when the witness is on the stand if the testimony has any relation to the work product. Even if a court were to limit cross-examination to questions regarding the facts and data considered by the expert, such a line of questioning might impinge on the expert's communications with counsel, and it is difficult to estimate where a court might draw the line in a particular case. For example, in a scenario discussed

during the November 21, 2007 call, in which the attorney directs the expert to conduct tests to be used in cross-examining the other side's expert, the permissible cross-examination of the expert conducting the tests might include inquiry into the tests directed by the attorney, even though they were not part of the expert's opinion for his testimony. It may be difficult to draw the line regarding what information was considered for the testimony and what was considered for other consulting purposes.

Yet another difficulty arises in that it is complicated to determine the impact of the 1993 amendments to Federal Rule of Civil Procedure 26 with respect to discovery of expert materials/communications. Given the report requirement in the rule and the statement that opposing parties are entitled to "data or other information considered by the witness in forming the opinions," it is unclear if decisions in the last 14 years permit broad discovery of testifying experts because of the language in the amended rule alone or if the same result would occur based on the common law regarding work product and waiver. As a result, it is useful to examine cases decided before the 1993 amendments to determine whether courts permitted discovery of attorney-expert communications or expert work papers prior to the addition of the report requirement. A circuit opinion addressing this issue prior to 1993 that contains useful analysis is *Bogosian v Gulf Oil Corp* , 738 F.2d 587 (3d Cir. 1984). In that case, the Third Circuit held that core work product is not discoverable simply because an attorney shows it to a testifying expert. The court held that the possibility of discovering in cross-examination that the expert's opinion originated with an attorney's thoughts was not sufficient to justify ordering disclosure of documents containing core attorney work product *See id* at 595 ("Even if examination into the lawyer's role is permissible, an issue not before us, the marginal value in the revelation on cross-examination that the expert's view may have

originated with an attorney's opinion or theory does not warrant overriding the strong policy against disclosure of documents consisting of core attorney's work product."). The court did find that if the documents contained facts and data, a party could not avoid production simply by co-mingling the facts and data with an attorney's core work product *See id.* In such a situation, the party would be required to redact any core work product and produce the remainder of the document revealing facts or data considered. *Id* Judge Becker dissented, disagreeing with the majority's position that discovering whether the expert's view originated with an attorney is only of "marginal" value. *Id* at 598. Judge Becker thought that even the majority's view would permit cross-examination regarding the attorney's role in shaping the expert's opinion, but that the issue was whether extrinsic evidence could be used to impeach the expert who denies that his opinion was shaped by an attorney. *Id.* Judge Becker felt that the majority's almost exclusive ban on extrinsic evidence containing core work product that was considered by the expert was contrary to other authority and to FED. R. EVID. 612. *Bogosian*, 738 F.2d at 599. Specifically, Judge Becker pointed to the opinion in *Berkey Photo, Inc. v. Eastman Kodak Co* , 74 F.R.D. 613 (S.D N.Y. 1977), where it was held that core work product shown by counsel to a witness waived the work product protection. *Id.*

The Northern District of California took a view similar to that of Judge Becker's in *Bogosian* in *Intermedics, Inc. v Ventritex, Inc* , 139 F R.D. 384 (N D. Cal. 1991). In that case, the court held that communications between an attorney and a testifying expert were discoverable. The case involved a deposition of the expert (rather than testimony at trial), and the opposing party had sought to compel answers and documents related to the expert's communications with counsel. *Id* at 385. The court found that after weighing the potential increased efficiency produced by precluding disclosure against reducing the risk of compromising the independence of experts, the choice was

easily in favor of disclosure of such communications, even if disclosure would reveal work product. *See id.* at 394 The court determined that there was much to be gained by finding out if the attorney shaped the expert's opinion, *see id.* at 396, a holding that would likely permit cross-examination regarding more than "facts or data considered" by the expert.

In another pre-1993 case, the Western District of Missouri found that a testifying expert's communications with counsel were discoverable. *See William Penn Life Assurance Co. of Am v Brown Transfer and Storage Co.*, 141 F R.D. 142 (W.D. Mo. 1990) In that case, third-party defendants sought to compel the plaintiff's expert to answer deposition questions regarding the content of the expert's communications with plaintiff or plaintiff's counsel regarding the expert's opinion of the conduct of one of the third-party defendants. *Id.* at 142. The court agreed with the dissent in *Bogosian* and found that the third-party defendants were entitled to "explore the effect those communications [between plaintiff's counsel and the expert] had on the expert's formation of his opinion." *Id.* at 143.

Similarly, in *Inspiration Consol. Copper Co. v. Lumbermens Mut Cas Co* , 60 F.R.D. 205 (S.D.N.Y. 1973), the court permitted discovery of documents created by the expert with respect to claims on which it had been indicated that he might be called to testify. In that case, an accountant wore three different hats in the litigation: (1) as a longtime auditor; (2) as an expert employed specifically for the litigation and who would not testify with respect to certain claims; and (3) as an expert who might testify at trial regarding claims that might be made in the alternative. *Id* at 208–09. The court held that "for purposes of Rule 26(b)(4)(B) an independent accountant may wear two hats, that of a general auditor subject to normal discovery, and that of an expert specially retained for litigation, in which case discovery respecting preparation of the claim is limited by Rule

26(b)(4)(B) if he is *not* to be a witness at trial." *Id* at 210 (emphasis in original). The court concluded that discovery was prohibited with respect to documents or opinions prepared in connection with the claim on which the expert would not testify. *Id.* However, the court stated that its holding was "not to be construed . . as an anticipatory ruling on the scope of cross examination of Mr. Smith or of any other Price Waterhouse person who appears as a witness." *Id* With respect to the alternative claim on which the expert might be called to testify, the court permitted discovery, but again emphasized that it was not ruling on admissibility or the scope of cross examination at trial. *Id* at 211.

In addition, another pre-1993 case in the Northern District of California permitted discovery of all documents that were given to a testifying expert. *See Mushroom Assocs v. Monterey Mushrooms, Inc* , 1992 WL 442898 (N.D. Cal 1992). In that patent suit, one of the co-inventors was designated as a testifying expert, and the defendants sought to discover all documents to which he had access, regardless of whether they were used in formulating his expert opinion. *Id.* The court ordered disclosure of all documents that the expert considered, whether they were rejected or relied upon, and noted that "considered" meant that the expert had reviewed the documents in preparation for his expert testimony. *Id* The court declined to grant access to all documents he saw during the life of the patent (*i e* , in his role as co-inventor rather than his role as testifying expert) that he did not consider in forming his expert opinion *Id*

Finally, yet another pre-1993 district court case determined that an expert's documents were not protected under the work product doctrine. *See United States v. Real Property Known and Numbered as 2847 Chartiers Ave , Pittsburgh, PA*, 142 F.R.D. 431 (W.D. Pa 1992). In that case, the government retained an expert to examine alleged gambling machines, and the expert prepared

a report that contained facts known and opinions held by the expert in connection with his examination of the machines. *Id.* at 432 The government contended that the report was not discoverable because it was work product prepared in connection with litigation and was thus protected under *Hickman*, as codified in Rule 26(b)(3). *Id* at 433. The court held that *Nobles*'s holding that attorney work product extends to material prepared by agents for the attorney did not mean that an expert's knowledge and opinions become attorney work product simply because the expert is retained by an attorney in anticipation of litigation. *Id.* The court ruled that expert discovery was governed by Rule 26(b)(4) rather than 26(b)(3) and that most authority recognized that 26(b)(3) "work-product privilege" does not apply to discovery of experts' material. *Id.* at 434. The court also noted that materials prepared by an expert in anticipation of litigation were not protected even prior to the 1970 amendment adopting sub-section 26(b)(4). *Id.* (citations omitted).

Overall, it appears that the majority of pre-1993 cases permit discovery of expert communications with counsel and expert-created documents once the expert testifies at trial. This may mean that the 1993 amendments to Rule 26 regarding expert disclosures are not the sole reason for courts' unwillingness to shield attorney-expert communications or other documents shared with experts from discovery. It appears that the trend before 1993 was to allow access to these materials and communications, so it may be that the 1993 amendments codified the common law practice of allowing access to these documents. The relevance of investigating the effect of the 1993 amendments is that if the practice prior to those amendments was to shield certain expert materials or communications, and the effect of the 1993 amendments was to remove that shield, then the authority to replace the shield is more apparent That is, if common law regarding work product applied to protect expert materials prior to the 1993 amendments, then the Committee should be able

to codify that common law. If the Rules Committee had the authority in 1993 to create a rule that in effect removed certain protections for expert documents and communications, then the Committee ought to have the authority to undo the effect of that amendment and return practice regarding experts to its pre-1993 state. However, an initial review of some of the pre-1993 case law on this topic reveals that it is not clear that removing the effect of the 1993 amendments would be to deny access to expert materials and communications.

II. Whether Rule 26(b)(3) or *Hickman* Would Apply to Work Product Protection at Trial

Another issue relevant to the analysis of potential amendments to rules governing expert discovery is, assuming work product protection does in fact extend through trial, whether a revised version of Rule 26(b)(3) could provide that protection at trial or whether *Hickman* itself would apply. A protection found solely in Rule 26 would appear to apply to discovery matters, not trial, particularly given the current title of that rule. "General Provisions Governing Discovery; Duty of Disclosure." Thus, absent further explanation, a protection for expert communications placed in Rule 26 would not necessarily apply through trial based solely on the text of the rule. On the other hand, to the extent that *Hickman* provides work product protection through trial, it is possible that Rule 26 could be read to include that same protection, given some courts' language stating that Rule 26 incorporates *Hickman*. *See Seal v. Univ of Pittsburgh*, 135 F.R.D. 113, 114 (W.D. Pa. 1990) ("[T]he protection of work product arising from the case of *Hickman v. Taylor* . . has been *supplanted* by Rule 26(b)(3) of the Federal Rules of Civil Procedure . . . ." (emphasis added)), *Airheart v. Chicago and N.W. Transport Co.*, 128 F.R.D. 669, 671 (D.S.D. 1989) ("The work product doctrine had its genesis in *Hickman v. Taylor* and is now *fully expressed* in Rule 26(b)(3) of the Federal Rules of Civil Procedure . . ." (emphasis added)); *but see* Gregory P. Joseph,

Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure, 164 F.R.D 97, 106 n.18 (1996) ("Rule 26(b)(3) does not fully codify the work-product protection recognized in Hickman." (citing MOORE'S FEDERAL PRACTICE ¶ 26.15 at 26-292, 26-293 (1995))). However, if it is really true that *Hickman* has been fully codified in Rule 26, it might be argued that there is no protection for work product at trial because Rule 26 may govern only discovery and its replacement of *Hickman* may leave no protection remaining for work product at trial. Nonetheless, given that many courts appear to have approved of the *Nobles* holding that work product protection applies at trial, it is likely that some protection remains through trial.

At least one court has recognized that while Rule 26(b)(3) only protects work product in discovery, *Hickman* applies to protect work product at trial. *See Stansberry v Schaad Prop.*, 1991 WL 11015266 (W.D. Va. 1991). In that case, the court confronted the question of whether an expert who was consulted by the plaintiffs but not ultimately retained could be called at trial by the defendants without violating the work product doctrine. *Id* at *1. The court found that allowing the defendants to call the expert at trial would not be a *per se* violation of the work product doctrine, but held that the court would prevent against disclosure of work product at trial. *Id* The court recognized that *Hickman* was "codified, in part, for pretrial discovery of documents and tangible objects by Federal Rule of Civil Procedure 26(b)(3) . . . ." *Id* at *2. The court then cited *Nobles* for the proposition that work product protection exists at trial. *Id* (citing *Nobles*, 422 U.S. at 239) The court concluded: "Thus, although Rule 26 is generally inapplicable at trial, the work-product doctrine as developed at common law controls " *Id* This 1991 holding shows that, at least prior to the 1993 amendments, work product protection was recognized at trial for communications with experts under the common law. Even if the 1993 amendments have been interpreted to remove much of the

protection for the attorney-expert communications, both before and during trial, if the common law protected those communications before the amendments, then presumably additional amendments to the rules could recapture that protection both during discovery and at trial.[3] However, it also appears that the rule may not be able to do all the heavy lifting itself because it may only apply to pre-trial discovery. As discussed in the November 21, 2007 conference call, the amended rule could potentially provide discovery protection for attorney-expert communications, and encourage (via committee note) the courts to follow suit with respect to protecting those communications at trial as well.

Another reason that Rule 26(b) may not be able to officially protect work product at trial on its own is that an exclusion of relevant testimony at trial would appear to be an evidentiary exclusion rather than a limit on discovery The relevant statutory scheme provides: "Any . . . rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." 28 U.S.C. § 2074(b). While it is not clear exactly what constitutes an "evidentiary privilege," a rule directed to the exclusion of otherwise relevant evidence at trial is likely to fall into the category of modifying an evidentiary privilege. *See* 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5423 (1980).

> [T]he so-called "work product rule" was originally considered to be an immunity from discovery in civil cases rather than a true privilege In this aspect, the doctrine falls within Civil Rule 26(b)(3). However, recently the Supreme Court has applied the doctrine to exclude trial preparation materials when offered in a criminal trial, a decision which has gone some way toward turning the immunity into a privilege. As such, the "work product" doctrine is within Rule 501.

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[3] As noted earlier in this memo, this appears to be a protection that is waivable by calling the expert as a testifying expert at trial, although the extent of waiver remains unclear.

Id (citing *Nobles*, 422 U.S. 225). Thus, if the revised rule does not specify that it applies at trial, it is not clear that it would automatically apply at trial, and if the rule does specify that it applies at trial, then it might be subject to criticism for avoiding the procedure required by section 2074(b) for creating or modifying a privilege. *See* Gregory P. Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 106 (1996) (Under some interpretations, "Rule 26(a)(2)(B), alone or in conjunction with Rules 26(b)(3)-(4), makes waiver of core work-product an unavoidable cost of putting an expert forward to testify. If core work-product is an 'evidentiary privilege,' and if mandating the waiver of this 'evidentiary privilege' constitutes 'abolishing or modifying' it, § 2074(b) has to that extent been contravened and Rule 26(a)(2)(B) is to that extent invalid. Because § 2074(b) has not been construed, the meaning of these operative phrases is not settled.").

III. Whether Interaction With Experts Should Be Regarded as Protected by *Hickman* Itself

The question has also been raised as to whether interaction with experts should be regarded as protected by *Hickman*. If so, then it may be easier to overcome challenges to a proposed amendment because the amendment would essentially be a codification of an already existing doctrine. The committee notes to the 1970 amendments to Rule 26, which substantially codified *Hickman*, indicate that *Hickman* left open the issue of whether the work product doctrine extends to the preparatory work only of lawyers FED R. CIV. P 26 advisory committee's note (1970 Amendment). The post-1970 case law does not clarify this issue because once Rule 26 substantially codified *Hickman*, courts largely relied on the rule itself to determine the scope of expert discovery, not on *Hickman*, making it difficult to determine if *Hickman* itself provides protection for these communications and interactions *See, e.g., United States v Real Property Known and Numbered*

as 2847 Chartiers Ave , Pittsburgh, PA, 142 F R.D. 431 (W.D. Pa. 1992) ("*Chartiers*") (noting that the *Hickman* principles have been codified in Rule 26(b)(3) and that expert discovery is governed by Rule 26(b)(4) rather than 26(b)(3)). In *Chartiers*, the court noted that the advisory committee note to Rule 26 "expressly states that the committee 'reject[ed] as ill-considered the decisions which have sought to bring expert information within the work product doctrine.'" *Id.* at 433 (citing FED. R. CIV. P., West's 1991 Revised Edition at 87). There is other language in the committee note that indicates that there were very few decisions before the 1970 amendments that protected expert information from discovery. *See* FED. R. CIV. P 26 advisory committee notes (1970 Amendments) ("These new provisions of subdivision (b)(4) repudiate the few decisions that have held an expert's information privileged simply because of his status as an expert.") (citing *Am Oil Co v Penn Petroleum Prods Co* , 23 F.R.D. 680, 685–86 (D.R.I. 1959)). The fact that *Hickman* was largely codified in Rule 26, coupled with the fact that the committee notes disapproved of strong discovery protections for expert materials, make it difficult to assess whether *Hickman* actually provided that protection and the amended rule then reduced it,[4] or if strong protection for expert materials never truly existed.

IV. Case Law Involving Invocation of Work Product At Trial to Limit Questioning of an Expert Witness

I have not encountered any cases directly involving invocation of the work product doctrine at trial to limit questioning of an expert witness. Most of the relevant case law focuses on obtaining testifying experts' documents and draft reports, which seem to be generally discoverable under the

[4] Clearly, some protection of certain expert materials did survive the amendments *See, e g , Krisa v Equitable Life Assurance Soc.*, 196 F R D 254, 259 (M D Pa 2000) ("The policy reasons supporting the 'bright-line' rule in favor of disclosure of materials disclosed to an expert are not compelling and ignore the policy considerations that compel protection of core work product ")

current version of the rule Of the cases I have seen thus far, the one most relevant to this issue is *New Mex. Tech Research Found v Ciba-Geigy Corp.*, 1997 WL 576389 (D R.I. 1997), which involved inquiry into work product during the deposition of a testifying expert. In *Ciba-Geigy*, the plaintiff's testifying expert was deposed and opposing counsel inquired into whether the plaintiff's counsel had expressed to him their views on the case and on infringement of the patent-in-suit, and whether they had discussed their interpretation of relevant claim terms used in the patent *Id* at *1. The questions called for only a "yes" or "no" answer, but the plaintiff's counsel objected on the basis of work product. *Id* The parties agreed that follow-up questions would have gotten into work product, but apparently disagreed regarding the initial questions. *See id* In addition to objecting to questioning, the plaintiff's counsel withheld several documents, including: (1) several authored by the expert having notes made by the expert during conversations about the case with plaintiff's counsel; (2) a document authored by the expert and the plaintiff's counsel, described as a "draft supplemental expert report reflecting mental impressions of counsel, and (3) a document authored by the plaintiff's counsel with a copy sent to the expert described as "notes reflecting mental impressions of counsel." *Id.* at *2. The defendants took the position, relying on *Intermedics, Inc v Ventritex, Inc.*, 139 F.R.D. 384 (N.D. Cal. 1991), that any communications, written or oral, given by counsel to a testifying witness, are discoverable, even if they would ordinarily be protected by the work product doctrine. *See Ciba-Geigy*, 1997 WL 576389, at *3. The court rejected this approach, finding more compelling the reasoning in *Haworth, Inc. v Herman Miller, Inc* , 162 F.R D. 289 (W D Mich 1995), which would protect an attorney's core work product. *Ciba-Geigy*, 1997 WL 576389, at *5 However, the court noted that even the *Haworth* analysis "does not eliminate discovery of the bases for the expert's opinions or the source of the facts on which the expert relies,"

and that "the expert is not insulated from all discovery." *Id* The court quoted *Haworth* regarding how to determine whether a question posed to an expert is proper:

> "Whether a question is improper depends upon the question. If the question regards mechanical advice on the preparation of the expert report, the question is not objectionable. If the question tests whether certain facts had not been provided the expert for his consideration, the question would be proper as well. Opposing counsel may test whether the witness's report accurately reflects all the facts actually considered. Opinion work product protection is not triggered unless 'disclosure creates a real, nonspeculative danger of revealing the lawyer's mental impressions' and the attorney had 'a justifiable expectation that the mental impressions revealed by the materials will remain private.'"

Id (quoting *Haworth*, 162 F.R.D at 296 (quoting *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1015–16 (1st Cir. 1988))). The court held that the questions posed at the deposition would require revealing counsel's opinions about the case, whether there had been infringement of the patent, and counsel's interpretation of terms in the patent, and that they were therefore objectionable. *Id* at *6 The court likewise denied access to the documents *Id*

It may also be possible to analogize cases regarding the discoverability of documents provided to testifying experts to the scenario where the expert is questioned on the stand regarding information claimed to be subject to work product immunity. Presumably, if courts will limit discovery of certain categories of work product even after it is shown to a testifying expert, then it seems likely that courts would also limit questioning at trial regarding the same categories. And the converse is likely true as well—if the court will permit pre-trial discovery of work product shown to an expert, surely it would permit inquiry into work product at trial. As to this line of cases, there appears to be a split of authority as to whether to protect core work product once it is shown to a testifying expert.

Those cases holding that core work product is discoverable if given to a testifying expert seem to focus on the theory that if the attorney is going to shape the expert's view, then the opponent is entitled to inquire into the attorney's participation, and on the fact that the attorney has control over the amount of work product given to an expert, if any. These cases hold that if the attorney is concerned about discoverability, the attorney can simply be careful about giving core work product to the expert.[5] For example, in *Elm Grove Coal Co. v Director, Office of Workers' Comp. Programs*, 480 F.3d 278 (4th Cir. 2007), the court heard an administrative law action governed by administrative law rules of procedure containing a provision that matched federal Rule 26(b)(3), with the exception of the 1993 amendment regarding expert disclosures. *See id.* at 300. The court determined that the expert could not be properly and fully cross-examined in the absence of draft reports and attorney-expert communications. *Id* at 301. The court found that "other courts, under both pre- and post-amendment Rule 26, have mandated the production of similar draft reports and attorney-expert communications with respect to testifying experts," *id* at 301, but noted a split of authority: "We recognize that certain courts, both before and after the 1993 amendments to Rule 26, have determined that draft reports provided to testifying experts and attorney-expert communications are entitled to varying degrees of work product protection," *id* at 302 n.24 (citing *Bogosian*, 738 F.2d 387; *Nexxus Prods. Co. v. CVS N Y , Inc* , 188 F.R.D 7, 10–11 (D. Mass. 1999)). The court continued: "We are unpersuaded by this line of decisions [protecting draft reports shown to testifying experts and attorney-expert communications as work product] and, as discussed herein, believe that the vastly superior view is, consistent with the 1993 amendments to Rule 26, that such attorney-

[5] This theory runs into the very problem that an amendment to the rule would be aimed at solving - the use of two sets of experts so that the attorney has one set that she can discuss theories with and another set that will testify

expert communications are not entitled to protection under the work product doctrine." *Elm Grove Coal*, 480 F.3d at 302 n 24. The court concluded: "In sum, draft expert reports prepared by counsel and provided to testifying experts, and attorney-expert communications that explain the lawyer's concept of the underlying facts, or his view of the opinions expected from such experts, are not entitled to protection under the work product doctrine." *Id.* at 303

Similarly, in *Energy Capital Corp. v United States*, 45 Fed. Cl. 481 (Ct. Fed. Cl. 2000), the case was governed by the rules of procedure for the Court of Federal Claims, which contained a rule governing expert discovery that matched federal Rule 26 before the 1993 amendments. 45 Fed. Cl. at 493. The court stated, "All cases of which this court is aware have required that the production of factual information given by an attorney to an expert must be produced. In addition, courts also require the production of the information and opinion provided by an expert to the attorney " *Id* at 493–94 (internal citations omitted). However, on the issue of whether the party must produce documents that reveal opinion work product, the court found that other courts had reached varying results. *Id.* at 494. The court concluded:

> [T]his Court finds that the policy arguments favor the production of all materials given to experts. Complete disclosure promotes the discovery of the true source of the expert's opinions and the detection of any influence by the attorney in forming the opinion of the expert. In addition, the attorneys can minimize how much the other side learns of their opinion work product by monitoring what information is provided to the expert. . . Lastly, a clear line is easier to administer and a predictable result helps litigants plan their strategy.

Id

In yet another case, the Eastern District of New York found all documents "considered" by the expert to be discoverable, but focused its reasoning on the 1993 amendments to the federal rules. *See Weil v Long Island Sav. Bank FSB*, 206 F R D. 38, 39–40 (E D.N.Y 2001) (collecting cases that

have held that the 1993 amendments require that anything disclosed to a testifying expert must be produced to opposing counsel, whether or not the expert relies on the disclosed material). The court noted a split of authority on the issue of the protection of core work product given to an expert *Id* at 40. The court concluded that even core work product is discoverable if given to a testifying expert because such discovery would lead to more effective cross-examination and would reveal counsel's involvement in forming the expert's opinion. *Id* at 41. The court also focused on the attorney's ability to decide whether to provide the expert with work product material. *Id* at 42.

In contrast to those cases permitting discovery of core work product, those courts finding that core work product is not discoverable after disclosure to a testifying expert have focused on the fact that Rule 26(b)(3) is subject to Rule 26(b)(4), which grants broad discovery of expert witnesses, but that nothing in either section suggests that core work product is discoverable under (b)(4). For example, in *Krisa v Equitable Life Assurance Soc* , 196 F.R.D 254 (M.D. Pa. 2000), the court rejected a bright-line rule that materials given to a testifying expert are automatically discoverable, and exempted core work product from discovery. The *Krisa* court determined that a bright-line rule in favor of requiring production of attorney work product shown to a testifying expert would "abridge[] the attorney work product privilege without specific authority to do so." 196 F.R.D. at 260. A pre-1993 example of a case finding that core work product is not discoverable after showing it to an expert is *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 594 (3d Cir. 1984) (finding that the proviso in the first sentence of Rule 26(b)(3) beginning "[s]ubject to the provisions of subdivision (b)(4) . . .," does not limit the second sentence of Rule 26(b)(3), which restricts disclosure of work product revealing "mental impressions" and "legal theories")

In sum, my research so far has not uncovered case law involving the situation where an

expert took the stand at trial and there was an objection based on inquiry into work product. As noted, however, this may be the result of the broad expert discovery permitted by the 1993 amendments and the corresponding committee notes. While it may be possible to analogize cases regarding the discoverability of materials given to an expert or attorney-expert communications to the situation of questioning an expert witness on the stand, even that analogy does not add much clarity because it appears that there has been a split of authority, both before and after the 1993 amendments, as to whether core work product will be shielded from discovery when shared with a testifying expert.

V. Conclusion

Overall, it appears that the majority of authority holds that work product protection does in fact extend through the trial. Thus, the concern that a rule amendment would not actually deter parties from retaining a second set of experts if the protection would simply disappear at trial may be somewhat alleviated by the general acceptance of the proposition that work product protection extends through trial. However, under the current regime, it also appears that there is a strong risk of waiver of work product protection when an expert who has been exposed to work product is put on the stand The extent of the waiver is unclear, and it is difficult to remove the impact of the 1993 amendments to determine whether the common law would provide protection for work product shared with testifying experts absent the contrary implication of the 1993 amendments. Even prior to the 1993 amendments, the case law was unclear as to the extent of protection for work product shared with a testifying expert Thus, although work product immunity may extend through trial as a general proposition, the interest in permitting effective cross-examination may remove that protection, at least to some extent, for testifying experts. Because the extent of work product waiver

that may be found with respect to a testifying expert is unclear, and because it may be difficult for Rule 26 to officially provide protection through trial without modifying a privilege, it may be difficult to fully prevent the cautious party with sufficient resources from hiring two sets of experts and avoiding written communications with testifying experts. Nonetheless, as discussed in the November 21, 2007 conference call, it may be that a limit on discovery of expert materials in Rule 26, coupled with an advisory committee note encouraging courts to maintain the protection through trial, will go a substantial distance in preventing the undesired behaviors.

III INFORMATION ITEMS

The Committee considered the current installment of the Federal Judicial Center study of the impact of the Class Action Fairness Act of 2005 on the federal courts. This first phase of the study examines the rates of original class-action filings and removals. The total number of class actions in federal courts has grown substantially since CAFA was enacted, but much of the growth has been in federal-question actions, particularly labor cases. The increase in diversity actions prompted by CAFA has been remarkably close to the annual increase of 300 actions predicted by the Judicial Center. The increase has come mainly in contract, consumer-protection, and tort property-damage cases. Tort personal-injury cases have declined, perhaps because it seems to be increasingly difficult to persuade courts to certify class-action treatment in these cases. The increase in diversity class actions has been widely spread among courts in the different circuits, although some circuits have experienced more pronounced increases than other circuits. The next phase of the study will compare the characteristics of class actions brought to federal courts before CAFA with those brought after. One pair of comparisons will focus on diversity class actions, taking an intense look at how they are handled. The second pair of comparisons will focus on federal-question cases, primarily to determine whether there has been an increase in the addition of state-law claims.

The Committee also heard a report on the work of the Administrative Office to review and revise the many forms it has created for clerk's offices and for use by lawyers. It was noted that the Civil Rules forms have never been submitted for review by the Advisory Committee. Examples were provided for examination. The Administrative Office is considering whether it should change the process of generating these forms, including the possibility of seeking review by a relevant rules advisory committee.

Possible future Civil Rules projects were noted. Professor Gensler will prepare a prospectus on the question whether it is desirable to undertake amendment of Rule 26(b)(5)(A) to provide more specific guidance for practice in creating privilege logs. The Committee will continue to study developing practice in response to the notice-pleading decision in the Twombly case, and may begin to consider the range of possible responses at its next meeting. A study of the impact of the e-discovery amendments also may be undertaken, although it is hoped that the amendments will work well enough in the first few years to justify a deliberate approach. And it may be that the Committee will revive the long-stagnating effort to develop simplified procedures for some categories of cases; the effort may seem more promising if some new approach is identified