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

To: **Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure**

From: **Honorable Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure**

Date: **May 25, 2007**

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

Introduction

The Civil Rules Advisory Committee met at the Brooklyn Law School on April 19-20, 2007. Draft Minutes of the meeting are attached. Subcommittees held three "miniconferences." The Discovery Subcommittee met with a group of lawyers after the January Standing Committee meeting to discuss reports from and discovery of testifying expert witnesses. In April, the day before the Advisory Committee meeting, the Discovery Subcommittee met in New York with a group of New Jersey lawyers to explore experience with a New Jersey rule addressing some of the expert-witness disclosure and discovery issues. The Rule 56 Subcommittee met in New York in late January with a large group of lawyers and judges to review possible approaches to revising Rule 56.

No rules were published for comment in August 2006, and no amendments are recommended for adoption.

Part I of this report presents three sets of proposed amendments recommended for approval for publication in August 2007. The first set is amendments that result from or relate to the Time-Computation Project. Proposed Rule 6(a) implements for the Civil Rules the time-computation methods template developed by the Time-Computation Subcommittee for parallel provisions in the Civil, Appellate, Bankruptcy, and Criminal Rules. Revisions of other Civil Rules are also proposed, most adjusting for elimination of the former rule that excluded intermediate Saturdays, Sundays, and legal holidays in computing periods shorter than 11 days. A final amendment related to the Time-Computation Project adds commonwealths, territories, and possessions to the Rule 81 definition of "state."

The second set proposes publication of amendments to regularize Rule 56 summary-judgment procedures without revising summary-judgment standards. This set of proposals also has a tie to time computation. Proposed Rule 56(a) makes needed changes in the timing rules and is independently recommended for publication as part of the Time-Computation Project.

The final item proposed for publication, a new Rule 62.1 on indicative rulings, was discussed extensively at the January Standing Committee meeting. The current proposal includes revisions that reflect that discussion and — more importantly — integrate the Civil Rule with the parallel Appellate Rule 12.1 being recommended for publication by the Appellate Rules Committee.

This report does not set out again proposals approved for publication at the January 2006 and January 2007 Standing Committee meetings. Publication of an amendment of Rule 8(c) to delete "discharge in bankruptcy" from the list of affirmative defenses was approved in 2006. The 2007 meeting approved publication of three amendments. Rule 13(f) would be deleted, making Rule 15 the sole standard for amendments that add a counterclaim. Rule 15(a) would be amended to allow one amendment of a pleading as a matter of course within 21 days after a responsive pleading is served; the memorandum transmitting this amendment will invite comment on the desirability of eliminating the present distinction that terminates the right to amend once as a matter of course upon service of a responsive pleading. A new subdivision (c) would be added to Rule 48 to provide for jury polling in terms drawn from Criminal Rule 31(d).

Part II is a brief description of ongoing Advisory Committee projects.

I. Action Items: Recommendations for Publication

A. TIME-COMPUTATION PROPOSALS

These recommendations to approve publication of the Civil Rules components of the Time-Computation Project contemplate publication coordinating with publication of parallel proposals for the Appellate, Bankruptcy, and Criminal Rules. They begin with Civil Rule 6(a), the template rule defining computation methods, and then turn to corresponding proposals to amend specific time periods in particular rules.

(1) Computation Method

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

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

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

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

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

~~(3) ***Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is filing a paper in court — a day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded,~~

*New material is underlined; matter to be omitted is lined through. Includes amendments to rules that will take effect on December 1, 2007.

~~the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.~~

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

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

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

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

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

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

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

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

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

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

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

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues

to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

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

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

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

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

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

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

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

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

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

(B) any other day declared a holiday by the President, Congress, or the state where the district court is located. [The word 'state,' as used in this Rule, includes the District of Columbia and any commonwealth, territory, or possession of the United States.]

Discussion

The Advisory Committee concurs in the discussion of the template provisions provided by the Time-Computation Subcommittee. The Advisory Committee had continuous opportunities to participate in framing the template and was pleased both with the process and with the product.

(2) Specific Rule Time Provisions

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

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

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(b) Extending Time.

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

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

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

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

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

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*New material is underlined; matter to be omitted is lined through. Includes amendments to rules that will take effect on December 1, 2007.

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

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

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Committee Note

Subdivision (b). None of the rules listed in former Rule 6(b) allow the court to extend the times to act set in those rules. The purported exception for extensions allowed by those rules is deleted as meaningless. The times allowed for motions under Rules 50, 52, and 59, however, are extended to 30 days.

Subdivision (c). The time provided by former Rule 6(c) to serve a motion and notice of hearing has been expanded from 5 days to 14 days before the time specified for the hearing, without changing the exceptions. The 14-day period sets a more realistic time for other parties to respond and for the court to consider the motion. The time

to serve an opposing affidavit is expanded from 1 day before the hearing to 7 days before the hearing. Even if actual delivery is accomplished 1 day before the hearing, a single day is not sufficient time to consider and prepare a response.

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

(a) Time to Serve a Responsive Pleading.

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

(A) A defendant must serve an answer:

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

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

outside any judicial district of the United States.

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

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

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

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading

must be served within ~~10~~ 14 days after notice of the court's action; or

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

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

within the time the court sets, the court may strike the pleading or issue any other appropriate order.

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

(1) on its own; or

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

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Committee Note

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

Rule 14. Third-Party Practice

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

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

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Committee Note

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

Rule 15. Amended and Supplemental Pleadings

(a) Amendments Before Trial.

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

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

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

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

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

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Committee Note

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

Rule 23. Class Actions

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

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Committee Note

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

Rule 27. Depositions to Perpetuate Testimony

(a) Before an Action Is Filed.

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

represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies.

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Committee Note

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

Rule 32. Using Depositions in Court Proceedings

(a) Using Depositions.

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

(A) *Deposition Taken on Short Notice.* A deposition must not be used against a party who, having received less than ~~11~~ 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B)

requesting that it not be taken or be taken at a different time or place — and this motion was still pending when the deposition was taken.

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(d) Waiver of Objections.

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

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(C) *Objection to a Written Question.* An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within ~~5~~ 7 days after being served with it.

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Committee Note

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

Rule 38. Right to a Jury Trial; Demand

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

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

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

(c) Specifying Issues. In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial

on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may — within ~~10~~ 14 days after being served with the demand or within a shorter time ordered by the court — serve a demand for a jury trial on any other or all factual issues triable by jury.

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Committee Note

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

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

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(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule

50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than ~~10~~ 30 days after the entry of judgment — or if the motion addresses a jury issue not decided by a verdict, no later than ~~10~~ 30 days after the jury was discharged — the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

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(d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than ~~10~~ 30 days after the entry of the judgment.

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Committee Note

Former Rules 50, 52, and 59 adopted 10-day periods for their respective postjudgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory postjudgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 30 days. Rule 6(b) continues to prohibit expansion of the 30-day period.

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

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(b) Amended or Additional Findings. On a party's motion filed no later than ~~10~~ 30 days after the entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

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Committee Note

Former Rules 50, 52, and 59 adopted 10-day periods for their respective postjudgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory postjudgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 30 days. Rule 6(b) continues to prohibit expansion of the 30-day period.

Rule 53. Masters

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

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

copy is served, unless the court sets a different time.

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Committee Note

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

Rule 54. Judgment; Costs

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(d) Costs; Attorney's Fees.

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

~~day's~~ 14 days' notice. On motion served within the next ~~5~~ 7 days, the court may review the clerk's action.

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Committee Note

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

Rule 55. Default; Default Judgment

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(b) Entering a Default Judgment.

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(2) ***By the Court.*** In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a

general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least ~~3~~ 7 days before the hearing. The court may conduct hearings or make referrals — preserving any federal statutory right to a jury trial — when, to enter or effectuate judgment, it needs to:

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Committee Note

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

Rule 59. New Trial; Altering or Amending a Judgment

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(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than ~~10~~ 30 days after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has ~~10~~ 14 days after being served to file opposing affidavits~~; but that period may be extended for up to 20 days, either by the court for good cause or by the parties' stipulation~~. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than ~~10~~ 30 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and

an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) **Motion to Alter or Amend a Judgment.** A motion to alter or amend a judgment must be filed no later than ~~10~~ 30 days after the entry of the judgment.

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Committee Note

Former Rules 50, 52, and 59 adopted 10-day periods for their respective postjudgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory postjudgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 30 days. Rule 6(b) continues to prohibit expansion of the 30-day period.

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

stipulation. The apparent 20-day limit on extending the time to file opposing affidavits seemed to conflict with the Rule 6(b) authority to extend time without any specific limit. This tension between the two rules may have been inadvertent. It is resolved by deleting the former Rule 59(c) limit. Rule 6(b) governs. The underlying 10-day period was extended to 14 days to reflect the change in the Rule 6(a) method for computing periods of less than 11 days.

Rule 62. Stay of Proceedings to Enforce a Judgment

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

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Committee Note

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

Rule 65. Injunctions and Restraining Orders

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(b) Temporary Restraining Order.

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

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Committee Note

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

Rule 68. Offer of Judgment

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

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Committee Note

Former Rule 68 allowed service of an offer of judgment more than 10 days before the trial begins. It may be difficult to know in advance when trial will begin. The time is now measured from the

date set for trial. The former 10-day period was extended to 14 days to reflect the general preference for setting short periods in multiples of 7 days. See the Note to Rule 6.

Rule 71.1. Condemning Real or Personal Property

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(d) Process.

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

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

(i) that the action is to condemn property;

(ii) the interest to be taken;

(iii) the authority for the taking;

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

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

(vi) that the failure to so serve an answer constitutes consent to the taking and to the court's authority to proceed with the action and fix the compensation; and

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

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(e) Appearance or Answer.

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(2) ***Answer.*** A defendant that has an objection or defense to the taking must serve an answer within

~~20~~ 21 days after being served with the notice. The answer must:

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Committee Note

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

Rule 72. Magistrate Judges: Pretrial Order

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

consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

(b) Dispositive Motions and Prisoner Petitions.

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

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Committee Note

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

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

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(c) Removed Actions.

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

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

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

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

(3) Demand for a Jury Trial.

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

(i) it files a notice of removal; or

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

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Committee Note

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

SUPPLEMENTAL RULES FOR ADMIRALTY OR MARITIME CLAIMS AND ASSET FORFEITURE ACTIONS

Rule B. In Personam Actions: Attachment and Garnishment

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(3) Answer.

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

court may award compulsory process against the garnishee. If the garnishee admits any debts, credits, or effects, they shall be held in the garnishee's hands or paid into the registry of the court, and shall be held in either case subject to the further order of the court.

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Committee Note

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

Rule C. In Rem Actions: Special Provisions

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(4) Notice. No notice other than execution of process is required when the property that is the subject of the action has been released under Rule E(5). If the property is not released within ~~10~~ 14 days after execution, the

plaintiff must promptly — or within the time that the court allows — give public notice of the action and arrest in a newspaper designated by court order and having general circulation in the district, but publication may be terminated if the property is released before publication is completed. The notice must specify the time under Rule C(6) to file a statement of interest in or right against the seized property and to answer. This rule does not affect the notice requirements in an action to foreclose a preferred ship mortgage under 46 U.S.C. §§ 31301 et seq., as amended.

* * * * *

(6) Responsive Pleading; Interrogatories.

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

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

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

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

(B) within the time that the court allows;

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

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

(iv) a person who asserts a right of possession or any ownership interest must serve an answer

within ~~20~~ 21 days after filing the statement of interest or right.

* * * * *

Committee Note

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

Rule G. Forfeiture Actions In Rem

* * * * *

(4) Notice.

* * * * *

(b) Notice to Known Potential Claimants.

(i) Direct Notice Required. The government must send notice of the action and a copy of the complaint to any person who reasonably appears to be a potential claimant on the facts known to the government before the end of

the time for filing a claim under Rule G(5)(a)(ii)(B).

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

(A) the date when the notice is sent;

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

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

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

* * * * *

(5) Responsive Pleadings.

* * * * *

(b) Answer. A claimant must serve and file an answer to the complaint or a motion under Rule 12 within ~~20~~ 21 days after filing the claim. A claimant

waives an objection to in rem jurisdiction or to venue if the objection is not made by motion or stated in the answer.

(6) Special Interrogatories.

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

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

(c) Government's Response Deferred. The government need not respond to a claimant's

motion to dismiss the action under Rule G(8)(b) until ~~20~~ 21 days after the claimant has answered these interrogatories.

* * * * *

Committee Note

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

Discussion

Revisions of the time periods in specific rules are proposed for publication in the Style Rule form. The Style Rules have been transmitted to Congress. It seems better to anticipate the presumed December 1 effective date than to invite confusion by publishing in the form of present rules that are slated to be superseded before the close of the comment period. The same choice has been made for the other proposals for publication this August, including those that have been approved at earlier Standing Committee meetings.

The Committee Notes describe the changes proposed for each rule. Most of the changes respond to elimination of the rule that excluded intermediate Saturdays, Sundays, and legal holidays in computing periods shorter than 11 days. Some of the changes reflect determinations that the period allowed by a present rule is simply too short.

A few of the changes were somewhat more complex. The 10-day limit for posttrial motions under Rules 50, 52, and 59 was extended to 30 days in each Rule. The 10-day period has proved too short in many cases. Because Rule 6(b) prohibits any extension of these particular time limits, courts have responded by such strategies as deferring entry of judgment or setting briefing dates long after the motion deadline. Rather than amend Rule 6(b) to permit extensions, the Committee concluded that it would be better to set a more realistic initial period while carrying forward the bar against any extension. Allowing an additional 20 days does not seem extravagant. If there is no appeal, 20 days are not much in comparison to the time required to get through to the end of trial. If there is to be an appeal, 30 days corresponds to the period for most civil appeals, and should work well in conjunction with the rule that a timely motion under these Rules suspends appeal time.

Another revision of Rule 59 is also proposed. Style Rule 59(c) provides that the period to file affidavits opposing a new-trial motion may be extended "for up to 20 days." This provision has been in Rule 59(c) since 1938. Up to 1948, Rule 6(b) prohibited extension of any Rule 59 time period, "except as stated in subdivision (c) thereof." In 1948 this reference to Rule 59(c) was deliberately omitted from Rule 6(b); the Committee Note observed that Rule 6(b) no longer referred to Rule 59(c) "because, once the motion for new trial is made, the judgment no longer has finality, and the extension of time for affidavits thus does not of itself disturb finality." This Note explanation suggests that the open-ended Rule 6(b) extension provision was intended to supersede the 20-day limit in Rule 59(c). However that may be, it seems appropriate to reconcile the tension between the two rules by eliminating the 20-day limit from Rule 59(c). There is no reason to fear that over-long extensions will be granted.

A minor revision is proposed for Rule 68. The present provision directs that an offer of judgment be made more than 10 days before "trial begins." It may be difficult to know when trial will begin. The amendment would change this to 14 days before "the date set for trial."

Finally, it should be noted that proposed Rule 56(a) includes time provisions for summary-judgment practice quite different from the current provisions. Proposed Rule 56(a) has been approved independently as part of the Time-Computation project and is recommended for publication both in the Time-Computation Rules and in Rule 56.

(3) Statutory Time Provisions

The Advisory Committee has not concluded its study of statutory time periods that may seem uncomfortably short in light of the proposal to compute periods less than 11 days without excluding intermediate Saturdays, Sundays, and legal holidays. It is likely that any final list will be quite brief.

One statutory period, however, is an important candidate for revision. 28 U.S.C. § 636(b)(1) allows 10 days to serve and file written objections to a magistrate judge's proposed findings and

recommendations "as provided by rules of court." Current Rule 72 provisions adopt the same 10-day period. Under the present rule excluding intermediate Saturdays, Sundays, and legal holidays, the period is always a minimum of 14 calendar days and runs longer if there is an intermediate legal holiday. Both the statutory and Rule 72 time periods are calculated according to Rule 6(a). The specific Rules package includes a recommendation that the period in Rule 72 be extended to 14 days to accommodate the new calendar-day computation rule. This proposal will supersede the statutory period less dramatically than the double-supersession effect of present Rules 6(a) and 72, and is further bolstered by the § 636(b)(1) recognition that court rules may provide for serving and filing objections. This does not eliminate the usefulness of seeking statutory amendment because of the potential for confusion from the difference between the statute and the amended Rule.

B. RULE 81: DEFINITION OF STATE

The Advisory Committee recommends publication for comment of this revision of Style Rule 81(d):

Rule 81. Applicability of Rules in General; Removed Actions

* * * * *

(d) Law Applicable.

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

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

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

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

COMMITTEE NOTE

Several Rules incorporate local state practice. Original Rule 81(e) provided that "the word 'state' * * * includes, if appropriate, the District of Columbia." The definition is expanded to include any

commonwealth, territory[, or possession] of the United States. As before, these entities are included only "where appropriate." They are included for the reasons that counsel incorporation of state practice. For example, state holidays are recognized in computing time under Rule 6(a). Other, quite different, examples are Rules 64(a), invoking state law for prejudgment remedies, and 69(a)(1), relying on state law for the procedure on execution. Including commonwealths, territories[, and possessions] in these and other rules avoids the gaps that otherwise would result when the federal rule relies on local practice rather than provide a uniform federal approach. Including them also establishes uniformity between federal courts and local courts in areas that may involve strong local interests, little need for uniformity among federal courts, or difficulty in defining a uniform federal practice that integrates effectively with local practice.

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

Discussion

Consideration of Rule 81(d)(2) began with the Time-Computation Project. Civil Rule 6(a) and its counterparts extend a time period that ends on a state holiday. The reasons that make it useful to integrate federal time-counting practices with state practices seem to apply as well in a commonwealth or territorial court. If the more general proposal to publish Rule 81 for comment is deferred, it is recommended that Civil Rule 6(a)(6)(B) be amended by adding a new final sentence: "The word 'state,' as used in this Rule, includes [the District of Columbia] and any commonwealth, territory[, or possession] of the United States." ("District of Columbia" is shown in brackets. It is not necessary in Rule 6(a) because the District already is defined as a state by Rule 81(d)(2). More than a few casual readers might be misdirected, however, if forced to remember Rule 81 when reading Rule 6(a).)

The reasons for including commonwealths, territories, and perhaps possessions in the rules that incorporate state practice are sketched in the Committee Note. The closest analogue in the Rules is Criminal Rule 1(b)(9): "The following definitions apply to these rules * * * (9) 'State' includes the District of Columbia, and any commonwealth, territory, or possession of the United States." The Criminal Rule does not include the qualifying "where appropriate" found in Style Rule 81(d)(2) and carried forward by this proposal. Retaining "where appropriate" seems desirable in light of the

inability to know or foresee all of the ways in which a territorial procedure, for example, might prove unsuitable for adoption into federal-court practice.

Comment should be particularly invited from those familiar with procedures in the commonwealths and territories. If there are a significant number of local practices unsuitable for adoption into federal practice, it may not suffice to rely on "where appropriate" as an escape clause.

Comment should be separately invited on the question whether to include "possessions." There is at least some reason to believe that the United States does not now have any possessions. Even if that is so, symmetry with the Criminal Rules might support retaining the reference on the chance that a possession might be acquired in the future.

Finally, an apparent miscue in the Style Rule is corrected. Present Rule 81(e) provides that "the term 'statute of the United States' * * * includes * * * any Act of Congress locally applicable to and in force in the District of Columbia." Style Rule 81(d)(2) limits this provision by the introductory language: "When these rules provide for state law to apply, in the District Court for the District of Columbia * * * (B) the term 'federal statute' includes any Act of Congress that applies locally to the District." That is at best narrower than present Rule 81(e), and at worst confusing.

Authority to adopt the proposed definition of "state" seems secure. The Rules Enabling Act, 28 U.S.C. § 2072(a), establishes Supreme Court authority to adopt procedure rules for "the United States district courts." 28 U.S.C. § 451 defines "district court of the United States" for all of Title 28 — it "mean[s] the courts constituted by chapter 5 of this title." Chapter 5 in turn includes §§ 132(a) and 133. Section 132(a) provides for a district court in each judicial district, "known as the United States District Court" for the district. Section 133 enumerates the districts; the list includes Puerto Rico but not Guam, the Northern Mariana Islands, or the Virgin Islands. Up to this point, authority to make rules for federal courts in those places seems uncertain. But the Enabling Act rules are incorporated by the territorial organic acts for each place — as an Enabling Act Rule is "promulgated and made effective," it is incorporated in territorial court practice. 48 U.S.C. §§ 1424-4 (Guam); 1416(b) (Virgin Islands); 1821(c) (Northern Mariana Islands).

C. RULE 56: SUMMARY JUDGMENT

The Advisory Committee on Civil Rules recommends publication for comment of a revised Civil Rule 56 to clarify and make more consistent the procedures for litigating summary-judgment motions, without changing the substantive standards that apply. The proposed changes respond to the wide gap between present Rule 56 and the ways in which summary-judgment motions are actually brought and litigated; to the increasing number and variety of detailed local rules, standing orders, and individual judge rules that address summary-judgment procedures; and to the problems in the present Rule made apparent through the close study required by the Style Project. The proposed changes to Rule 56 are intended to facilitate the determination of whether summary judgment is appropriate, in a way that neither favors nor disfavors the grant or denial of the motion, while allowing the case law on the standards for obtaining or defeating summary judgment to continue to develop.

I. Introduction

In 1992, after the 1986 "trilogy" of Supreme Court decisions on summary judgment, the Standing Committee recommended adoption of a thoroughly revised Rule 56. The Judicial Conference rejected the recommendation. That effort differed from the present proposal in many ways. The most important difference is that the present proposal does not attempt to incorporate into the rule the substantive teaching of the Supreme Court cases establishing the summary-judgment standard. At the same time, the work done in developing the 1992 proposal provided valuable insight into ways the procedures for presenting a summary-judgment motion to the other parties and to the court might be improved.

Present Rule 56 has not been amended in any significant way since 1963 despite significant changes in both summary-judgment practice and the importance of summary-judgment motions since

then. For years, the Committee has been told that Rule 56 is far removed from current practice. For example, present Rule 56 does not mention partial summary judgment. Rule 56(d) focuses on court orders specifying facts that are not in controversy, which are "deemed established" in subsequent proceedings, while actual practice focuses much more on obtaining summary judgment as to claims, defenses, or issues, often dispositive of the entire case. Rule 56(c) provides that the motion shall be served at least ten days prior to "the hearing" – which few judges hold and most do not hold regularly – and that affidavits can be served the day before a hearing – an obvious timing problem addressed in parallel both in the Rule 56 proposal and independently in the timing project. The many gaps between Rule 56 and summary-judgment practice have made the Rule text increasingly irrelevant. A clear indication of the extent to which the national Rule is viewed as deficient is the number of local rules addressing summary-judgment procedures. All but thirty districts have local rules addressing summary-judgment procedures, and those local rules vary significantly from district to district. The practice rules of individual judges provide additional variation within a single district, even in those without a local rule on summary judgment.

The Civil Rules Committee formed a subcommittee to undertake a thorough study of Rule 56 practice and possible amendments. Judge Michael Baylson served as chair. The Subcommittee studied many local rules, as well as some standing orders and individual judges' practice orders establishing specific procedures for summary-judgment motions, identified the common features and variations in the rules and orders, and synthesized and harmonized what appeared to be the best "best practices" identified from that study. The Subcommittee reviewed the 1992 proposal to revise Rule 56, adapting some ideas from it but, as noted, taking a very different approach shaped by the experience of the last 15 years. The Subcommittee developed several successive drafts and led a lengthy discussion of Rule 56 at the September 2006 Advisory Committee meeting. A draft based

on the Advisory Committee's deliberations was presented on January 29, 2007, at a "miniconference" of a small group of litigators, judges, and professors, all of whom had extensive summary-judgment expertise. The draft considered at the conference was revised in light of the lessons learned. This draft in turn has been revised extensively in response to decisions made by the Advisory Committee at its April 2007 meeting. The revisions have been reviewed and approved by the Advisory Committee for presentation to the Standing Committee with a recommendation for publication for comment.

The proposed amendments are limited to clarifying and improving summary-judgment procedures and making them more consistent, without changing the standard for granting or denying summary judgment. There is no purpose to make it easier or more difficult to grant summary judgment, no purpose to favor plaintiffs or defendants. The changes address only the procedure for presenting and considering summary-judgment motions.

II. Summary of Revisions

The proposed amended version of Rule 56 consists of the following subdivisions: (a) timing; (b) affidavits; (c) a procedure for the movant to state what facts are asserted to be undisputed and entitle the movant to judgment as a matter of law, for the nonmovant to respond addressing those facts, for the movant to reply to address additional facts stated in the response, and for the parties to present citations to record support and to present their legal arguments; (d) the court's action when there is no response or no proper response; (e) court's action on grounds not raised by a motion; (f) the procedure for seeking additional time to respond to a summary-judgment motion; (g) the court's action in granting summary judgment; (h) partial summary judgment; and (i) affidavits that are presented in bad faith. The primary changes from the present Rule are in subdivisions (a), (c), (d), and (h).

Subdivisions (a) and (c) are "default" provisions, designed to be overridden by a court order entered in a particular case and tailored to that case. These portions of the rule are consistent with the practice most judges follow of entering case-specific orders that set deadlines and other limits on summary-judgment motions and responses. Subdivision (c) implements as a default provision a procedure for stating undisputed facts that are asserted as the basis for a summary judgment motion, and for challenging that statement in the response to that motion. Subdivision (c) is based on the procedures used in the local rules of approximately fifty districts. Subdivision (d) describes the court's authority to act when a party fails to respond or to file a response that complies with the rule. Subdivision (g) states but does not change the standard for granting summary judgment and makes clear that a court should state its reasons for doing so. Subdivision (h) addresses partial summary judgment by name for the first time in the Rule. These changes are summarized in detail in the "discussion" section following the proposed amended Rule 56 text, both "clean" and "blacklined" to show changes from the Style Rule 56, and the proposed Committee Note.

III. Conclusion

Rule 56 presents difficult drafting challenges. There is a reason it has not been revised in over forty years. But during that period, the law has developed in ways that have made summary-judgment motions and summary judgments – whole or partial – much more frequent. A study by the Federal Judicial Center shows that summary-judgment motions are now filed in a high proportion of civil cases that survive default, disposition on the pleadings, and early settlement. The ways in which those motions are brought and litigated no longer resemble the procedures described in Rule 56. The proliferation of local rules and other orders evidences the deficiencies in the national rule, yet those local rules and orders are often inconsistent with each other and with the national rule. Both bench and bar deserve better and more consistent procedures in this critical area of litigation.

The drafting difficulties and challenges that Rule 56 presents should not defeat or further delay efforts to improve it. The Advisory Committee has worked diligently. That work has made it clear that public comment is essential to understand whether the procedures that have worked well in the "laboratories" provided by districts with local rules can work fairly and effectively as the national rule. Standing Committee consideration, followed by publication for comment, is the next step in ensuring that Rule 56, amended to be relevant to current summary-judgment motion practice, is as good as possible.

Attached are the following:

1. Clean copy of proposed Rule 56.

2. Blacklined copy showing the changes the proposal would make from Style Rule 56

3. Proposed Committee Note.

4. Discussion of proposed Rule changes.

5. Summary of our miniconference on January 29, 2007.

6. Memoranda from Jeffrey Barr and James Ishida of the Administrative Office Rules Support Office summarizing a survey of district court local summary-judgment rules and standing orders and summarizing local rules provisions for statements of uncontested facts.

7. Research by the Federal Judicial Center on motions related to affidavits taken in bad faith and on the frequency of motions and whole or partial grants.

8. Memorandum on "Rule 56 Revision: The Effort That Failed in 1992."

1. Proposed Rule 56

A. The "Clean" Proposed Rule 56 Amendment

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 56. Summary Judgment

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

(1) a party may move for summary judgment on all or part of a claim or defense — or on an issue — at any time until 30 days after the close of all discovery;

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

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*New material is underlined; matter to be omitted is lined through. Includes style amendments to rule that will take effect on December 1, 2007.

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

(b) **Affidavits.** A party may support or oppose the motion with an affidavit that is made on personal knowledge, sets out facts that would be admissible in evidence, and shows that the affiant is competent to testify on the matters stated.

(c) **Procedures.**

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

(2) ***Motion.*** The motion must:

(A) describe each claim, defense, or issue as to which summary judgment is sought; and

(B) state in separately numbered paragraphs only those material facts that the movant asserts are not genuinely in dispute and entitle the movant to judgment as a matter of law.

(3) Response. A response:

(A) must, by correspondingly numbered paragraphs, accept, qualify, or deny — either generally or for purposes of the motion only — each fact in the Rule 56(c)(2)(B) statement;

(B) may state that those facts do not support judgment as a matter of law; and

(C) may state additional facts that preclude summary judgment.

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

(5) ***Citing Support for Positions.*** A statement, qualification, or denial of fact in a motion, response, or reply must be supported by:

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

(B) a showing that:

(i) the materials cited to support the fact do not establish the absence of a genuine dispute; or

(ii) no material can be cited to support the fact.

(6) Filing Cited Materials. A party must attach to a motion, response, or reply the cited parts of any factual materials that have not already been filed.

(7) ***Brief.*** A party must make its arguments of law and fact in a separate brief filed with the motion, response, or reply or at a time the court orders.

(d) Failure to Respond or Properly Respond. If a party does not respond to the motion or if a response fails to comply with Rule 56(c), the court may:

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

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

(3) issue any other appropriate order.

(e) Court Action. The court may:

(1) grant or deny summary judgment in whole or in part; or

(2) after giving notice and a reasonable time to respond:

(A) grant summary judgment for a nonmovant;

(B) grant or deny a motion for summary judgment in whole or in part on grounds not raised by the motion or response; or

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

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

(1) defer consideration of the motion or deny it;

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

(3) issue any other appropriate order.

(g) **Granting Summary Judgment.** Summary judgment should be granted if evidence that would be admissible at trial shows that there is no genuine dispute as to any material fact and that a party is entitled to judgment as

a matter of law. An order or memorandum granting summary judgment should state the reasons.

(h) Granting Partial Summary Judgment. If summary judgment is not granted on the whole action, the court may:

(1) grant partial summary judgment on a claim, defense, or issue;

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

(3) identify material facts that are genuinely in dispute.

(i) Affidavit Submitted in Bad Faith. If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court 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.

B. The "Blacklined" Proposed Rule 56 Amendment Showing Changes from the Style Rule

Rule 56. Summary Judgment

(a) ~~By a Claiming Party~~ Time for a Motion, Response, and Reply. ~~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.~~

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

(1) a party may move for summary judgment on all or part of a claim or defense — or on an issue — at any time until 30 days after the close of all discovery;

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

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

~~**(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.~~

(b) **Affidavits.** A party may support or oppose the motion with an affidavit that is made on personal knowledge, sets out facts that would be admissible in evidence, and

shows that the affiant is competent to testify on the matters stated.

~~**(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.~~

(c) Procedures.

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

(2) Motion. The motion must:

(A) describe each claim, defense, or issue as to which summary judgment is sought; and

(B) state in separately numbered paragraphs only those material facts that the movant asserts are not genuinely in dispute and entitle the movant to judgment as a matter of law.

(3) ***Response.*** A response:

(A) must, by correspondingly numbered paragraphs, accept, qualify, or deny — either generally or for purposes of the motion only — each fact in the Rule 56(c)(2)(B) statement;

(B) may state that those facts do not support judgment as a matter of law; and

(C) may state additional facts that preclude summary judgment.

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

(5) ***Citing Support for Positions.*** A statement, qualification, or denial of fact in a motion, response, or reply must be supported by:

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

(B) a showing that:

(i) the materials cited to support the fact do not establish the absence of a genuine dispute; or

(ii) no material can be cited to support the fact.

(6) ***Filing Cited Materials.*** A party must attach to a motion, response, or reply the cited parts of any factual materials that have not already been filed.

(7) ***Brief.*** A party must make its arguments of law and fact in a separate brief filed with the motion, response, or reply or at a time the court orders.

(d) **Failure to Respond or Properly Respond.** If a party does not respond to the motion or if a response fails to comply with Rule 56(c), the court may:

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

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

(3) issue any other appropriate order.

(e) **Court Action.** The court may:

(1) grant or deny summary judgment in whole or in part; or

(2) after giving notice and a reasonable time to respond:

(A) grant summary judgment for a nonmovant;

(B) grant or deny a motion for summary judgment in whole or in part on grounds not raised by the motion or response; or

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

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

(1) defer consideration of the motion or deny it ~~the motion~~;

(2) ~~order a continuance~~ allow time to obtain ~~enable~~ affidavits ~~to be obtained, depositions to be taken,~~ or ~~other~~ to take discovery ~~to be undertaken~~; or

(3) issue any other ~~just~~ appropriate order.

(g) Granting Summary Judgment. Summary judgment should be granted if evidence that would be admissible at trial shows that there is no genuine dispute as to any material fact and that a party is entitled to judgment as a matter of law. An order or memorandum granting summary judgment should state the reasons.

(hd) Granting Partial Summary Judgment ~~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.~~

If summary judgment is not granted on the whole action, the court may:

(1) grant partial summary judgment on a claim, defense, or issue;

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

(3) identify material facts that are genuinely in dispute.

~~**(c) 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 otherwise as 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.~~

(ig) 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~~ 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.

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*3. **Proposed Committee Note***

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 (g) 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 case law development construing and applying these phrases. The source of contemporary summary-judgment standards continues to be three decisions from 1986: *Celotex Corp. v. Catrett*, 477 U.S. 317; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242; and *Matsushita Electrical Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574.

The practice and procedures implementing Rule 56 have grown away from the rule text. Many districts have adopted local rules 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 and some are inconsistent — or at least fit poorly — with some of these amendments. Local rules committees should review their local rules to ensure they continue to meet the Rule 83 standard that they be consistent with and not duplicate Rule 56.

Subdivision (a). The timing provisions in former subdivisions (a) and (c) are consolidated and substantially revised in new subdivision (a). The new rule allows a party to move for summary judgment at any time, even as early as the commencement of the action. If the motion seems premature both subdivision (a) and Rule 6(b) allow the court to extend the time to respond. The rule

does set a presumptive deadline at 30 days after the close of all discovery.

The presumptive timing rules are default provisions that may be altered by an order in the case or by local rule. In most cases the court will enter a scheduling order tailored to the specific case, superseding the presumptive rule provisions and setting different deadlines or specific dates for summary-judgment motions. The parties may agree on a tailored scheduling order, including deadlines for filing and responding to summary-judgment motions. A scheduling order may be tailored to a particular case by, for example, calling for discovery to occur in stages, such as resolving threshold issues on jurisdiction or aspects of liability first. Or the order may call for expert-witness discovery to occur after all other discovery has been completed. Deadlines for summary-judgment motions may be set to correspond with completion of the discovery stages.

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

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

Subdivision (b). Subdivision (b) 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 be attached to the affidavit is omitted as unnecessary given the requirement that an affidavit set out facts that would be admissible in evidence and the subdivision (c)(6) direction to file factual materials.

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

Subdivision (c). 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. The court retains authority to direct a different procedure by order in a case that will benefit from different procedures. The parties may be able to agree on a procedure for presenting and responding to a summary-judgment motion tailored to the needs of the case. The court may play a role in shaping the order under Rule 16.

The motion must describe the claims, defenses, or issues as to which summary judgment is sought. This requirement is expressed in terms that anticipate the "partial summary judgment" provisions in subdivision (h). A motion may address discrete parts of an action without seeking disposition of the entire action.

The movant must state only material facts that are not genuinely in dispute and are the basis of the claim that the movant is entitled to judgment as a matter of law. Many local rules require, in varying terms, that a motion include a statement of undisputed facts. In some cases the statements and responses have expanded to identification of hundreds of facts supported by unwieldy volumes of materials. This practice is self-defeating. To be effective, the statement of undisputed facts in the motion should be limited to the small number of facts identified as dispositive because they are both undisputed and entitle the movant to judgment as a matter of law.

The response must indicate what material facts are genuinely in dispute. A response that a material fact is accepted—is not in dispute—may be made for purposes of the motion only. The response should fairly meet the substance of the asserted fact. A response that qualifies an asserted fact should specify any part of the fact that is not genuinely in dispute, in a way similar to the response to a Rule 36(b)(2)(4) request for an admission or a Rule 8(b)(4) answer to a claim.

Subdivision (c)(4) recognizes that the movant may reply to the response. The time to reply is governed by subdivision (a)(3). The procedures that apply to a response also apply to a reply. A reply may address only additional facts stated in the response; it is not the occasion for asserting facts not addressed by the motion or response.

Subdivision (c)(5)(A) requires that a statement, qualification, or denial of fact be supported by citations to particular parts of discovery responses, documents, electronically stored information, affidavits, or other materials. Specific citations are important to enable the parties and the court to address the facts efficiently and effectively. Specific citations often will be provided even by a party who does not have the trial burdens on an issue, including citations to discovery responses, stipulations, or other concessions by the party who does have the trial burdens. But subdivision (c)(5)(B) recognizes that a party need not always point to specific record materials. One party may respond or reply to another party's statement, qualification, or denial by showing that the materials cited to support the fact do not establish the absence of a genuine dispute without citing any other materials. And a party who does not have the trial burdens may rely on a showing that a party who does have the trial burdens does not have sufficient evidence to carry them.

A response must respond to the facts asserted in the motion by correspondingly numbered paragraphs and may recite any additional facts defeating summary judgment. The citation of supporting materials must follow the same procedures that apply to the motion. But as subdivision (c)(5)(B)(i) recognizes, a nonmovant who does not have the trial burden on an issue is not required to point to evidence that supports its position. It suffices instead to respond that the materials cited by the movant do not show that the fact is established beyond genuine dispute. No matter who has the trial burden, the nonmovant also may state that even if the movant has established the asserted facts they do not support judgment as a matter of law.

Subdivision (c)(6) requires filing with a motion, response, or reply any cited factual materials that have not already been filed when the motion, response, or reply is filed. The filing requirement includes materials referred to in an affidavit. Legal sources cited to support a party's position need not be filed. A local rule or order in the case may direct that materials *already on file* be gathered in an appendix, or a party may voluntarily submit an appendix. Direction to a specific location in an appendix satisfies the citation requirement.

Subdivision (c)(7) directs that arguments as to the law or the facts must be made in a separate brief.

Subdivision (d). Subdivision (d) resolves a question that has been answered differently by different local rules. The court may not grant a motion for summary judgment simply because a nonmovant has failed to respond at all or has responded in a manner that does not comply with subdivision (c). Instead the court must examine the motion and supporting materials to ensure that the movant has carried the summary-judgment burden. Before undertaking this task, however, the court may afford an opportunity to respond as the Rule requires or make another appropriate order. One approach would be

an order in the case stating that the court will treat as admitted for purposes of the motion any fact that is not addressed by a proper response.

Subdivision (e). Subdivision (e) brings into Rule 56 text a number of related procedures that have grown up in practice. After giving notice and a reasonable time for responses the court may grant summary judgment for a nonmovant, grant or deny a motion on grounds not raised by the motion or response, or consider summary judgment on its own.

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

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

The Rule 56(f)(1) provision to defer ruling is new. 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) and the record citations required by subdivision (c)(5) will have to be substantially changed. But it may be feasible to defer consideration of the motion if there is a prospect that it can be addressed without substantial change after further discovery.

Subdivision (g). Subdivision (g) carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word — genuine "issue" becomes genuine "dispute." Words are added to express the requirement that although the summary-judgment materials need not themselves be in a form admissible at trial, summary judgment should be granted only on the basis of evidence that would be admissible at trial. There is no

change in the rule that a court has discretion to deny summary judgment if information not admissible at trial shows a prospect that a nonmovant may be able to find sufficient admissible evidence in time for trial.

The reference to a genuine "issue" is changed to "dispute" to avoid any risk that other uses of "issue" to refer to a component of the case might cause confusion. This substitution does not affect the summary-judgment standard. The reference to "any material fact" is carried forward unchanged, recognizing that the materiality of a fact may be conditional upon other facts. If the defendant was not driving the automobile involved in the accident and there is no basis for vicarious liability, the character of the driver's conduct is not material as to this defendant, even though it would be material to a claim against the driver.

Subdivision (g) also adds a new direction that an order granting a final summary judgment should state the reasons for the judgment. This statement is not a matter of finding facts in the sense of Rule 52. Appellate review will continue to be as a matter of law. But the statement should address the dispositive facts and underlying law in a way that may inform the decision whether to appeal and the argument and decision of the appeal.

Subdivision (g) is satisfied by identifying the general reasons that support the judgment. At the same time the court may, if it wishes, address other issues as well. It might be useful for purposes of appellate review, for example, to state that not only is there no genuine dispute whether the defendant was driving the automobile but in addition the defendant has established beyond genuine dispute that the driver was not negligent — or to state that there is a genuine dispute as to the driver's negligence.

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

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

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

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

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

Subdivision (i). Subdivision (i) carries forward former subdivision (g) with one change. 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).

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4. Discussion of Proposed Rule Changes

Subdivision (a).

Subdivision (a) allows a summary-judgment motion at any time up to 30 days after the close of all discovery and sets the times for the nonmovant's response and any reply. These time periods can be changed by a local rule or by judge's order in a particular case. It is expected that most cases will be governed by case-specific scheduling orders and that the default deadline set in Rule 56 will govern only a small number of cases.

The timing provision is the only provision that, under the proposed amended Rule 56, can be changed by local rule. This approach recognizes that local scheduling practices may respond to local docket conditions of case load and case mix in ways that are incompatible with the proposed national rule. The other aspects of summary-judgment practices and procedures do not vary with conditions in particular districts in ways that require or justify the across-the-board rejection that a local rule or standing order represents. Under the proposed amended rule, provisions other than timing are not variable by local rule or standing order, but can and frequently should be changed or adapted by court order to the specific needs of particular cases.

The Subcommittee and full Advisory Committee extensively debated whether to have a default timing rule at all and, if so, what it should be. The conclusion was that having a clear default rule was useful, particularly to avoid summary-judgment motions filed so late in the case or so close to trial as to be disruptive. The Subcommittee and full Advisory Committee also extensively debated whether the default timing rule should be keyed to a certain amount of time before trial as well as after discovery. The conclusion was that a single deadline set after discovery would be more effective and less likely to generate timing problems. The Committee held extensive discussions over an alternative that would have set the deadline at the earlier of 30 days after the end of all discovery or 60 days before the date set for trial. We heard concerns from both judges and lawyers that the alternative that looked to the date set for trial would not work in many cases. Given the 21 days to respond and 14 days to reply, a timely motion could – and often would – be submitted 25 days before the date set for trial. That would often require that the trial be rescheduled or that the case go to trial without any decision on the motion. In addition, some courts apparently do not set trial dates in a fashion that would make sense of this alternative. That could cause difficulty if the time-before-trial deadline were extended backward to a greater number of days – such as 120 days.

Like all default or presumptive timing provisions – or, for that matter, case-specific timing provisions – the proposal cannot cover all timing contingencies. If, for example, important evidence is obtained after the deadline, either because discovery has revived or through other investigation, the court should consider granting leave to file the motion.

This timing subdivision has been independently approved as part of the Time-Computation Project, and is recommended for publication in conjunction with the Civil Rules portion of the Time-Computation Project, perhaps most conveniently by cross-reference to the full text of Rule 56 if it is published at the same time.

Subdivision (c)

Subdivision (c) was approved after vigorous discussion. The central feature is the (c)(2)(B) requirement that as part of the summary-judgment motion, the movant must file a statement of "only those material facts that the movant asserts are not genuinely in dispute," complemented by a nonmovant's (c)(3)(A) duty to respond by correspondingly numbered paragraphs. The statement, response, and any reply must cite to specific record sources supporting the movant's and nonmovant's assertions. In the response, a nonmovant may state whether the facts the movant asserted to be undisputed are accepted, denied, or qualified (either generally or limited to the purposes of the motion); may state that even if accepted as true, those facts do not support summary judgment; or may state that other facts, not identified by the movant, preclude summary judgment.

Subdivision (c)(4) addresses replies by limiting them to "any additional fact stated in the response." Subdivision (c)(5) addresses the need to provide citations to the record to support statements, qualifications, or denials of fact in a motion, response, or reply. The amendment recognizes that a nonmovant may show that the materials cited by the movant to support a fact do not establish the absence of a genuine dispute, or may show that there is no record evidence to

support a particular fact asserted as undisputed by the movant. Subdivision (c)(6) addresses whether parties need to attach factual materials to their motions, responses, or replies. The proposed rule provides that parties must attach materials that have not already been filed, but does not state whether materials that have already been filed must be refiled in connection with the summary-judgment filings. The national rule need neither mandate nor forbid refiling materials that are already in the court's record if those materials are cited in the summary-judgment motion or supporting brief. As the Committee Note states, some judges want an appendix collecting in one place the materials relied on to support or oppose summary judgment, even if those materials are already on file. Other judges do not want duplicate filings of the same material. Proposed amended Rule 56 would allow both practices to continue.

The proposed Rule 56(c) procedure provides a clear framework to focus the parties and the court on the specific facts and record support asserted as the basis for granting or denying summary judgment. It is drawn from procedures established by the local rules in over fifty districts. Judges and lawyers with experience under such local rules and similar standing orders informed the Committee that such a procedure brings a very useful discipline, organization, and focus to summary-judgment motions and responses. But the judges and lawyers acknowledged that the procedure was not appropriate for all cases. In particular, huge cases that generate lengthy, even mammoth, records may also generate lengthy, even mammoth, motions. Although the proposed Rule text emphasizes that the statements of undisputed fact are to be limited to those facts critical to the summary-judgment motion, a rule can go only so far in reminding the parties that no one is well served by a motion listing hundreds of facts and perhaps thousands of supporting references. Based on the experience of lawyers and judges with such procedures, the proposed Rule also allows a judge to tailor the form of the summary-judgment motion, response, and reply based on what works

best for a specific case. The proposed Rule recognizes that certain cases may – whether because of complexity or unduly adversarial approaches – require different case-management techniques implemented through case-specific orders altering the Rule's default provisions.

One aspect of subdivision (c) generated substantial discussion. Subdivision (c)(3)(A) allows a response to "qualify" a fact that the movant asserts is undisputed, rather than merely accept or deny that fact. This provision is drawn from Style Rule 36(a)(4), which allows a party to qualify a response to a request for admission, and Style Rule 8(b)(4), which directs that a responsive pleading must admit the part of an allegation that is true and deny the rest. The Committee considered at length a concern that this word might seem to invite lawyers to "qualify" rather than accept facts asserted as undisputed. This concern was overcome by the recognition that in many cases, facts cannot simply be accepted or denied. Including the word "qualify" allows a nonmovant to make it clear to the judge whether a fact the movant asserts is undisputed is accepted or denied entirely, or is qualified, rather than inviting endless wrangles over whether a stated fact was not simply accepted or denied and therefore not in compliance with the Rule. Allowing a nonmovant's response to include "qualifying" as well as "accepting" or "denying" facts the movant asserts are undisputed allows a nonmovant fully to respond to a motion. The Committee concluded that explicit recognition of the opportunity to "qualify" was more realistic, would in many cases likely lead to partial acceptance rather than blanket denial, and would in general lead to better-focused responses rather than convoluted denials that would be qualifications in all but name.

Subdivision (d).

Subdivision (d) addresses an issue at the heart of summary judgment. A party may fail to respond to the motion, or may respond in a way that does not satisfy subdivision (c). Three main approaches could be taken. One would treat the failure to respond or an improper response as a

default, leading the judge to grant summary judgment without examining the motion or supporting materials to determine whether the movant is entitled to judgment as a matter of law. A second – reflected in more than a dozen local rules – would "deem admitted" facts asserted by the movant and not properly responded to. This approach is not the same as default. If there is no response to a summary-judgment motion, or the response does not address the facts asserted to be undisputed as subdivision (c) requires, the court could not grant summary judgment unless the facts "deemed admitted" and facts otherwise established beyond genuine dispute supported judgment as a matter of law. A third approach would require the judge to examine the motion and the supporting materials, allowing summary judgment only if the movant has carried the summary-judgment burden; on this approach the only penalty for failure to respond properly is loss of the opportunity to direct the court to information that would defeat the otherwise sufficient showing made by the movant. Subdivision (d) combines the second and third approaches, recognizing the common practice that the court first gives the nonmovant an opportunity to respond, in proper form, before "deeming admitted" facts not properly responded to. If there is no response or a deficient response, the court may defer its examination of the motion and record, order the nonmovant to file a response that meets the Rule's requirements, and then conduct its analysis. Or the court may grant summary judgment if, after reviewing the motion and supporting materials, the court determines that the movant has shown entitlement to judgment as a matter of law. But the court also may issue another appropriate order. As recognized in the Committee Note, it may be appropriate to order that facts not properly responded to will be "deemed admitted" unless a proper response is filed.

Other Subdivisions.

The remaining subdivisions present fewer issues. Subdivision (b) carries forward with little change Style Rule 56(e)(1)'s provision on affidavits; it omits as incomplete and unnecessary the

further Rule 56(e)(1) direction to attach a cited paper. The word "declaration" was added to earlier drafts of the proposal as a reminder of 28 U.S.C. § 1746 but later deleted to reflect the Style Project's choice to refer uniformly to "affidavits." The Committee Note explains that under section 1746, a "declaration" is an acceptable alternative to an affidavit.

Subdivision (e) recognizes practices well established in current procedure, making clear the court's obligation to give notice to the parties before granting summary judgment on grounds not raised in the motion, or for a nonmovant, or without a motion. Subdivision (f) carries forward substantially unchanged Style Rule 56(f); the Committee considered and rejected adding a requirement that a party asking more time for discovery or other investigation describe the facts it hopes to prove.

Subdivision (g) carries forward the Style Rule 56(c) language setting the summary-judgment standard, with only one change. "Genuine *issue* of material fact" is changed to "genuine *dispute*" of material fact. "Dispute" is a more natural word in this setting. It also avoids any risk of confusion with repeated references in Rule 56 and elsewhere to an "issue" as a component of a claim or defense. Subdivision (g) also adds a provision that an order granting summary judgment "should state the reasons." This provision reflects regular requests by appellate courts for district-court explanations of orders granting summary judgment. Such explanations are not only useful to the appellate courts, but also help the parties decide whether to appeal and what focus the appeal should have. The proposed amendment does not require a Rule 52-like finding of facts and leaves to the district judge's discretion how to provide the explanation of the summary judgment grant; the proposed rule does not say "must."

Subdivision (h) recognizes the common tendency to describe summary adjudication of part of a case as "partial summary judgment" and simplifies expression to emphasize the court's

discretion in determining whether it is useful to grant partial summary judgment. It also recognizes that a court may find it useful to identify material facts that are genuinely in dispute.

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

Conclusion

The Rule 56 proposal draws from the laboratory provided by the many districts with local rules on summary-judgment procedures. The proposed amendment attempts to synthesize the procedures that have been most effective, providing both guidance and consistency lacking in the present Rule, as well as necessary flexibility to tailor the procedures to the needs of particular cases. Public comment will further reveal experiences with the local rules and will ensure that the amended Rule achieves its stated purpose of improving the procedures and making them more consistent without changing the standard for summary-judgment rulings or making summary judgments easier or more difficult to obtain.

NOTES: RULE 56 MINICONFERENCE

The Rule 56 Subcommittee held a miniconference at the new United States Courthouse in Manhattan on January 29, 2007. Committee members present included Hon. Lee H. Rosenthal, Committee Chair; Hon. Michael M. Baylson, Subcommittee Chair; Hon. C. Christopher Hagy; Robert C. Heim, Esq.; Ted Hirt, Esq. (for the Department of Justice); Hon. Randall T. Shepard; and Hon. Vaughn R. Walker. Anton R. Valukas, Esq., participated by telephone. Former Committee members Sheila L. Birnbaum, Esq., and Hon. Shira Ann Scheindlin were among the invited participants. Edward H.Cooper, Reporter, and Richard L. Marcus, Special Reporter, were present. Joe Cecil represented the Federal Judicial Center. Administrative Office Representatives included Peter G. McCabe, John K. Rabiej, James N. Ishida, and Jeffrey N. Barr.

The invited participants who attended, in addition to the former Committee members, included Alice W. Ballard, Allen D. Black, Edward J. Brunet, Edward D. Buckley, Richard B. Drubel, Muriel Goode-Trufant, Jeffrey J. Greenbaum, Gregory P. Joseph, Peter F. Langrock, Frank C. Morris, George F. Pappas, David Rudovsky, and Alan N. Salpeter. Alfred W. Cortese, Jr., and Sol Schreiber were observers.

Chief Judge Kimba Wood welcomed the participants to Manhattan and to the courthouse.

Judge Rosenthal expressed the Subcommittee's appreciation for being invited to use the court facilities. And she expressed thanks to all the participants for taking the time to come to appraise the current Rule 56 draft in light of their experiences with summary judgment. She noted that the "miniconference" format has been very helpful in the past in helping to move the Committee beyond the limits of its own members' experience. Richly experienced and thoughtful lawyers are able to appraise the implications a draft proposal may have and to advance the drafting process. This sort of help is an important part of the process in moving toward a proposal that is worthy of the intense scrutiny that follows on publication. This group of participants includes lawyers from a variety of practice backgrounds, including areas that involve frequent use of summary-judgment motions. They include both those who frequently represent plaintiffs and those who frequently represent defendants. This blend of perspectives will be important.

The practice backgrounds of the participants were briefly identified. Many of them observed that they had seen an increase in the frequency of summary-judgment motions; several said that at least one summary-judgment motion had been made in every case they had been involved with in the last ten years. This was often coupled with the remark that the motions usually fail — with at least one observation that this experience generally seems to have involved complex litigation. Judge Baylson built on these remarks to open the initial discussion. The group's experience shows that Rule 56 motions are more common now than at the time the participants entered practice. And they are more likely to be granted; thirty years ago orders granting the motions were seldom encountered.

Pappas observed that Rule 56 "has to be made better and has to work better." He often engages in patent litigation involving high technology products that have a market life cycle of 18 or 20 months. There should be procedures for prompt disposition, including trial while the dispute still has meaning.

Salpeter noted that in the large-scale commercial litigation he encounters, a few Rule 56 motions are won and many are lost.

Ballard said that she has been faced by a summary-judgment motion in every case she has litigated in the last ten years. The cases involve plaintiff job rights — dismissal, pension rights, False Claims Act.

Black suggested that this is another case of the rules process focusing on a practice that "ain't broke."

Scheindlin said that Rule 56 is a big part of a judge's job. "The papers come in boxes." Lawyers should screen the motions more carefully; a Rule 56 motion should not become a matter of reflex.

Joseph agreed that Rule 56 motions are made in every case that is not dismissed, without adequate thought or careful presentation.

Rudovsky emphasized the frequency and importance of Rule 56 motions in civil rights cases.

Morris said that in defending employment cases careful use of Rule 56 is met with some success.

Brunet found that Rule 56 practice is very helpful in inducing settlements.

Goode-Trufant noted that her department has an average of 1,200 cases pending. Summary judgment is important, particularly in defending police conduct cases.

Buckley said that his job in pursuing employment claims is "to get past Rule 56." There are too many motions, and the motions are too voluminous.

Birnbaum observed that she had just won a summary-judgment motion in a multi-class class action. Rule 56 can be used successfully even in complex litigation.

Valukas sounded a common theme by observing that one side or the other had moved for summary judgment in every case he has litigated in the last ten years.

Judge Rosenthal explained that the current study was given added urgency when "the Style Project hit Rule 56." Close scrutiny of the Rule 56 text showed a great distance between "Rule 56 in practice and what Rule 56 says." Enough time has passed since rejection of the 1992 revisions to see whether improvements can be made.

Discussion then turned to the specific details of the current draft, generally proceeding subdivision-by-subdivision.

Draft 56(a): Timing

Judge Baylson noted that the draft of Rule 56(a) has been approved by the Advisory Committee as part of the time-computation project. But it has not yet been recommended to the Standing Committee, and it remains open for full discussion.

Subdivision (a) allows a summary-judgment motion at any time "until the earlier of 30 days after the close of discovery or 60 days before the date set for trial." This would depart from present Rule 56 in two directions. First, there is no waiting period — a plaintiff, for example, could serve a Rule 56 motion with the complaint. Second, there is a cut-off. Both departures, however, are designed as "default" provisions. Subdivision (a) begins: "Unless a different time is set by local rule or by an order in the case." It is anticipated that scheduling orders will set times in most cases, geared to the anticipated needs of each particular case. And room is left for adoption of local rules that might, for example, respond to special needs arising from more comprehensive local rules for particular types of litigation.

The first question was whether "the close of discovery" means the close of all discovery. The intent is to refer to the close of all discovery, recognizing that the needs of specific cases can be met by orders that, for example, stage discovery on specific issues and direct that summary-judgment motions be integrated with the completion of a defined discovery stage. It was suggested that "all" be added to the rule text: "after the close of all discovery.

Turning to paragraph (a)(2), it was suggested that the 21 days allowed to respond is too brief; it should be made 30 days. A second participant agreed that 21 days to respond to a long statement

of uncontested facts "is very tight." And a third noted that he always has needed more time than 21 days; 30 days seems a minimum.

The cut-off at 60 days before trial was then questioned. It was noted that under Rule 26(a)(2) the presumptive time to disclose expert trial-witness reports is 90 days before the trial date, with an additional 30 days to disclose rebuttal expert witness reports. The result would be that the summary-judgment motion must be made on the same day as the rebuttal reports are filed. Even if the rule adheres to a 21-day response period, adding those 21 days and the 14 days allowed by (a)(3) to reply means that the motion will be submitted 25 days before trial. That is very short. Of course, this concern arises only in the "mythical district" that does not govern these questions by a scheduling order.

A judge asked whether these problems can be addressed by agreement among counsel, working through the provision that allows the timing requirements to be altered by order in the case. The response was that it doesn't work, particularly for the cut-off for the motion itself. It would be better to have a deadline that requires the matter — motion, response, and reply — to be submitted for decision at least 90 days before trial.

In the same vein, another judge observed that for the "mythical" case without a scheduling order, a procedure that contemplates submission for decision 25 days before trial will require that the trial date be pushed back. This judge usually sets the time by order at the close of fact discovery, before expert disclosure and discovery even begin. Another participant suggested the Committee Note should make it clear that the deadline is geared to the close of fact discovery because the motion and ruling may avoid or change the need for expensive expert discovery. But another participant observed that he needs to have expert discovery before summary judgment; in his civil rights practice, expert testimony commonly goes to the merits, not just to damages. Still another participant noted that the period should extend after the close of all discovery, noting that it is a deadline — a motion can always be made earlier.

A practitioner noted that when a motion is served close to trial, the lawyers still have to prepare for trial. A different practitioner noted that it is often difficult to know when discovery has concluded, and that often enough it is clear that discovery is continuing beyond the time set at 60 days before trial.

Turning to an omission from the draft, it was urged that there should be a provision for cross-motions. The calculation can be much like the dilemma involved with the decision whether to appeal. A party may believe that there is a plausible basis for a summary-judgment motion, but also believe that on balance it is better to proceed as promptly as possible toward trial. Proceeding toward trial saves the expense of a summary-judgment motion, which can be high, and advances the powerful effect an impending trial has in encouraging settlement. If another party is going to defeat these objectives by moving for summary judgment, on the other hand, the responding party should be free to respond with a cross-motion even though the time set for an initial motion has run. The provision could look for inspiration to the provisions for crossappeals, which involve similar concerns. The opportunity to invite the court to grant summary judgment for the nonmovant is not an adequate substitute. But another participant objected that a rule provision would encourage crossmotions that otherwise would not — and should not — be made.

A different omission was noted. It would be useful to include a statement that there is no right for a nonmovant to file a "sur-reply" to address the movant's reply to the nonmovant's response.

These complications led to the question whether it is useful to have a default time provision. Why not rely on scheduling orders for all cases? The draft does not reflect a judgment that the default time periods are desirable for all cases, setting a presumptive model for case-specific orders. Instead, it reflects concern that there may not be a scheduling order in every case — Rule 16(b)

makes an exception for categories of cases exempted by local rule. And there are local rules. But the question persists: has anyone identified problems that arise from the lack of any deadlines in present Rule 56?

Discussion returned to the event that should measure the deadline. Support was urged for setting it to run from the close of discovery. An experienced lawyer usually knows pretty early in the case whether there are grounds for a serious summary-judgment motion. The rule should protect against motions delayed until a time that will require that the trial date be deferred. "It's pure hell preparing for trial." The motion should be made well before trial, and can be if there is serious support.

The contrary suggestion was made: instead of alternative deadlines, (a)(1) should set the deadline at a specified time before trial. One possibility would be "no later than 90 days before trial," remembering that the court can order otherwise. But a judge responded that even 90 days is a close thing: "I have a 60-day list to decide motions, and often it's a close thing." That pushes the decision back to 30 days before trial. A different protest was that a national rule cannot be written on the assumption that every case has a "date set for trial." Some cases do not.

This discussion led to a quite different suggestion. Building from the observation that Rule 56 motions often involved "boxes of papers" the judge must wade through, it was suggested that Rule 56 should look for inspiration to practice in SDNY. A motion could be made only after a prescreening conference with the judge. The conference could be initiated by a 2-page letter brief identifying a small number of "big issues" and stating why it is proper to consider them on summary judgment. The result of the conference would be an order identifying the issues that can be addressed by the motion.

Draft 56(b): Affidavits or Declarations

The first questions asked whether it is necessary to supplement the traditional reference to "affidavits" by adding "or declaration." 28 U.S.C. § 1746 is clear — a rule that requires an affidavit is satisfied by submitting a statement made under penalty of perjury. And it is not clear that "declaration" refers to § 1746 — although that is the intent, there is no single word that really does the job. New York practice uses "affirmation" to describe the substitute for a sworn statement, but that may be even more obscure in a federal rule. But if "declaration" is used in subdivision (b), care should be taken to ensure consistent usage throughout the rule.

Discussion turned to the second sentence, which revises Style Rule 56: "~~If a paper or part of a paper is~~ Other evidence referred to in an affidavit or declaration ~~a sworn or certified copy must be attached to or served with the affidavit~~ must be served with it in a form admissible at trial unless the evidence is already on file [with the court]." The changes began with concern that an affidavit may rely on electronically stored information, better referred to as "evidence" than as a paper. Then "form admissible at trial" was substituted for a sworn or certified copy, with the thought that admissible form should suffice without the present need to supply a sworn or certified copy. Disputes as to authenticity could be resolved if they actually arise. But the rule can be read to say that the evidence attached to the affidavit or declaration must be presented in a way that would overcome all trial objections to admissibility. It would be better to refer to "a form that can be made admissible at trial." (This view was seconded later in the discussion. A variation also was suggested: "a form that would be admissible at trial.") It was also observed that the draft seems to assume that anything on file with the court is in a form admissible at trial, which may not be the case. These observations were supplemented by noting that many traditional summary-judgment materials are not in a form admissible at trial. Affidavits are prominent examples. Deposition transcripts may or may not be admissible at trial. An instrument attached to a pleading may not be sworn or certified. For that matter, documents produced in discovery may present problems arising from custody of the documents. So the Celotex decision on remand to the court of appeals led to a ruling

that summary judgment can be opposed by material that simply shows information that can be put in admissible form, or likely can be put in admissible form.

A related twist was the suggestion that this second sentence seems to invoke the Rules of Evidence for all Rule 56 materials. But that issue really is presented by draft subdivision (f). Subdivision (b) addresses only the form of materials referred to in an affidavit and not already on file. It has that in common with present Rule 56(e)(1). Something should be done somewhere to make clear the proposition that summary judgment can be granted only on the basis of information admissible at trial — that is different from denying summary judgment on the basis of information that is not yet in admissible form. Perhaps the tag line for subdivision (b) should be changed to "summary-judgment evidence."

This observation was complicated by referring to a practice common in some federal courts. A summary judgment motion often is supported by an "affidavit" of counsel that warrants the authenticity of the supporting materials — "this is an accurate excerpt from the deposition of Witness 1," "this document was produced by the plaintiff in response to a Rule 34 request," and so on. So drafting subdivision (b) to cover only "evidence" referred to in an "affidavit" does not narrow it. Another practitioner retorted that this practice is peculiar to SDNY; it is not followed in most districts. A judge said that the SDNY practice is useful because it organizes the presentation and ensures that the summary-judgment "exhibits" are in a form admissible at trial. But it was responded that the organizing function is better performed by the statement of uncontested facts required by subdivision (c).

A different question asked whether supporting materials always need be attached to an affidavit. Suppose the affidavit describes the contents of "five pounds of telephone records," or extensive accounts.

Quite a different question was raised by asking whether a reference to admissibility invites Evidence Rule 403 rulings at the summary-judgment stage. It was suggested that "this happens now, particularly with expert witness affidavits."

Draft 56(c): Detailed Procedure

Statement of Undisputed Facts. Draft Rule 56(c) provides a far more detailed statement of summary-judgment procedure than present Rule 56 provides, built around a detailed statement of "specific facts that are not genuinely at issue." The statement must be supported by specific references to materials supporting the facts. This procedure is adapted from a large number of local district rules that, in various terms, impose similar requirements.

The first observation was that the draft makes all of this detail "part of the motion. It is extraordinarily expensive." And once the detailed "150-page" motion is made, the nonmovant "denies everything." The denials are as lengthy as the motion. Often the denials do not address the understood merits of the stated facts but instead address quibbles about the precise forms of stating the facts. This captious response behavior is driven in part by fears on consequences outside the immediate litigation. The rule should allow the parties to opt out of the detailed statement by agreement. Most parties think they get nothing out of it.

But, it was protested, this procedure has become very common because it makes things easier for the judge. That in turn makes possible prompter and better-informed rulings. The parties do get something out of it.

A rejoinder suggested that this requirement for a detailed and supported statement of specific facts "is a bad idea. The Committee should lead in the opposite direction," away from an accumulation of undesirable local rules. Professor Burbank, who was required by his teaching schedule to miss this meeting, has put it well. The proposals have at least five undesirable effects. (1) Practice will be more burdensome and expensive. (2) 90% of what is required is busy work.

Without these requirements, the parties will do a pretty good job of identifying what is at issue. (3) Adding cumbersome requirements makes Rule 56 ever more a tool of delay and oppression of the weak. (4) There will be a further erosion of jury trial. (5) All of this will facilitate the continuing movement away from trial and toward trial by affidavit without cross-examination or any of the other benefits of a "real trial."

The perspective of plaintiff employment-law practice was offered by arguing that the proposal "retreats from Celotex." Under present practice a party can move by stating that there is a piece missing from the nonmovant's case, a piece that cannot be proved. The nonmovant can respond that this piece indeed can be proved. Employment cases commonly turn on intent. Findings of intent depend on how the facts are put together. If a movant has the first right to order the facts, and subdivision (c)(2) requires the nonmovant to respond by accepting the movant's fact framework, the nonmovant is put at a disadvantage. It is a big disadvantage.

A somewhat different criticism was that Rule 56 motions should be brought to a quick focus. "Long statements are a waste. They go in no particular order." It is wrong to introduce motion requirements by directing that the motion be "without argument"; it always is an argument. A separate memorandum of law should not be required. The facts should be organized in the way the case is organized, not as draft (c)(1)(C) suggests. The motion in a fraud action, for example, should be organized in the way the case is organized. The focus should be on the elements of the claim or defense, pointing to supporting materials. The response would enable the judge to see whether anything is missing. Ordinarily "the paragraphs will line up" by the elements of the claim. If clarification is needed, the court can hold a hearing.

The suggestion for organization by the elements of claim or defense was met by a counter-suggestion that focus should be on the "controlling facts" that support judgment as a matter of law. The Committee Note could say that ordinarily there will be only a few facts of this caliber. This procedure could be integrated with Rule 16, providing an opportunity for a hearing when a party wants to assert more than a limited number of facts — the limit might, for example, be set at 20 controlling facts. Some form of organization is needed to avoid the burden of stating every fact and responding by quibbles.

An alternative suggestion was that often a motion is best organized by a "chronology." Whatever the order, "there has to be a story." The movant tells the story. The response, organized around the numbered paragraphs of the motion, is orderly. It should be "like a complaint and answer."

A theme familiar to many procedure discussions emerged with the thought that something like the draft (c)(1) procedures can be useful in simple cases with no more than a few disputed facts. But in complicated cases it is "busy work." The story is told in the brief, not in the motion. The motion does not help the judge.

This view was supported, speaking from practice in civil rights cases, by urging that the motion should be focused on "material" facts. Local rules similar to draft (c)(1) help to focus the parties and court.

A judge reported similar experiences. The statement should be limited to "material" facts. Then it can be very helpful in small cases. But in big cases the statement generates collateral disputes. "The movant's stated fact 135 is really two propositions; I cannot respond until you make them state them separately." The statement can be an exercise in futility in such cases.

Another lawyer suggested that the detailed statement by the defendant helps him, representing a plaintiff, to get organized for trial. "I want to tell my story in my own statement of facts." But a pro se litigant cannot make that happen. Indeed there are unsophisticated lawyers who cannot. There should be an escape clause.

Still another practitioner said that "Rule 56 is an organization of facts. We need to allow the responding party to marshall the facts to tell its story. 'Without argument' means nothing. It's all argument."

The burden argument was embroidered by noting that the debates about summary judgment will be stimulated by the pending publication of two articles. One argues that summary judgment is unconstitutional. The second, agreeing with that argument, adds that it also is inefficient and unfair. Academic criticism of any draft that is seen as facilitating summary judgment will be intense. And the academic protests will spur protests by broader segments of the bar.

Further criticism was that more than 90% of summary-judgment motions are denied because they should not have been made. The motions are too long, and so are the responses. The court cannot wade through the morass. But there is a helpful practice in pretrial hearings to construe patent claims that may be useful more generally. After discovery every word in the claim that requires interpretation is listed separately in a chart. Each party addresses separately its position and supporting evidence as to each word. Judges find this very useful. The same thing could be done for each disputed fact under Rule 56. But it was asked whether "spreadsheet presentation" will work generally in all cases.

Drawing back, participants were reminded that draft (c)(1) is based on a great number of local rules. Many courts have found something like this useful. The practice avoids the risk that motion and response will be ships passing in the night. But it may not be needed for small cases, and it may present difficulties in the large cases. The difficulties may be augmented when practice wings out of control on excesses of adversary zeal. And it does seem important to allow the nonmovant to find a way to tell its own story without being bound to the movant's chosen frame.

Returning to the fray, a practitioner observed that there are a lot of false denials, based on the asserted ambiguity of the words used in stating an "uncontested" fact. It might help to call for a statement of what facts a movant thinks are established beyond dispute, and a response that identifies facts that are in dispute.

After an interval devoted to other questions, the problems of statement and counter-statement were resumed. The response provision in (c)(2)(A)(ii) might be modified to call, not for "additional facts" precluding summary judgment, but for "any additional facts or inferences from facts." Both in (c)(1)(C) and in (c)(2)(A)(ii), it might be better to omit the lengthy — and probably incomplete — itemization of various types of supporting materials such as depositions, documents, and the like. Instead the required reference could be to "particular evidence supporting" the facts or response. Or the bracketed itemization could be deleted, referring only to the supporting "materials."

Others were worried about "materials," and suggested "evidence." But it should not be "evidence admissible at trial." A judge observed that it has become common to make evidence motions on summary judgment, arguing the admissibility at trial of evidence relied upon to support or oppose summary judgment. This theme was carried further by observing that the problem of admissibility appears throughout the draft. One complication is that a lawyer may deliberately refrain from objecting at trial — evidence ruled out of consideration on a Rule 56 motion might well come in at trial even though it would have been excluded on objection. But at least Rule 403 rulings are not being sought on summary judgment.

The "evidence" question was attacked from a different angle. "Evidence" is not "fact." There is a risk that references to "evidence" and to "fact" in Rule 56 will cause confusion. What will decide the motion is the determination whether facts are genuinely disputed, not what evidence is.

A different perspective was taken in observing that it is difficult to frame a statement of undisputed facts that observes the line between "fact" and "inference." A response denying a statement that "intent" is not disputed, for example, may be treated as an "argumentative" response.

These questions may be addressed in the argument called for in draft subdivision (c)(6), but they are hard to address in the statement and response form.

The inference problem was illustrated by another example. A common civil rights claim is that prison officials have shown deliberate indifference to a prisoner's medical needs. The facts susceptible of direct testimony may be clear, but the inference is not. The prisoner should be able to respond to an official's statement that the lack of deliberate indifference is undisputed by saying that the official is simply missing the issue.

One suggestion was that the nonmovant can respond by identifying the facts that should be considered in determining the range of reasonable inferences and by describing the permissible inferences favoring the nonmovant. This suggestion was followed up by suggesting that the inference arguments can be addressed in the argument memorandum described by draft (c)(6), and need not be addressed also in the motion. But it was responded that "the mind doesn't work that way. You want the judge to see the inference issue when she reads" the statement of facts. This perspective suggests that Rule 56 should recognize the nonmovant's right to provide an independent statement of facts, not simply a response that initially tracks the movant's statement item-by-item.

Another practitioner thought that this is what generally happens. The first step is the motion identifying facts and record support for them. Then briefs are filed — often the briefs gloss over the evidentiary support. "This works when properly done." It helps to approach the question by asking what are the elements of the claim.

Discussion of inferences led to the observation that the draft uses "issue" in two different senses. It carries forward the current rule's reference — adopted in Style Rule 56 — to any "genuine issue" of material fact. But it also refers to summary judgment on any "issue." "Issue" in this second use seems better than "fact" — we may not want to provide for a motion describing the "claims, defenses, or ~~issues~~ facts" on which summary judgment is sought. "Matters" might be substituted for either "issues" or "facts," but it may be too open-ended. Although the present rule language has been treated as nearly sacred in the Style Project, perhaps the time has come to adopt a more natural contemporary expression. The standard could be expressed as a genuine dispute as to any material fact.

Federal Judicial Center Study. Various assertions having been made about the frequency of orders granting summary judgment, Joe Cecil was asked to report on progress in the Federal Judicial Center study. The study examines cases terminated in 2006. Summary-judgment motions were made in 16 of every 100 cases terminated in the federal courts. That frequency is not as low as might appear, remembering that significant numbers of cases are resolved by default, dismissal on the pleadings, or settlement before it seems plausible to seek summary judgment. There is significant variation in the frequency of motions across different case types. Motions are more frequent in civil rights cases, less frequent in tort cases. Some of the increase in frequency across the entire body of filings is attributable to changes in the composition of the case load toward types of cases that experience more frequent motions.

Across all case types, 60% of the Rule 56 motions are granted in whole or in part. Again, the rate varies across case types.

Ongoing work in the study will examine how long it takes the judge to decide Rule 56 motions. It may be possible to compare disposition time to the time to dispose of Rule 12 motions. It would be nice to be able to compare disposition times in districts that have local rules requiring undisputed-fact statements of the sort required by draft subdivision (c) with times in districts that do not have such local rules, but the comparison might be made unreliable by individual judge practices in districts that do not have local rules.

Three-stage presentation. Discussion cycled around a different question. The draft, drawing from the 1992 proposals, directs that the motion and response be made "without argument." The "argument" is to be made in a separate memorandum. The first suggestion was that there should be three steps: A motion that states in simple terms the undisputable facts that control judgment, matched by a response in equally simple terms; a separate statement that marshals the record materials that support or refute the asserted facts; and an argument.

This discussion was directed next to draft (c)(6), which directs that "a party must submit its contentions as to the controlling law or the facts in a separate memorandum * * *." Why direct that there "must" be a separate memorandum? The result may be wasteful duplication of matters already presented in the motion. The Rule 56 procedure should be streamlined, not made more cumbersome. The memorandum is likely to resemble the statement of uncontested facts before turning to arguments. Some judges prefer to get it all in one document. It would be better to reduce this to a direction to "submit its contentions ~~as to the controlling law or the facts~~ in a separate memorandum."

The next statement was that the brief is the most important document. It provides the opportunity for a party to tell its story. The brief can cite to the statement of facts without lengthy repetition. It can, for example, say "the defendant stabbed the plaintiff three times, see Statement at x - y."

A judge noted that there is strong support for a right to file a brief that recites the facts and argues how the law applies. If the brief is to be a full explanation of the law and facts, is there a need for the discipline provided by a separate statement of facts?

A practitioner urged that the statement of undisputed facts "is organized." It lays out the record. It anchors the advocacy in the brief. A judge added that it reduces the risk that "the ships will pass in the night."

Another judge recognized that draft (c)(1) may need revision, but observed that in most cases the facts are fairly straightforward. The sequence of statement and brief helps the judge process the case. Many local rules require a statement of undisputed facts, but the terms vary, imposing a burden on the bar. It would be better to have a uniform national practice.

Another judge responded that "you're not going to corral all 94 districts. This rule will metastasize through the local rules." Is it possible to draft a rule that prohibits elaboration or departure by local rules?

A practitioner asked whether the concern about lengthy statements of uncontested facts that are not material to the case could be met by requiring that the facts be organized according to the elements of claim or defense? That would leave the free-form memorandum-brief for the task of addressing fact, inference, and law as an advocacy piece. Another practitioner suggested that greater supervision is needed. It is "controlling facts" that support judgment as a matter of law. The Committee Note could say that ordinarily there will be only a few facts of this caliber. This procedure could be integrated with Rule 16, providing an opportunity for a hearing when a party wants to assert more than a limited number of facts — the limit might, for example, be set at 20 controlling facts. Some form of organization is needed to avoid the burden of stating every fact and responding by quibbles. (The desire for judicial supervision was addressed directly by urging that a Rule 56 motion should be available only with the court's leave, a proposal noted separately below.) Organization is needed to avoid the burden of stating "every fact, and responding by quibbles."

A judge stated that "you lose the judge real quick if you list a lot of not material facts." The sanction is to deny the motion or, if the failure is in the response, to deem the facts admitted.

A practitioner asked what sanction will be imposed on a party who does not comply with the appropriate procedure? Draft (c)(7) addresses this only in part, stating that the court may grant summary judgment against a party who does not respond or whose response does not comply with

(c)(2) requirements only if the motion and supporting materials show there is no genuine issue — that the movant has carried the summary-judgment burden. The draft does not address a motion that fails to comply, assuming that the court may simply refuse to consider the motion. Later discussion renewed the suggestion that the court can deny a motion that is not supported by a proper statement of undisputed facts.

Pre-motion hearing. Earlier discussion tied the undisputable fact statement to an argument for a premotion hearing. If we allow a motion only on leave of court granted after a hearing, with an order that identifies the facts to be addressed by the motion, a requirement that the facts be stated separately and supported by specific references to the record is fine. And it will work to require the nonmovant to respond in that order. But simply limiting the required statement to "material" facts will not resolve the problem. This argument was renewed by a suggestion that the "urge" to require statement and counterstatement of undisputed and disputed facts might be channeled through a pre-motion conference with the court. The problem is that present practice generates too many fact statements that run far too long, supported by boxes of materials. Few motions should be so cumbersome. Most cases will turn on a small number of essential facts. A conference with the judge can focus the motion and response on the truly important facts.

Rule 56 burdens. Quite a different question was raised about the need to frame a rule that addresses the nature of the movant's burden when the nonmovant has the trial burden of production. The draft, in (c)(2)(B)(i), allows a nonmovant to respond with the simple statement that the movant has not carried the Rule 56 burden of showing that there is no genuine issue as to the assertedly undisputed facts. It should be balanced by stating in (c)(1), or somewhere, that a movant who does not have the trial burden does not have to cite to materials that fail to show what the nonmovant has to show. A defendant in an antitrust action, for example, may believe that the plaintiff has no evidence of the claimed conspiracy. The rule should be clear that the defendant need only state that the plaintiff has no evidence.

This question directed the discussion toward the draft provision (c)(2)(B)(i). The 1992 draft attempted to restate the 1986 Supreme Court decisions in rule text, identifying moving burdens that correspond to allocation of the trial burden of proof and a standard that varies with the standard of proof required at trial. There is at least some ground to suspect that the Judicial Conference rejected the 1992 proposal because of dissatisfaction with this effort. This concern has engendered a wariness about further attempts to address the Rule 56 moving burden in rule text. The (c)(2)(B)(i) item was added to offset the seeming command of (c)(2)(A)(ii) that the nonmovant must respond by an item-by-item listing of record sources that refute the movant's statement of undisputed facts. It is clear that when the movant has the trial burden a nonmovant can respond with a simple assertion that the movant's showings have not carried the summary-judgment burden of showing support in record materials that would require judgment as a matter of law if introduced at trial. An alternative provision that speaks directly to the moving burden is included at the end of the draft rule materials. This alternative would distinguish between a movant who has the trial burden and one who does not.

The practitioner who raised the question responded that it is not desirable to refer to only part of the Celotex allocation of the moving burden. As soon as the rule addresses the need to support the motion — as by separately reciting facts and pointing to materials that support or refute them — it becomes necessary to address the complete allocation. "The paradigmatic Rule 56 setting is when the party who has the trial burden has no evidence. You need it both places." (c)(1)(C) should balance (c)(2)(B)(i) — it should state that a movant who does not have the trial burden can carry the summary-judgment burden by "pointing out" that the nonmovant lacks evidence. The Celotex opinion immediately describes the statement that the movant must "show" the absence of evidence as "pointing out" the absence of evidence. A party can "point out" the lack of evidence by stating simply that the nonmovant has none, without having to point to anything specific that negates the nonmovant's position.

This question was expressed in terms of the Celotex setting: How does Celotex "show" that the plaintiff's late husband never was exposed to any Celotex product, at any time or any place? Celotex makes it clear that the movant does not have to make an affirmative showing that negates an element that must be proved by the nonmovant at trial. The movant does not have to "prove" that the light was green; it suffices to show that the nonmovant has no evidence that the light was red. It is difficult to reconcile this proposition with a rule that directs the movant to cite to particular parts of record materials.

This discussion led to a further exchange about the question whether there is any reason to distinguish between trial burdens and the summary-judgment burden. Summary-judgment practice could be made an image of trial practice by allowing a movant who does not have the trial burden to demand summary judgment without any showing at all. At trial a party who does not have the burden wins judgment as a matter of law unless the party who does have the burden produces sufficient evidence to carry the burden. So it could be done before trial. But the Celotex requirement that the movant "show" the lack of evidence has not meant that. In effect the Court qualified its statement that summary judgment is not "disfavored" by imposing a burden that distinguishes summary judgment from trial. Any attempt to further relax the movant's responsibility raises fundamental questions about the wisdom of relying on predictions of what a trial record will be without having a trial.

The first piece of advice was that the rule should not be complicated by express references to burdens and shifting burdens.

The next observation was that what movants and courts fear is the late-filed affidavit. So in the Celotex case, Celotex twice asked the plaintiff by interrogatory to identify the circumstances of her husband's exposure to any Celotex product. Twice she failed to respond. It was only after Celotex moved for summary judgment that she provided affidavits and other materials that may have shown a prospect that — if reduced to admissible form — she could carry the trial burden of production. But that "fear" may address only a desire to put orderly procedure ahead of a well-informed decision whether there is a prospect of success at trial.

Another practitioner suggested that it may not be necessary to refer to the trial burden. It suffices to allow a response that the movant has failed to show there is no genuine issue. That approach could be built into (c)(2)(A)(ii), leaving it to the nonmovant to decide whether it will suffice to rely on this general assertion or whether it is better to point to record materials that are not described by the movant and that show there is a genuine issue. But it was asked whether it is possible to direct a movant to show a basis in the record for asserting that the nonmovant lacks evidence — doesn't this resolve to "make them prove their case"? There is a "nasty drafting problem" here. "Pointing out" sounds good, but what does the movant point to?

A practitioner responded that this is not a problem. The movant relies on deposition testimony, admissions, or the like, to show there is no evidence to support a necessary element of a claim or defense. Another practitioner elaborated. The movant will depose the witnesses identified in the initial disclosures — those, for example, identified as having information about the plaintiff's exposure to the defendant's asbestos products. Then the defendant moves for summary judgment, showing that none of the deponents has testified to exposure. Another practitioner agreed that this is not a problem. Draft (c)(2)(B)(i) can be discarded.

A judge asked whether explicit Rule 56 text is important as a guide to lawyers who do not have the sophisticated grasp of practice common to participants in this conference? A first response was that it is "a whole lot more efficient" to allow the simple response that the movant has not carried the burden of showing there is no genuine issue. This response should be specifically identified in rule text. Another response was that "this is the distinction between motion and brief" — the brief can point out that the movant has not carried the moving burden.

Yet another response was that the alternative draft provision addressing burdens is accurate and clear, but might be improved in the part that addresses a movant who does not have the trial burden, who can "~~show~~ point out that the nonmovant does not have sufficient evidence to carry its burden at trial." Another practitioner objected that the reference to "sufficient evidence" seems to invite weighing. It would be better to say "does not have evidence to avoid judgment as a matter of law at trial." This view was supported by yet another practitioner.

Doubts whether Rule 56 should refer to trial burdens were renewed. Will any expression of this complication in the Rule 56 moving burden generate confusion? Will it generate complaints that Rule 56 is being amended to skew the burdens to the disadvantage of some litigants? A practitioner expressed the view that any rule addressing these problems will generate confusion. But another practitioner expressed approval of the (d)(2)(B) alternative draft, thinking it better than the less comprehensive effort in draft (c)(2)(B)(i). Yet a different practitioner returned to the suggestion that the (c)(2)(B)(i) provision should be balanced by adding a parallel statement in (c)(1)(C) that a movant who does not have the trial burden can point out that the nonmovant lacks evidence to carry the trial burden. Still another suggested that these wrinkles would be better addressed in the Committee Note than in rule text.

(c)(3) was discussed briefly. The draft provides that a movant can reply to a response by using the response procedure. It was observed that if the response is an affirmative defense, the movant should be allowed to respond to the affirmative defense in all the ways that a nonmovant is allowed to respond to the initial motion. This discussion was tied to discussion of draft subdivision (c)(5). This provision gives the court discretion to permit a party to supplement the materials supporting a motion, response, or reply. The response to a motion, for example, may point to the need to adduce materials that were omitted from the initial identification of support, or to find and supply new materials. Or the movant may want to add materials to support a reply to the response, particularly if the response raises new issues not included in the motion. A practitioner approved the implicit requirement that a party must obtain the court's leave to supplement the summary-judgment record. This requirement may assuage another concern — that this provision may seem to invite motions to reconsider after summary judgment is granted or denied.

Admissible evidence. There was an early observation that draft (c)(7) anticipates the summary-judgment standard articulated in draft (f) but does not incorporate the bracketed reference in (f) to "[evidence available for use at trial * * *]." The suggestion was that (c)(7) should not refer to admissible evidence.

(c)(7) Draft subdivision (c)(7) provides that even when a nonmovant fails to respond, or responds in a form that does not comply with subdivision (c)(2), the court can grant summary judgment only if the motion and supporting materials show there is no genuine issue of material fact. It also says that the court may — but need not — consider materials outside those called to its attention by motion, response, and reply. An academic participant observed that there are cases that say these things. A practitioner added that the cases are right. But another practitioner thought that if there is no response the court should be authorized to find that a fact asserted by the movant is not contested. A judge pointed out that some local district rules state that failure to respond puts a nonmovant at risk of a "deemed admission." There was no further development of these positions.

Draft 56(d): Court Action

Draft subdivision (d) sets out three propositions established by decisions under present Rule 56. The court may (1) grant summary judgment for a nonmoving party; (2) grant or deny a motion on grounds not raised by motion or response; or (3) raise the possibility of summary judgment on its own.

Discussion began by agreeing that notice should be given before the court grants or denies a motion on grounds not raised by the parties; the brackets around this provision in the draft should be removed.

That notice provision provoked the suggestion that notice also should be required before the court grants summary judgment for a nonmoving party. It might be better, for that matter, to adopt an explicit cross-motion provision. The nonmovant needs notice it is at risk so it can respond. Another practitioner agreed that notice should be required, comparing the provision that allows the court to deny an unopposed motion.

The question whether Rule 56 should duplicate the Rule 12(b) and 12(c) provisions that require a reasonable opportunity to respond when a pleading motion is converted to a summary-judgment motion was raised and put aside as not necessary.

Further discussion suggested that all of the obvious alternatives should be listed in subdivision (d), particularly if it continues to be tag-lined as "Court action": (1) grant summary judgment in whole or in part; (2) deny summary judgment in whole or in part; (3) grant summary judgment for a nonmovant; * * *.

Draft 56(e): Cannot Present Opposing Facts

Draft 56(e), which parallels present Rule 56(f), includes a provision directing that a party who seeks more time to oppose summary judgment describe the facts it intends to support. This provision is drawn from an "offer of proof" provision in the 1992 proposal. The first practitioner reaction was that something like this is a good idea — the nonmovant should be forced to do more than simply ask for time. Another practitioner, however, asked how specific must be the showing of the facts you do not yet know? A third asked whether it would suffice to say that you want to depose an affiant to find out more about what the full testimony would be?

Another practitioner suggested there may be some disagreement in the cases about the court's authority to grant summary judgment after denying a Rule 56(f) motion for more time.

A different question was asked: should we assume that a motion for more time is sensible only after discovery has closed? A judge responded that the court can reopen discovery, and that in any event the case-management order may anticipate such issues. Another judge further observed that the draft provision that allows a Rule 56 motion at any time will increase the frequency of motions to defer consideration pending further discovery. It is difficult to be more specific in the rule.

A different question asked whether a party requesting more time should be required only to offer "specified reasons," as in the draft, or whether good cause should be required. An academic noted that the case law is not clear. Some courts say that argument in a brief is the substantial equivalent of an affidavit, but it would be better to adhere to the draft, which requires an affidavit or declaration of reasons. A judge responded that "a lawyer's affidavit is an argument."

Finally, a question was raised as to the relationship between the effect of a motion to defer consideration of a Rule 56 motion and the time to respond to the motion. It was said that the First Circuit has ruled that the time to respond can continue to run, and expire, while the court is considering the motion to defer. All participants agreed this was a bad idea. There was no discussion of the question whether a motion to defer consideration should toll the time to respond. Tolling might create an artificial incentive to move for deferral. Perhaps this problem should be left to the initiative of the party seeking to defer consideration — if there is a problem with the time to respond to the motion, the party should address the problem in its motion to defer.

Draft 56(f): Final Grant

Draft subdivision (f) raises several issues. One is whether, and in what detail, a court should be required to explain an order granting summary judgment. Another is whether the rule should add words similar to the draft, authorizing summary judgment if "evidence available for use at trial shows" the absence of a genuine issue.

Trial Evidence: A practitioner observed that "available" for trial presents awkward practical problems. No one can be sure whether a witness will be available at the time of trial, whether by subpoena or otherwise. What we want to describe is evidence that would be admissible at trial. Another practitioner agreed that "available" is too demanding. Perhaps the rule should simply cross-refer to the subdivision (c) requirements for motion, statement of uncontested facts with supporting references, and so on.

Another practitioner protested that requiring evidence admissible at trial is too limiting. A nonmovant should be able to oppose the motion by other forms of showing.

A judge asked whether it would be better to refer to evidence that "may be admissible at trial"? A different judge thought this formulation presents distinctions that may be too subtle for easy administration.

Another practitioner asked whether the reference to available evidence responds to a problem found in practice. The history of this provision traces back to 1992. The Committee then was concerned that present Rule 52(e) requires that supporting and opposing affidavits set forth such facts as would be admissible in evidence, but does not impose a similar admissibility requirement on discovery materials used to support or oppose a motion. Inclusion of this provision in the current draft does not reflect any judgment whether it is needed.

Other practitioners supported "may be admissible." The declarant in an affidavit, for example, may be available at trial.

It was observed that some of the difficulty may lie in the word "evidence." But it may be difficult to substitute some more neutral word, such as "information." An affidavit plainly can be used to support or oppose summary judgment, but ordinarily is not admissible as evidence at trial. The affidavit may suffice even though it points to information that is not itself in admissible form — the affiant, for example, may swear to hearing another person say something. The prospect that this hearsay information might be available in a form admissible at trial may justify denial of summary judgment, at least until there is no reasonable prospect that it can be produced in admissible form. But at some point, why deny summary judgment when the nonmovant cannot show any reasonable prospect that a trial will yield sufficient evidence to avoid judgment as a matter of law?

A different practitioner asked about evidence that may be impeached at trial? The witness who recants at trial? The draft forces the nonmoving party to engage in cross-examination before trial. A judge asked what happens if a party has a "dynamite impeaching document" it wants to use to blow a witness out of the water: must it be revealed on summary judgment? Another judge said it must be, if that is the only way to defeat summary judgment. A practitioner observed that this is a problem only if the document is protected by work-product doctrine; if it is not protected, it is discoverable in any event (even though protected against disclosure, if solely for impeachment, by 26(a)(1) and (3)). Still another judge agreed that if the movant has carried the Rule 56 burden, the nonmovant has to show the impeaching materials to defeat summary judgment. A practitioner agreed; it is not enough simply to say "I will destroy this witness at trial."

Another practitioner observed that he tries some cases without taking depositions. He wants to cross-examine a witness known to be weak at trial.

An academic observed that the discussion of impeachment raises the question of credibility in an unusual setting. Ordinarily credibility is resolved at trial, and at trial is resolved by the trier of fact. But the Supreme Court has provided deliberately considered dictum stating that there is a category of witnesses that must be believed. A jury or judge may be required to believe a witness who is disinterested, uncontradicted (whether by direct or circumstantial contradiction), and unimpeached. In theory, it is only this kind of witness that raises the concern about impeachment at the summary-judgment stage. When such a witness appears, summary judgment is not defeated by a mere hope that other witnesses or cross-examination at trial will lead to contradiction. Nor will an unsupported hope to impeach defeat summary judgment.

This discussion led a practitioner to recall the fear that practice is evolving away from live trial and toward trial by affidavits. We risk diluting the role of cross-examination if we provide that summary judgment can be defeated only by showing the cross-examination questions, or even conducting the cross-examination, before trial.

Explanation: The second question posed by draft subdivision (f) is how much explanation should be required when the court grants a "final" summary judgment. The draft includes a bracketed provision that the judgment "[should state material facts that are genuinely at issue and that require judgment as a matter of law {and should separately state conclusions of law <on those facts>}]."

The first comment was that this draft looks like a findings requirement. It would be a lot of work, and would provide ammunition for appeal. Present Rule 52(a) expressly says that findings of fact are not required.

The next comment anticipated draft subdivision (g), noting that in some settings appellate courts are calling for findings to support a denial of summary judgment.

A third comment asked whether it would suffice to read the explanation into the record; a judge responded that a separate writing would not be required.

Another practitioner urged that Rule 56 should require "something like this." The court should give "reasons" for granting summary judgment. And why limit the direction to "final" summary judgment? It was observed that the Committee Note defines a "final" summary judgment as one that concludes the action or one that is entered as a partial final judgment under Civil Rule 54(b). As compared to findings on an interlocutory partial summary judgment, or on denying summary judgment, there is a higher obligation to explain an appealable order that is not vulnerable to revision as the case proceeds.

Yet another practitioner observed that an articulated opinion that provides a basis for appeal is necessary to make the system work. It facilitates the appeal. In like vein, support was expressed for the Third Circuit requirement of "an explanation sufficient to permit the parties and this court to understand the legal premise for the court's order."

Two other practitioners suggested some form of the 1992 draft: "recite the law and facts on which the decision is based."

Further discussion suggested that any provision for an explanation should be expressed as "may," not "should." This suggestion was not developed further.

Draft 56(g): Partial Summary Judgment

Subdivision (g) expressly recognizes "partial summary judgment" practice. It ties to the proposition recognized in earlier subdivisions — summary judgment may be appropriate on all or part of a claim or defense. The earlier subdivisions would benefit from further revision to make this still clearer.

It was noted that present Rule 56(d) says that the court "shall if practicable" determine what material facts exist without substantial controversy. This direction is softened in Style Rule 56 to "should." The current draft softens it still further to "may."

A practitioner thought it an improvement to revise the present rule to remind the court of this "useful option." A second practitioner agreed, recommending that the rule choose "may" rather than "should" to express the discretion to resolve facts. Discretion, sensitive to case needs, is important. He recommended another edit: "an order ~~stating~~ identifying any material fact * * *"; "stating" seems to set the matter too firmly in concrete, when there may be occasions to reconsider as the case develops.

In response to a question, it was agreed that the draft provision that the partial summary judgment fact is "established in the action" means that it is not to be a subject for dispute at trial.

A judge said that the common practice is to grant "partial" summary judgment as to causes of action, not individual issues within a cause of action. It was noted that present Rule 56(a) refers to summary judgment on all or any part of a claim. One practitioner thought the rule text should refer to claims or defenses.

Draft 56(h): Sanctions

The draft sanctions provision in subdivision (h) carries forward present Rule 56(g), but makes sanctions discretionary rather than mandatory. Brief discussion focused on the adequacy of Rule 11 and other sanctions. The Rule 56 sanctions can be more severe; there is no "safe-harbor" provision akin to Rule 11; and misuse of affidavits may present special problems that require special sanctions. Opinion divided evenly on the question whether Rule 56 should continue to include separate sanctions.

Draft Rule 12(e)

The draft materials include several versions of an amended Rule 12(e). The focus on Rule 12(e) has grown out of the overall consideration of notice pleading, discovery, and summary judgment. The Advisory Committee has concluded that it is not yet appropriate to propose general modifications of notice pleading. But the question remains whether pleading can be used more effectively to advance disposition of actions that now are pursued too far into discovery and other pretrial work. Present Rule 12(e) provides for a more definite statement only when a pleading is so unintelligible that a response is not possible. The drafts present the question whether pretrial management can be enhanced by providing a case-specific tool that requires more specific pleading.

A judge opened the discussion by asking whether anyone present had seen a Rule 12(e) motion granted. Another judge responded that the Swierkiewicz decision invites the motions; "we get them." Another judge stated that in some cases, after some discovery, he requires the plaintiff to file a statement of fact contentions — this device is not limited to the initial pleading stage.

A practitioner noted that she had won a few orders granting more definite statements, and that the orders were not limited to immunity cases. A judge commented that it is surprising that there are not more Rule 12(e) motions in immunity cases.

It was noted that preliminary work by the Federal Judicial Center indicates that Rule 12(e) motions "are seldom decided." It is too early to tell, but it seems likely that the pleader responds to the motion by an amended pleading.

A practitioner seconded the observation of an academic who was unable to attend the conference: Rule 12(e) revisions will be politically charged. They are likely to be seen as yet another effort to rein in plaintiffs and to advantage defendants. The Advisory Committee should not take up this question. Another practitioner thought that some version of the draft models would be a useful advance.

Summary Discussion

Judge Baylson invited concluding remarks, stating that the discussion had been extremely helpful. Many useful points were made. The conference will advance the Subcommittee's progress toward proposals for the Advisory Committee meeting in April.

Greenbaum offered five suggestions. (1) If a plaintiff can move for summary judgment with the complaint, the defendant should be allowed at least 21 days after the responsive pleading is due to respond to the motion for summary judgment. (2) It may be desirable to allow counsel to agree on the times for motion, response, and reply, but the rule should require court approval. (3) The rule should address cross-motions, and provide 30 days to respond to a cross-motion. (4) Most importantly, the (c)(1) statement of undisputed facts could be limited to "core or material facts essential to the claim." The Committee Note could observe that in many cases only a few facts will be core or material. (5) The national rule should provide that a supporting brief is filed with all the other materials, and be designed to preempt local rules. Later he added a sixth suggestion: there should be more oral arguments on summary-judgment motions. Judges widely discredit the value of oral argument, inappropriately.

Salpeter said that (1) a separate statement of facts is a good discipline. It is used for a separate brief. "This is not chaos at all. It works. It is a lot of paper. (2) Partial summary judgment is a reality. It should be expressed clearly in the rule. (3) The problem of fact inferences should be addressed in rule text. (4) The court should articulate reasons for granting or denying a motion, "certainly the grant." (5) Cross-motions should be "handled in the rule." It could be a mirror of the rule for first filing.

Drubel argued that together, Celotex and Anderson v. Liberty Lobby show that Rule 56 practice mirrors trial practice on a motion for judgment as a matter of law. A party who does not have the trial burdens on an issue can, at trial, insist that it is entitled to judgment as a matter of law unless the party who does have the trial burden carries the burden. The same should be true on summary judgment: a party who does not have the trial burden should have no more burden on summary judgment than to make a request that it be awarded judgment unless its adversary shows enough evidence to carry the trial burden. This statement prompted an exchange of views. It was suggested that because Rule 56 motions occur before trial, the Rule 56 burden should require the movant to show that the nonmovant does not have a right to jury trial. It was responded that the question can be seen by asking what is it that triggers the obligation to come forward with evidence: trial? Or, usefully, a pretrial motion by the party who does not have he trial burden? A different protest was that Celotex incorporates the Anderson decision for the purpose of invoking the standard of proof required at trial — if the trial burden requires clear and convincing evidence, that standard must be recognized in measuring the sufficiency of the evidence. Celotex still puts the burden on the moving party to show that the nonmovant cannot carry the trial burden. This protest was met head-on: why should we not do before trial as we would do at trial, after adequate opportunity for discovery — it is easier for the party who has the trial burden to show how it will carry the burden than it is for the opposing party to "show" or "point out" that the burden cannot be carried. Another participant agreed that a movant who does not have the trial burden should not be required to "list evidence"; the rule should say so, or else the rule should not say that a party who does not have the trial burden can respond to the motion by stating simply that the movant has not shown that it can carry the trial burden to the point of winning judgment as a matter of law. The rule can say that the movant can point to the absence of facts to support the nonmovant's trial burden. Another participant suggested that the draft helps by identifying the alternatives available for response by the nonmovant.

Further discussion in this vein observed that after discovery, the defendant may know that the plaintiff does not have sufficient evidence. The rule should say that it is enough to point that out. Another practitioner added that the rule should include the alternative draft that spells out the Celotex definition of the Rule 56 moving burdens.

Ballard said that "we should not forget that inferences are evidence." Impeachment — credibility — is evidence. Attacks on testimony are evidence. These things should not be relegated to the briefs. Inference is fact, not argument. "Intent" in an employment case is a fact. We should not rely on a defendant's statements about intent at a deposition; there may be serious credibility problems that are not reflected in the deposition transcript. Apart from that, the judge should not have to write an opinion in denying summary judgment. But it would be OK to recognize discretion to tell the parties what issues the judge considers open for trial.

Black urged that Rule 56 should preserve the values of trial by jury. The Committee should consider the prospect that requiring a premotion conference will reduce the burdens arising from the identification of "uncontested" facts and designation of record sources. Or the rule might limit the number of facts a party can claim are undisputed. A judge suggested that Rule 16 gives the general authority to direct a pretrial conference before a Rule 56 motion can be made — is it necessary to duplicate this in Rule 56, or to cross-refer to Rule 16? Black responded that it might be better to go further, to eliminate the statement of undisputed facts. The rule could provide that the motion identifies the undisputed facts that entitle the movant to judgment as a matter of law. The first step is notice to the court, with a brief statement of reasons. The next step is the conference with the court to determine how the motion will be presented.

Scheindlin offered these suggestions: (1) the alternative deadline for a Rule 56 motion set by draft subdivision (a) at 60 days before the date set for trial should be deleted. If it is retained, it should be set at a period longer than 60 days. (2) The rule should address the nature of the Rule 56 burden for a party who does not have the trial burden. It remains a puzzle to understand how a movant can point out what isn't there. This party should be allowed to make a one-page motion, without identifying evidence. The nonmovant's response will point to the materials that support its case. The movant's reply will do the heavy work of showing — if it can be done — the inadequacy of the support asserted in the response. (3) The idea that the parties be required to meet before a Rule 56 motion can be made is attractive. A premotion conference is a possible alternative. "I do this in cases that are not pro se." The conference limits the motion, and can be used to set the time for motions — often the time is set after the close of fact discovery. (4) Credibility is a hard issue to deal with when the nonmovant says "I can show the witness is not credible."

Joseph suggested that there is no value in requiring the parties to meet and confer before a Rule 56 motion. A premotion conference can be helpful, but there is no need to provide for it in the Rule. This device should be left for use by judges who can make it work.

Morris (1) agreed that a premotion conference adds expense, and expressed concern that some judges "will never allow the motion to be filed. (2) Rule 56 should address partial summary judgment. (3) A time cut-off 60 days before trial makes no sense. (4) A party who resists a summary-judgment motion by attacking credibility should be required to show a basis for the attack — allowing a motion to be defeated by a bare statement that credibility is an issue would disfavor Rule 56, contrary to the Celotex admonition that summary judgment is not disfavored.

Brunet observed that Charles Clark preferred "simple, brief, succinct rules." Draft subdivision (c) on motion, response, reply, and court responsibilities and powers, is not succinct. The final paragraph of the Celotex opinion celebrates summary judgment. Summary judgment is a tool that weeds out sham cases. We need it. Pleadings do not do the job. The discussion today has not seemed a celebration of summary judgment. On a different front, the draft does not address "sham" affidavits. The second generation of cases addressing self-serving, self-contradicting affidavits allows explanation of the change in position, recognizing authority to rely on the affidavit to defeat summary judgment. The Supreme Court seems to have blessed this approach in the Cleveland dictum. It may be appropriate to leave these problems out of the rule text, but perhaps they could be addressed in the Committee Note.

Goode-Trufant said (1) that practice under SDNY Local Rule 56.1 leads her to strongly approve the statement of uncontested facts. (2) The Local Rule 56.2 requirement that an attorney moving for summary judgment notify a pro se adversary of Rule 56 requirements and consequences is useful. (3) Premotion conferences often are very helpful — often a plaintiff withdraws some claims when confronted with the law. (4) One SDNY judge requires a joint statement of facts; this practice may avoid the problem arising when the movant frames the facts.

Buckley (1) recognized that intent and motive are particularly unsuited to resolution on summary judgment. Intent, inference, and credibility "often cannot be put down on paper. Only a jury can pin this Jello® to the wall." (2) Rule 56 is a device that may soak up as much time as it saves. Summary judgment is over-used in employment cases; there is an assembly line in some courts. The FJC statistics show that "District A" in the Eleventh Circuit grants summary judgment in 95% of the employment cases — many of these cases are not suitable for summary disposition. "Human rights should not be sacrificed to judicial efficiency." At the same time, partial summary judgments can be useful. (3) Evidence determinations that should be left for trial are being made on Rule 56 motions. (4) The draft (c)(2) provisions for the nonmovant's response are reasonable, but it would be better to have the response provide its own statement of facts that are in dispute and that defeat judgment as a matter of law. That will allow the nonmovant to tell its story.

Langrock (1) noted that summary judgment is used in a variety of circumstances. It is used in small cases, not only the complex cases described by many of the participants. In big cases, it can help formulate positions. (2) "Courts are not for lawyers or judges but for litigants. Ease and efficiency should not stand in the way." (3) Cross-examination is the best way to get at the truth. Summary judgment should be closely guarded lest it defeat the values of cross-examination at trial. (4) Local rules in Vermont require a lawyer to provide a pro se adversary a notice set out in the rule; this might be a useful addition to the national rule.

Judge Rosenthal noted in summation that neither the Subcommittee nor the Advisory Committee have decided what might be recommended for publication as proposed Rule 56 amendments. This meeting was arranged to enable the Committee to draw from the kinds of resources the participants in fact brought to the discussion. "The horse has not left the barn. We know there is a barn, but not what the horse looks like." The Committee will welcome any further suggestions.

Judge Baylson thanked all the participants for taking the time and making the effort to attend, and urged all to continue to offer advice.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[5]*See* Appendix.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a) Central District of California,[9]

b) Southern District of Florida,[10]

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

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

c) Northern District of Texas, and

d) Northern District of Ohio.

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

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

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

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

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

18. Motions – Form and Length:

* * * * *

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

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

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

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

* * * * *

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

APPENDIX

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I. NUMBER OF SUMMARY JUDGMENT MOTIONS ALLOWED

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

II. TIME FOR FILING SUMMARY JUDGMENT MOTION

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

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

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

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

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

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

III. FORM OF MOTION FOR SUMMARY JUDGMENT

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

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

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

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

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

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

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

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

document.[7]

• FRCP 56(e):

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. SERVICE OF MOTION

A. In General.[14]

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

V. OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

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

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

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

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

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

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

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

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

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

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

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

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

VI. COURT REVIEW AND DETERMINATION OF MOTION FOR SUMMARY JUDGMENT

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

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

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

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

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

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

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

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

VII. HEARING AND ORAL ARGUMENT

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

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

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

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

VIII. PRO SE LITIGANTS

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

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

Federal Judicial Center
Research Division

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memorandum

DATE: April 2, 2007
TO: Honorable Michael Baylson
FROM: Joe Cecil and George Cort
SUBJECT: FRCivP 56(g) Motions for Sanctions

Our search of CM/ECF codes and docket entries for 273,193 cases terminated in FY2006 revealed no instance of sanctions awarded under FRCivP 56(g) for a bad faith affidavit. We found a single pro se civil rights case in which the judge denied a plaintiff's hand-written motion for sanctions under FRCivP 56(g) (Gyadu v. O'Connell, 3:2002cv1271, D. Conn. 2/28/06). The judge then granted the defendant's motion for summary judgment.

We first identified the 680 cases terminated in FY2006 that included one or more motions for summary judgment and one or more orders regarding sanctions, as indicated by CM/ECF codes entered by each court. (There is no specific CM/ECF code for sanctions under FRCivP 56(g).) We then examined each sanctions order and related motion to determine if the sanction related to a bad faith affidavit submitted within a summary judgment proceeding. As noted, we found only a single pro se case which denied the motion for sanctions under 56(g). We found no other motion for sanctions for bad faith affidavits under FRCivP 11 or any other authority.

Please let me know if you require additional information on this topic.

THE FEDERAL JUDICIAL CENTER
THURGOOD MARSHALL FEDERAL JUDICIARY BUILDING
ONE COLUMBUS CIRCLE, N.E.
WASHINGTON, DC 20002-8003

April 12, 2007

Memorandum

To: Hon. Michael Baylson

From: Joe Cecil and George Cort

Subject: Estimates of Summary Judgment Activity in Fiscal Year 2006

The following tables contain the results of our analyses of summary judgment activity in 179,969 cases terminated in the 78 federal district courts that had fully implemented the CM/ECF reporting system in Fiscal Year 2006. These figures exclude class action cases, multi-district litigation cases, and reopened cases. The tables indicate the following:

- Nationwide, approximately 17 motions for summary judgment are filed for every 100 cases terminated. Of course, some cases may have more than one motion filed, so the proportion of actual cases with summary judgment motions is somewhat lower. This estimate is based on all terminated cases, including those cases terminated before the issue was joined and before a summary judgment motion would have been appropriate. (Table 1)

- Summary judgment activity in the circuits ranges from a low of 7 motions per 100 cases in the Second Circuit to a high of 34 motions per 100 cases in the District of Columbia Circuit. (Table 1)

- Summary judgment activity varies greatly within circuits, due in part to differences in the composition of the districts' caseloads. Some of the districts with high rates of summary judgment activity also have a high percentage of social security cases, which are typically resolved by the grant or denial of a summary judgment motion. Some of the districts with especially low rates of summary judgment motions have local rules or standing orders that encourage consultation with the judge before filing a summary judgment motion. (Table 1)

- Approximately 9 percent of the motions are for partial summary judgment, and less than 1 percent of the motions seek summary judgment under FRCivP 54. (Table 2)

- Summary judgment activity varies greatly across types of cases, from a low of 9 motions per 100 cases in torts cases to a high of 28 motions per 100 cases in civil rights cases. Summary judgment activity in personal injury product liability cases is difficult to assess due to the frequent consolidation of such cases in class actions and multi-district litigation proceedings. (Table 3)

- Approximately 60 percent of the summary judgment motions are granted in whole or in part, with a somewhat higher rate of motions granted in civil rights cases. (Table 3)

- Over 70 percent of the summary judgment motions in employment discrimination cases are granted in whole or in part, with considerable variation across circuits and across districts within circuits. (Table 4)

Methodology

The information in the following tables was extracted from the CM/ECF replication database. The individual courts follow somewhat different data recording practices and this may account for some of the variation across districts. For example, summary judgment motions under FRCivP 54 may simply be recorded as summary judgment motions in some districts. Summary judgments arising from a magistrate judge's report and recommendation that is adopted by the district judge may not be noted other than as adoption of the magistrate judge's report. Motions to dismiss that become summary judgment motions when affidavits are filed in support of the motion may not be properly identified as summary judgment motions in all districts. These tables exclude cases designated as class actions and multi-district litigation transfers because summary judgment activity may not be recorded separately for each case that is affected by a consolidated motion. Finally, these tables exclude cases that are reopened, because such cases may not indicate summary judgment activity that occurred earlier in the case, before it was reopened. Together these exclusions eliminated almost 35,000 product liability personal injury cases, 7,000 asbestos cases, and smaller numbers of other types of cases terminated in Fiscal Year 2006.

Please let me know if you wish to discuss these tables or wish to see other analyses.

cc: Hon. Lee Rosenthal
Professor Edward Cooper
Professor Richard Marcus

Table 1: Summary Judgment Motions Across Circuits and Districts

	SJ Motions per 100 Case Terminations	SJ Orders Granting Motion
TOTAL (28,748 motions)	**17**	**60%**
First Circuit (862 motions)	**16**	**55%**
Highest Rate Among Districts	32	57%
Lowest Rate Among Districts	13	51%
Second Circuit (1,276 motions)	**7**	**63%**
Highest Rate Among Districts	25	68%
Lowest Rate Among Districts	4	54%
Third Circuit (3,013 motions)	**16**	**56%**
Highest Rate Among Districts	32	64%
Lowest Rate Among Districts	13	47%
Fourth Circuit (2,626 motions)	**17**	**60%**
Highest Rate Among Districts	39	75%
Lowest Rate Among Districts	13	49%
Fifth Circuit (2,338 motions)	**11**	**60%**
Highest Rate Among Districts	21	65%
Lowest Rate Among Districts	8	52%
Sixth Circuit (3,328 motions)	**20**	**59%**
Highest Rate Among Districts	37	70%
Lowest Rate Among Districts	14	57%
Seventh Circuit (2,999 motions)	**21**	**58%**
Highest Rate Among Districts	40	65%
Lowest Rate Among Districts	13	56%
Eighth Circuit (2,176 motions)	**18**	**59%**
Highest Rate Among Districts	36	68%
Lowest Rate Among Districts	13	26%
Ninth Circuit (4,803 motions)	**18**	**59%**
Highest Rate Among Districts	47	71%
Lowest Rate Among Districts	11	40%
Tenth Circuit (1,542 motions)	**18**	**59%**
Highest Rate Among Districts	22	67%
Lowest Rate Among Districts	14	54%

Eleventh Circuit (2,867 motions)	**16**	**59%**
Highest Rate Among Districts	25	73%
Lowest Rate Among Districts	8	48%
District of Columbia (918 motion)	**34**	**68%**

Table 2: Types of Summary Judgment Motions Across Circuits

	Type of Motion		
	Summary Judgment	Partial Summary Judgment	Rule 54 Motion
TOTAL	**91%**	**9%**	**0%**
First Circuit	91%	8%	2%
Second Circuit	95%	4%	1%
Third Circuit	93%	7%	0%
Fourth Circuit	95%	5%	0%
Fifth Circuit	89%	10%	0%
Sixth Circuit	93%	7%	0%
Seventh Circuit	93%	7%	0%
Eighth Circuit	93%	6%	0%
Ninth Circuit	83%	17%	0%
Tenth Circuit	83%	16%	1%
Eleventh Circuit	90%	9%	1%
DC Circuit	94%	6%	0%

Table 3: Summary Judgment Activity by Type of Case

NOS Code - Description	Total FY2006 Cases Term'd	Total SJ Motions Filed	SJ Motions per 100 Cases	Orders Decided Denied	Orders Decided Granted
TOTAL	**205,058**	**30,556**	**15**	**40%**	**60%**
Contracts	**22,489**	**4,682**	**21**	**47%**	**53%**
110 Insurance	7229	2071	29	46%	54%
120 Marine Contract Actions	1295	118	9	50%	50%
130 Miller Act	352	28	8	63%	37%
140 Negotiable Instruments	307	45	15	50%	50%
160 Stockholders Suits	280	25	9	64%	36%
190 Other Contract Actions	12642	2347	19	47%	53%
195 Contract Product Liability	209	39	19	46%	54%
196 Franchise	175	9	5	44%	56%
Tort	**30,574**	**2,871**	**9**	**46%**	**54%**
310 Airplane Personal Injury	237	24	10	43%	57%
315 Airplane Product Liability	74	22	30	59%	41%
320 Assault, Libel, and Slander	596	78	13	32%	68%
330 Federal Employers Liability	645	89	14	39%	61%
340 Marine Personal Injury	1358	204	15	54%	46%
345 Marine - Product Liability	25	9	36	44%	56%
350 Motor Vehicle Pers Injury	3864	363	9	52%	48%
355 Motor Vehicle Prod Liability	463	92	20	39%	61%
360 Other Personal Injury	7752	987	13	44%	56%
362 Medical Malpractice	1089	185	17	47%	53%
365 Personal Injury - Prod Liab	11505	581	5	45%	55%
368 Asbestos - Prod Liability	1704	3	0	33%	67%
370 Other Fraud	1262	234	19	47%	53%
Civil Rights	**32,277**	**8,924**	**28**	**30%**	**70%**
440 Other Civil Rights	14319	3962	28	32%	68%
441 Civil Rights Voting	117	28	24	35%	65%
442 Civil Rights Jobs	15679	4716	30	27%	73%
443 Civ Rts Accommodation	592	124	21	53%	47%
444 Civil Rights Welfare	40	4	10	0%	100%
445 Am Disab Act Employment	509	48	9	25%	75%
446 Am Disab Act Other	1021	42	4	53%	48%

NOS Code - Description	Total FY2006 Cases Term'd	Total SJ Motions Filed	SJ Motions per 100 Cases	Orders Decided	
				Denied	Granted
Prisoner	**50,403**	**3,418**	**7**	**36%**	**64%**
510 Pris Pet - Vacate Sentence	7118	65	1	50%	50%
530 Pris Pet - Habeas Corpus	19619	497	3	46%	54%
535 Habeas Corp Death Pen	161	27	17	44%	56%
540 Prisoner -Mandamus Other	1084	26	2	42%	58%
550 Prisoner - Civil Rights	14052	1652	12	35%	65%
555 Prisoner - Prison Condition	8369	1151	14	33%	67%
Other	**69,315**	**10,661**	**15**	**47%**	**53%**
150 Overpayments - Judgment	271	43	16	72%	28%
151 Overpayments - Medicare	187	107	57	17%	83%
152 Recovery Student Loans	2189	38	2	18%	82%
153 Recovery of Vet Benefits	11	2	18	0%	100%
210 Land Condemnation	215	7	3	14%	86%
220 Foreclosure	2567	132	5	24%	76%
230 Rent, Lease, Ejectment	117	19	16	32%	68%
240 Torts to Land	369	49	13	40%	60%
245 Tort to Land Prod Liability	96	21	22	12%	88%
290 Other Real Property Actns	680	142	21	58%	42%
371 Truth in Lending	458	53	12	38%	62%
380 Other Pers Prop Damage	949	160	17	42%	58%
385 Prop Damage - Prod Liab	413	70	17	40%	60%
400 State Re-Apportionment	3	4	133	100%	0%
410 Antitrust	397	103	26	47%	53%
423 Bankruptcy Withdrawal	706	79	11	46%	54%
430 Banks and Banking	184	25	14	23%	77%
450 Interstate Commerce	420	67	16	57%	43%
460 Deportation	120	6	5	67%	33%
470 Civil (RICO)	589	185	31	65%	35%
480 "Consumer Credit"	1423	63	4	48%	52%
490 "Cable Sat TV"	685	9	1	14%	86%
610 Agricultural Acts	27	1	4	100%	0%
625 Drug Related Seizure	1246	56	4	44%	56%
690 Forfeiture and Penalty	673	38	6	50%	50%
710 Fair Labor Standards Act	2779	300	11	42%	58%
720 Labor/Mgmt Relations Act	1246	354	28	37%	63%
730 Labor/Mgmt Report	69	22	32	18%	82%
740 Railway Labor Act	102	42	41	44%	56%
790 Other Labor Litigation	1182	247	21	37%	63%
791 ERISA	10052	1367	14	46%	54%
820 Copyright	5072	279	6	53%	47%
830 Patent	2352	645	27	53%	47%

NOS Code - Description	Total FY2006 Cases Term'd	Total SJ Motions Filed	SJ Motions per 100 Cases	Orders Decided	
				Denied	Granted
840 Trademark	3318	333	10	50%	50%
850 SEC	1296	143	11	55%	45%
861 Medicare	46	5	11	60%	40%
862 Black Lung	16	2	13	50%	50%
863 D.I.W.C./D.I.W.W.	6296	1285	20	54%	46%
864 S.S.I.D.	6927	1721	25	52%	48%
865 R.S.I.	615	212	34	49%	51%
870 Tax Suits	1175	208	18	44%	56%
871 IRS 3rd Party Suits	88	1	1	0%	100%
875 Customer Challenge	15	1	7	100%	0%
890 Other Statutory Actions	9842	1420	14	41%	59%
891 Agricultural Acts	336	45	13	62%	38%
892 Economic Stabilization Act	4	4	100	50%	50%
893 Environmental Matters	877	270	31	48%	52%
895 FOIA	280	179	64	30%	70%
950 State Statute Constitutional	262	90	34	47%	53%
990 Other	73	7	10	50%	50%

Note: This table excludes the following case types that did not reveal any summary judgment activity: Bankruptcy Appeals (2450 cases); Food and Drug Acts (46); Liquor Laws (2); Airline Regulations (4); Occupational Safety/Health (9); Selective Service (16); Energy Allocation Act (4); and Appeal of Fee - Equal Access to Justice (9). Motions granted in part and denied in part are recorded as granted rather than denied. Orders with no indication of dispositive action are excluded from the table.

Table 4: Summary Judgment Activity in Employment Discrimination Cases

CIRCUIT	DISTRICT*	Percent Granted (in whole or in part)
TOTAL		**73%**
FIRST		**56%**
	Highest Rate Among Districts	60%
	Lowest Rate Among Districts	48%
SECOND		**76%**
	Highest Rate Among Districts	82%
	Lowest Rate Among Districts	71%
THIRD		**69%**
	Highest Rate Among Districts	85%
	Lowest Rate Among Districts	54%
FOURTH		**74%**
	Highest Rate Among Districts	85%
	Lowest Rate Among Districts	67%
FIFTH		**78%**
	Highest Rate Among Districts	86%
	Lowest Rate Among Districts	66%
SIXTH		**73%**
	Highest Rate Among Districts	78%
	Lowest Rate Among Districts	67%
SEVENTH		**75%**
	Highest Rate Among Districts	79%
	Lowest Rate Among Districts	68%
EIGHTH		**70%**
	Highest Rate Among Districts	87%
	Lowest Rate Among Districts	59%
NINTH		**74%**
	Highest Rate Among Districts	93%
	Lowest Rate Among Districts	59%
TENTH		**72%**
	Highest Rate Among Districts	79%
	Lowest Rate Among Districts	64%

ELEVENTH		**75%**
	Highest Rate Among Districts	95%
	Lowest Rate Among Districts	56%
DC		**58%**

*Includes the 65 federal district courts that had fully implemented the CM/ECF system in FY2006 and had more than 15 employment discrimination cases (i.e., nature of suit code 442) with summary judgment orders terminated during that year.

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

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

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

Purpose of Revision

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

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

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

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

Standard

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

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

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

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

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

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

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

Moving and Opposing Burdens

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

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

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

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

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

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

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

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

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

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

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

"Evidence" Considered

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

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

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

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

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

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

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

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

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

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

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

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

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

Timing

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

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

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

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

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

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

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

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

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

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

Explanation of Court's Action

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

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

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

Partial Summary Judgment: Nomenclature and Limits

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

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

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

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

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

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

Parties Affected

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

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

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

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

Court-Initiated Summary Judgment

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

Oral Testimony

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

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

Rule 11 Overlap

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

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

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

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

"Sham Affidavit"

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

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

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

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

Proposed New Civil Rule 62.1 on Indicative Rulings

Proposed new Civil Rule 62.1 emerged from a recommendation by the Solicitor General that was referred to the Civil Rules Committee by the Appellate Rules Committee. Earlier versions have been considered by the Standing Committee, most recently in January 2007. Changes have been made to reflect those deliberations. More importantly, further changes have been made to integrate Rule 62.1 with the proposed new Appellate Rule 12.1. The materials presenting Rule 12.1 provide the framework for considering both proposals together.

The Civil Rules Committee recommends proposed Civil Rule 62.1 for publication for comment. The clean version of Rule 62.1 set out below is specifically integrated with proposed Appellate Rule 12.1. The over- and underlined version of the Rule and Committee Note show how Rule 62.1 would be reconstructed if Rule 12.1 had not been proposed for publication.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

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

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

(1) defer consideration of the motion;

(2) deny the motion; or

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

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

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

Committee Note

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment

that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the action is remanded or that the motion raises a substantial issue. Experienced appeal lawyers often refer to the suggestion for remand as an "indicative ruling."

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

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

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

raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

Discussion

A year ago the Advisory Committee recommended approval for publication of a new Civil Rule 62.1 on "indicative rulings." The recommendation was to defer publication to August 2007 as part of a larger package of Civil Rules proposals. The recommendation was discussed at the June 2006 and January 2007 Standing Committee meetings. The Appellate Rules Committee became convinced that it should consider a parallel provision in the Appellate Rules. The attached Appellate Rules Committee materials and draft Appellate Rule 12.1 provide the background not only for the Appellate Rules Committee's work but also for earlier work on Civil Rule 62.1.

The rule text recommended for approval for publication has been revised to reflect proposed Appellate Rule 12.1. An over- and underlined version is set out below to illustrate the revisions and to show the version that the Civil Rules Committee approved for publication before the Appellate Rules Committee recommended publication of Appellate Rule 12.1. The most important change results from the opportunity to rely on Appellate Rule 12.1 to address the form of the remand for further district-court proceedings. Subdivision (c) is shortened to become a formal recognition of remand that closes the circle opened by subdivisions (a) and (b).

Subdivision (b) also was revised to coordinate with Appellate Rule 12.1. It had been designed to invite comment on the choice between two alternatives for giving notice to the court of appeals. One alternative would require notice to the court of appeals when the motion for relief is filed in the district court and a second notice when the district court acts on the motion. That alternative had the advantage of giving the court of appeals early warning that it might want to adjust the progress of the appeal. It had a potential disadvantage arising from the frequent uncertainty whether a pending appeal ousts the district court's authority to grant the relief requested by a motion. In practice, notice would likely be given only when the

question of district-court authority is identified. The other alternative, and the one adopted by Appellate Rule 12.1, requires notice to the court of appeals only when the district court states that it would grant the motion or that the motion raises a substantial issue. This second approach has been adopted for Rule 62.1(b) without suggesting any alternative for comment.

Other changes reflect the discussion at the January Standing Committee meeting. The Rule title was settled. There was rather extensive discussion of the question whether the court of appeals should be asked to consider remand if the district court indicates only that it "might" grant the motion for relief. The interim resolution was a recommendation to publish as "[might or] would grant"; the letter transmitting the proposal for publication would have invited comment on the question whether the rule should require that the district court state that it "would" grant relief, or should pave the way for appellate consideration if the district court states only that it "might" grant relief. This approach has been modified to acquiesce in the Appellate Rules Committee's recommendation. Proposed Rule 62.1 now imitates Appellate Rule 12.1, allowing the district court to state either that it would grant the motion on remand or instead to state that the motion raises a substantial issue. If a statement that the motion raises a substantial issue implies a slightly lower degree of district-court consideration or commitment, the difference does not warrant further negotiation. The most important point is that the court of appeals remains in control, deciding whether to remand in light of the progress of the appeal, the importance of the issues raised by the motion for relief, the prospect that relief would change or perhaps moot the issues on appeal, and the persuasiveness of the district court's explanation of the reasons for remand.

Revisions To Conform to Proposed Appellate Rule 12.1

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

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

(1) defer consideration of the motion;

(2) deny the motion; or

(3) ~~indicate~~ state either that it ~~[might or]~~ would grant the motion if the ~~appellate~~ court of appeals ~~should~~ remands for that purpose or that the motion raises a substantial issue.

(b) Notice to ~~Appellate~~ the Court of Appeals. The movant must promptly notify the circuit clerk ~~of the appellate court~~ under Federal Rule of Appellate Procedure [12.1] ~~[when the motion is filed and when the district court acts on it the motion]~~[if the district court ~~indicates~~ states that it ~~{might or}~~ would grant the motion or that the motion raises a substantial issue.

(c) Remand. The district court may decide the motion if the court of appeals remands for that purpose. ~~If the district court states that it [might or] would grant the motion, the appellate court may remand for further~~

~~proceedings in the district court[, and if it remands may retain jurisdiction of the appeal]~~.

Committee Note

This new rule adopts ~~and generalizes~~ for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot on its own reclaim the case to grant a Rule 60(b) motion. But it can entertain the motion and ~~either~~ deny it, defer consideration, or ~~indicate~~ state either that it ~~might or~~ would grant the motion if the action is remanded or that the motion raises a substantial issue. Experienced appeal lawyers often refer to the suggestion for remand as an "indicative ruling."

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

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the clerk of the appellate court under Federal Rule of Appellate Procedure [12.1] ~~[when the motion is filed in the district court and again when the district court rules on the motion]~~[when the district court states that

it ~~{might or}~~ would grant the motion ~~{and when the district court grants or denies the motion}.]~~ or that the motion raises a substantial issue. Remand is in the appellate court's discretion under Appellate Rule [12.1]. ~~The appellate court may remand all proceedings, terminating the initial appeal. The appellate court may instead choose to~~ or may remand for the sole purpose of ruling on the motion ~~while retaining jurisdiction to proceed with the appeal after the district court rules if any party wishes to proceed~~ after the district court rules on the ~~motion~~.

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

II. Information Items

A. Expert-Witness Discovery

The Discovery Subcommittee continues to study four questions relating to discovery of testifying expert witnesses. As noted in the Introduction, two "miniconferences" were held to discuss these questions with practicing lawyers.

Two of the expert-witness questions address trial witnesses who are not required to provide reports under the pretrial disclosure provisions of Civil Rule 26(a)(2)(B). A report is not required from an expert who is not retained or specially employed to give testimony in the case, nor from an expert whose duties as an employee of the party do not regularly involve the giving of expert testimony. Treating physicians are the standard example of expert witnesses who are not retained or specially employed to give testimony, but some difficulties have occurred in determining whether a particular physician is testifying on subjects that require a report. As to employee experts, several opinions have required reports by strained readings of Rule 26(a)(2)(B). The Subcommittee is considering a proposal to require an attorney disclosure that would provide information of the sort obtained by expert-witness interrogatories under the pre-1993 version of Rule 26(b)(4). The disclosure would be made with the Rule 26(a)(2)(A) disclosure identifying these witnesses.

The other two questions involve discovery of draft expert-witness reports and discovery of communications between an attorney and the attorney's expert witness. The ABA has proposed tight restrictions on such discovery. The April miniconference explored experience under New Jersey rules that appear to impose sharp limits and that in practice seem to impose even sharper limits. The New Jersey lawyers who appeared at the miniconference expressed great and unanimous enthusiasm for the state practice.

The Discovery Subcommittee continues to work on these questions. It expects to present proposals for amending Rule 26 at the fall Advisory Committee meeting.

B. Other Topics

Rule 68. The Committee continues to study suggestions to amend the offer-of-judgment provisions of Rule 68 advanced in law review articles and judicial opinions. Earlier advisory

committees have worked intensively on Rule 68 only to abandon the enterprise. The Committee is likely to decide whether to take up the topic after the appearance of the second of a set of two articles based on a recent empirical examination of Rule 68 practices in employment and civil rights cases.

Rule 12(e). The Federal Judicial Center undertook a study of Rule 12(e) at the Committee's request. The study will be useful in the long-range effort to determine whether Rule 12(e) might be amended to provide for greater use of case-specific orders directing more specific pleading.

Class Action Fairness Act. The Federal Judicial Center is carrying forward its study of the impact of the Class Action Fairness Act on the numbers and types of class actions brought to federal courts. Information developed by this study may prove useful in determining whether to consider revising Rule 23 to address developing class-action practices.