

# Agenda

## Advisory Committee on Rules of Civil Procedure

January 28, 2009  
4:00 to 6:00 p.m.

Administrative Office of the Courts  
Scott M. Matheson Courthouse  
450 South State Street  
Judicial Council Room, Suite N31

Approval of minutes	Tab 1	Fran Wikstrom
Reintroduction of Committee members*		Fran Wikstrom
Simplified Civil Procedures		Fran Wikstrom
Renewal of judgment by motion	Tab 2	Tim Shea
Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.	Tab 3	Frank Carney
Changes to FRCP 26 & 56	Tab 4	Frank Carney
Rule 76. Notice of contact information change	Tab 5	Tim Shea
Rule 3. Commencement of action.	Tab 6	Tim Shea

**Committee Web Page:** <http://www.utcourts.gov/committees/civproc/>

### Meeting Schedule

February 25, 2009  
March 25, 2009  
April 22, 2009  
May 27, 2009  
September 23, 2009  
October 28, 2009  
November 18, 2009  
January 27, 2010

\*Rule 11-101(4): "At the first meeting of a committee in any calendar year, and at every meeting at which a new member of the committee first attends, each committee member shall briefly disclose the general nature of his or her legal practice."

# Tab 1

## MINUTES

### UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, November 19, 2008  
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Honorable Lyle R. Anderson, Jonathan Hafen, Thomas R. Lee, Honorable Anthony B. Quinn, Leslie Slauch, James T. Blanch, Francis J. Carney, Todd M. Shaughnessy, Steven Marsden, Honorable Derek Pullan, David W. Scofield, Barbara Townsend, Matty Branch

EXCUSED: Lincoln Davies, Judge R. Scott Waterfall, Cullen Battle, Lori Woffinden, Terrie T. McIntosh, Honorable David O. Nuffer, Janet H. Smith, Anthony W. Schofield

STAFF: Tim Shea, Trystan B. Smith

GUEST: Hutch Fale

#### I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:00 p.m., and entertained comments from the committee concerning the October 22, 2008 minutes. No comments were made and Mr. Wikstrom asked for a motion that the minutes be approved. The motion was duly made and seconded, and unanimously approved.

#### II. RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY.

Mr. Slauch addressed concerns regarding a loophole in Rule 26 that allowed a party to serve document subpoenas on an unrepresented party prior to engaging in an attorney planning meeting. Mr. Slauch discussed domestic practitioners concerns who felt it necessary to subpoena records prior to an attorney planning meeting in preparation for hearings on motions for temporary orders. The committee noted its concern for parties engaging in discovery without an attorney planning meeting. The committee also debated Mr. Slauch's suggestion to amend Rule 26(d) to state: "In all cases, a party may not seek discovery from any source until 30 days after service of the pleading to which the discovery relates."

Judge Quinn observed that domestic practitioners routinely engage in discovery without an attorney planning meeting or a case management order. He further noted that a committee in the Third District is currently studying discovery in domestic cases.

Mr. Wikstrom suggested that the committee allow the Third District to render its

recommendations before the committee acts on the problem.

### **III. RULE 7. PLEADINGS ALLOWED; MOTIONS, MEMORANDA, HEARINGS, ORDERS, OBJECTION TO COMMISSIONER'S ORDER.**

The committee discussed Judge Claudia Laycock's recommendation that Rule 7(g) addressing objections to court commissioner's recommendations be moved to Rule 101. After a brief discussion, the committee unanimously agreed to move the language in Rule 7(g) to Rule 101.

The committee further discussed a number of concerns about the timing for a party to file a response to a cross-motion for summary judgment. After a brief discussion, the committee agreed Rule 7 as written adequately addressed the timing for such motions.

### **IV. RULE 3. COMMENCEMENT OF ACTION.**

Mr. Wikstrom welcomed our guest Hutch Fale and invited him to discuss Rule 3(a)(2) and his concerns regarding the 10-day summons.

The specific provision in question is Rule 4(c)(2), which states: "If the action is commenced under Rule 3(a)(2), the summons shall state that the defendant need not answer if the complaint is not filed within 10 days after service and shall state the telephone number of the clerk of the court where the defendant may call at least 13 days after service to determine if the complaint has been filed." The concern is that well-intentioned debtors call the court to determine if a complaint was filed, are told there is no complaint on file, when a complaint has been filed but due to administrative delays the clerk of the court is unaware of the filing.

Mr. Fale noted his experiences in the Fourth District that there is sometimes a 2 - 3 day delay before a filed complaint is lodged on the docket. He further noted a debtor's difficulty trying to determine if a complaint is on file because there is no assigned judge and no case number listed on the complaint and summons.

The committee discussed its previous discussions about abolishing the 10-day summons. The committee previously decided to keep the 10-day summons because it saved the debtor from paying a filing fee as a part of any judgment.

Mr. Carney suggested the committee elicit input from creditors and members of the collections industry before eliminating the 10-day summons.

Mr. Wikstrom recommended a revision where the action started with a summons, but the debtor would not have to file a response until another notice was sent telling the debtor to respond to the complaint.

Mr. Fale suggested either abolishing the 10-day summons, or increasing the deadline for a debtor to file an answer, perhaps 40 days.

Mr. Shaughnessy suggested a debtor contact the creditor's lawyer to see whether a complaint has been filed. To get a default, the lawyer would have to certify she told the debtor a complaint had been filed.

Mr. Wikstrom asked that the committee think further about possible solutions and revisit Rule 3(a)(2) at a future meeting.

## **V. SIMPLIFIED CIVIL PROCEDURES**

Mr. Wikstrom circulated a draft of concerns and principles for the committee's consideration, and opened discussion to determine if the committee could reach any consensus.

Judge Quinn noted that currently parties do not meet and meaningfully discuss a discovery plan. Parties merely circulate dates through correspondence and rely on the defaults when drafting attorney planning meeting reports.

Mr. Marsden noted that rule changes alone would not be enough to accomplish our goals.

The committee debated whether lowering the defaults would simplify discovery.

Mr. Wikstrom discussed changing the view point from all facts are discoverable to absent agreement, no facts are discoverable unless the party seeking discovery can demonstrate proportionality and reasonable likelihood of finding usable evidence.

Judge Pullan suggested the committee approach the Supreme Court suggesting a paradigm shift, a cultural change, amongst lawyers.

Mr. Shaughnessy questioned whether the rules should be drafted to deal with the ordinary case or the exceptional case.

Mr. Carney questioned whether the committee believed there was a problem with discovery. Mr. Shaughnessy noted there was a problem with the routine case. Mr. Slauch noted that the dollar amount in controversy was not a good indicator of the complexity of the case. He suggested simplified discovery based on a dollar amount alone may not alleviate the committee's concerns. Mr. Wikstrom said the committee should approach the issue with a "veil of ignorance," not anticipating the perspective of plaintiff or defendant on a large or small case.

Mr. Wikstrom asked the committee's opinion about a requirement that a party produce without a request at the onset of litigation all documents and things that they might use as evidence to support their claims or defenses. The committee questioned how the above principle would differ from the current rules governing initial disclosures.

Mr. Marsden and Judge Quinn said that we might develop custom disclosure lists based on the nature of the case. Mr. Wikstrom indicated that we could ask the specialty sections of the Bar to develop such lists.

Judge Quinn said that as a lawyer he frequently had several boxes of documents and so did the other side. He has observed as a judge that seldom are more than 25 documents critical to the case. The difficulty is in identifying those documents. Several committee members said that is especially difficult as the amount of data from multiple drafts, email, text messaging and other sources grows at an incredible rate.

Mr. Wikstrom said that if a \$50,000 case cannot be filed because the cost is prohibitive, we have a problem. Mr. Carney indicated that in medical malpractice a \$200,000 case is iffy. Judge Pullan said that if we try to measure the cases that are not being filed, we may be looking for something that is not there. Mr. Shea said that the computer system may be able to report an amount in controversy, and we could then see the minimum amounts claimed.

Mr. Lee said that our discussions with the Supreme Court should identify the issues and the principles, but that we do not have a particular agenda. At a minimum we need to let the court know what we are doing, and see whether they have any advice.

Mr. Carney noted that an earlier effort with the legislature to streamline the process did not pass.

Judge Quinn made a motion to approve Mr. Wikstrom meeting with the Supreme Court to present the issues and principles prepared in Mr. Wikstrom's paper and as modified by the discussion today. Mr. Carney seconded the motion.

Mr. Marsden said that there are some points in the paper that he does not support, but that he favors the motion. Mr. Hafen suggested removing some of the more controversial detailed suggestions that might act as lightning rods.

Mr. Marsden referred to the New Mexico principles, which he thought might be adequate at this early stage: proportionality, reduce delay and cost, improve access to trials, protect court resources, modify the legal culture.

Mr. Hafen said that he thought it compelling to observe that the federal rules are designed for a certain type of case and that most cases in the state system are not that case.

Mr. Wikstrom called for the question and the motion passed unanimously. Ms. Branch will try to find time on the Court's December 10 agenda.

## **VI. ADJOURNMENT.**

The meeting adjourned at 6:00 p.m. The next meeting of the committee will be held at 4:00 p.m. on Wednesday, January 28, 2009, at the Administrative Office of the Courts.

# Tab 2



## Administrative Office of the Courts

Chief Justice Christine M. Durham  
Utah Supreme Court  
Chair, Utah Judicial Council

### MEMORANDUM

Daniel J. Becker  
State Court Administrator  
Myron K. March  
Deputy Court Administrator

**To:** Civil Procedures Committee  
**From:** Tim Shea *TS*  
**Date:** January 22, 2009  
**Re:** Renewing a judgment

A legislator has approached us with the idea of renewing a judgment by some process other than by independent action. The Judicial Council supports the concept.

Currently, what we call "renewing a judgment" is a bit of a misnomer. Section 78B-2-311 creates an eight year statute of limitations to sue someone claiming non-payment of a judgment. So "renewal" is actually a new cause of action.

I recommend we manage as much of the process as possible by rule, but there should be a statute of limitations, and that will have to be a legislative piece. I have suggested the attached statutory amendments to the legislative drafters. Section 78B-2-311 will differentiate between an action on a Utah judgment which might be renewed and an action on a judgment of another state or the federal courts. We simply don't know what other states allow.

The amendments to Section 78B-5-202 are conforming amendments rather than policy. The statute will refer to the statute of limitations period rather than a fixed number of years. I propose striking line 11 of that draft because it is an incorrect statement. If enforcement of a judgment is stayed, the judgment still exists, it just cannot be enforced.

Rule 58C is to establish the principles of renewing a judgment. The process would be governed by Rule 7. I recommend the motion process because it already provides a means to oppose the motion, principally to dispute the amount owed. California and Arizona do not expressly provide for this opportunity. I have suggested resolution of a few questions that we can anticipate, but there may well be others.

Encl. Statutory amendments  
Rule 58C.  
Letter

The mission of the Utah judiciary is to provide the people an open, fair,  
efficient, and independent system for the advancement of justice under the law.

1       **78B-2-311. Eight years.**

2       (1) An action may be brought within eight years upon a judgment or decree of any  
3 court of the United States, or of any state or territory within the United States.

4       (2) An action may be brought upon a judgment or decree of a Utah court within eight  
5 years after the original judgment or renewal thereof.

6       **78B-5-202. Duration of judgment -- Judgment as a lien upon real property --**  
7 **Abstract of judgment -- Small claims judgment not a lien -- Appeal of judgment --**  
8 **Child support orders.**

9       (1) Judgments shall continue ~~for eight years from the date of entry in a court until~~  
10 expiration of the statute of limitations created by Section 78B-2-311 unless previously  
11 satisfied ~~or unless enforcement of the judgment is stayed in accordance with law.~~

12       (2) Prior to July 1, 1997, except as limited by Subsections (4) and (5), the entry of  
13 judgment by a district court creates a lien upon the real property of the judgment debtor,  
14 not exempt from execution, owned or acquired during the existence of the judgment,  
15 located in the county in which the judgment is entered.

16       (3) An abstract of judgment issued by the court in which the judgment is entered  
17 may be filed in any court of this state and shall have the same force and effect as a  
18 judgment entered in that court.

19       (4) Prior to July 1, 1997, and after May 15, 1998, a judgment entered in the small  
20 claims division of any court may not qualify as a lien upon real property unless  
21 abstracted to the civil division of the district court and recorded in accordance with  
22 Subsection (3).

23       (5) (a) If any judgment is appealed, upon deposit with the court where the notice of  
24 appeal is filed of cash or other security in a form and amount considered sufficient by  
25 the court that rendered the judgment to secure the full amount of the judgment, together  
26 with ongoing interest and any other anticipated damages or costs, including attorney  
27 fees and costs on appeal, the lien created by the judgment shall be terminated as  
28 provided in Subsection (5)(b).

29       (b) Upon the deposit of sufficient security as provided in Subsection (5)(a), the court  
30 shall enter an order terminating the lien created by the judgment and granting the

31 judgment creditor a perfected lien in the deposited security as of the date of the original  
32 judgment.

33 (6)(a) A child support order or a sum certain judgment for past due support may be  
34 enforced:

35 (i) within four years after the date the youngest child reaches majority; or

36 (ii) eight years from the date of entry of the sum certain judgment entered by a  
37 tribunal.

38 (b) The longer period of duration shall apply in every order.

39 (c) A sum certain judgment may be renewed to extend the duration.

40 (7) (a) After July 1, 2002, a judgment entered by a district court or a justice court in  
41 the state becomes a lien upon real property if:

42 (i) the judgment or an abstract of the judgment containing the information identifying  
43 the judgment debtor as described in Subsection 78B-5-201(4) is recorded in the office  
44 of the county recorder; or

45 (ii) the judgment or an abstract of the judgment and a separate information  
46 statement of the judgment creditor as described in Subsection 78B-5-201(5) is recorded  
47 in the office of the county recorder.

48 (b) The judgment shall run from the date of entry by the district court or justice court.

49 (c) The real property subject to the lien includes all the real property of the judgment  
50 debtor:

51 (i) in the county in which the recording under Subsection (7)(a)(i) or (ii) occurs; and

52 (ii) owned or acquired at any time by the judgment debtor during the time the  
53 judgment is effective.

54 (d) State agencies are exempt from the recording requirement of Subsection (7)(a).

55 (8) (a) A judgment referred to in Subsection (7) shall be entered under the name of  
56 the judgment debtor in the judgment index in the office of the county recorder as  
57 required in Section 17-21-6.

58 (b) A judgment containing a legal description shall also be abstracted in the  
59 appropriate tract index in the office of the county recorder.

60

1 **Rule 58C. Renewal of judgment.**

2 (a) If a judgment has not been fully satisfied, the judgment creditor may file a motion  
3 to renew the judgment in the court that entered the original judgment. The motion shall  
4 be filed before expiration of the statute of limitations to file an action on the judgment  
5 and no sooner than 180 days before expiration of the statute of limitations to file an  
6 action on the judgment.

7 (b) The parties shall file affidavits or other evidence supporting or opposing the  
8 motion that detail the accrual of fees, costs, interest and payments.

9 (c) An order granting a timely motion to renew a judgment, even if entered after  
10 expiration of the statute of limitations to file an action on the judgment, extends the  
11 judgment, as renewed, with no interruption in enforceability, effect as a lien, or other  
12 legal consequence.

13 (d) The post-judgment interest rate on the unpaid balance of the judgment shall be  
14 the rate determined by Utah Code Section 15-1-4 on the date the court enters an order  
15 renewing the judgment.

16

# Tab 3

1       **Rule 50. Motion for a directed verdict and for judgment notwithstanding the**  
2 **verdict.**

3       (a) Motion for directed verdict; when made; effect. A party who moves for a directed  
4 verdict at the close of the evidence offered by an opponent may offer evidence in the  
5 event that the motion is not granted, without having reserved the right so to do and to  
6 the same extent as if the motion had not been made. A motion for a directed verdict  
7 which is not granted is not a waiver of trial by jury even though all parties to the action  
8 have moved for directed verdicts. A motion for a directed verdict shall state the specific  
9 ground(s) therefor. The order of the court granting a motion for a directed verdict is  
10 effective without any assent of the jury.

11       (b) Motion for judgment notwithstanding the verdict. ~~Whenever~~If a motion for a  
12 directed verdict ~~made at the close of all the evidence~~ is denied or ~~for any reason~~ is not  
13 granted, the court is deemed to have submitted the action to the jury subject to a later  
14 determination of the legal questions raised by the motion. Not later than ten days after  
15 entry of judgment, a party who ~~has~~ moved for a directed verdict may ~~move~~serve a  
16 motion to have the verdict and any judgment entered thereon set aside and to have  
17 judgment entered in accordance with ~~his~~the motion for a directed verdict; or if a verdict  
18 was not returned such party, within ten days after the jury has been discharged, may  
19 ~~move~~serve a motion for judgment in accordance with ~~his~~the motion for a directed  
20 verdict. A motion for a new trial may be joined with this motion, or a new trial may be  
21 prayed for in the alternative. If a verdict was returned, the court may allow the judgment  
22 to stand or may reopen the judgment and either order a new trial or direct the entry of  
23 judgment as if the requested verdict had been directed. If no verdict was returned, the  
24 court may direct the entry of judgment as if the requested verdict had been directed or  
25 may order a new trial.

26       (c) Same: conditional rulings on grant of motion.

27       (c)(1) If the motion for judgment notwithstanding the verdict, provided for in  
28 Subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new  
29 trial, if any, by determining whether it should be granted if the judgment is thereafter  
30 vacated or reversed, and shall specify the grounds for granting or denying the motion  
31 for a new trial. If the motion for a new trial is thus conditionally granted, the order

32 thereon does not affect the finality of the judgment. In case the motion for a new trial  
33 has been conditionally granted and the judgment is reversed on appeal, the new trial  
34 shall proceed unless the appellate court has otherwise ordered. In case the motion for a  
35 new trial has been conditionally denied, the respondent on appeal may assert error in  
36 that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be  
37 in accordance with the order of the appellate court.

38 (c)(2) The party whose verdict has been set aside on motion for judgment  
39 notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not  
40 later than ten days after entry of the judgment notwithstanding the verdict.

41 (d) Same: denial of motion. If the motion for judgment notwithstanding the verdict is  
42 denied, the party who prevailed on that motion may, as respondent, assert grounds  
43 entitling him to a new trial in the event the appellate court concludes that the trial court  
44 erred in denying the motion for judgment notwithstanding the verdict. If the appellate  
45 court reverses the judgment, nothing in this rule precludes it from determining that the  
46 respondent is entitled to a new trial, or from directing the trial court to determine whether  
47 a new trial shall be granted.

48

# Tab 4

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

LEE H. ROSENTHAL  
CHAIR

PETER G. McCABE  
SECRETARY

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MARK R. KRAVITZ  
CIVIL RULES

RICHARD C. TALLMAN  
CRIMINAL RULES

ROBERT L. HINKLE  
EVIDENCE RULES

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

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

**Date: May 9, 2008, as supplemented June 30, 2008**

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

*Introduction*

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

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

\* \* \* \* \*

Part II.A of this Report recommends for publication proposals that would amend parts of the Rule 26 provisions governing disclosure and discovery with respect to expert trial witnesses. Part II.B recommends for publication a thorough revision of Rule 56 that regulates the procedure for seeking summary judgment without changing the standard for granting summary judgment. Both the Rule 26 proposal and the Rule 56 proposal were presented for preliminary discussion at this Committee's January 2008 meeting; the proposals have been improved by incorporating several responses to that discussion.

\* \* \* \* \*

## II RECOMMENDATIONS FOR PUBLICATION

The Committee recommends publication for comment of amendments to Rules 26 and 56. The Rule 26 amendments address disclosure and discovery of trial-witness experts.

\* \* \* \* \*

### *A. Rule 26(a)(2) and (b)(4): Expert Trial Witness Discovery*

#### **Introduction**

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

Party Disclosure: Rule 26(a)(2)(A) requires a party to disclose the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. The witness is required to provide a Rule 26(a)(2)(B) report only if the witness "is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." But some courts have required witness reports even as to experts outside these express limits.

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

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

Draft Reports and Attorney-Expert Communications: The background for these proposals traces back to the 1970 amendments that added an express work-product provision, Rule 26(b)(3), and at

the same time made Rule 26(b)(3) “subject to the provisions of subdivision (b)(4).” Rule 26(b)(4), also new in 1970, provided for “[d]iscovery of facts known and opinions held by experts \* \* \* acquired or developed in anticipation of litigation or for trial, \* \* \* only as follows.” What followed was a right to ask by interrogatory for the substance of the facts and opinions to which the expert trial witness is expected to testify; “further discovery by other means” could be ordered by the court. Many lawyers and courts found the interrogatory discovery an inadequate basis for preparing for trial; in many courts depositions of trial-witness experts became routine.

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

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

The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert’s opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions — whether or not ultimately relied upon by the expert — are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

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

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

Consequences that surely were unforeseen in 1993 have demonstrated the pragmatic failure of any hope that expert opinions would be better tested by sweeping discovery of draft reports and attorney-expert communications. The result has been a regime that does not provide the anticipated information. It does not provide that information because attorneys and expert witnesses go to great lengths to forestall discovery. These strategies generally defeat discovery of any information that might be valuable, but lawyers persist in devoting costly deposition time to the vain quest for

communications or drafts that may undercut an expert's opinions. Perhaps worse, these strategies impede effective use of expert witnesses. Effective use is impeded as to the opinion testimony because lawyers restrict free communications that might lead to more sophisticated and helpful opinions. Effective use also is impeded because lawyers hesitate to use a trial-witness expert for assistance with such responsibilities as understanding an adversary's expert's report and preparing for deposition or cross-examination at trial, or in evaluating a case for settlement. Additional cost flows from an offsetting practice of hiring "consulting" experts who, because they will not testify at trial, are protected against discovery by present Rule 26(b)(4)(B). The consulting experts are used for the free explorations that are too risky to pursue with a trial-witness expert. A party who cannot afford the expense of a dual set of experts is put at a disadvantage.

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

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

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

The proposals that have been developed through miniconferences, subcommittee meetings, countless conference calls, several Advisory Committee meetings, and the preliminary presentation to this Committee, seek to improve the use of expert testimony by correcting the unforeseen consequences that have emerged in the wake of the 1993 amendments. The seeming availability of broad discovery into draft reports and attorney-expert communications has failed to yield useful information in practice because lawyers and experts have developed coping strategies that generally defeat discovery efforts. Those strategies have entailed increased costs, most notoriously by increasing the simultaneous use of consulting experts and testifying experts. They also contribute in some cases to diminishing the quality of expert testimony because attorney and expert fear to engage in the open and robust discussions that would lead to better mutual understanding. In

addition, they may diminish the opportunity to effectively challenge an adversary's expert when a party cannot afford to explore cross-examination and rebuttal with a consulting expert, and — fearing the possibility of discovery — refuses to consult with its trial-witness expert.

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

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

### **Overview**

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

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

### **Invitation for Comment**

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

31 (v) a list of all other cases in which, during  
32 the previous 4 years, the witness  
33 testified as an expert at trial or by  
34 deposition; and

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

38                   **(C)** Witnesses Who Do Not Provide a Written  
39                   Report. Unless otherwise stipulated or  
40                   ordered by the court, if the witness is not  
41                   required to provide a written report, the Rule  
42                   26(a)(2)(A) disclosure must state:

43                   **(i)** the subject matter on which the witness  
44                   is expected to present evidence under  
45                   Federal Rule of Evidence 702, 703, or  
46                   705; and

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

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

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- 54 (i) at least 90 days before the date set for  
55 trial or for the case to be ready for trial;  
56 or  
57 (ii) if evidence is intended solely to  
58 contradict or rebut evidence on the same  
59 subject matter identified by another  
60 party under Rule 26(a)(2)(B) or (C),  
61 within 30 days after the other party's  
62 disclosure.

63 **(E)** *Supplementing the Disclosure.* The  
64 parties must supplement these  
65 disclosures when required under Rule  
66 26(e).

67 \* \* \* \* \*

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

69 \* \* \* \* \*

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

71 **(A)** *Deposition of an Expert Who May Testify.* A  
72 party may depose any person who has been  
73 identified as an expert whose opinions may

74 be presented at trial. If Rule 26(a)(2)(B)  
75 requires a report from the expert, the  
76 deposition may be conducted only after the  
77 report is provided.

78 **(B)** Trial Preparation Protection for Draft  
79 Reports or Disclosures. Rules 26(b)(3)(A)  
80 and (B) protect drafts of any report or  
81 disclosure required under Rule 26(a)(2),  
82 regardless of the form of the draft.

83 **(C)** Trial Preparation Protection for  
84 Communications Between Party's Attorney  
85 and Expert Witnesses. Rules 26(b)(3)(A) and  
86 (B) protect communications between the  
87 party's attorney and any witness required to  
88 provide a report under Rule 26(a)(2)(B),  
89 regardless of the form of the  
90 communications, except to the extent that the  
91 communications:

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

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

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

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

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

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

117                   (€) *Payment.* Unless manifest injustice  
118                   would result, the court must require that  
119                   the party seeking discovery:

120                   (i) pay the expert a reasonable fee for time  
121                   spent in responding to discovery under  
122                   Rule 26(b)(4)(A) or (DB); and

123                   (ii) for discovery under (DB), also pay the  
124                   other party a fair portion of the fees and  
125                   expenses it reasonably incurred in  
126                   obtaining the expert's facts and  
127                   opinions.

128                   \*\*\*\*\*

#### COMMITTEE NOTE

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

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

13 The rules first addressed discovery as to trial-witness experts  
14 when Rule 26(b)(4) was added in 1970, permitting an interrogatory  
15 about expert testimony. In 1993, Rule 26(b)(4)(A) was revised to  
16 authorize expert depositions and Rule 26(a)(2) was added to provide  
17 disclosure, including — for many experts — an extensive report.  
18 Influenced by the Committee Note to Rule 26(a)(2), many courts read  
19 the provision for disclosure in the report of “data or other information  
20 considered by the expert in forming the opinions” to call for  
21 disclosure or discovery of all communications between counsel and  
22 expert witnesses and all draft reports.

23 The Committee has been told repeatedly that routine discovery  
24 into attorney-expert communications and draft reports has had  
25 undesirable effects. Costs have risen. Attorneys may employ two  
26 sets of experts — one for purposes of consultation and another to  
27 testify at trial — because disclosure of their collaborative interactions  
28 with expert consultants would reveal their most sensitive and  
29 confidential case analyses, often called “core” or “opinion” work  
30 product. The cost of retaining a second set of experts gives an  
31 advantage to those litigants who can afford this practice over those  
32 who cannot. At the same time, attorneys often feel compelled to  
33 adopt an excessively guarded attitude toward their interaction with  
34 testifying experts that impedes effective communication. Experts  
35 might adopt strategies that protect against discovery but also interfere  
36 with their effective work, such as not taking any notes, never  
37 preparing draft reports, or using sophisticated software to scrub their  
38 computers’ memories of all remnants of such drafts. In some  
39 instances, outstanding potential expert witnesses may simply refuse  
40 to be involved because they would have to operate under these  
41 constraints.

42 Rule 26(a)(2)(B) is amended to specify that disclosure is only  
43 required regarding “facts or data” considered by the expert witness,  
44 deleting the “or other information” phrase that has caused difficulties.  
45 Rule 26(a)(2)(C) is added to mandate disclosures regarding testimony  
46 of expert witnesses not required to provide expert reports. Rule  
47 26(b)(4) is amended to provide work-product protection for draft  
48 reports and attorney-expert communications, although this protection  
49 does not extend to communications about three specified topics.

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

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

68 **Subdivision (a)(2)(C).** Rule 26(a)(2)(C) is added to mandate  
69 disclosures regarding the opinions to be offered by expert witnesses  
70 who are not required to provide reports under Rule 26(a)(2)(B). It  
71 requires disclosure of information that could have been obtained by  
72 a simple interrogatory under the 1970 rule, but now depends on more  
73 cumbersome discovery methods. This disclosure will enable parties  
74 to determine whether to take depositions of these witnesses, and to  
75 prepare to question them in deposition or at trial. It is considerably  
76 less extensive than the report required by Rule 26(a)(2)(B). Courts  
77 must take care against requiring undue detail, keeping in mind that

78 these witnesses have not been specially retained and may not be as  
79 responsive to counsel as those who have.

80 This amendment resolves a tension that has sometimes  
81 prompted courts to require reports under Rule 26(a)(2)(B) even from  
82 witnesses exempted from the report requirement, reasoning that  
83 having a report before the deposition or trial testimony of all expert  
84 witnesses is desirable. *See Minnesota Min. & Manuf. Co. v. Signtech*  
85 *USA, Ltd.*, 177 F.R.D. 459, 461 (D. Minn. 1998) (requiring written  
86 reports from employee experts who do not regularly provide expert  
87 testimony on theory that doing so is “consistent with the spirit of Rule  
88 26(a)(2)(B)” because it would eliminate the element of surprise);  
89 *compare Duluth Lighthouse for the Blind v. C.B. Bretting Manuf.*  
90 *Co.*, 199 F.R.D. 320, 325 (D. Minn. 2000) (declining to impose a  
91 report requirement because “we are not empowered to modify the  
92 plain language of the Federal Rules so as to secure a result we think  
93 is correct”). With the addition of Rule 26(a)(2)(C) disclosure for  
94 expert witnesses exempted from the report requirement, courts should  
95 no longer be tempted to overlook Rule 26(a)(2)(B)’s limitations on  
96 the full report requirement.

97 A witness who is not required to provide a report under Rule  
98 26(a)(2)(B) may both testify as a fact witness and also provide expert  
99 testimony under Evidence Rule 702, 703, or 705. Frequent examples  
100 include physicians or other health care professionals and employees  
101 of a party who do not regularly provide expert testimony. Parties  
102 must identify such witnesses under Rule 26(a)(1)(A) and provide the  
103 disclosure required under Rule 26(a)(2)(C) with regard to their expert  
104 opinions.

105 **Subdivision (a)(2)(D).** This provision (formerly Rule  
106 26(a)(2)(C)) is amended slightly to specify that the time limits for  
107 disclosure of contradictory or rebuttal evidence apply with regard to  
108 disclosures under new Rule 26(a)(2)(C), just as they do with regard  
109 to reports under Rule 26(a)(2)(B).

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

114 provide reports under Rule 26(a)(2)(B) or are the subject of disclosure  
115 under Rule 26(a)(2)(C). It applies regardless of the form of the draft,  
116 whether oral, written, electronic, or otherwise. It also applies to  
117 drafts of any supplementation under Rule 26(e); *see* Rule 26(a)(2)(E).

118 Rule 26(b)(4)(C) is added to provide comparable work-product  
119 protection for attorney-expert communications regardless of the form  
120 of the communications, whether oral, written, electronic, or  
121 otherwise. The addition of Rule 26(b)(4)(C) is designed to protect  
122 counsel's work product and ensure that lawyers may interact with  
123 retained experts without fear of routine wholesale discovery. The  
124 protection is limited to communications between an expert witness  
125 required to provide a report under Rule 26(a)(2)(B) and the attorney  
126 for the party on whose behalf the witness will be testifying. The rule  
127 provides no protection for communications between counsel and  
128 other expert witnesses, such as those for whom disclosure is required  
129 under Rule 26(a)(2)(C). It does not exclude protection under other  
130 doctrines, such as privilege or independent development of the work-  
131 product doctrine.

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

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

147 The protection for communications between the retained expert  
148 and "the party's attorney" should be applied in a realistic manner, and  
149 often would not be limited to communications with a single lawyer

150 or a single law firm. For example, it may happen that a party is  
151 involved in a number of suits about a given product or service, and  
152 that a particular expert witness will testify on that party's behalf in  
153 several of the cases. In such a situation, a court should recognize that  
154 this protection applies to communications between the expert witness  
155 and the attorneys representing the party in any of those cases.  
156 Similarly, communications with in-house counsel for the party would  
157 often be regarded as protected even if the in-house attorney is not  
158 counsel of record in the action. Other situations may also justify a  
159 pragmatic application of the "party's attorney" concept.

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

169 First, under Rule 26(b)(4)(C)(i) attorney-expert communications  
170 regarding compensation for the expert's study or testimony may be  
171 the subject of discovery. In some cases, this discovery may go  
172 beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not  
173 limited to compensation for work forming the opinions to be  
174 expressed, but extends to all compensation for the study and  
175 testimony provided in relation to the action. Any communications  
176 about additional benefits to the expert, such as further work in the  
177 event of a successful result of the present case, would be included.  
178 This exception includes compensation for work done by the expert  
179 witness personally or by another person associated with the expert in  
180 providing study or testimony in relation to the action. Compensation  
181 paid to an organization affiliated with the expert is included as  
182 compensation for the expert's study or testimony. The objective is to  
183 permit full inquiry into such potential sources of bias.

184 Second, consistent with Rule 26(a)(2)(B)(ii), under Rule  
185 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the  
186 party's attorney provided to the expert and that the expert considered

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

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

208 The amended rule does not absolutely prohibit discovery  
209 regarding attorney-expert communications on subjects outside the  
210 three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports  
211 or disclosures. But such discovery is permitted regarding attorney-  
212 expert communications or draft reports only in limited circumstances  
213 and by court order. No such discovery may be obtained unless the  
214 party seeking it can make the showing specified in Rule  
215 26(b)(3)(A)(ii) — that the party has a substantial need for the  
216 discovery and cannot obtain the substantial equivalent without undue  
217 hardship. It will be rare for a party to be able to make such a showing  
218 given the broad disclosure and discovery otherwise allowed regarding  
219 the expert’s testimony. A contention that required disclosure or  
220 discovery has not been provided is not a ground for broaching the  
221 protection provided by Rule 26(b)(4)(B) or (C), although it may  
222 provide grounds for a motion under Rule 37(a).

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

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

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

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### Detailed Discussion and Questions

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

**(C)** *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, the Rule 26(a)(2)(A) disclosure must state:

- (i)** the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
- (ii)** a summary of the facts and opinions to which the witness is expected to testify.

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

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

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

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

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

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

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

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

— Rule 37(c)(1) enables sensible accommodation. These questions, however, will benefit from public comment.

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

Incidental Points: The Committee decided that it would be unwise to clutter the rules by addressing two technical questions. A “hybrid” witness may have been deposed before a party discloses a summary of expert testimony that was not explored at the deposition. It might be argued that a second deposition to explore the expert testimony can be had only with the court’s permission under Rule 30(a)(2)(A)(ii), and also under Rule 30(a)(2)(A)(i) if the result is more than 10 depositions by the plaintiffs, or by the defendants, or by third-party defendants. The Committee anticipates that these issues will be resolved by common-sense application of the rules.

*Rule 26(a)(2)(B)(ii): Disclose “Facts or Data”*

- (B) *Witnesses Who Must Provide a Written Report*. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert testimony. The report must contain:
- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
  - (ii) the facts or data ~~or other information~~ considered by the witness in forming them. \* \* \*

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

*Rule 26(b)(4): Work-Product for Attorney-Expert Communications and Draft Reports***(b) Discovery Scope and Limits**

\* \* \* \* \*

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

- (A)** Deposition of an Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.
- (B)** Trial Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form of the draft.
- (C)** Trial Preparation Protection for Communications Between Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:
- (i)** Relate to compensation for the expert's study or testimony;
  - (ii)** Identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
  - (iii)** Identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.
- (DB)** *Expert Employed Only for Trial Preparation. \* \* \**

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

**(B): Work-Product protection for draft reports:** The proposal adopts work-product protection for drafts of any disclosure or report required under Rule 26(a)(2). Absolute protection might be too much — there may be circumstances (probably rare) in which a party has substantial need of a draft report. Even if the court orders discovery, the command of Rule 26(b)(3)(B) applies: the court must

protect the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

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

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

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

(C): Witness required to give (a)(2)(B) report: The purposes of ensuring work-product protection for attorney-expert communications focus on communications with a witness retained or specially employed to provide expert testimony or one whose duties as a party's employee regularly involve giving expert testimony. They are the witnesses required to provide reports under Rule 26(a)(2)(B), and the ones involved in the communications protected by the proposal. There is less need to protect an attorney's communications with witnesses in the many other categories of experts. Communications with a client's employees often will be privileged. There is little reason to extend independent protection under (b)(4)(A) to such other witnesses as a treating physician or a state accident investigator. They do not have the same relationship to counsel as those who are protected. Neither have they figured in the many discussions of the practical problems that arise in current discovery practice.

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

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

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

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

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

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

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

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

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

*Committee Note*

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

As a discovery rule, Rule 26(b)(4)(A) does not directly address examination at trial about drafts of a disclosure or report of expert testimony, or about attorney-expert communications. The policies that underlie work-product protection, however, often carry over to examination at trial. Among the reasons for incorporating work-product protection in (b)(4)(B) and (C) is the expectation that courts will adopt the same approach in defining the limits of examination at trial. Many of those who have participated in developing these proposals believe that unless the protection is carried forward to

trial, lawyers will continue to engage with experts in the costly and inefficient ways that now impede effective development of expert testimony.

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

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

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

*B. Rule 56: Summary Judgment***Introduction**

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

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

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

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

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

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

### Overview

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

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

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

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

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

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

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

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

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

### Invitation for Comment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (1) A party may move for summary judgment on all or part of a claim or defense.
- (2) The court must grant the motion if there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law on all claims.
- (3) If a party is not entitled to summary judgment on all claims, the court should grant the motion if there is no genuine dispute as to any material fact and the party is entitled to judgment as a matter of law on a claim, defense, or part of a claim or defense addressed by the motion.
- (4) The court should state on the record the reasons for granting or denying summary judgment.

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

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

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

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

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

**Rule 56. Summary Judgment<sup>\*\*\*</sup>**

1       **(a) Motion for Summary Judgment or Partial Summary**  
2       **Judgment.** A party may move for summary judgment  
3       on all or part of a claim or defense. The court should<sup>\*\*\*\*</sup>  
4       grant summary judgment if there is no genuine dispute  
5       as to any material fact and a party is entitled to judgment  
6       as a matter of law. The court should state on the record  
7       the reasons for granting or denying the motion.

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

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

14      **(2)** a party opposing the motion must file a response  
15      within 21 days after the motion is served or that

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<sup>\*\*\*</sup>Text of current Rule 56, which is on page 41, is deleted; new substitute language is proposed.

<sup>\*\*\*\*</sup>Some observers have argued that this should be “must grant” summary judgment. The issue is framed by the invitation for comment (see page 23 for a detailed discussion).

16 party's responsive pleading is due, whichever is  
17 later; and

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

20 (c) **Procedures.**

21 (1) ***Case-Specific Procedure.*** The procedures in this  
22 subdivision (c) apply unless the court orders  
23 otherwise in the case.

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

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

28 (i) a motion that identifies each claim or  
29 defense — or the part of each claim or  
30 defense — on which summary judgment  
31 is sought;

32 (ii) a separate statement that concisely  
33 identifies in separately numbered  
34 paragraphs only those material facts that

35 cannot be genuinely disputed and entitle  
36 the movant to summary judgment; and  
37 **(iii)** a brief of its contentions on the law or  
38 facts.

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

40 A party opposing summary judgment:

41 **(i)** must file a response that, in  
42 correspondingly numbered paragraphs,  
43 accepts or disputes — or accepts in part  
44 and disputes in part — each fact in the  
45 movant’s statement;

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

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

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

- 53                   (i) must file, in the form required by Rule  
54   56(c)(2)(B)(i), a reply to any additional  
55   facts stated by the nonmovant; and  
56                   (ii) may file a reply brief.

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

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

62           (A) *Supporting Fact Positions.* A statement that  
63   a fact cannot be genuinely disputed or is  
64   genuinely disputed must be supported by:

- 65                   (i) citation to particular parts of materials  
66   in the record, including depositions,  
67   documents, electronically stored  
68   information, affidavits or declarations,  
69   stipulations (including those made for  
70   purposes of the motion only),  
71   admissions, interrogatory answers, or  
72   other materials; or

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

78                   **(B) *Materials Not Cited.*** The court need consider  
79                   only materials called to its attention under  
80                   Rule 56(c)(4)(A), but it may consider other  
81                   materials in the record:

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

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

85                   **(5) *Assertion that Fact is Not Supported by***  
86                   ***Admissible Evidence.*** A response or reply to a  
87                   statement of fact may state that the material cited  
88                   to support or dispute the fact is not admissible in  
89                   evidence.

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

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93 facts that would be admissible in evidence, and  
94 show that the affiant or declarant is competent to  
95 testify on the matters stated.

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

- 100 (1) defer considering the motion or deny it;  
101 (2) allow time to obtain affidavits or declarations or to  
102 take discovery; or  
103 (3) issue any other appropriate order.

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

- 107 (1) afford an opportunity to properly respond or reply;  
108 (2) consider a fact undisputed for purposes of the  
109 motion;  
110 (3) grant summary judgment if the motion and  
111 supporting materials — including the facts

112 considered undisputed — show that the movant is  
113 entitled to it; or

114 (4) issue any other appropriate order.

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

117 (1) grant summary judgment for a nonmovant;

118 (2) grant or deny the motion on grounds not raised by  
119 the motion, response, or reply; or

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

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

128 (h) **Affidavit or Declaration Submitted in Bad Faith.** If  
129 satisfied that an affidavit or declaration under this rule  
130 is submitted in bad faith or solely for delay, the court —  
131 after notice and a reasonable time to respond — may

132 order the submitting party to pay the other party the  
 133 reasonable expenses, including attorney’s fees, it  
 134 incurred as a result. An offending party or attorney may  
 135 also be held in contempt.

#### COMMITTEE NOTE

1 Rule 56 is revised to improve the procedures for presenting and  
 2 deciding summary-judgment motions and to make the procedures  
 3 more consistent with those already used in many courts. The standard  
 4 for granting summary judgment remains unchanged. The language  
 5 of subdivision (a) continues to require that there be no genuine  
 6 dispute as to any material fact and that a party be entitled to judgment  
 7 as a matter of law. The amendments will not affect continuing  
 8 development of the decisional law construing and applying these  
 9 phrases. The source of contemporary summary-judgment standards  
 10 continues to be three decisions from 1986: *Celotex Corp. v. Catrett*,  
 11 477 U.S. 317; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242; and  
 12 *Matsushita Electrical Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574.

13 **Subdivision (a).** Subdivision (a) carries forward the summary-  
 14 judgment standard expressed in former subdivision (c), changing only  
 15 one word — genuine “issue” becomes genuine “dispute.” “Dispute”  
 16 better reflects the focus of a summary-judgment determination.

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

23 Subdivision (a) also adds a new direction that the court should  
 24 state on the record the reasons for granting or denying the motion.  
 25 Most courts recognize this practice. Among other advantages, a  
 26 statement of reasons can facilitate an appeal or subsequent trial-court  
 27 proceedings. It is particularly important to state the reasons for

28 granting summary judgment; the statement may be dispensed with  
29 only when the reasons are apparent both to the parties and to an  
30 appellate court. The form and detail of the statement of reasons are  
31 left to the court's discretion.

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

35 **Subdivision (b).** The timing provisions in former subdivisions (a)  
36 and (c) [were consolidated and substantially revised as part of the  
37 time computation amendments that took effect in 2009.] These  
38 provisions are adapted by new subdivision (b) to fit the context of  
39 amended Rule 56. The timing for each step is directed to filing.

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

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

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

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

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

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

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

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

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

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

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

98 Subdivision (c)(4)(A) addresses the ways to support a statement  
99 or dispute of fact. Item (i) describes the familiar record materials

100 commonly relied upon and requires that the movant cite the particular  
101 parts of the materials that support the facts. Materials that are not yet  
102 in the record — including materials referred to in an affidavit or  
103 declaration — must be placed in the record. Once materials are in the  
104 record, the court may, by order in the case, direct that the materials be  
105 gathered in an appendix, a party may voluntarily submit an appendix,  
106 or the parties may submit a joint appendix. The appendix procedure  
107 also may be established by local rule. Direction to a specific location  
108 in an appendix satisfies the citation requirement. So too it may be  
109 convenient to direct that a party assist the court in locating materials  
110 buried in a voluminous record.

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

118 Subdivision (c)(4)(B) reflects judicial opinions and local rules  
119 provisions stating that the court may decide a motion for summary  
120 judgment without undertaking an independent search of the record.  
121 Nonetheless, the rule also recognizes that a court may consider record  
122 materials not called to its attention by the parties. Consideration is  
123 more likely to be appropriate when uncited material shows there is a  
124 genuine dispute. If the court intends to rely on uncited record  
125 material to grant summary judgment it must give notice to the parties  
126 under subdivision (f).

127 Subdivision (c)(5) provides that a response or reply may be used  
128 to challenge the admissibility of material cited to support or dispute  
129 a fact. The statement in the response should include no more than a  
130 concise identification of the basis for the challenge. The challenge  
131 can be supported by argument in the brief, or may be made in the  
132 brief alone. There is no need to make a separate motion to strike. If  
133 the case goes to trial, failure to challenge admissibility at the  
134 summary-judgment stage does not forfeit the right to challenge  
135 admissibility at trial.

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

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

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

149           A party who seeks relief under subdivision (d) should consider  
150 seeking an order deferring the time to respond to the summary-  
151 judgment motion.

152           **Subdivision (e).** Subdivision (e) addresses questions that arise when  
153 a response or reply does not comply with Rule 56(c) requirements,  
154 when there is no response, or when there is no reply to additional  
155 facts stated in a response. Summary judgment cannot be granted by  
156 default even if there is a complete failure to respond or reply, much  
157 less when an attempted response or reply fails to comply with all Rule  
158 56(c) requirements. Before deciding on other possible action,  
159 subdivision (e)(1) recognizes that the court may afford an opportunity  
160 to respond or reply in proper form. In many circumstances this  
161 opportunity will be the court's preferred first step.

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

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

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

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

201           **Subdivision (g).** Subdivision (g) applies when the court does not  
202 grant all the relief requested by a motion for summary judgment. It  
203 becomes relevant only after the court has applied the summary-  
204 judgment standard carried forward in subdivision (a) to each claim,  
205 defense, or part of a claim or defense, identified by the motion under  
206 subdivision (c)(2)(A)(i). Once that duty is discharged, the court may  
207 decide whether to apply the summary-judgment standard to dispose  
208 of a material fact that is not genuinely in dispute.

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

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

**CURRENT FEDERAL RULE OF CIVIL PROCEDURE 56****Rule 56. Summary Judgment**

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

5       **(1)** 20 days have passed from commencement of the  
6       action; or

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

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

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

19 genuine issue as to any material fact and that the movant  
20 is entitled to judgment as a matter of law.

21 **(d) Case Not Fully Adjudicated on the Motion.**

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

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

37 **(e) Affidavits; Further Testimony.**

- 38 (1) ***In General.*** A supporting or opposing affidavit  
39 must be made on personal knowledge, set out facts  
40 that would be admissible in evidence, and show  
41 that the affiant is competent to testify on the  
42 matters stated. If a paper or part of a paper is  
43 referred to in an affidavit, a sworn or certified copy  
44 must be attached to or served with the affidavit.  
45 The court may permit an affidavit to be  
46 supplemented or opposed by depositions, answers  
47 to interrogatories, or additional affidavits.
- 48 (2) ***Opposing Party’s Obligation to Respond.*** When  
49 a motion for summary judgment is properly made  
50 and supported, an opposing party may not rely  
51 merely on allegations or denials in its own  
52 pleading; rather, its response must — by affidavits  
53 or as otherwise provided in this rule — set out  
54 specific facts showing a genuine issue for trial. If  
55 the opposing party does not so respond, summary  
56 judgment should, if appropriate, be entered against  
57 that party.

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

- 62 (1) deny the motion;
- 63 (2) order a continuance to enable affidavits to be  
64 obtained, depositions to be taken, or other  
65 discovery to be undertaken; or
- 66 (3) issue any other just order.

67 **(g) Affidavit Submitted in Bad Faith.** If satisfied that an  
68 affidavit under this rule is submitted in bad faith or  
69 solely for delay, the court must order the submitting  
70 party to pay the other party the reasonable expenses,  
71 including attorney's fees, it incurred as a result. An  
72 offending party or attorney may also be held in  
73 contempt.

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### Detailed Discussion and Questions

#### *Subdivision (a): Motion*

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

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

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

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

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

At least until December 1, 2010, Rule 56(c) will continue to say “should.” Although there has not been much opportunity to assess reactions to “should” in the 2007 version of Rule 56, experience during the period the present proposals remain under consideration will offer some insight into its interpretation.

Some observers continue to argue that “should” should have been translated as “must,” and ought to be changed to “must” in the new Rule 56. When pressed, they would prefer “shall” to

“should.” Their concern is that “should” may exacerbate what they see as an unfortunate tendency of some judges to delay or entirely omit any ruling on a summary-judgment motion in the hope that uncertainty will press the parties to settle. Their fall-back position is that at the very least the Committee Note should repeat and entrench the advice in the 2007 Committee Note that discretion should seldom be exercised to deny summary judgment when the motion and response show there is no genuine fact dispute.

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

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

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

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

State Reasons for Acting: Many courts of appeals repeatedly remind trial courts of the need to explain the reasons for granting summary judgment. The need to explain the reasons for denying summary judgment is not as frequently remarked, apart from official-immunity appeals where it is important to know what genuine disputes were found. The draft presented for discussion last January resolved Advisory Committee uncertainties by providing that the court “must” state the reasons for granting summary judgment and “should” state the reasons for denying it. Further discussion led the Subcommittee to recommend, and the Committee to approve, the present proposal that the court “should” state the reasons for either granting or denying summary judgment. The

Committee concluded that the reasons for granting summary judgment are so obvious in some cases that nothing would be gained by requiring the court to restate the obvious.

*Subdivision (b): Time*

- (b) **Time to File a Motion, Response, and Reply.** These times apply unless a different time is set by local rule or the court orders otherwise in the case:
- (1) a party may file a motion for summary judgment at any time until 30 days after the close of all discovery;
  - (2) a party opposing the motion must file a response within 21 days after the motion is served or that party's responsive pleading is due, whichever is later; and
  - (3) any reply by the movant must be filed within 14 days after the response is served.

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

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

*Subdivision (c): Procedure*

(c) **Procedures.**

- (1) **Case-Specific Procedure.** The procedures in this subdivision (c) apply unless the court orders otherwise in the case.
- (2) **Motion, Statement, and Brief; Response and Brief; Reply and Brief.**
  - (A) **Motion, Statement, and Brief.** The movant must simultaneously file:
    - (i) a motion that identifies each claim or defense — or the part of each claim or defense — on which summary judgment is sought;
    - (ii) a separate statement that concisely identifies in separately numbered paragraphs only those material facts that cannot be genuinely disputed and entitle the movant to summary judgment; and
    - (iii) a brief of its contentions on the law or facts.
  - (B) **Response and Brief by the Opposing Party.** A party opposing summary judgment:
    - (i) must file a response that, in correspondingly numbered paragraphs, accepts or disputes — or accepts in part and disputes in part — each fact in the movant's statement;

- (ii) may in the response concisely identify in separately numbered paragraphs additional material facts that preclude summary judgment; and
  - (iii) must file a brief of its contentions on the law or facts.
- (C) *Reply and Brief.* The movant:
- (i) must file, in the form required by Rule 56(c)(2)(B)(i), a reply to any additional facts stated by the nonmovant; and
  - (ii) may file a reply brief.
- (3) ***Accept or Dispute Generally or for Purposes of Motion Only.*** A party may accept or dispute a fact either generally or for purposes of the motion only.
- (4) ***Citing Support for Statements or Disputes of Fact; Materials Not Cited.***
- (A) *Supporting Fact Positions.* A statement that a fact cannot be genuinely disputed or is genuinely disputed must be supported by:
- (i) citation to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
  - (ii) a showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.
- (B) *Materials not Cited.* The court need consider only materials called to its attention under Rule 56(c)(4)(A), but it may consider other materials in the record:
- (i) to establish a genuine dispute of fact; or
  - (ii) to grant summary judgment if it gives notice under Rule 56(f).
- (5) ***Assertion that Fact is not Supported by Admissible Evidence.*** A response or reply to a statement of fact may state that the material cited to support or dispute the fact is not admissible in evidence.
- (6) ***Affidavits or Declarations.*** An affidavit or declaration used to support a motion, response, or reply must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Subdivision (d)*

- (d) When Facts are Unavailable to the Nonmovant.** If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
- (1) defer considering the motion or deny it;
  - (2) allow time to obtain affidavits or declarations or to take discovery; or
  - (3) issue any other appropriate order.

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

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

*Subdivision (e): Missing or Noncomplying Response or Reply*

- (e) **Failure to Respond or Properly Respond.** If a response or reply does not comply with Rule 56(c) — or if there is no response or reply — the court may:
- (1) afford an opportunity to properly respond or reply;
  - (2) consider a fact undisputed for purposes of the motion;
  - (3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or
  - (4) issue any other appropriate order.

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

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

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

Consider Undisputed: Subdivision (e)(2) addresses a central question raised by the local rules that establish point-counterpoint procedures similar to the procedures set out in subdivision (c). The local rules commonly provide that failure to respond to the statement of “undisputed facts” point-by-point, with appropriate references to the record, authorizes the court to “deem admitted” the facts not addressed by a proper response. The memorandum prepared by Andrea Kuperman illustrates the variety of approaches taken by the courts of appeals in reviewing summary judgments that rest in part on facts deemed admitted. Some decisions clearly require the court to examine the materials

cited by the movant to determine whether those materials support the fact asserted. Others seem to imply that the court can deem the fact admitted without examining the movant's cited materials.

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

Alternatives were considered at length. One would have attempted to provide a specific formula. A fact might be considered undisputed "if: (i) supported by citation to record materials that would satisfy the movant's burden of production at trial, or (ii) supported by an apparent showing that the nonmovant could not satisfy its burden of production at trial." This formula would not require that the full summary-judgment burden be satisfied. A plaintiff, for example, might support a statement that the defendant went through a red light by citing the plaintiff's own deposition testimony. A jury would not be required to believe the plaintiff at trial; summary judgment for the plaintiff would not be proper if the defendant responded, even with a simple (and correct) statement that the material cited did not show that the fact cannot be disputed. The question is a bit trickier for the "no-evidence" motion made by a party who does not have the trial burden; to distinguish the showing required to support a "considered undisputed" finding from the showing required to win summary judgment over a properly framed response, the requirement is reduced to an "apparent" showing.

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

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

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

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

**(e)(3) — Grant Summary Judgment.** This subdivision has been revised to address uncertainties expressed during the discussion last January. The uncertainties arose from a drafting history that had not quite caught up with the development of Committee positions. As noted above, the position embodied in the early drafts eschewed any opportunity to consider a fact undisputed; the court could

find a fact established beyond genuine dispute only on determining that the movant’s cited materials carried the full summary-judgment burden. Development of the authority to consider a fact undisputed was not clearly matched by the text of (e)(3). The current draft seeks to state clearly the role of facts considered undisputed.

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

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

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

*Subdivision (f): Judgment Independent of Motion*

- (f) Judgment Independent of the Motion.** After giving notice and a reasonable time to respond, the court may:
- (1) grant summary judgment for a nonmovant;
  - (2) grant or deny the motion on grounds not raised by the motion, response, or reply; or
  - (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

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

Invite Motion: Discussion last January asked whether it would be better to invite a summary judgment motion — or a better-focused motion or response — rather than act on the court’s own. The Committee Note observes that often it will be useful to invite a motion in order to trigger the full procedure established by subdivision (c). But the Committee believes that the procedure should not be limited to inviting a motion. The running illustration assumed an action against a public official and the official’s municipal employer. The official’s motion for summary judgment on official-immunity grounds is granted on finding there was no violation of the asserted constitutional

right. The employing municipality could not have moved for summary judgment on the immunity ground. There may be no advantage in inviting a new motion; the plaintiff is sufficiently protected by notice that the court is considering summary judgment for the municipality and an opportunity to be heard on the reasons why the municipality might be liable independently of the official's conduct.

*Subdivision (g): Findings after Partial Grant*

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

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

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

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

*Subdivision (h): Bad-Faith Affidavits or Declarations*

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

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

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

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

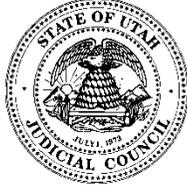
# Tab 5

1 **Rule 76. Notice of contact information change.**

2 An attorney and party must promptly notify the court in writing of any change in that  
3 person's address, e-mail address, phone number or fax number.

4

# Tab 6



## Administrative Office of the Courts

Chief Justice Christine M. Durham  
Utah Supreme Court  
Chair, Utah Judicial Council

### MEMORANDUM

Daniel J. Becker  
State Court Administrator  
Myron K. March  
Deputy Court Administrator

**To:** Civil Procedures Committee  
**From:** Tim Shea *TS*  
**Date:** January 22, 2009  
**Re:** Action commenced by serving the complaint and summons

---

No one has contacted me to propose a solution to the issues raised at the last meeting. The simplest approach would probably be to eliminate permission to commence an action by serving the complaint and summons.

Barring that, another option is to place the burden on the plaintiff, not the clerk, to notify the defendant that the complaint has been filed. I have suggested amendments to Rules 3 and 4 to accomplish that result.

I have also suggested amendments to Rule 12 to give defendant the full 20 days from plaintiff's final, necessary action in which to answer the complaint. This would treat defendants the same under Rule (3(a)(1) and 3(a)(2).

Encl. Rules 3, 4 and 12

1 **Rule 3. Commencement of action.**

2 (a) How commenced. A civil action is commenced (1) by filing a complaint with the  
3 court, or (2) by service of a summons together with a copy of the complaint in  
4 accordance with Rule 4.

5 ~~(b)~~ If the action is commenced ~~by the service of a summons and a copy of the~~  
6 ~~complaint under paragraph (a)(2)~~, then the plaintiff must file the complaint, the  
7 summons and proof of service, ~~must be filed~~ within ten days of such service and  
8 promptly notify the defendant in writing that the complaint has been timely filed and that  
9 the answer is due 20 days after the notice is served.

10 ~~(c)~~ If, ~~in a case~~ the action is commenced under paragraph (a)(2) ~~of this rule, and~~ the  
11 complaint, summons and proof of service are not filed within ten days of service, the  
12 action commenced ~~shall be is~~ deemed dismissed and the court ~~shall have has~~ no  
13 further jurisdiction thereof.

14 ~~(d)~~ If a check or other form of payment tendered as a filing fee is dishonored, the  
15 party shall pay the fee by cash or cashier's check within 10 days after notification by the  
16 court. Dishonor of a check or other form of payment does not affect the validity of the  
17 filing, but may be grounds for such sanctions as the court deems appropriate, which  
18 may include dismissal of the action and the award of costs and attorney fees.

19 ~~(b)-(e)~~ Time of jurisdiction. The court ~~shall have has~~ jurisdiction from the time of filing  
20 of the complaint or service of the summons and a copy of the complaint.

21 Advisory Committee Notes

22 Rule 3 constitutes a significant change from the prior rule. The rule retains service of  
23 the ten-day summons as one of two means to commence an action, but the rule  
24 requires that the summons together with a copy of the complaint be served on the  
25 defendant pursuant to Rule 4. In so doing, the rule eliminates the requirement that a  
26 copy of the complaint be deposited with the clerk for the defendant whose address is  
27 unknown. The changes in Rule 3 must be read and should be interpreted in conjunction  
28 with coordinate changes in Rule 4 and with a change in Rule 12(a) that begins the  
29 running of the defendant's 20-day response time from the service of the summons and  
30 complaint.

31 Paragraph (a). This paragraph eliminates the requirement that a copy of the  
32 complaint be deposited with the clerk for the defendant whose address is unknown.  
33 Paragraph (b) of the former rule, which permitted the plaintiff to deposit copies of the  
34 complaint with the clerk for defendants not otherwise served with a copy at the time of  
35 the service of the summons, has also been eliminated. The rule requires, in effect, that  
36 both the summons and the complaint be served pursuant to Rule 4. Under a coordinate  
37 change in Rule 12(a), the defendant's time for answering or otherwise responding to the  
38 complaint does not begin to run until service of the summons and complaint pursuant to  
39 Rule 4.

40 ~~Paragraph (b). This paragraph is substantially identical to paragraph (c) of the~~  
41 ~~former rule.~~

1       **Rule 4. Process.**

2       (a) Signing of summons. The summons shall be signed and issued by the plaintiff or  
3 the plaintiff's attorney. Separate summonses may be signed and served.

4       (b)(i) Time of service. In an action commenced under Rule 3(a)(1), the summons  
5 together with a copy of the complaint shall be served no later than 120 days after the  
6 filing of the complaint unless the court allows a longer period of time for good cause  
7 shown. If the summons and complaint are not timely served, the action shall be  
8 dismissed, without prejudice on application of any party or upon the court's own  
9 initiative.

10       (b)(ii) In any action brought against two or more defendants on which service has  
11 been timely obtained upon one of them,

12       (b)(ii)(A) the plaintiff may proceed against those served, and

13       (b)(ii)(B) the others may be served or appear at any time prior to trial.

14       (c) Contents of summons.

15       (c)(1) The summons shall contain the name of the court, the address of the court,  
16 the names of the parties to the action, and the county in which it is brought. It shall be  
17 directed to the defendant, state the name, address and telephone number of the  
18 plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number. It  
19 shall state the time within which the defendant is required to answer the complaint in  
20 writing, and shall notify the defendant that in case of failure to do so, judgment by  
21 default will be rendered against the defendant. It shall state either that the complaint is  
22 on file with the court or that the complaint will be filed with the court within ten days of  
23 service.

24       (c)(2) If the action is commenced under Rule 3(a)(2), the summons shall state that  
25 the defendant need not answer if the complaint is not filed within 10 days after service  
26 ~~and shall state the telephone number of the clerk of the court where the defendant may~~  
27 ~~call at least 13 days after service to determine if the complaint has been filed.~~

28       (c)(3) If service is made by publication, the summons shall briefly state the subject  
29 matter and the sum of money or other relief demanded, and that the complaint is on file  
30 with the court.

31 (d) Method of Service. Unless waived in writing, service of the summons and  
32 complaint shall be by one of the following methods:

33 (d)(1) Personal service. The summons and complaint may be served in any state or  
34 judicial district of the United States by the sheriff or constable or by the deputy of either,  
35 by a United States Marshal or by the marshal's deputy, or by any other person 18 years  
36 of age or older at the time of service and not a party to the action or a party's attorney. If  
37 the person to be served refuses to accept a copy of the process, service shall be  
38 sufficient if the person serving the same shall state the name of the process and offer to  
39 deliver a copy thereof. Personal service shall be made as follows:

40 (d)(1)(A) Upon any individual other than one covered by subparagraphs (B), (C) or  
41 (D) below, by delivering a copy of the summons and the complaint to the individual  
42 personally, or by leaving a copy at the individual's dwelling house or usual place of  
43 abode with some person of suitable age and discretion there residing, or by delivering a  
44 copy of the summons and the complaint to an agent authorized by appointment or by  
45 law to receive service of process;

46 (d)(1)(B) Upon an infant (being a person under 14 years) by delivering a copy of the  
47 summons and the complaint to the infant and also to the infant's father, mother or  
48 guardian or, if none can be found within the state, then to any person having the care  
49 and control of the infant, or with whom the infant resides, or in whose service the infant  
50 is employed;

51 (d)(1)(C) Upon an individual judicially declared to be of unsound mind or incapable  
52 of conducting the person's own affairs, by delivering a copy of the summons and the  
53 complaint to the person and to the person's legal representative if one has been  
54 appointed and in the absence of such representative, to the individual, if any, who has  
55 care, custody or control of the person;

56 (d)(1)(D) Upon an individual incarcerated or committed at a facility operated by the  
57 state or any of its political subdivisions, by delivering a copy of the summons and the  
58 complaint to the person who has the care, custody, or control of the individual to be  
59 served, or to that person's designee or to the guardian or conservator of the individual to  
60 be served if one has been appointed, who shall, in any case, promptly deliver the  
61 process to the individual served;

62 (d)(1)(E) Upon any corporation not herein otherwise provided for, upon a partnership  
63 or upon an unincorporated association which is subject to suit under a common name,  
64 by delivering a copy of the summons and the complaint to an officer, a managing or  
65 general agent, or other agent authorized by appointment or by law to receive service of  
66 process and, if the agent is one authorized by statute to receive service and the statute  
67 so requires, by also mailing a copy of the summons and the complaint to the defendant.  
68 If no such officer or agent can be found within the state, and the defendant has, or  
69 advertises or holds itself out as having, an office or place of business within the state or  
70 elsewhere, or does business within this state or elsewhere, then upon the person in  
71 charge of such office or place of business;

72 (d)(1)(F) Upon an incorporated city or town, by delivering a copy of the summons  
73 and the complaint to the recorder;

74 (d)(1)(G) Upon a county, by delivering a copy of the summons and the complaint to  
75 the county clerk of such county;

76 (d)(1)(H) Upon a school district or board of education, by delivering a copy of the  
77 summons and the complaint to the superintendent or business administrator of the  
78 board;

79 (d)(1)(I) Upon an irrigation or drainage district, by delivering a copy of the summons  
80 and the complaint to the president or secretary of its board;

81 (d)(1)(J) Upon the state of Utah, in such cases as by law are authorized to be  
82 brought against the state, by delivering a copy of the summons and the complaint to the  
83 attorney general and any other person or agency required by statute to be served; and

84 (d)(1)(K) Upon a department or agency of the state of Utah, or upon any public  
85 board, commission or body, subject to suit, by delivering a copy of the summons and  
86 the complaint to any member of its governing board, or to its executive employee or  
87 secretary.

88 (d)(2) Service by mail or commercial courier service.

89 (d)(2)(A) The summons and complaint may be served upon an individual other than  
90 one covered by paragraphs (d)(1)(B) or (d)(1)(C) by mail or commercial courier service  
91 in any state or judicial district of the United States provided the defendant signs a  
92 document indicating receipt.

93 (d)(2)(B) The summons and complaint may be served upon an entity covered by  
94 paragraphs (d)(1)(E) through (d)(1)(I) by mail or commercial courier service in any state  
95 or judicial district of the United States provided defendant's agent authorized by  
96 appointment or by law to receive service of process signs a document indicating receipt.

97 (d)(2)(C) Service by mail or commercial courier service shall be complete on the  
98 date the receipt is signed as provided by this rule.

99 (d)(3) Service in a foreign country. Service in a foreign country shall be made as  
100 follows:

101 (d)(3)(A) by any internationally agreed means reasonably calculated to give notice,  
102 such as those means authorized by the Hague Convention on the Service Abroad of  
103 Judicial and Extrajudicial Documents;

104 (d)(3)(B) if there is no internationally agreed means of service or the applicable  
105 international agreement allows other means of service, provided that service is  
106 reasonably calculated to give notice:

107 (d)(3)(B)(i) in the manner prescribed by the law of the foreign country for service in  
108 that country in an action in any of its courts of general jurisdiction;

109 (d)(3)(B)(ii) as directed by the foreign authority in response to a letter rogatory or  
110 letter of request; or

111 (d)(3)(B)(iii) unless prohibited by the law of the foreign country, by delivery to the  
112 individual personally of a copy of the summons and the complaint or by any form of mail  
113 requiring a signed receipt, to be addressed and dispatched by the clerk of the court to  
114 the party to be served; or

115 (d)(3)(C) by other means not prohibited by international agreement as may be  
116 directed by the court.

117 (d)(4) Other service.

118 (d)(4)(A) Where the identity or whereabouts of the person to be served are unknown  
119 and cannot be ascertained through reasonable diligence, where service upon all of the  
120 individual parties is impracticable under the circumstances, or where there exists good  
121 cause to believe that the person to be served is avoiding service of process, the party  
122 seeking service of process may file a motion supported by affidavit requesting an order  
123 allowing service by publication or by some other means. The supporting affidavit shall

124 set forth the efforts made to identify, locate or serve the party to be served, or the  
125 circumstances which make it impracticable to serve all of the individual parties.

126 (d)(4)(B) If the motion is granted, the court shall order service of process by  
127 publication or by other means, provided that the means of notice employed shall be  
128 reasonably calculated, under all the circumstances, to apprise the interested parties of  
129 the pendency of the action to the extent reasonably possible or practicable. The court's  
130 order shall also specify the content of the process to be served and the event or events  
131 as of which service shall be deemed complete. Unless service is by publication, a copy  
132 of the court's order shall be served upon the defendant with the process specified by the  
133 court.

134 (d)(4)(C) In any proceeding where summons is required to be published, the court  
135 shall, upon the request of the party applying for publication, designate the newspaper in  
136 which publication shall be made. The newspaper selected shall be a newspaper of  
137 general circulation in the county where such publication is required to be made and  
138 shall be published in the English language.

139 (e) Proof of Service.

140 (e)(1) If service is not waived, the person effecting service shall file proof with the  
141 court. The proof of service must state the date, place, and manner of service. Proof of  
142 service made pursuant to paragraph (d)(2) shall include a receipt signed by the  
143 defendant or defendant's agent authorized by appointment or by law to receive service  
144 of process. If service is made by a person other than by an attorney, the sheriff or  
145 constable, or by the deputy of either, by a United States Marshal or by the marshal's  
146 deputy, the proof of service shall be made by affidavit.

147 (e)(2) Proof of service in a foreign country shall be made as prescribed in these rules  
148 for service within this state, or by the law of the foreign country, or by order of the court.  
149 When service is made pursuant to paragraph (d)(3)(C), proof of service shall include a  
150 receipt signed by the addressee or other evidence of delivery to the addressee  
151 satisfactory to the court.

152 (e)(3) Failure to make proof of service does not affect the validity of the service. The  
153 court may allow proof of service to be amended.

154 (f) Waiver of Service; Payment of Costs for Refusing to Waive.

155 (f)(1) A plaintiff may request a defendant subject to service under paragraph (d) to  
156 waive service of a summons. The request shall be mailed or delivered to the person  
157 upon whom service is authorized under paragraph (d). It shall include a copy of the  
158 complaint, shall allow the defendant at least 20 days from the date on which the request  
159 is sent to return the waiver, or 30 days if addressed to a defendant outside of the United  
160 States, and shall be substantially in the form of the Notice of Lawsuit and Request for  
161 Waiver of Service of Summons set forth in the Appendix of Forms attached to these  
162 rules.

163 (f)(2) A defendant who timely returns a waiver is not required to respond to the  
164 complaint until 45 days after the date on which the request for waiver of service was  
165 mailed or delivered to the defendant, or 60 days after that date if addressed to a  
166 defendant outside of the United States.

167 (f)(3) A defendant who waives service of a summons does not thereby waive any  
168 objection to venue or to the jurisdiction of the court over the defendant.

169 (f)(4) If a defendant refuses a request for waiver of service submitted in accordance  
170 with this rule, the court shall impose upon the defendant the costs subsequently  
171 incurred in effecting service.

172

**Rule 12. Defenses and objections.**

(a) When presented. Unless otherwise provided by statute or order of the court, a defendant shall serve an answer within twenty days after the service of the summons and complaint is complete within the state and within thirty days after service of the summons and complaint is complete outside the state. If the action is commenced under Rule 3(a)(2), the defendant shall serve an answer within twenty days after the plaintiff has served the defendant with notice that the complaint has been timely filed. A party served with a pleading stating a cross-claim shall serve an answer thereto within twenty days after the service. The plaintiff shall serve a reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court, but a motion directed to fewer than all of the claims in a pleading does not affect the time for responding to the remaining claims:

(a)(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(a)(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

(b) How presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the

32 trial any defense in law or fact to that claim for relief. If, on a motion asserting the  
33 defense numbered (6) to dismiss for failure of the pleading to state a claim upon which  
34 relief can be granted, matters outside the pleading are presented to and not excluded  
35 by the court, the motion shall be treated as one for summary judgment and disposed of  
36 as provided in Rule 56, and all parties shall be given reasonable opportunity to present  
37 all material made pertinent to such a motion by Rule 56.

38 (c) Motion for judgment on the pleadings. After the pleadings are closed but within  
39 such time as not to delay the trial, any party may move for judgment on the pleadings.  
40 If, on a motion for judgment on the pleadings, matters outside the pleadings are  
41 presented to and not excluded by the court, the motion shall be treated as one for  
42 summary judgment and disposed of as provided in Rule 56, and all parties shall be  
43 given reasonable opportunity to present all material made pertinent to such a motion by  
44 Rule 56.

45 (d) Preliminary hearings. The defenses specifically enumerated (1)-(7) in subdivision  
46 (b) of this rule, whether made in a pleading or by motion, and the motion for judgment  
47 mentioned in subdivision (c) of this rule shall be heard and determined before trial on  
48 application of any party, unless the court orders that the hearings and determination  
49 thereof be deferred until the trial.

50 (e) Motion for more definite statement. If a pleading to which a responsive pleading  
51 is permitted is so vague or ambiguous that a party cannot reasonably be required to  
52 frame a responsive pleading, the party may move for a more definite statement before  
53 interposing a responsive pleading. The motion shall point out the defects complained of  
54 and the details desired. If the motion is granted and the order of the court is not obeyed  
55 within ten days after notice of the order or within such other time as the court may fix,  
56 the court may strike the pleading to which the motion was directed or make such order  
57 as it deems just.

58 (f) Motion to strike. Upon motion made by a party before responding to a pleading or,  
59 if no responsive pleading is permitted by these rules, upon motion made by a party  
60 within twenty days after the service of the pleading, the court may order stricken from  
61 any pleading any insufficient defense or any redundant, immaterial, impertinent, or  
62 scandalous matter.

63 (g) Consolidation of defenses. A party who makes a motion under this rule may join  
64 with it the other motions herein provided for and then available. If a party makes a  
65 motion under this rule and does not include therein all defenses and objections then  
66 available which this rule permits to be raised by motion, the party shall not thereafter  
67 make a motion based on any of the defenses or objections so omitted, except as  
68 provided in subdivision (h) of this rule.

69 (h) Waiver of defenses. A party waives all defenses and objections not presented  
70 either by motion or by answer or reply, except (1) that the defense of failure to state a  
71 claim upon which relief can be granted, the defense of failure to join an indispensable  
72 party, and the objection of failure to state a legal defense to a claim may also be made  
73 by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at  
74 the trial on the merits, and except (2) that, whenever it appears by suggestion of the  
75 parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall  
76 dismiss the action. The objection or defense, if made at the trial, shall be disposed of as  
77 provided in Rule 15(b) in the light of any evidence that may have been received.

78 (i) Pleading after denial of a motion. The filing of a responsive pleading after the  
79 denial of any motion made pursuant to these rules shall not be deemed a waiver of such  
80 motion.

81 (j) Security for costs of a nonresident plaintiff. When the plaintiff in an action resides  
82 out of this state, or is a foreign corporation, the defendant may file a motion to require  
83 the plaintiff to furnish security for costs and charges which may be awarded against  
84 such plaintiff. Upon hearing and determination by the court of the reasonable necessity  
85 therefor, the court shall order the plaintiff to file a \$300.00 undertaking with sufficient  
86 sureties as security for payment of such costs and charges as may be awarded against  
87 such plaintiff. No security shall be required of any officer, instrumentality, or agency of  
88 the United States.

89 (k) Effect of failure to file undertaking. If the plaintiff fails to file the undertaking as  
90 ordered within 30 days of the service of the order, the court shall, upon motion of the  
91 defendant, enter an order dismissing the action.

92