111th Congress, 2d Session – – – – – – – – – – – – House Document 111–111

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE THAT HAVE BEEN ADOPTED BY THE SUPREME COURT, PURSUANT TO 28 U.S.C. 2072

MAY 13, 2010.—Referred to the Committee on the Judiciary and ordered to be printed

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56–365 WASHINGTON : 2010

SUPREME COURT OF THE UNITED STATES,
Washington, DC, April 28, 2010.

Hon. NANCY PELOSI,
Speaker of the House of Representatives,
Washington, DC.

DEAR MADAM SPEAKER: I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

JOHN G. ROBERTS, Jr.,
Chief Justice.

April 28, 2010

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein amendments to Civil Rules 8, 26, and 56, and Illustrative Civil Form 52.

[See infra., pp. __ __ __.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2010, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 8. General Rules of Pleading

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(c) Affirmative Defenses.

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

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;

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

* * * * *

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

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

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must

disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

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

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

(ii) the facts or data considered by the witness in forming them;

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

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

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

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

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not

required to provide a written report, this disclosure must state:

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

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

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

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

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(b) Discovery Scope and Limits.

* * * * *

(3) ***Trial Preparation: Materials.***

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are

prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental

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

(C) *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording — or a transcription of it —

that recites substantially verbatim the person's oral statement.

(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 in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a 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 on in forming the opinions to be expressed.

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

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

(ii) on showing exceptional circumstances under which it is impracticable for the

party to obtain facts or opinions on the same subject by other means.

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

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

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

* * * * *

Rule 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for

summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) ***Supporting Factual Positions.*** A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing 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

(B) 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.

(2) ***Objection That a Fact Is Not Supported by Admissible Evidence.*** A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

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

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

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

(1) defer considering the motion or deny it;

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

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

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

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

(4) issue any other appropriate order.

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

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

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

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

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including

attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

Form 52. Report of the Parties' Planning Meeting.

(Caption — See Form 1.)

1. The following persons participated in a Rule 26(f) conference on _date_ by _state the method of conferring_:

2. Initial Disclosures. The parties [have completed] [will complete by _date_] the initial disclosures required by Rule 26(a)(1).

3. Discovery Plan. The parties propose this discovery plan:

   (*Use separate paragraphs or subparagraphs if the parties disagree.*)

   (a) Discovery will be needed on these subjects: (*describe*)
   (b) Disclosure or discovery of electronically stored information should be handled as follows: (*briefly describe the parties' proposals, including the form or forms for production.*)
   (c) The parties have agreed to an order regarding claims of privilege or of protection as trial-preparation material asserted after production, as follows: (*briefly describe the provisions of the proposed order.*)
   (d) (Dates for commencing and completing discovery, including discovery to be commenced or completed before other discovery.)
   (e) (Maximum number of interrogatories by each party to another party, along with dates the answers are due.)
   (f) (Maximum number of requests for admission, along with the dates responses are due.)
   (g) (Maximum number of depositions for each party.)
   (h) (Limits on the length of depositions, in hours.)
   (i) (Dates for exchanging reports of expert witnesses.)
   (j) (Dates for supplementations under Rule 26(e).)

4. Other Items:

* * * * *

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

December 18, 2009

MEMORANDUM

To: The Chief Justice of the United States and the Associate Justices of the Supreme Court

From: James C. Duff

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 8, 26, and 56, and Illustrative Civil Form 52, which were approved by the Judicial Conference at its September 2009 session. The Judicial Conference recommends that the amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference as well as the Report of the Advisory Committee on the Federal Rules of Civil Procedure.

Attachments

EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

* * * * *

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rules 8(c), 26, and 56, and Illustrative Form 52, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments to Rules 26 and 56 were circulated to the bench and bar for comment in August 2008. Approximately 90 witnesses testified at the three public hearings on the proposed amendments to Rules 26 and 56. The proposed amendment to Rule 8(c) was circulated earlier for comment in August 2007, and the scheduled public hearings were canceled because no one asked to testify.

The proposed amendment to Rule 8(c) deletes the reference to "discharge in bankruptcy" from the rule's list of affirmative defenses that must be asserted in response to a pleading. Under 11 U.S.C. § 524(a), a discharge voids a judgment to the extent that it determines the debtor's personal liability for the discharged debt. Though the self-executing statutory provision controls and vitiates the affirmative-defense pleading requirement, the continued reference to "discharge" in Rule 8's list of affirmative defenses generates confusion, has led to incorrect decisions, and causes unnecessary litigation. The amendment conforms Rule 8 to the statute. The Committee Note was revised to address the Department of Justice's concern that courts and litigants should be aware that some categories of debt are excepted from discharge.

The proposed amendments to Rule 26 apply work-product protection to the discovery of draft reports by testifying expert witnesses and, with three important exceptions, communications between those witnesses and retaining counsel. The proposed amendments also address witnesses who will provide expert testimony but who are not required to provide a Rule 26(a)(2)(B) report because they are not retained or specially employed to provide such testimony, or they are not employees who regularly give expert testimony. Under the amendments, the lawyer relying on such a witness must disclose the subject matter and summarize the facts and opinions that the witness is expected to offer.

The proposed amendments address the problems created by extensive changes to Rule 26 in 1993, which were interpreted to allow discovery of all communications between counsel and expert witnesses and all draft expert reports and to require reports from all witnesses offering expert testimony. More than 15 years of experience with the rule has shown significant practical problems. Both sets of amendments to Rule 26 are broadly supported by lawyers and bar organizations, including the American Bar Association, the Council of the American Bar Association Section on Litigation, the American College of Trial Lawyers, the American Association for Justice (formerly ATLA), the Federal Magistrate Judges' Association, the Lawyers for Civil Justice, the Federation of Defense & Corporate Counsel, the International Association of Defense Counsel, and the United States Department of Justice.

Experience with the 1993 amendments to Rule 26, requiring discovery of draft expert reports and broad disclosure of any communications between an expert and the retaining lawyer, has shown that lawyers and experts take elaborate steps to avoid creating any discoverable record and at the same time take elaborate steps to attempt to discover the other side's drafts and communications. The artificial and wasteful discovery-avoidance practices include lawyers

hiring two sets of experts – one for consultation, to do the work and develop the opinions, and one to provide the testimony – to avoid creating a discoverable record of the collaborative interaction with the experts. The practices also include tortuous steps to avoid having the expert take any notes, make any record of preliminary analyses or opinions, or produce any draft report. Instead, the only record is a single, final report. These steps add to the costs and burdens of discovery, impede the efficient and proper use of experts by both sides, needlessly lengthen depositions, detract from cross-examination into the merits of the expert's opinions, make some qualified individuals unwilling to serve as experts, and can reduce the quality of the experts' work.

Notwithstanding these tactics, lawyers devote much time during depositions of the adversary's expert witnesses attempting to uncover information about the development of that expert's opinions, in an often futile effort to show that the expert's opinions were shaped by the lawyer retaining the expert's services. Testimony and statements from many experienced plaintiff and defense lawyers presented to the advisory committee before and during the public comment period showed that such questioning during depositions was rarely successful in doing anything but prolonging the questioning. Questions that focus on the lawyer's involvement instead of on the strengths or weaknesses of the expert's opinions do little to expose substantive problems with those opinions. Instead, the principal and most successful means to discredit an expert's opinions are by cross-examining on the substance of those opinions and presenting evidence showing why the opinions are incorrect or flawed.

The advisory committee's analysis of practice under the 1993 amendments to Rule 26 showed that many experienced lawyers recognize the inefficiencies of retaining two sets of experts, imposing artificial record-keeping practices on their experts, and wasting valuable

deposition time in exploring every communication between lawyer and expert and every change in the expert's draft reports. Many experienced lawyers routinely stipulate at the outset of a case that they will not seek draft reports from each other's experts in discovery and will not seek to discover such communications. In response to persistent calls from its members for a more systematic improvement of discovery, the American Bar Association issued a resolution recommending that federal and state procedural rules be amended to prohibit the discovery of draft expert reports and limit discovery of attorney-expert communications, without hindering discovery into the expert's opinions and the facts or data used to derive or support them. The State of New Jersey did enact such a rule and the advisory committee obtained information from lawyers practicing on both sides of the "v" and in a variety of subject areas about their experiences with it. Those practitioners reported a remarkable degree of consensus in enthusiasm for and approval of the amended rule. The New Jersey practitioners emphasized that discovery had improved since the amended rule was promulgated, with no decline in the quality of information about expert opinions.

The proposed amendments to Rule 26 recognize that discovery into the bases of an expert's opinion is critical. The amendments make clear that while discovery into draft reports and many communications between an expert and retaining lawyer is subject to work-product protection, discovery is not limited for the areas important to learning the strengths and weaknesses of an expert's opinion. The amended rule specifically provides that communications between lawyer and expert about the following are open to discovery: (1) compensation for the expert's study or testimony; (2) facts or data provided by the lawyer that the expert considered in forming opinions; and (3) assumptions provided to the expert by the lawyer that the expert relied upon in forming an opinion.

In considering whether to amend the rule, the advisory committee carefully examined the views of a group of academics who opposed the amendments. These academics expressed concern that the amendments could prevent a party from learning and showing that the opinions of an expert witness were unduly influenced by the lawyer retaining the expert's services. These concerns were not borne out by the practitioners' experience. After extensive study, the advisory committee was satisfied that the best means of scrutinizing the merits of an expert's opinion is by cross-examining the expert on the substantive strength and weaknesses of the opinions and by presenting evidence bearing on those issues. The advisory committee was satisfied that discovery into draft reports and all communications between the expert and retaining counsel was not an effective way to learn or expose the weaknesses of the expert's opinions; was time-consuming and expensive; and led to wasteful litigation practices to avoid creating such communications and drafts in the first place.

Establishing work-product protection for draft reports and some categories of attorney-expert communications will not impede effective discovery or examination at trial. In some cases, a party may be able to make the showings of need and hardship that overcome work-product protection. But in all cases, the parties remain free to explore what the expert considered, adopted, rejected, or failed to consider in forming the opinions to be expressed at trial. And, as observed in the Committee Note, nothing in the Rule 26 amendments affects the court's gatekeeping responsibilities under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

The proposed amendments to Rule 56 are intended to improve the procedures for presenting and deciding summary-judgment motions, to make the procedures more consistent across the districts, and to close the gap that has developed between the rule text and actual

practice. The proposed amendments are not intended to change the summary-judgment standard or burdens.

The text of Rule 56 has not been significantly changed for over 40 years. During this time, the Supreme Court has developed the contemporary summary-judgment standards in a trio of well-known cases, and the district courts have, in turn, prescribed local rules with practices and procedures that are inconsistent in many respects with the national rule text and with each other. The local rule variations do not appear to be justified by unique or different conditions in the districts. The fact that there are so many local rules governing summary-judgment motion practice demonstrates the inadequacy of the national rule.

Although there is wide variation in the local rules and individual-judge rules, there are similarities among them. The proposed amendments draw from many summary-judgment provisions common in the current local rules. For example, the amendments adopt a provision found in many local rules that requires a party asserting a fact that cannot be genuinely disputed to provide a "pinpoint citation" to the record supporting its fact position. Other salient changes: (1) recognize that a party may submit an unsworn written declaration, certificate, verification, or statement under penalty of perjury in accordance with 28 U.S.C. § 1746 as a substitute for an affidavit to support or oppose a summary-judgment motion; (2) provide courts with options when an assertion of fact has not been properly supported by the party or responded to by the opposing party, including considering the fact undisputed for purposes of the motion, granting summary judgment if supported by the motion and supporting materials, or affording the party an opportunity to amend the motion; (3) set a time period, subject to variation by local rule or court order in a case, for a party to file a summary-judgment motion; and (4) explicitly recognize that "partial summary judgments" may be entered.

The public comment drew the advisory committee's attention to two provisions that raised significant interest. The first dealt with a single word change in the rule that took effect in December 2007 as part of the comprehensive Style Project and remained unchanged in the Rule 56 proposal published for comment in August 2008. The second was a proposed amendment that would have enhanced consistency by putting in the national rule the practice of many courts requiring parties to submit a "point-counterpoint" statement of undisputed facts. This proposed "point-counterpoint" provision in the national rule was a default, subject to variation by a court's order in a case. With the exception of these two important aspects, the public comment on all other provisions of the proposed amendments was highly favorable.

The first aspect of divided public comment related to a change made in 2007 with virtually no comment. As part of the Style Project, the word "shall," which appeared in many rules, was changed in each rule to clarify whether it meant "must," "may," or "should." The word "shall" is inherently ambiguous. Whether "shall" meant, in a particular rule, "must," "may," or "should," had to be determined by studying the context and how courts had interpreted and applied the rule. In 2007, the word "shall" in Rule 56(a) was changed to "should" in stating the standard governing a court's decision to grant summary judgment. ("The judgment sought *should* be rendered if [the record shows] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.") The change to "should" was based on the advisory committee's and Standing Committee's study of the case law. Like all the changes made as part of the Style Project, the change to "should" in Rule 56(a) was accompanied by a statement that the change was intended to be stylistic only and not intended to change the substantive meaning or make prior case law inapplicable. That change was virtually unnoticed until the current proposed amendments to Rule 56 were published for comment. Those amendments left the word "should" unchanged, consistent with the intent to improve the

procedures for litigating summary-judgment motions but not to change the standard for granting or denying them.

Many comments expressed a strong preference for "must" or "shall," based in part on a concern that retaining "should" in rule text would lead to undesirable failures to grant appropriate summary judgments. Proponents of the word "must" pointed to language in opinions stating that a grant of summary judgment is directed when the movant is "entitled" to judgment as a matter of law. These comments emphasized the importance of summary judgment as a protection against the burdens imposed by unnecessary trial and against the shift of settlement bargaining power that follows a denial of a valid summary-judgment motion.

Equally vigorous comments expressed a strong preference for retaining "should." These comments emphasized the importance of the trial court having some discretion in handling summary-judgment motions, particularly motions for partial summary judgment that leave some issues to be tried, and the trial record will provide a superior basis for deciding the issues as to which summary judgment was sought. These comments emphasized case law supporting the continued use of the word "should" as opposed to changing the word to "must." And trial-court judges pointed out that a trial may consume much less court time than would be needed to determine whether a summary judgment can be granted, besides providing a more reliable basis for the decision at the trial level and a better record for appellate review.

After considering these comments, and after extensive research into the case law in different contexts, the advisory committee concluded that it could not accurately or properly decide whether "shall" in Rule 56(a) meant "must" or "should" in all cases. Both the proponents of "must" and of "should" found support for their position in the case law. The case law ambiguity on whether "shall" means "must" or "should" is further complicated by circuit differences in the summary-judgment standard and differences in the standard depending on the

subject matter. But the cases reflect, in part, the fact that they were decided based on the word "shall" in the statement of the standard for granting summary-judgment motions. The advisory committee decided that changing the word "shall" created an unacceptable risk of changing the substantive summary-judgment standard as it had developed in different circuits and different subject areas. The advisory committee decided that the words of Rule 56(a) – "The court *shall* grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law" – had achieved the status of a term of art or "sacred phrase" that could not be safely changed for stylistic reasons without risking a change to substantive meaning. Instead, the advisory committee decided to restore the word "shall" to avoid the unintended consequences of either "must" or "should" and to allow the case law to continue to develop.

After extensive public comment, the advisory committee decided to withdraw the "point-counterpoint" proposal that was included in the rule text published for comment. Under the proposal, a movant would be required to include with the motion and brief a "point-counterpoint" statement of facts that are asserted to be undisputed and entitle the movant to summary judgment. The respondent, in addition to submitting a brief, would have to address each fact by accepting it, disputing it, or accepting it in part and disputing it in part (which could be done for purposes of the motion only). A court could vary the procedure by order in a case. The point-counterpoint statements were intended to identify the essential issues and provide a more efficient and reliable process for the judge to rule on the motion.

During the public comment period, the advisory committee heard from lawyers and judges who found the point-counterpoint statement useful and efficient. But the advisory committee also heard that the procedure can be burdensome and expensive, with parties submitting long and unwieldy lists of facts and counter-facts. Some courts adopted the point-

counterpoint procedure by local rule and subsequently abandoned it or are rethinking it. Testimony and comments did not provide sufficient support for including the point-counterpoint procedure in the national rule. Instead, the rule is revised to continue to provide discretion to the courts to adopt the procedure or not, by entering an order in an individual case or by local rule.

The proposed revision of Illustrative Form 52, Report of the Parties' Planning Meeting, (formerly Form 35), corrects an inadvertent omission made during the comprehensive revision of illustrative forms in 2007. The revision reinstates two provisions that took effect in 2006 but were omitted in the comprehensive revision in 2007. The provisions require that a discovery plan include: (1) a reference to the way that electronically stored information would be handled in discovery or disclosure; and (2) a reference to an agreement between parties regarding claims of privilege or work-product protection. The two provisions are consistent with amendments to Rule 16(b)(3) that took effect in 2006. The proposed revision is not published for public comment because it is technical and conforming.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference —

Approve the proposed amendments to Civil Rules 8(c), 26, and 56 and Illustrative Form 52 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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

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CHAIR

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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 8, 2009 (Revised June 15, 2009)**

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

Introduction

The Civil Rules Advisory Committee met in San Francisco on February 2 and 3, 2009, and in Chicago on April 20 and 21, 2009.

* * * * *

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

Four action items are presented in this report. Part I A recommends approval of a recommendation to adopt the amendments to Rule 26, with revisions from the proposal as published. Part I B recommends approval of a recommendation to adopt the amendments to Rule 56, with revisions of the proposal as published. Part I C recommends approval of a recommendation to delete "discharge in bankruptcy" from the list of affirmative defenses in Rule 8(c) as published in August 2007.[1]

* * * * *

[1]Following the Standing Committee's meeting on June 1-2, 2009, the Rules Committees approved by email ballot conforming, technical amendments to Illustrative Civil Form 52.

I ACTION ITEMS FOR ADOPTION

A. Rule 26: Expert Trial Witnesses

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> **(i)** relate to compensation for the expert's study or testimony;
> **(ii)** identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
> **(iii)** identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.
> The change made adds a few words to the published text of Rule 26(b)(4)(B):
> **(B)** * * * Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a), regardless of the form <u>in which</u> ~~of~~ the draft <u>is recorded</u>.

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

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

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

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

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B. Rule 56

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

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

"Shall" Restored

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

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

The divisions between the comments favoring "should" and those favoring "must" are described at length in the summary of comments and testimony. The comments favoring "must" rely at times on the language of opinions and on the Rule 56 standard that summary judgment is directed when the movant is "entitled" to judgment as a matter of law. More functionally, they emphasize the importance of summary judgment as a protection against the burdens imposed by unnecessary trial, and also against the shift of settlement bargaining that follows denial of summary judgment. The comments favoring "should" focus on decisions that recognize discretion to deny summary judgment even when there appears to be no genuine dispute as to any material fact. They also focus on the functional observation that a trial-court judge may have good grounds for suspecting that a

trial will test the evidence in ways not possible on a paper record, showing there is, after all, a genuine dispute. And trial-court judges point out that a trial may consume much less court time than would be needed to determine whether summary judgment can be granted — time that is pure waste if summary judgment is denied, or if it is granted and then reversed on appeal. Still more elaborate arguments also have been advanced for continuing with "should."

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

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

"Point-Counterpoint" Eliminated

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

The Committee, after considering the public comments and testimony, has concluded that although the point-counterpoint procedure is worthy, and often works well, the time has not come to mandate it as a presumptively uniform procedure for most cases. The comments and testimony showed the perils of misuse and suggested that there is less desire for national uniformity than might have been expected.

This part of the proposal provoked a near avalanche of comments. Many comments were favorable, urging that a point-counterpoint procedure focuses the parties and the motion in a disciplined and helpful way. But many of the comments were adverse. Perhaps the most negative comments from practicing lawyers came from those who represent plaintiffs in employment-discrimination cases. They protested that time and again the point-counterpoint procedure fractures consideration of the case, focusing only on "undisputed" "historic" "facts" that are the subject of direct testimony, diverting attention from the need to consider the inferences that a jury might draw from both undisputed facts and disputed facts. Defendants, moreover, have taken to stating hundreds of facts even in simple cases. A plaintiff is hard-put to undertake the work of responding to so many facts, most of them irrelevant and many of them simply wrong. In addition, they protested that Rule

56 procedure stands trial procedure upside-down. At trial the plaintiff opens and closes. On summary judgment the defendant opens and — if there is no opportunity to surreply — also closes. Some complained that defendant employers seem to deliberately manipulate this inversion, making a motion in vague general terms and withholding a clear articulation of their positions until a reply, without the right to file a surreply without leave of court.

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

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

Courts that have had and abandoned point-counterpoint local rules provide a broader-based perspective. Two illustrations suffice. Judge Claudia Wilken explored the experience in the Northern District of California. See 08-CV-090, and the summary of testimony on February 2. California state courts adopted a point-counterpoint procedure in 1984. From 1988 to 2002 the Northern District had a parallel local rule. The rule was abandoned. It made more work and required more time to decide a motion. It was inefficient and created extra expense. The facts set out in the separate statements were repeated in the supporting memoranda; the separate statements "were supernumerary, lengthy, and formalistic." Responses often included "objections," and often included statements of purportedly undisputed facts that were repeated in the supporting memoranda. The objections often were no more than semantic disputes. And matters became really complicated in the face of cross-motions. "[T]he statement of undisputed material facts is a format that particularly lends itself to abuse by the game-playing attorneys and by the less competent attorneys." In addition, this format does not lend itself to coherent consideration of fact inferences. Narrative statements are better. "You need to know facts that are not material to understand what happened."

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

The recommendation to abandon the point-counterpoint procedure simplifies proposed subdivision (c). As a matter of drafting, it eliminates the need to refer to "motion, response, and

reply." It facilitates reorganization of the remaining subdivisions. More importantly, it averts any need to determine whether a right to surreply should be added. The arguments in favor of a surreply seem compelling, but a right to surreply could easily degenerate to a proliferation of useless papers in many cases.

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

Subdivision (a)

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

"Shall": The decision to restore "shall" is explained above.

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

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

Subdivision (b)

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

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

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

Subdivision (c)

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

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

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

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

Accept for purposes of motion only: Subdivision (c)(3) of the published proposal provided that "A party may accept or dispute a fact either generally or for purposes of the motion only." This provision is withdrawn. It was added primarily out of concern for early reports that point-

counterpoint procedure may elicit inappropriately long statements of undisputed facts. A party facing such a statement might conclude that many of the stated facts are not material and that it is more efficient and less expensive simply to accept them for purposes of the motion rather than undertake the labor of attacking the materials said to support the facts and combing the record for counterpoint citations. Elimination of the point-counterpoint proposal removes the primary reason for including this provision. The provision, moreover, creates a tension with subdivision (g). Subdivision (g) provides that if the court does not grant all the relief requested by the motion, it may order that a material fact is not genuinely disputed and is established in the case. Several comments expressed fear that no matter how carefully hedged, an acceptance for purposes of the motion might become the basis for an order that there is no genuine dispute as to a fact accepted "for purposes of the motion." The advantages of recognizing in rule text the value of accepting a fact for purposes of the motion only do not seem equal to the difficulties of drafting to meet this risk. The Committee Note to Subdivision (g) addresses the issue.

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

Subdivision (d)

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

Subdivision (e)

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

Subdivision (f)

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

As published, subdivision (f) required notice and a reasonable opportunity to respond before a court can deny summary judgment on a ground not raised by the parties. This provision caused second thoughts in the Committee. The Committee concluded that notice should not be required before denying a motion on what might be termed "procedural" grounds — the motion is filed after the time set by rule or scheduling order, the motion is "ridiculously overlong," and the like. It does not seem feasible to draft a clear distinction that would require notice before denying a motion on "merits" grounds not raised by the parties and denying a motion on "procedural" grounds not raised by the parties. The Committee proposes that subdivision (f) be revised by deleting "deny" from paragraph (2): "(2) grant ~~or deny~~ the motion on grounds not raised by the parties * * *."

Subdivision (g)

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

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

Subdivision (h)

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

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

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C. Rule 8(c): Discharge in Bankruptcy

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

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

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

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

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

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 8. General Rules of Pleading

1 * * * * *

2 **(c) Affirmative Defenses.**

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

4 must affirmatively state any avoidance or

5 affirmative defense, including:

6 • accord and satisfaction;

7 • arbitration and award;

8 • assumption of risk;

9 • contributory negligence;

10 ~~• discharge in bankruptcy;~~

11 • duress;

12 • estoppel;

13 • failure of consideration;

14 • fraud;

---

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

15 • illegality;

16 • injury by fellow servant;

17 • laches;

18 • license;

19 • payment;

20 • release;

21 • res judicata;

22 • statute of frauds;

23 • statute of limitations; and

24 • waiver.

25 * * * * *

Committee Note

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

§ 523(a) are excepted from discharge. The issue whether a claim was excepted from discharge may be determined either in the court that entered the discharge or — in most instances — in another court with jurisdiction over the creditor's claim.

Changes Made After Publication and Comment

No changes were made in the rule text.

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

COMMITTEE NOTE SHOWING REVISIONS

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

Rule 26. Duty to Disclose; General Provisions Governing Discovery[**]

1 **(a) Required Disclosures.**

2 * * * * *

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

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

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

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

13 accompanied by a written report — prepared
14 and signed by the witness — if the witness is
15 one retained or specially employed to provide
16 expert testimony in the case or one whose
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 10 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, this ~~the~~
42 ~~Rule 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 **(D~~C~~)** *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:
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 the 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~~D~~)** *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 **(3)** ***Trial Preparation: Materials.***
71 **(A)** *Documents and Tangible Things*. Ordinarily,
72 a party may not discover documents and
73 tangible things that are prepared in
74 anticipation of litigation or for trial by or for
75 another party or its representative (including
76 the other party's attorney, consultant, surety,
77 indemnitor, insurer, or agent). But, subject to

78 Rule 26(b)(4), those materials may be
79 discovered if:
80 **(i)** they are otherwise discoverable under
81 Rule 26(b)(1); and
82 **(ii)** the party shows that it has substantial
83 need for the materials to prepare its case
84 and cannot, without undue hardship,
85 obtain their substantial equivalent by
86 other means.
87 **(B)** *Protection Against Disclosure.* If the court
88 orders discovery of those materials, it must
89 protect against disclosure of the mental
90 impressions, conclusions, opinions, or legal
91 theories of a party's attorney or other
92 representative concerning the litigation.
93 **(C)** *Previous Statement.* Any party or other
94 person may, on request and without the

95 required showing, obtain the person's own
96 previous statement about the action or its
97 subject matter. If the request is refused, the
98 person may move for a court order, and Rule
99 37(a)(5) applies to the award of expenses. A
100 previous statement is either:
101 **(i)** a written statement that the person has
102 signed or otherwise adopted or
103 approved; or
104 **(ii)** a contemporaneous stenographic,
105 mechanical, electrical, or other
106 recording — or a transcription of it —
107 that recites substantially verbatim the
108 person's oral statement.
109 **(4)** ***Trial Preparation: Experts.***
110 **(A)** *Deposition of an Expert Who May Testify.* A
111 party may depose any person who has been

112 identified as an expert whose opinions may
113 be presented at trial. If Rule 26(a)(2)(B)
114 requires a report from the expert, the
115 deposition may be conducted only after the
116 report is provided.

117 **(B)** *Trial-Preparation Protection for Draft*
118 *Reports or Disclosures.* Rules 26(b)(3)(A)
119 and (B) protect drafts of any report or
120 disclosure required under Rule 26(a)(2),
121 regardless of the form in which ~~of~~ the draft is
122 recorded.

123 **(C)** *Trial-Preparation Protection for*
124 *Communications Between a Party's Attorney*
125 *and Expert Witnesses.* Rules 26(b)(3)(A) and
126 (B) protect communications between the
127 party's attorney and any witness required to
128 provide a report under Rule 26(a)(2)(B),

129 regardless of the form of the
130 communications, except to the extent that the
131 communications:
132 (i) rRelate to compensation for the expert's
133 study or testimony;
134 (ii) iIdentify facts or data that the party's
135 attorney provided and that the expert
136 considered in forming the opinions to be
137 expressed; or
138 (iii) iIdentify assumptions that the party's
139 attorney provided and that the expert
140 relied upon in forming the opinions to
141 be expressed.
142 (DB) *Expert Employed Only for Trial*
143 *Preparation.* Ordinarily, a party may
144 not, by interrogatories or deposition,
145 discover facts known or opinions held

146 by an expert who has been retained or
147 specially employed by another party in
148 anticipation of litigation or to prepare
149 for trial and who is not expected to be
150 called as a witness at trial. But a party
151 may do so only:
152 **(i)** as provided in Rule 35(b); or
153 **(ii)** on showing exceptional circumstances
154 under which it is impracticable for the
155 party to obtain facts or opinions on the
156 same subject by other means.
157 **(E~~C~~)** *Payment.* Unless manifest injustice
158 would result, the court must require that
159 the party seeking discovery:
160 **(i)** pay the expert a reasonable fee for time
161 spent in responding to discovery under
162 Rule 26(b)(4)(A) or (D~~B~~); and

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

168 * * * * *

Committee Note

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

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

to testify at trial — because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

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

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

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

26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

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

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

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

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

applies to drafts of any supplementation under Rule 26(e); *see* Rule 26(a)(2)(E).

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

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

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

are testifying, whether or not the expert considered them in forming the opinions expressed. These discovery changes therefore do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and related cases.

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

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

First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert's study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not

limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.

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

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

Under the amended rule, discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii) — that the party has a substantial need for the

discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. A party's failure to provide required disclosure or discovery does not show the need and hardship required by Rule 26(b)(3)(A); remedies are provided by Rule 37.

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

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

Changes Made After Publication and Comment

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

~~**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 ~~**(c) 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.~~

74 **Rule 56. Summary Judgment**

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

76 **Judgment.** A party may move for summary judgment,

77 identifying each claim or defense — or the part of each

78 claim or defense — on which summary judgment is

79 sought. The court shall grant summary judgment if the

80 movant shows that there is no genuine dispute as to any

81 material fact and the movant is entitled to judgment as

82 a matter of law. The court should state on the record the
83 reasons for granting or denying the motion.
84 **(b) Time to File a Motion.** Unless a different time is set by
85 local rule or the court orders otherwise, a party may file
86 a motion for summary judgment at any time until 30
87 days after the close of all discovery.
88 **(c) Procedures.**
89 (1) ***Supporting Factual Positions.*** A party asserting
90 that a fact cannot be or is genuinely disputed must
91 support the assertion by:
92 (A) citing to particular parts of materials in the
93 record, including depositions, documents,
94 electronically stored information, affidavits
95 or declarations, stipulations (including those
96 made for purposes of the motion only),
97 admissions, interrogatory answers, or other
98 materials; or

99 (B) showing that the materials cited do not
100 establish the absence or presence of a genuine
101 dispute, or that an adverse party cannot
102 produce admissible evidence to support the
103 fact.
104 (2) ***Objection That a Fact Is Not Supported by***
105 ***Admissible Evidence.*** A party may object that the
106 material cited to support or dispute a fact cannot be
107 presented in a form that would be admissible in
108 evidence.
109 (3) ***Materials Not Cited.*** The court need consider only
110 the cited materials, but it may consider other
111 materials in the record.
112 (4) ***Affidavits or Declarations.*** An affidavit or
113 declaration used to support or oppose a motion
114 must be made on personal knowledge, set out facts
115 that would be admissible in evidence, and show

116 that the affiant or declarant is competent to testify
117 on the matters stated.

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

126 **(e) Failing to Properly Support or Address a Fact.** If a
127 party fails to properly support an assertion of fact or fails
128 to properly address another party's assertion of fact as
129 required by Rule 56(c), the court may:
130 (1) give an opportunity to properly support or address
131 the fact;

132 (2) consider the fact undisputed for purposes of the
133 motion;
134 (3) grant summary judgment if the motion and
135 supporting materials — including the facts
136 considered undisputed — show that the movant is
137 entitled to it; or
138 (4) issue any other appropriate order.
139 (f) **Judgment Independent of the Motion.** After
140 giving notice and a reasonable time to respond, the
141 court may:
142 (1) grant summary judgment for a nonmovant;
143 (2) grant the motion on grounds not raised by a party;
144 or
145 (3) consider summary judgment on its own after
146 identifying for the parties material facts that may
147 not be genuinely in dispute.

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

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

Committee Note

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

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

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

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

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

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

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

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

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

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

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

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

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

Subdivision (c)(2) provides that a party may object that material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence. The objection functions much as an objection at trial, adjusted for the pretrial setting. The burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated. There is no need to make a separate motion to strike. If the case goes to trial, failure to challenge admissibility at the summary-judgment stage does not forfeit the right to challenge admissibility at trial.

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

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

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

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

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

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

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

court knows of record materials that show grounds for genuine dispute.

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

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

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

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

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

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

a reasonable time to respond. Finally, authority to impose other appropriate sanctions also is recognized.

Changes Made After Publication and Comment

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

"[T]he movant shows that" was added.

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

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

Words referring to an order "in the case" were deleted.

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

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

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

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

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

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

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

Form 52. Report of the Parties' Planning Meeting.

(Caption — See Form 1.)

1. The following persons participated in a Rule 26(f) conference on _date_ by _state the method of conferring_:

2. Initial Disclosures. The parties [have completed] [will complete by _date_] the initial disclosures required by Rule 26(a)(1).

3. Discovery Plan. The parties propose this discovery plan:

(*Use separate paragraphs or subparagraphs if the parties disagree.*)

(a) Discovery will be needed on these subjects: (*describe*)
(b) Disclosure or discovery of electronically stored information should be handled as follows: (*briefly describe the parties' proposals, including the form or forms for production.*)
(c) The parties have agreed to an order regarding claims of privilege or of protection as trial-preparation material asserted after production, as follows: (*briefly describe the provisions of the proposed order.*)
(~~b~~d) (Dates for commencing and completing discovery, including discovery to be commenced or completed before other discovery.)
(~~c~~e) (Maximum number of interrogatories by each party to another party, along with dates the answers are due.)
(~~d~~f) (Maximum number of requests for admission, along with the dates responses are due.)
(~~e~~g) (Maximum number of depositions for each party.)
(~~f~~h) (Limits on the length of depositions, in hours.)
(~~g~~i) (Dates for exchanging reports of expert witnesses.)
(~~h~~j) (Dates for supplementations under Rule 26(e).)

4. Other Items:

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