COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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, as supplemented June 30, 2008**

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

Introduction

This report accompanies publication for comment of proposed amendments to Rules 26 and 56 of the Federal Rules of Civil Procedure. These amendments were approved for publication at the June 2008 meeting of the Standing Committee on Rules of Practice and Procedure. The explanation of the proposals is taken from the Civil Rules Advisory Committee Report to the Standing Committee, adding for each rule specific invitations for comment on issues that have been highlighted in ongoing discussions. These specific invitations should not obscure the value of comments on all aspects of each proposal — indeed the most valuable comments are likely to include questions that have not yet been identified.

The Civil Rules Advisory Committee met in Half Moon Bay, California, on April 7 and 8, 2008. * * * 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.

* * * * *

Part II.A of this Report recommends for publication proposals that would amend parts of the Rule 26 provisions governing disclosure and discovery with respect to expert trial witnesses. Part II.B 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. 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.

* * * * *

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.

* * * * *

A. 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 disclosure 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 26(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 any information that might be valuable, 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 present 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)(B) and 26(b)(4) 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.

Invitation for Comment

Careful study and detailed comments on all aspects of these proposals are important to developing the best possible amendments. Many aspects of the proposals have been intensely debated and many changes have been made as they have developed. Renewal of even well-rehearsed debates is helpful. Identification of questions that have not even been considered is particularly helpful. The questions described here are a selection of those that have figured regularly and often prominently in ongoing discussions. They are noted because they are certain to elicit comment, with the hope of eliciting comment from as many voices as possible. The background included with some of them is simply that — a description of background considerations that is not intended to close off discussion of any assumption or suggestion.

These proposals accept the established discovery practice that subjects an expert's opinions to intense examination. Inquiry continues to be permitted as to the opinions, their foundations, all facts or data considered in forming the opinions and the sources of the facts or data, assumptions made, alternatives considered and rejected, alternatives not considered, persons consulted, and still other matters. But two avenues of inquiry commonly pursued now will be cut back, permitting discovery only on satisfying the substantial need and undue hardship test stated in Rule 26(b)(3). The interrelated reasons for these proposed limits deserve careful comment.

Drafts of expert witness reports under Rule 26(a)(2)(B) and of party disclosures under proposed Rule 26(a)(2)(C) would be protected for reasons that reflect the purpose of requiring these reports or disclosures. They are not themselves trial evidence. Instead they provide the foundation for informed examination by deposition or at trial, and notice of the need to prepare to rebut opinions that otherwise might not be anticipated. Those functions are performed by the report or disclosure. An expert's attempt to depart from the expert's own report exposes the expert to impeachment, and significant departures may lead to exclusion or other sanctions under Rule 37(c)(1). What is important is the opinion, and the foundation and reliability of the opinion, not the process of

reflecting the opinion in the report. Curtailing discovery of draft reports does not limit the opportunity to explore the foundation and reliability of the opinion itself.

The Committee believes that the working of the draft report provision in proposed Rule 26(b)(4)(B) is clear. Absent a showing that satisfies the Rule 26(b)(3) test, production of draft reports is barred. Deposition questions as to the contents or evolution of draft reports also are barred. But it remains proper to inquire fully about the foundation and reliability of the opinion, including the process and analysis by which the expert arrived at the opinion. Given such full inquiry into the basis for the opinion, will curtailing discovery of draft opinions significantly impair the truth-seeking process? How is the answer to this question affected by the observation of many lawyers that parties rarely obtain draft expert reports in practice, either because they stipulate out of such discovery or because experts and parties go to great lengths to avoid creating them, often at significant cost?

The requirement in Rule 26(a)(2)(B) that the expert's report be "prepared and signed by the witness" raises a second question. It may seem natural to inquire whether the report in fact satisfies this requirement by asking whether the expert had help in preparing the report, and then moving into examination about the source, nature, and extent of the help. The 1993 Committee Note explaining the report requirement, however, observes that the rule "does not preclude counsel from providing assistance to experts in preparing the reports," and concludes that the report nonetheless "should be written in a manner that reflects the testimony to be given by the witness." The Committee believes it important to carry forward the direction that the expert prepare and sign the report, to ensure both the accuracy of the report and the expert's ultimate responsibility for the report. Inquiry into the ways in which counsel may assist the expert in preparing the report, however, seems to be little different from inquiry into the ways in which counsel and expert interact in focusing development of the expert's opinions. Is there anything distinctive about preparation of the report that advances the process of testing the opinion beyond the help to be had by appropriate inquiry into the development of the opinion itself?

Protection of draft reports also reflects the reasons for protecting communications between the party's attorney and the expert witness. As noted above, extending the test of Rule 26(b)(3) reflects the conclusion that the present regime that generally allows free discovery of these communications does not in fact contribute significantly to testing expert opinions in many cases. The first question is whether that conclusion, voiced by many attorneys representing a broad cross-section of practice experience, is sound.

A second set of questions goes to the reasons for protecting communications only between a party's attorney and an expert who is required to prepare a Rule 26(a)(2)(B) report. These are the experts who are retained or specially employed to provide expert testimony in the case, or whose duties as an employee regularly involve giving expert testimony. The Committee believes discovery of attorney communications with these experts involves several distinctive concerns. Retained experts have been the focus of the widespread advice that present discovery practices provoke behavior that effectively stymies any worthwhile discovery and interferes with effective and efficient preparation for trial. Similar concerns have not been raised about witnesses who give expert testimony but have not been specially retained. The Committee also has considered the concerns of some lawyers that specially retained experts play a special role in working with counsel to identify and evaluate the theories that are relevant to the known facts (including, at times, the theories relied upon by an adversary), and also to identify the facts that would support a theory if the facts can be proved. Free exchanges are important to developing the case, and also to understanding and preparing to meet the adversary's case. Witnesses outside the 26(a)(2)(B) categories are less likely to figure in developing the case in these ways. In addition, witnesses outside these categories often will present "fact" testimony in addition to expert opinions under Evidence Rule 702, 703, or 705.

It could be difficult to apply in practice a rule that protects communications that address the witness's role as expert but not those that address the role as fact witness. Do these distinctions suffice, or should the protection of communications be extended to all witnesses expected to testify as experts?

A third question is whether the exceptions to protecting attorney-expert communications are properly framed to support all discovery in this direction that is important to test the expert's opinions, but no more. A matched pair of questions arises from comparing the exception that allows free discovery of the parts of communications that identify facts or data "considered" by the expert, and of the parts that identify assumptions "relied upon" by the expert. Given free discovery of all facts or data considered by the expert, is it important to know that the attorney was the source of those considered but not relied upon? Or is knowing that the attorney was the source important only as to facts or data actually relied upon to support the opinion? Conversely, is it for some reason important to know that the attorney identified assumptions that the expert considered, but did not rely upon?

The exceptions apply only "to the extent that" the communication falls within one of the three exceptions. When a single attorney-expert communication touches both on matters within an exception and also on matters not within any exception, will it be difficult to distinguish in practice between the parts of the communication that fall within an exception and the parts that do not?

Illustrations may serve to frame the broad question whether the proposed drafting adequately conveys the intended meaning. Testing the expert's opinion itself remains fully open. For example, no special showing is required to ask the expert whether other theories were explored; whether the expert has ever explored theories that were not explored in this case; whether or not the expert has ever explored other theories, why were they not explored in this case; whether any facts were considered and not relied upon — and why they were not relied up; whether any tests were run, or models developed, other than those expressed with the opinion — and what were the results; who, other than the party's attorney, provided support or participation in framing the opinion; and all of the matters described in the exceptions to the protection for attorney-expert communications. Nor does the rule attempt to regulate the expert's answers. If the expert is asked why a particular theory was not explored, for example, the expert is free to answer "because my lawyer told me not to," or "because my lawyer directed me to explore only the theory that supports my opinion." Does anything in the draft words cast doubt on these outcomes? If so, how might the drafting be improved?

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

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

---

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

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 4 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) *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 Rule 26(a)(2)(A) 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.

(D~~C~~) *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.

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

* * * * *

(b) Discovery Scope and Limits.

* * * * *

(4) Trial Preparation: Experts.

(A) *Deposition of an Expert Who May Testify.* 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.

(B) *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.

(C) *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:

(i) Relate to compensation for the expert's study or testimony;

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

(iii) Identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

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

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

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

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D~~B~~); and

(ii) for discovery under (D~~B~~), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

* * * * *

COMMITTEE NOTE

Rule 26. Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the

expert report to facts or data (rather than "data or other information," as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and — with three specific exceptions — communications between expert witnesses and counsel. Together, these changes provide broadened disclosure regarding some expert testimony and require justifications for disclosure and discovery that have proven counterproductive.

The rules first addressed discovery as to trial-witness experts when Rule 26(b)(4) was added in 1970, permitting an interrogatory about expert testimony. In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including — for many experts — an extensive report. Influenced by the Committee Note to Rule 26(a)(2), 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) 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.

Subdivision (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) 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.

Subdivision (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.

Subdivision (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).

Subdivision (b)(4). Rule 26(b)(4)(B) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to

provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form 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)(C) is added to provide comparable work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of 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)(B) and (C) apply to all discovery regarding the work of expert witnesses. The most frequent method is by deposition of the expert, as authorized by Rule 26(b)(4)(A), but the protections of (B) and (C) apply to all forms of discovery.

Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed.

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

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

in forming the opinions to be expressed. In applying this exception, courts should recognize that the word "considered" is a broad one, but this exception is limited to those facts or data that bear on the opinions the expert will be expressing, not all facts or data that may have been discussed by the expert and counsel. And the exception applies only to communications "identifying" the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party's attorney may tell the expert witness to assume 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)(C), or regarding draft expert reports or disclosures. But such discovery is permitted regarding attorney-expert communications or draft reports only in limited circumstances and by court order. 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)(B) or (C), although it may provide grounds for a motion under Rule 37(a).

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

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

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

Detailed Discussion and Questions

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

(C) *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 Rule 26(a)(2)(A) 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.

(D~~C~~) *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.

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). 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) 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): Work-Product for Attorney-Expert Communications and Draft Reports

(b) Discovery Scope and Limits

* * * * *

(4) Trial Preparation: Experts.

(A) *Deposition of an Expert Who May Testify.* 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.

(B) *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.

(C) *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:

(i) Relate to compensation for the expert's study or testimony;

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

(iii) Identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

(DB) *Expert Employed Only for Trial Preparation.* * * *

(A): Deposition before Rule 26(a)(2)(C) party disclosure: The rule text is taken unchanged from the present rule; only the tag line is expanded. 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.

(B): 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 subparagraph (C).

(B): 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 subparagraph (C). That version was unclear to some readers. The present proposal uses more words, but should be clear: "regardless of the form of the draft."

(C): 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 in-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.

(C): 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. Neither have they figured in the many discussions of the practical problems that arise in current discovery practice.

(C): 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 subparagraph (C). Discovery of matters outside an attorney-expert communication is not affected by subparagraph (C). As one example, an expert might properly be asked how much compensation had been earned by testifying in other cases for this lawyer.

(C): 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.

(C): 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.

(C): 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.

(C) 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 next-to-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. Among the reasons for incorporating work-product protection in (b)(4)(B) and (C) 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 of this paragraph, 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.

B. Rule 56: Summary Judgment

Introduction

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 to the court in three steps — 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.

Invitation for Comment

Careful study and detailed comments on all aspects of these proposals are important to developing the best possible amendments. Many aspects of the proposals have been intensely debated and many changes have been made as they have developed. Renewal of even well-rehearsed debates is helpful. Identification of questions that have not even been considered is particularly helpful. The questions described here are a selection of those that have figured regularly and often prominently in ongoing discussions. They are noted because they are certain to elicit comment, with the hope of eliciting comment from as many voices as possible. The background included with some of them is simply that — a description of background considerations that is not intended to close off discussion of any assumption or suggestion.

Rule 56(a): "Should Grant": In 2007 Rule 56 was reworded as part of the Style Project. As with all of the rules, the changes were "intended to be stylistic only." One of the unbreakable commandments of the Style Project was that "shall" is never used in rule text because of its inescapable ambiguity. Former Rule 56(c) said that summary judgment "*shall* be rendered forthwith * * * if there is no genuine issue as to any material fact and * * * the moving party is entitled to a judgment as a matter of law." The 2007 Committee Note explained that "shall" was changed to "should" in order to preserve the meaning that "shall" had acquired in practice. A Supreme Court decision and many lower-court decisions, described by reference to a treatise, were invoked to show that there is limited discretion to deny summary judgment even though the summary-judgment record reveals no genuine issue of material fact. The Note observed: "'Should'* * * recognizes that courts will seldom exercise the discretion to deny summary judgment when there is no genuine issue as to any material fact."

Some who have participated in developing the present proposal have argued that "should" is the wrong word, and should be replaced by "must." The argument is supported by pointing to the expression — carried forward from both former Rule 56(c) and present Rule 56(c) — that the movant is "entitled to judgment as a matter of law." Several questions should be explored in addressing this argument. The reasons favoring the proposed text should be stated before framing the questions.

The starting point is the firm purpose to revise Rule 56 only with respect to the procedures for presenting and deciding a summary-judgment motion. The standard for granting summary judgment is left as it is and may be further developed by the courts. Whatever word is chosen for rule text should carry the standard forward without inviting arguments that it has been changed. Although there has not been much opportunity to assess reactions to "should" in the 2007 version of Rule 56, experience during the period the present proposals remain under consideration will offer some insight as to its interpretation.

This starting point is bolstered by the view that "should" conveys not only the present standard but also the proper standard. Summary judgment cuts off the right to trial; in many cases it cuts off the right to trial by jury. It is based on a paper record, not live testimony. A paper record that fails to show a genuine dispute as to any material fact cannot always be an infallible sign that a trial record also will require judgment as a matter of law. A judge who is not satisfied that pretrial

circumstances have afforded a fully reliable demonstration that trial will not change the record should have some measure of freedom to send the case to trial. These doubts may reflect concerns about the need to evaluate the credibility of testimony presented only by deposition transcript, affidavit, or declaration. The need for a full trial record may also be particularly important when the case presents questions, such as novel questions of law, that affect important interests beyond those engaged in the immediate dispute.

The intrinsic value of a limited discretion to deny summary disposition is supplemented by practical concerns. One is that the summary-judgment standard, however clearly expressed, is not always clear in application. The question whether there is a genuine dispute may balance on the sharpest edge of close judgment. A judge who believes that the balance falls on the side of no genuine dispute may also recognize that the all-too-reasonably-possible costs of granting summary judgment, appeal, and remand for trial outweigh the cost of proceeding to trial.

Another practical concern is that many cases present some issues that seem suitable for summary judgment while other issues are not suitable. The issues that remain for trial may require presentation of almost the same evidence — and in some cases all of the same evidence — as trial of all issues. Partial summary judgment will not save significant expense nor reduce delay, and creates the risk of increased expense and delay if the partial summary judgment is reversed after a first trial. Consideration of a detailed record, research, and decision of the summary-judgment issues, moreover, may impose a greater burden on the court than the surer course of going to trial.

A subsidiary but real practical concern grows from the arguments that might be spun out of "must." The many concerns that shape trial scheduling mean that a summary-judgment motion may at times be possible — and in any event may be made — only on the eve of trial. It may be important to hold the trial on schedule without the delay required to risk the chance that summary judgment will foreclose the need for any trial. A rule directing that summary judgment must be granted could be advanced in arguing that trial must be postponed until the court can rule on the motion.

Proponents of "must" respond that "shall" in the pre-2007 Rule established an entitlement to summary judgment, protecting a party against the cost and delay of a wasted trial and concomitantly protecting against untoward pressures to settle. They also point to the substantial numbers of summary-judgment motions that are never ruled upon. They argue that "must" is essential to protect against a tendency to delay ruling in the hope of settlement and with the thought that trial may be less work for the court than summary judgment.

The general question is whether "should" achieves a proper balance of these concerns in light of the central purpose to carry forward without changing the summary-judgment standard as it has developed in practice.

A more pointed question is whether, if the rule text continues to say "should," the Committee Note should be expanded to reiterate and perhaps entrench the observations in the 2007 Committee Note. The Note could simply repeat the suggestion that courts will seldom exercise the discretion to deny summary judgment when the summary-judgment papers show there is no genuine dispute of material fact. Although there is a risk that any expansion on the 2007 Note might seem to invite changes in the summary-judgment standard, making a rule by Note rather than rule text, it might be possible to offer illustrations of the sort sketched above with explicit statements that the standard is not being changed.

Another possible approach would be to avoid the issue by finding text that does not adopt either "should" or "must." The suggestions have tended to rely on the passive voice: "Summary judgment is [required][necessary][appropriate] if there is no genuine dispute as to any material fact * * *." The central question is whether it is possible to find any descriptive word that correctly conveys the present summary-judgment standard. A subsidiary question is whether an exactly right word would

be correctly applied, even as bolstered by a Committee Note stating that the word is intended to carry forward the practice established while Rule 56(c) said "shall."

Yet another approach would be to distinguish between partial summary judgment and situations in which there is no genuine dispute as to any material fact as to all claims against a party. Rule text could say that summary judgment must be granted when there is no genuine dispute of material fact and a party is entitled to summary judgment on all claims, and that summary judgment should be granted when there is no genuine dispute as to some smaller part of an action. The central question is whether the rule ought to say "must" when summary judgment would protect a party against any further involvement in the action. A subsidiary question is whether the attempted distinction would prove effective, or might even cause some confusion. A rough draft illustrating the distinction is set out in the margin to focus comments on how the distinction might be expressed.**

Rule 56(c): "Point-Counterpoint," Supported by Record: The Committee believes that the point-counterpoint procedure does not impose unreasonable demands. Many local rules, and the independent practices of many judges, attest to its efficiency. A movant does not present a credible summary-judgment motion unless the movant identifies facts that are established by evidence that meets the summary-judgment standard and identifies the record materials containing that evidence. Nor does a nonmovant present a credible response by simply disagreeing; the disputed facts must be identified, and the weaknesses of the supporting evidence exposed by challenging that evidence, by pointing to refuting evidence in the record, or by showing that other facts — also supported by record citations — defeat the motion. The proposed Rule 56(c) procedure simply identifies the elements that have inhered in Rule 56 from the beginning. The motion should not be made, or resisted, without this level of preparation. Is there any reason for concern that requiring orderly presentation will deter well-founded motions or impose burdens out of proportion to the benefits for the parties and the court?

Rule 56(c)(3): Accept or Dispute: Proposed Rule 56(c)(3) recognizes that a party may accept or dispute a fact for purposes of the summary-judgment motion only. Allowing a party to accept a fact only for purposes of the motion can be an important means of making the summary-judgment process more efficient. If a movant states an extravagant number of facts, many of them unnecessary or irrelevant, the nonmovant can accept them for purposes of the motion only and focus the response — and the court's attention — on the facts that are important and material. But it may be asked whether there is any need for rule text that addresses a provisional dispute. Courts generally do not require a party to continue disputing a proposition that the party later is willing to concede. Yet there may be some concern that a court may hold a party bound by disputing a position it later wishes to assert when developing information reverses the parties' interests in the fact. For example, a defendant uncertain as to the applicable limitations period might at first wish to dispute the

---

(a) **Motion for Summary Judgment or Partial Summary Judgment.

(1) A party may move for summary judgment on all or part of a claim or defense.

(2) The court must grant the motion if there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law on all claims.

(3) If a party is not entitled to summary judgment on all claims, the court should grant the motion if there is no genuine dispute as to any material fact and the party is entitled to judgment as a matter of law on a claim, defense, or part of a claim or defense addressed by the motion.

(4) The court should state on the record the reasons for granting or denying summary judgment.

Note that paragraph (3) focuses on the part of the case addressed by the motion. The discretion to go beyond the motion established by subdivision (f) is not subject to the "should" command.

plaintiff's assertion that the claim arose on April 2, 2003, and then — after the period is chosen — wish to assert that the claim arose on April 2, 2003.

Rule 56(c)(4)(B), (f)(2): Notice of Court's Consideration: Proposed Rule 56(f)(2) requires that the court give notice and a reasonable time to respond before granting or denying a motion for summary judgment "on grounds not raised by the motion, response, or reply." Subdivision (c)(4)(B) directs the court to give notice under subdivision (f) before granting summary judgment on the basis of materials in the record not called to its attention under subdivision (c)(4)(A), but not before denying summary judgment on the basis of such materials. This provision proceeds on the premise that a court should not always be required to give notice before denying summary judgment on the basis of materials not called to its attention by the parties. The parties, for example, might cite particular parts of depositions; the court may read other parts of the same depositions and find that they establish a genuine dispute. This use of record materials to address the "grounds" for judgment argued by the parties is not within the intended reach of subdivision (f). Two questions emerge: should notice be required if the court finds a genuine dispute and denies summary judgment by examining record materials not cited by the parties? And is subdivision (f)(2) sufficiently clear to support the intended distinction?

Subdivision (e)(3): Effect of Facts Considered Undisputed: Subdivision (e)(2) authorizes a court to consider a fact undisputed if it is not addressed by a proper response or reply. Subdivision (e)(3) is intended to make it clear that considering a fact undisputed does not lead to judgment by default. To the contrary, the court must evaluate the summary-judgment showings as to any facts that are not considered undisputed; consider the permissible range of fact inferences from facts that are considered undisputed, that are not genuinely in dispute, and that are disputed; and finally determine the legal consequences of all of those facts. Is the rule text clear?

Rule 56(g) - (c)(3): Accept for Motion Only: Proposed Rule 56(g) provides that if the court does not grant all the relief requested by the motion it may enter an order stating any material fact that is not genuinely in dispute. It is not intended that the court be able to rest the order simply on the fact that a party accepted the fact for purposes of the motion only, relying on subdivision (c)(3). Acceptance for purposes of the motion only is designed for use by a party who believes that it will defeat the motion on other grounds and does not wish to incur the expense of disputing facts it thinks not necessary for that purpose. Of course conditional acceptance runs the risk that the party predicted wrong and will lose the motion. But it should not be taken as an actual acceptance that holds even if the court does not grant all the relief requested by the motion. Is this relationship so apparent that there is no need for additional drafting?

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 the motion.

(b) Time to File 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 that

---

***Text of current Rule 56, which is on page 41, is deleted; new substitute language is proposed.

****Some observers have argued that this should be "must grant" summary judgment. The issue is framed by the invitation for comment (see page 23 for a detailed discussion).

party's 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 the case.

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

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

(i) a motion that identifies 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 of its contentions on the law or facts.

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

(i) must file a response 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 of 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 reply to any additional facts stated by the nonmovant; and

(ii) may file a reply brief.

(3) ***Accept or 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) *Supporting Fact Positions.* 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) *Materials Not Cited.* The court need consider only materials called to its attention under Rule 56(c)(4)(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 that the material cited to support or dispute 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 to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

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

(3) issue any other appropriate order.

(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, response, or reply; 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 the motion. Most courts recognize this practice. Among other advantages, a statement of reasons can facilitate an appeal or subsequent trial-court proceedings. It is particularly important to state the reasons for

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

Subdivision (c). Subdivision (c) is new. It establishes a common procedure for 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 is the (c)(2)(A)(ii) statement of facts that cannot be genuinely disputed. The court may find it useful, particularly in complex cases, to set a limit on the number of facts the statement can identify.

Paragraph (2) spells out the basic procedure of motion, response, and reply. It directs that contentions as to law or fact be set out in a

separate brief. Later paragraphs identify the methods of supporting the positions asserted, recognize that the court is not obliged to search the record for information not cited by a party, and carry forward the authority to rely on affidavits and declarations.

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

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

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

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

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

Subdivision (c)(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. Direction to a specific location in an appendix satisfies the citation requirement. So too it may be convenient to direct that a party assist the court in locating materials buried in a voluminous record.

Subdivision (c)(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 may be used to challenge the admissibility of material cited to support or dispute a fact. The statement in the response should include no more than a concise identification of the basis for the challenge. The challenge can be supported by argument in the brief, or may be made in the brief alone. There is no need to make a separate motion to strike. If the case goes to trial, failure to challenge admissibility at the summary-judgment stage does not forfeit the right to challenge admissibility at trial.

Subdivision (c)(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, when there is no response, or when there is 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. In many circumstances this opportunity will be the court's preferred first step.

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

Subdivision (e)(3) recognizes that the court may grant summary judgment 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 legal or factual grounds not raised by the motion, response, or reply; 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) unless the court directs a different procedure.

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

Subdivision (h). Subdivision (h) carries forward former subdivision (g) with two 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.

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 the motion.

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." Although there has not been much opportunity to assess reactions to "should" in the 2007 version of Rule 56, experience during the period the present proposals remain under consideration will offer some insight into its interpretation.

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. The resulting memorandum 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 all parts may require no more effort than trial on the parts that must be tried in any event, 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 to File 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 that party's 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 the 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 the case.

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

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

(i) a motion that identifies 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 of its contentions on the law or facts.

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

(i) must file a response 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 of 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 reply to any additional facts stated by the nonmovant; and

(ii) may file a reply brief.

(3) ***Accept or 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) *Supporting Fact Positions.* 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) *Materials not Cited.* The court need consider only materials called to its attention under Rule 56(c)(4)(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 that the material cited to support or dispute 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 the Case": Subdivision (c)(1) recognizes the authority to depart from the general procedures set out in paragraphs (2) through (6) by order in the 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 subdivision (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 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 showing 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 the court's 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. The Note advises that the statement in the response should be no more than a concise identification of the basis for the challenge. 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(e)(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 to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

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

(3) issue any other appropriate order.

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 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, response, or reply; 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. Subdivision (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. Subdivision (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.