Moore's Federal Practice: 2010 Amendments to the Federal Rules

167A Moore's Federal Practice: Proposed Amendments to Federal Rules

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A. Federal Rules of Civil Procedure

§ 1.01 Summary of Proposed FRCP Amendments

Rule 8. The proposed amendments to Rule 8 delete the reference to "discharge in bankruptcy" from the rule's list of affirmative defenses that must be asserted in response to a pleading.

Rule 26. The proposed amendments to Rule 26 extend work-product protection to the discovery of draft reports by a testifying expert witness and, with three important exceptions, to the discovery of communications between a testifying expert witness who is required to provide a report under Rule 26(a)(2)(B) and retaining counsel. The amendments also provide that a party relying on a witness who will provide expert testimony but who is not required to provide a Rule 26(a)(2)(B) report--because the witness is not retained or specially employed to provide expert testimony, or is not an employee who regularly gives expert testimony--must disclose the subject matter of the witness's testimony and only summarize the facts and opinions that the witness is expected to offer.

Rule 56. The proposed amendments to Rule 56 are intended to improve the procedures for presenting and deciding summary judgment motions, to make the procedure more consistent across the districts, and to close the gap that has developed between the rule text and actual practice. The amendments are not intended to change the summary-judgment standard or burdens.

The amendments include: (1) requiring a movant asserting a fact that cannot be genuinely disputed or a nonmovant asserting that the fact can be genuinely disputed provide a "pinpoint citation" to the record supporting its fact position; (2) recognizing 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; (3) setting out the court's options when an assertion of fact has not been properly supported by the party or responded to by the other party, including considering the fact undisputed ("deemed admitted") 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; (4) setting a time deadline, subject to variation by local rule or court order in a case, for the filing of a summary judgment motion; (5) explicitly recognizing that "partial summary judgment" may be entered; and (6) clarifying the procedure for challenging the admissibility of summary-judgment evidence.

Form 52. 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 adds two provisions that took effect in 2006 but were omitted in the comprehensive revision in 2007.

§ 1.02 Analysis of Civil Rule 8(c)

I. Text of Proposed Amendment to Civil Rule 8 and Committee Note

Matter to be omitted is lined through.

Rule 8. General Rules of Pleading.

* * *

(c) Affirmative Defenses.

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

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- The material within the following brackets is overstruck in the original. [discharge in bankruptcy;]
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;

- statute of frauds;
- statute of limitations; and
- waiver.

* * *

Committee Note of 2010 Amendment

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.

II. Explanation

Rule 8(c) lists 19 avoidance or affirmative defenses that must be timely made, if applicable, in response to a pleading. A party may waive the affirmative or avoidance defense if it fails to timely assert the defense. Rule 8(c) includes "discharge in bankruptcy" as one of the affirmative defenses, which is inconsistent with *11 U.S.C. § 524(a)*. The proposed amendment to Rule 8(c) deletes the reference to "discharge in bankruptcy" in the rule's list of affirmative defenses that must be asserted in response to a pleading. Under § 524(a), a discharge: (1) voids a judgment to the extent that it determines the debtor's personal liability for the discharged debt; and (2) operates as an injunction against the commencement or continuation of an action to collect, recover, or offset a discharged debt. Because a discharge enjoins litigation to enforce personal liability on a discharged debt and voids a judgment, a party cannot waive the defense by failing to assert it in response to a pleading. The plain language of the statute prevents treating discharge in bankruptcy as an affirmative defense.

III. Background and Purposes

The provisions of *11 U.S.C. § 524(a)* are self-executing and apply automatically without independent action. The statutory provision controls, and a judgment is voided when the underlying debt is discharged in bankruptcy, rendering moot the affirmative-defense pleading requirement in a subsequent action. Accordingly, if a debt is discharged in bankruptcy, the protection of the discharge cannot be waived if the debtor fails to plead the discharge when a post-discharge action is prosecuted on the underlying debt. A judgment on the debt is void.

Before the predecessor statutory provision of § 524(a) was enacted in 1970, courts interpreted the Bankruptcy Act of 1898 to provide that a debtor's discharge was an affirmative defense. Consistent with that law, Rule 8's list of affirmative defenses included a discharge in bankruptcy. But the 1970 enactment of § 524(a)'s predecessor superseded the Rule 8(c) bankruptcy-affirmative defense provision. Section 524(a) was enacted in 1978. Like its predecessor, § 524(a) was intended to "prevent waiver of discharge of a particular debt." The Congressional intent of the statutory provision is clear. The House report explained that:

> Subsection (a) specifies that a discharge in a bankruptcy case voids any judgment to the extent that it is a determination of the personal liability of the debtor with respect to a prepetition debt, and operates as an injunction against the commencement or continuation of an action ... to collect ... any discharged debt

> as a personal liability of the debtor ... whether or not the debtor has waived discharge of the debt involved. The injunction is to give complete effect to the discharge and to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts. This paragraph has been expanded over a comparable provision in Bankruptcy Act § 14f to cover any act to collect ... The change is ... intended to insure that once a debt is discharged the debtor will not be pressured in any way to repay it. In effect the discharge extinguishes the debt, and creditors may not attempt to avoid that. The language 'whether or not discharge of such debt is waived' is intended to prevent waiver of discharge of a particular debt from defeating the purposes of this section.

H.R. Rept. No. 95-595, at 365-366 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6321-6322; S. Rep. No. 95-989, at 80 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5866.

The issue does not arise frequently, but in the majority of cases addressing the issue since the enactment of § 524(a), courts have applied the statute and Rule 8(c) properly (*see Lone Star Sec. & Video, Inc. v. Gurrola, 328 B.R. 158, 170 (B.A.P. 9th Cir. 2005)* ; *Rooz v. Kimmel, 378 B.R. 630, 638 (B.A.P. 9th Cir. 2007)* . Over the years, a handful of courts have nonetheless rendered erroneous rulings, because they relied solely on Rule 8(c) without considering § 524(a) (*see Bauers v. Bd. of Regents of Univ. of Wis., 33 Fed. Appx. 812 (7th Cir. 2002))* .

Though § 524(a) supersedes the Rule 8(c) affirmative-defense provision, the continued reference to "discharge" in Rule 8's list of affirmative defenses continues to generate confusion, incorrect decisions, and unnecessary litigation. The proposed amendment conforms Rule 8(c) to § 524(a).

The Department of Justice raised concerns about a debtor failing to give notice of certain categories of debt, which are excepted from a discharge in bankruptcy, e.g., student loans, domestic support obligations, certain tax debts, and a debt to a creditor who was not notified of the bankruptcy proceeding. But the advisory committee concluded that questions of dischargeability can be determined by a non-bankruptcy court without violating the discharge injunction. In addition, as a practical matter it would be very unlikely for a debtor to appear in an action on the personal liability of a debt without raising the defense. The Committee Note was revised, however, to alert counsel to such possibilities.

IV. Advisory Committee Materials

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§ 1.03 Analysis of Civil Rule 26

I. Text of Proposed Amendment to Civil Rule 26 and Committee Note

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

Rule 26. Duty to Disclose; General Provisions Governing Discovery.

(a) Required Disclosures.

* * *

(2) Disclosure of Expert Testimony.

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

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

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

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

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

(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.

The material within the following brackets is overstruck in the original. [(C)] (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.

The material within the following brackets is overstruck in the original. [(D)] (E) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

* * *

(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.

The material within the following brackets is overstruck in the original. [(B)] (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.

The material within the following brackets is overstruck in the original. [(C)] (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 The material within the following brackets is overstruck in the original. [(B)] (D); and

(ii) for discovery under The material within the following brackets is overstruck in the original. [(B)] (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.

* * *

Committee Note of 2010 Amendment

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).

II. Explanation

The proposed amendments to Rule 26 primarily address two features of disclosure and discovery of trial-witness experts. First, Rule 26(a)(2)(C) relieves an expert witness, who is not required to provide a report under Rule 26(a)(2)(B), from an obligation to submit an extensive report. Instead, the amended rule requires the expert only to state the subject matter and summarize the facts and opinions to which the expert is expected to testify. In addition, Rule 26(a)(2)(B)(ii) requires any trial-witness expert who must submit a report to state the facts or data, but not "other information" as in the current rule, considered by the expert in forming an opinion. Second, Rule 26(b)(4)(B) and (C) extend work-product protection to the discovery of a draft report by an expert witness and, with three important exceptions, communications between the expert witness and retaining counsel.

Rule 26(a)(2)(C) addresses the reporting requirements imposed on a witness who is expected to provide expert testimony but who is not required to provide a Rule 26(a)(2)(B) report because the witness is not retained or specially

employed to provide such testimony, or the witness is not an employee who regularly gives expert testimony, e.g., treating physician or in-house expert. The amended rule relieves such a witness of the obligation to submit an extensive report. Instead, the amended rule requires the expert to disclose only the subject matter and summarize the facts and opinions the witness is expected to present bearing on the opinion to be offered as an expert. Only the facts supporting the expert's opinions must be summarized. The requirement does not apply to facts unrelated to the opinion. For example, if the witness is a "hybrid fact/opinion" expert witness, the summary requirement does not apply to facts that do not bear on the expert's opinions.

The abbreviated disclosures may be contained in a written report drafted by counsel. The amendments are aimed at facilitating obtaining testimony from treating physicians or other health care professionals and employees of a party who do not regularly provide expert testimony, who would otherwise be reluctant to testify if encumbered with extensive reporting burdens. At the same time, the abbreviated report provides sufficient information to the opposing party to prevent "surprise."

Rule 26(b)(4)(B) and (C) extend work-product protection to draft reports of expert witnesses and communications between counsel and experts.

Rule 26(b)(4)(B) is added to provide work-product protection to draft expert reports. The protection is extended to the draft reports of experts who are retained or specially employed to provide expert testimony in the case or whose duties as the party's employee regularly involve giving expert testimony *as well as* to experts who are expected to testify at trial but are not required to provide a report under Rule 26(a)(2)(B), e.g., treating physicians and in-house experts. The protection applies to a report regardless of the form it is recorded, by writing, by electronic means, or otherwise.

Rule 26(b)(4)(C) is added to provide work-product protection to attorney-expert communications regardless of the form of communications, whether oral, written, electronic, or otherwise. The rule extends the protection to communications between counsel and the expert's assistants, individuals who assist the expert witness in preparing for the testimony, including the drafting of the expert's report. But the protection is limited only to communications between a retaining counsel and an expert who is required to provide a report under Rule 26(a)(2)(B), e.g., an expert who is retained or specially employed to provide expert testimony in the case or whose duties as the party's employee regularly involves giving expert testimony.

The advisory committee considered, but declined, to extend work-product protection to communications between counsel and a witness who is not retained or specially employed to provide expert testimony or whose duties do not regularly involve giving expert testimony, e.g., an employee with particular knowledge or expertise, a treating physician, or accident investigator. The committee concluded that extending the protection to such in-house expert witnesses or treating physicians could be too broad, and they were concerned about unforeseen consequences. (The provisions of current Rule 26(b)(4)(B), which will be renumbered Rule 26(b)(4)(D), already bar discovery in most circumstances of an expert who has been retained or specially employed in anticipation of litigation who is not expected to be called as a witness at trial.)

The amendments make clear that while discovery into draft reports and many communications between an expert and a retaining lawyer is subject to work-product protection, a party remains entitled to discovery of areas essential to learning the strengths and weaknesses of an expert's opinion. The amended rule specifically provides that the following subjects communicated between the lawyer and expert are open to discovery:

> (1) compensation for the expert's study or testimony (including any communications about additional benefits, such as a promise of further work);
>
> (2) facts or data provided by the lawyer that the expert considered in forming opinions (the exception applies only to communications "identifying" the facts or data provided by counsel); and

(3) assumptions provided to the expert by the lawyer that the expert relied on in forming an opinion (the exception is limited to those assumptions that the expert actually relied on in forming an opinion).

In addition to these three categories, a court may require discovery of the entire draft report or attorney-expert witness communications under limited circumstances and by court order. Discovery will be permitted on a showing of substantial need for the discovery to prepare the case and an inability, without undue hardship, to obtain the substantial equivalent by other means.

The proposed amendments to Rule 26 recognize that discovery into the bases of an expert's opinion is critical. The Committee Note provides several illustrative examples. For instance, the expert's testing of material involved in litigation, and notes of any such testing, would be subject to discovery. Communications between the expert and anyone other than the party's counsel would also be subject to discovery. Inquiry can also be made about alternative analyses, testing methods, or approaches to the issues on which the expert is testifying, whether or not the expert considered them in forming an opinion. But the Committee Note also makes it clear that the rule should be applied pragmatically. Communications between an expert and in-house counsel or an expert and a party's counsel from earlier litigation would be protected.

III. Background and Purposes

The proposed amendments address problems dealing with the discovery of an expert witness that emerged after the extensive changes to Rule 26 in 1993, which were interpreted by many courts to allow discovery of all communications between counsel and expert witnesses and all draft expert reports and to require detailed reports from all witnesses offering expert testimony.

1. Subdivision (a)(2)(C)--Abbreviated Expert-Witness Report

Under the 1993 amendments to Rule 26, a party must disclose the identity of any witness it may use at trial to present evidence under *Federal Rule of Evidence 702*, *703*, or *705*. The amendments distinguished between experts who testify at trial and experts who only consult with counsel. Discovery of witnesses not expected to testify at trial is not permitted, unless exceptional circumstances are shown. Witnesses expected to testify at trial were further distinguished between those who were "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" and those not falling within this definition, e.g., treating physicians and in-house experts. Experts in the former group must provide an expert witness report during discovery under Rule 26(a)(2)(B). The witness must prepare and sign an extensive written report describing expected opinions and the basis for them, but only if the witness is retained or specially employed to provide expert testimony or whose duties as the party's employee regularly involve giving expert testimony.

Rule 26(a)(2)(B) does not expressly require experts who are not retained or specially employed to provide expert testimony or whose duties as the party's employee do not regularly involve giving expert testimony to submit a report describing their expected opinions, including most notably treating physicians and in-house experts. Nonetheless courts have imposed this requirement on these experts. Though these reports are often helpful, their burden falls heavily on treating physicians over whom a party has little control and employees who do not regularly offer expert testimony. In many cases these experts have little incentive to participate in litigation and are reluctant to prepare a report because of the time and expense.

Under the proposed amendments to Rule 26(a)(2)(C), the reporting burden of an expert witness who is not obligated to submit a report under Rule 26(a)(2)(B) is substantially mitigated. A party must disclose only the subject matter and a summary of the facts and opinions of the expert's expected testimony. The proposal responds to the "problem of surprise" by validating "the trend to require reports contrary to the rule." But it does so with much less inconvenience to

the expert. It is also expected that this "abbreviated" report will facilitate the taking of the witness's deposition. This report for experts must not be confused with the reports now required under Rule 26(a)(2)(B). The amendment is intended to accommodate experts, like treating physicians, who would not otherwise provide a detailed report.

2. Subdivision (b)(4)(B) & (C)--Work-Product Protection

The 1993 amendments to Rule 26 allowed discovery of facts, data, or "other information" considered by the expert. The phrase "other information" has in practice invited efforts to compel production of all communications between a lawyer and an expert. In addition, a passage in the accompanying 1993 Committee Note promoted such a reading of the rule: "Given this obligation of disclosure [to disclose data and other information considered by the expert], 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." The substitution of reports for interrogatories led to efforts to compel disclosure of drafts of reports. Many courts have taken the next step and construed the rule to authorize discovery of *all* communications between counsel and expert witnesses and *all* draft reports.

Experience with the rule has shown that routine discovery of communications between counsel and expert witnesses and the expert's draft reports has caused serious problems. Lawyers and experts take elaborate and costly 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 between the retaining lawyer and the experts. The practices also include tortuous steps to avoid having the expert take any notes, making any record of preliminary analyses or opinions, or producing any draft report. Instead, lawyers strive to limit the record to only 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 impair the quality of the expert's work.

Notwithstanding these discovery-avoidance tactics, lawyers devote much time attempting to uncover information about the development of an adversary's expert witnesses during depositions, in an often futile effort to show that the expert's opinions were unduly influenced 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 rarely succeeded 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. Rather, the principal and most effective means to discredit an expert's opinions continue to be by cross-examining the substance of those opinions and presenting evidence showing why the opinions are incorrect or flawed.

Many experienced lawyers recognized 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. These 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 communications between counsel and the expert. 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 support them. The State of New Jersey issued such a rule and the advisory committee gathered information from both plaintiff and defense-oriented lawyers and in a variety of subject areas about their experiences with it. The 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. If the opinion was bad or a party suspected that the expert's opinion was unduly influenced by the lawyer, the party encountered little difficulties in refuting the opinion on cross-examination in virtually all cases reported to the committee.

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 under Rule 26(b)(3)(A)(ii). 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 Pharms., Inc., 509 U.S. 579 (1993)* .

The advisory committee considered, but declined, to address the issue of whether the work-product protection provided to an expert's draft reports and communications between counsel and the expert in pretrial discovery would later continue to bar its admissibility at trial. Work-product protection that is extended to evidence in pretrial discovery is generally honored at trial. The committee concluded that an explicit statement to that effect was unnecessary. It expected that because the Civil Discovery Rules are designed to protect the lawyer's work product, and in light of the many disclosure and discovery opportunities available for challenging the testimony of adverse expert witnesses, the same limitations will ordinarily be honored at trial. *See United States v. Nobles, 422 U.S. 225, 238-239 (1975)* (work-product protection applies at trial as well as during pretrial discovery). The committee also concluded that the admissibility at trial of communications and draft expert reports subject to discovery work-product protection is governed by the Federal Rules of Evidence.

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 who practiced in jurisdictions that did not allow such discovery or who stipulated such discovery practices. 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 committee concluded that discovery of 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.

IV. Advisory Committee Materials

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§ 1.04 Analysis of Civil Rule 56

I. Text of Proposed Amendment and Committee Note

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

Rule 56. Summary Judgment.

The material within the following brackets is overstruck in the original. [(a) By a Claiming Party. A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim.]

The material within the following brackets is overstruck in the original. [(b) By a Defending Party. A party against whom relief is sought may move, with or without supporting affidavits, for summary judgment on all or part of the claim.]

The material within the following brackets is overstruck in the original. [(c) Time for a Motion, Response, and Reply; Proceedings.]

The material within the following brackets is overstruck in the original. [(1) These times apply unless a different time is set by local rule or the court orders otherwise:]

The material within the following brackets is overstruck in the original. [(A) a party may move for summary judgment at any time until 30 days after the close of all discovery;]

The material within the following brackets is overstruck in the original. [(B) a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later; and]

The material within the following brackets is overstruck in the original. [(C) the movant may file a reply within 14 days after the response is served.]

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

The material within the following brackets is overstruck in the original. [(d) Case Not Fully Adjudicated on the Motion.]

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

The material within the following brackets is overstruck in the original. [(2) Establishing Liability. An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.]

The material within the following brackets is overstruck in the original. [(e) Affidavits; Further Testimony.]

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

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

The material within the following brackets is overstruck in the original. [(f) When Affidavits Are Unavailable. If a

party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:]

The material within the following brackets is overstruck in the original. [(1) deny the motion;]

The material within the following brackets is overstruck in the original. [(2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or]

The material within the following brackets is overstruck in the original. [(3) issue any other just order.]

The material within the following brackets is overstruck in the original. [(g) Affidavit Submitted in Bad Faith. If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.]

(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.

Committee Note of 2010 Amendment

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.

II. Explanation

The proposed amendments completely rewrite and reorganize Rule 56, but the changes are exclusively procedural. The amendments are not intended to disturb the case law development following the Supreme Court 1986 trilogy, which set out the substantive standards governing summary judgment motions. (*See Anderson v. Liberty Lobby, 477 U.S. 242 (1986)* ; *Celotex Corp. v. Catrett, 477 U.S. 317 (1986)* ; and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)* .) There is no change in the summary-judgment burden. The amendments to Rule 56 as approved by the advisory committee, and later approved by the Supreme Court, contain significant differences from the version published for comment in August 2008. Most significantly, the "point-counterpoint" proposal was eliminated, in addition to many other less important changes.

1. Subdivision (a)--Motion for Summary Judgment or Partial Summary Judgment

The current summary-judgment standard is retained in a slightly revised form, i.e., "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 provision is relocated up-front in subdivision (a), moving it from its rather obscure location in

existing subdivision (c)(2). A few changes are worth noting.

The words "genuine dispute" are substituted for "genuine issue." "Dispute" more accurately reflects the focus of summary-judgment practice and eliminates the ambiguity when "issue" is used in other contexts, e.g., "issue" an order. In addition, the pre-2007 language directing the court to grant summary judgment if no genuine dispute is shown has been restored. As part of a comprehensive Style Project in 2007, Rule 56(a) had been changed to provide that a court "should" grant summary judgment rather than "shall" grant summary judgment, if there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law. Because the case law is not clear about whether a court "must" or "may" grant summary judgment if no genuine dispute exists, the advisory committee concluded that the most prudent expression of the court's duty was to return to the word "shall," which was in place from 1938 to 2007.

Though the word "shall" is inherently ambiguous and can mean either "must" or "may" depending on the context, the advisory committee opted to restore "shall" and allow case law to continue to develop its meaning, rather than fix the standard by rule driven by style protocols. The use of the passive voice in the existing provision is also changed to the active voice. Under the revised provision, summary judgment can be granted only if the "*movant shows* that there is no genuine dispute." The change emphasizes that a summary-judgment burden must be carried even by a party who does not have the burden of production at trial.

The subdivision also adds a new provision that a court "should" state on the record the reasons for granting or denying the motion. The rule does not go so far as to require a court to provide a statement of reasons in all cases. The advisory committee recognized that a statement of reasons may not make much sense under some circumstances, including when a court grants partial summary judgment. It opted instead to encourage courts to provide a statement of reasons, particularly if the motion is granted. The statement need not address every reason, nor need it specify findings of fact. But the statement should identify the general reasons supporting the judgment and address the dispositive facts and underlying law in a way that would assist the parties decide whether to appeal the court's ruling, and on appeal how to better fashion their arguments. A statement of reasons would also assist the appellate court decide the appeal. Many district courts already follow this practice as a means to facilitate appeals or other subsequent court proceedings.

"Partial summary judgment" is a common, but technically imprecise, term--summary judgment of a single claim or defense is complete and not partial. But because the bench and bar are so familiar with the term, it is referred to in the subdivision caption, though deliberately omitted in the text of the rule. The amended subdivision explicitly recognizes, what had been recognized previously only in the Committee Note, that summary judgment may be requested not only as to an entire case but also as to an *individual* claim, defense, or part of a claim or defense. Though the term "partial summary judgment" is not contained in the text of the rule, only in its caption, it is described in terms that anticipate the provisions on partial summary judgment in subdivision (g), dealing with situations in which the court fails to grant all the requested relief and instead finds individual facts established in the case. One consequence of the explicit recognition of a partial summary judgment is that existing subdivision (d)(2), which provides for an interlocutory summary judgment on "liability alone, even if there is genuine issue on the amount of damages," is no longer necessary.

2. Subdivision (b)--Time to File a Motion

The proposed amendments establish a general time period for filing a summary judgment motion. The advisory committee recognized that in many cases courts set specific time periods for filing summary judgment motions, responses, and replies either by local rule or, more often, by case specific scheduling orders. Amended subdivision (b) sets a default deadline only for the filing of the motion. It retains the existing timing provision allowing a party to file a summary judgment motion at any time until 30 days after the close of discovery, unless a different time is set by local rule or by court order. It is expected that, though a motion may be filed immediately at the commencement of an action, the motion will likely be premature and should be delayed until at least the nonmovant has had an opportunity to file a responsive pleading.

Subdivision (b) was amended in 2009 to require a party to file a response within 21 days after a summary judgment motion is served and to file a reply within 14 days after the response is served. Those provisions are eliminated in the amendments. They were promulgated in anticipation of amendments that would have established detailed "point-counterpoint" procedures governing the contents and submission of a response and reply. But because the "point-counterpoint" provisions were ultimately tabled, there was no justification to retain the time periods. In addition, the vexatious issue of whether to authorize a surreply, which some courts allow while other courts prohibit, would have to be addressed if the time periods for a response and reply were retained. The committee recognized that the elimination of the response and reply time periods only one year after the change had been made would cause some temporary confusion. Though the temporary confusion is regrettable, the committee concluded that having courts adjust the time schedules for filing a response and reply by scheduling orders and other pretrial orders would better fit the needs of individual cases. In addition, the streamlined version is more consistent with the general pattern of the rules, which do not fix time periods for responding to motions, leaving the scheduling in the hands of the judge. The amendment also avoids the surreply issue.

3. Subdivision (c)--Procedures

Subdivision (c) is new. It establishes a uniform procedure to handle summary judgment motions, which is based on common practices found in many local rules.

Subdivision (c)(1)(A) describes the typical record materials that a movant relies on to support an assertion that a fact cannot be disputed or a nonmovant relies on to support an assertion that a fact can be disputed, including depositions, electronically stored information, and affidavits. Unlike the existing the rule, which describes these materials separately for the movant and nonmovant, the amended subdivision consolidates both in one subparagraph.

Significantly, the amended subdivision requires both the movant and nonmovant to cite to particular parts of materials in the record ("pinpoint citations") when asserting its position. The requirement applies to a motion, response, reply, and any surreply. This is the key part of the amended rule, and it is described as the "beating heart" of the summary-judgment procedure. Specific citations to the record will assist the parties and the court address the facts efficiently and effectively.

Legal sources cited in the motion need not be filed. Materials that are not in the record, including materials referred to in an affidavit or declaration, must be placed in the record. As a practical matter, these materials are often collected in a single appendix in accordance with local practices in many courts. This widespread appendix procedure may be implemented in several ways. It can be established by local rule, a court may direct that materials be gathered in an appendix in an individual case, a party may submit the materials in an appendix voluntarily, or the parties may submit a joint appendix. A "pinpoint" citation in an appendix satisfies the citation requirement.

Subdivision (c)(1)(B) recognizes that pinpoint citations to the record is not the only way to support an assertion of fact. The subdivision recognizes that a party can argue that the materials cited by the movant fail to show the absence of a genuine dispute and, contrary to the movant's assertion, that a fact is genuinely disputed. A party may also make an assertion that a fact is not genuinely disputed by showing that a nonmovant, who has the trial burden of production, lacks admissible evidence to support the fact.

Subdivision (c)(2) provides that material cited to support or dispute a fact can be challenged if the material cannot be presented in a form that would be admissible in evidence. The amended subdivision recognizes that summary judgment may be sought and opposed by presenting materials that are not themselves admissible in evidence, e.g., affidavits and deposition transcripts. The provision carries forward existing subdivision (e)(1), which requires that an affidavit set out facts that would be admissible in evidence. The basis for challenging the admissibility of the fact should be stated. The Committee Note recognizes that it is not necessary to make a motion to strike to preserve an objection about the admissibility of a fact asserted at the summary-judgment stage.

Subdivision (c)(3) provides, consistent with case law and many local rules, that a court may limit its review to only the material cited by the parties in ruling on a summary judgment motion. In other words, a court may rely on the parties to identify the relevant information, and it is not required to do an independent search of the record. On the other hand, the court is not limited to reviewing only the "cited" material. The court may also consider other materials in the record. If the court opts to consider materials that were not cited by the parties when it denies or grants a summary judgment motion, the advisory committee declined requiring the court to give the parties notice.

The interplay with subdivision (f) is subtle. Under (f), a court must give notice and an opportunity to respond to the parties if it grants summary judgment on "*grounds* not raised by a party." The provisions of (c)(3) address consideration of materials that may bear on grounds that the parties did not raise, while (f)(2) addresses grounds that the parties did not raise. In other words, no notice is required if the court considers materials not cited by the parties if the materials also do not bear on the grounds on which summary judgment is granted. Earlier, the committee considered otherwise and proposed amending subdivision (f)(2) to explicitly require the court to give notice and a reasonable opportunity to respond if it granted a summary judgment motion on grounds "or record materials" not raised by a party. The notice would be especially useful in situations when a party might not have considered such materials reliable and therefore did not challenge them. But the committee did not amend the text of the rule or the Committee Note to so provide, concerned that such a provision would invite satellite litigation and create unnecessary delay. Nonetheless, it is expected that a court will provide notice in many cases when it relies on uncited record materials to grant summary judgment.

Subdivision (c)(4) sets out the required elements of an affidavit or declaration used to support or oppose a summary judgment motion. The affidavit or declaration must:

(1) be made on personal knowledge;

(2) set out facts admissible in evidence; and

(3) show that the affiant or declarant is competent to testify on the matters stated.

The subdivision is based on existing subdivision (e)(1). The amended subdivision explicitly recognizes the alternative use of a declaration made under penalty of perjury under *28 U.S.C. § 1746*, which is commonly relied on instead of the more cumbersome affidavit procedure, which entails a formally witnessed oath.

4. Subdivision (d)--When Facts Are Unavailable to the Nonmovant

Subdivision (d) carries forward existing subdivision (f). On a sufficient showing that a party cannot present facts to justify its opposition and describe the facts it intends to support, the court may provide a party additional time and a reasonable opportunity to obtain affidavits or declarations or to take discovery to gather facts essential to oppose a summary judgment motion. The advisory committee declined to adopt a provision permitting a nonmovant to routinely argue in the alternative that if the information in its response was insufficient to defeat the motion, it was asking for additional time to gather more facts. The committee does not want to encourage such seriatim motions.

5. Subdivision (e)--Failing to Properly Support or Address a Fact

Subdivision (e) addresses the failure of a movant or nonmovant to properly support or address a fact asserted in a summary judgment motion. The provision is consistent with the Supreme Court trilogy, which makes it clear that summary judgment cannot be granted by default if a party fails to respond to the motion or the response is inadequate. Nor can summary judgment be denied by default if the movant fails to reply to the nonmovant's response. The subdivision recognizes that a court may grant summary judgment only if the motion and supporting materials show that the movant is entitled to it. But the subdivision also recognizes the common practice of courts "deeming admitted" facts

that are not disputed. The tension between the two standards is addressed in the subdivision by providing the court several options.

The first option is the one most likely to be adopted by a court in most circumstances--a reminder to the party of the need to respond in proper form and an opportunity to do so. For instance, many courts provide additional time to pro se litigants, advising them of the requirement to respond and the consequences for failing to do so. The second option recognizes the authority of a court to consider a fact undisputed or "deemed admitted," as it is commonly referred to in many local rules. The third option is to grant summary judgment if the facts, including facts considered undisputed or "deemed admitted," satisfy the summary-judgment standard. The fourth option is a general provision authorizing a court to enter any other appropriate order.

Subdivision (e) was originally part of the point-counterpoint proposal, requiring pinpoint citation to both supporting and opposing assertions, which the advisory committee ultimately tabled. But the provision setting out the consequences for failing to properly respond was retained as a new subdivision (e).

Subdivision (e)(1) sets out the first option, which is expected to be the typical response to a party's failure to properly support or address a fact asserted in a summary judgment motion. Under this option, the party would be alerted to the failure and given an opportunity to remedy it.

If a party fails to respond to a summary judgment motion or provides an inadequate response, the court may consider the movant's fact statement to be "deemed admitted" or "undisputed for purposes of the motion" under subdivision (e)(2). A fact that the court had deemed admitted is considered "undisputed" only for purposes of the motion. If the summary judgment motion is denied, a party who failed to make a satisfactory response or reply can contest that fact in further proceedings.

The significance of the "deemed admitted" provision in subdivision (e)(2) becomes apparent in the interplay with subdivision (e)(3), because granting summary judgment only on the basis of a nonmovant's failure to respond is not generally approved in the case law. *See United States v. One Piece of Real Property at 5800 SW 74th Ave., 363 F.3d 1099 (11th Cir. 2004)* ("[T]he district court cannot base the entry of summary judgment on the mere fact that the motion was unopposed, but, rather, must consider the merits of the motion."); *see also Vermont Teddy Bear Co. v. 1-800 Beargram Co., 373 F.3d 241 (2d Cir. 2004)* (Rule 56 "does not embrace default judgment principles. Even when a motion for summary judgement is unopposed, the district court is not relieved of its duty to decide whether the movant is entitled to judgment as a matter of law."). These cases are in tension with other cases that approve enforcement of local rules that require a party to specifically refute facts a summary judgment motion identifies as established. The "deemed admitted" practice is found useful by many districts and appears in many local rules. *See Smith v. Lamz, 321 F.3d 680, 683 (7th Cir. 2003)* (district court's local rule "provides that when a responding party's statement fails to controvert the facts as set forth in the moving party's statement ... those facts shall be deemed admitted for purposes of the motion... . We have consistently held that a failure to respond by the nonmovant as mandated by local rules results in an admission.").

Subdivision (e)(3), consistent with existing case law, recognizes that a court may grant summary judgment if the motion and supporting materials, including the facts considered "deemed admitted" or undisputed under subdivision (2), show that the movant is entitled to it. *See e.g., Cosme-Rosado v. Serrano-Rodriguez, 360 F.3d 42, 45-46 (1st Cir. 2004)* (proper to deem admitted uncontested facts). Under such circumstances, the court is required to examine independently the record to satisfy itself that the movant is entitled to summary judgment under the law. Under the subdivision, a court can take a fact to be undisputed or "deemed admitted" without looking to the materials cited to support it. But the failure to respond in proper form would be treated a default only as to the specific fact, though not as default to the motion. The court must still determine the legal consequences of the facts considered undisputed or "deemed admitted" in the context of its application of the summary-judgment standard to any facts that are disputed in proper form.

Subdivision (e)(4) provides that a court may issue any other appropriate order, including, for example, an order denying summary judgment because the movant failed to reply to additional facts, or an order granting summary judgment for the nonmovant for the same reason.

6. Subdivision (f)--Judgment Independent of the Motion

Subdivision (f) is new and incorporates summary-judgment practices followed in many courts. The subdivision recognizes a court's discretion to consider summary judgment on its own. The subdivision recognizes these practices in the text of the rule. After giving notice and a reasonable time to respond, a court may: (1) grant summary judgment for the nonmoving party; (2) grant a motion on legal or factual grounds that were not raised by either party; or (3) consider summary judgment on its own. The advisory committee declined to require a court to give notice and an opportunity to respond if the court determines to deny the summary judgment motion on legal or factual grounds not raised by the parties. The case management difficulties that would arise if notice was required every time a court denied a motion on this basis offset any benefits in providing notice. A court has discretion, of course, to give notice before denying the motion.

7. Subdivision (g)--Failing to Grant All the Requested Relief

Subdivision (g) is based on existing subdivision (d)(1). Under the amended subdivision, a court may treat individual facts as established when they are not genuinely in dispute, relying solely on the summary-judgment record, if it does not otherwise grant all the relief requested by the motion. The provision comes into play only after the court has applied the summary-judgment standard to individual claims and defenses and has not granted all the relief requested, including a denial of the motion. If partial summary judgment cannot be granted, the court may look to individual material facts and determine whether they should be treated as established facts. The exercise of the court's discretion will often depend on the nature of the matters that are involved. For example, it may be important to grant partial summary judgment for a defendant on the basis of official-immunity doctrine as to claims for individual liability even though related matters must be tried on essentially the same claims.

Unlike the existing subdivision (d)(1), which seems to encourage courts to treat material facts established in the case (e.g., "court *should*, to the extent practicable, determine what material facts are not genuinely at issue"), subdivision (g) is phrased in neutral terms (court "*may* enter an order stating any material fact ... that is not genuinely in dispute and treating the fact as established in the case"). The provision is intended to cut costs by eliminating potential litigation about a fact material to the case.

The Committee Note sounds a cautionary note. A court should be wary of accepting a fact assertion relying solely on the failure of the nonmovant to dispute it. A nonmovant may not have disputed a particular material fact for purposes of the summary judgment deliberately for tactical reasons or because it believed that the motion would be defeated. It should be safe for a nonmovant to accept a fact for purposes of the summary judgment motion only. A court should not determine a material fact established based exclusively on a party's acceptance of a fact for purposes of the motion only. It would be risky for a court to conclude that all material facts, which are not disputed by the nonmovant, should be treated as established facts in the case. The Note goes on to say that even if the court concludes that a material fact is not genuinely in dispute, 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." On the other hand, by providing notice of the court's intent to grant summary judgment, the procedure provides a court with an effective and practicable vehicle to notify the parties of its preliminary findings, directing their attention to particular issues it wants them to address.

8. Subdivision (h)--Affidavit or Declaration Submitted in Bad Faith

Subdivision (h) is based on existing subdivision (g), with three significant exceptions. The existing provision mandates penalties for a party who submits an affidavit in bad faith or solely for delay. Unlike the existing subdivision,

subdivision (h) provides that sanctions under the rule are discretionary and not mandatory. The existing mandatory sanction provision is inconsistent with practice because courts seldom impose sanctions under Rule 56. The provision is also expanded to require the court to provide a party notice and an opportunity to respond. In addition, sanctions besides paying "reasonable expenses, including attorney fees" and holding the party in contempt are provided in subdivision (h), including any "appropriate sanction."

III. Background and Purposes

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 three well-known cases, and the district courts have, in turn, promulgated local rules with practices and procedures during the same 40 years 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 is indicative of the inadequacy of the existing national rule. Although there is wide variation in the local rules and individual-judge rules, there are similarities among them. The proposed amendments are derived from many summary-judgment provisions common in the current local rules.

The public comment to the published Rule 56 proposals in 2008 drew the advisory committee's attention particularly to two provisions. 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 established a uniform procedure requiring parties to submit a "point-counterpoint" statement of undisputed facts. The proposed "point-counterpoint" procedure 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 provisions, the public comment on all other provisions of the proposed amendments was highly favorable.

The first controversial provision related to a change made in Rule 56 in 2007, which raised virtually no comment at that time. As part of the Style Project, the word "shall," which appeared in many rules, was changed in each rule to "must," "may," or "should." The same clarification was undertaken during the comprehensive restyling of the Federal Rules of Appellate and Criminal Procedure and is being made to the Federal Rules of Evidence.

The word "shall" is inherently ambiguous, depending on the context, which has caused unnecessary litigation over the years. Whether "shall" means, 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. It was often difficult to discern which meaning the original drafters intended.

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 standard Committee Note explaining that the amendment was intended to be stylistic only and not intended to change the substantive meaning or make prior case law inapplicable. The change to "should" 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 committee's intent to improve the procedures for litigating summary judgment motions but not to change the standard for granting or denying them.

Many commentators expressed a strong preference for "must" or "shall," based in part on a concern that retaining "should" in the rule text would encourage courts not to grant appropriate summary judgments. Those advocating the use of the word "must" pointed to case law stating that the plain language of Rule 56 provides that a grant of summary judgment is directed when the movant is "entitled" to judgment as a matter of law. This group expressed concern that a denial of a valid summary judgment can force a defendant to settle an ill-founded case because of a fear of an unreasonable jury verdict. They were also concerned that judges prefer not to grant summary judgment because of a fear of reversal and wasted work. Supporting their contention was data showing that courts frequently fail to rule on summary judgment motions, though such data does not indicate whether the failure to rule on the motion actually represented a deliberate discretionary denial. 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. In their view, any "backsliding" on the court's duty to grant summary judgment in appropriate circumstances would only aggravate the current situation.

Equally vigorous comments expressed a strong preference for retaining "should." These comments emphasized the importance of trial court discretion and flexibility in handling summary judgment motions, particularly motions for partial summary judgment that leave some issues to be tried. The commentators also contended that a trial would provide a better 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 district court judges observed that a trial may consume much less court time than would be expended in determining whether summary judgment should be granted, besides providing a more reliable basis for the decision at the trial level and a better record for appellate review. The issue is especially acute in large and complex cases when a court will often not know in advance whether summary judgment is likely to be granted. Expending substantial time to review mountains of paper or gigabytes of electronically stored information on a summary judgment motion that eventually will be denied strains scarce judicial resources. In addition, important policy questions affecting issues of general public importance may be better addressed by trial rather than by summary judgment. Such concerns are described by Justice Jackson in *Kennedy v. Silas Mason Co., 334 U.S. 249* :

> We do not hold that in the form the controversy took in the District Court that tribunal lacked power or justification for applying the summary judgment procedure. But summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice. We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found lacking in the thoroughness that should precede judgment of this importance and which it the purpose of the judicial process to provide.

After considering the public 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. It is unclear whether the courts would have reached the same conclusion if the operative word had been "should." The 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 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 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.

The second controversial aspect of the Rule 56 amendments involved a proposed point-counterpoint procedure. Approximately one-third of the courts have a local rule requiring the movant to include, along with the summary judgment motion and brief, a "point-counterpoint" statement of facts that are asserted to be undisputed and entitle the movant to summary judgment. In these courts, the nonmovant, in addition to submitting a brief, must address each fact asserted by the movant 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). Another one-third of the courts require only the movant to make pinpoint citations to the record supporting assertions of facts. While the remaining one-third of courts have no local rule addressing the procedure. The point-counterpoint statements that were published for public comment were intended to identify the essential issues in a case and provide a more efficient, uniform, and reliable process for a judge to rule on the motion.

After extensive public comment, the advisory committee decided to withdraw the "point-counterpoint" proposal that was included in the rule text published for comment in August 2008.

During the public comment period, the advisory committee heard from lawyers and judges who found the point-counterpoint statement useful and efficient. But the committee also heard that the procedure can be burdensome and expensive, with parties submitting long and unwieldy lists of facts and counter-facts. Instead of less than twenty asserted facts, an average number in a typical case, some motions needlessly presented assertions of hundreds of facts. The committee heard comments that some lengthy motions were made for tactical purposes to deliberately increase litigation costs for parties who did not have adequate resources. In addition, some courts adopted the point-counterpoint procedure by local rule, only later to abandon it. Others are reexamining the procedure. The testimony and comments cast sufficient doubt on the efficacy of the point-counterpoint procedure to persuade the committee not to include it in the national rule. Instead, the rule is revised to provide discretion to the courts to continue using or adopting the point-counter-point procedure, by entering an order in an individual case or by local rule.

IV. Advisory Committee Materials

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§ 1.05 Analysis of Illustrative Form 52

I. Text of Proposed Amendment to Form 52 and Committee Note

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

The material within the following brackets is overstruck in the original. [(e.g., name representing the plaintiff.)]

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*.)

The material within the following brackets is overstruck in the original. [(b)] (d) (Dates for commencing and completing discovery, including discovery to be commenced or completed before other discovery.)

The material within the following brackets is overstruck in the original. [(c)] (e) (Maximum number of interrogatories by each party to another party, along with dates the answers are due.)

The material within the following brackets is overstruck in the original. [(d)] (f) (Maximum number of requests for admission, along with the dates responses are due.)

The material within the following brackets is overstruck in the original. [(e)] (g) (Maximum number of depositions for each party.)

The material within the following brackets is overstruck in the original. [(f)] (h) (Limits on the length of depositions, in hours.)

The material within the following brackets is overstruck in the original. [(g)] (i) (Dates for exchanging reports of expert witnesses.)

The material within the following brackets is overstruck in the original. [(h)] (j) (Dates for supplementations under Rule 26(e).)

4. Other Items:

* * *

II. Explanation

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.

III. Background and Purposes.

The omitted provisions require that a discovery plan include: (1) a reference to the way the parties planned to handle electronically stored information in discovery or disclosure; and (2) a reference to any 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 was not published for public comment because it is technical and conforming.

Moore's Federal Practice: 2010 Amendments to the Federal Rules

167A Moore's Federal Practice: Proposed Amendments to Federal Rules

167A-167A Moore's: 2010 Amendments to the Federal Rules B

B. Federal Rules of Appellate Procedure.

§ 2.01 Summary of Proposed FRAP Amendments

Rule 1. The proposed amendments to Rule 1 clarify that the word "state," when used in the Appellate Rules, includes the District of Columbia and any United States commonwealth or territory.

Rule 4. The proposed amendment to Rule 4 is a technical change to correct the cross-reference to *Fed. R. Civ. P. 58(a)*, which was renumbered as part of the December 2007 restyling of the Civil Rules.

Rule 29. The proposed amendments to Rule 29 require an amicus curiae to disclose whether a party's counsel authored the amicus brief in whole or in part and whether a party or a party's counsel contributed money with the intention of funding the preparation or submission of the brief, and to identify every person (other than the amicus, its members, and its counsel) who contributed money that was intended to fund the brief's preparation or submission.

Form 4. The proposed amendments to Form 4 limit the disclosure of personal-identifier information on the form consistent with the privacy provisions of Rule 25(a)(5).

§ 2.02 Analysis of Appellate Rule 1

I. Text of Proposed Amendment and Committee Note

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

Rule 1. Scope of Rules; Definition; Title.

(1) These rules govern procedure in the United States courts of appeals.

(2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

(b) The material within the following brackets is overstruck in the original. [[Abrogated.]] Definition. In these rules, ''state'' includes the District of Columbia and any United States commonwealth or territory.

(c) Title. These rules are to be known as the Federal Rules of Appellate Procedure.

Committee Note of 2010 Amendment

Subdivision (b). New subdivision (b) defines the term "state" to include the District of Columbia and any commonwealth or territory of the United States. Thus, as used in these Rules, "state" includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

II. Explanation

The proposed amendments to Rule 1 clarify that the word "state" when used in the rules includes the District of Columbia and any United States commonwealth or territory. The clarification makes clear that the word "state" includes Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

Besides appearing in Rule 1, the term "state" appears in Rules 22, 26, 29(a), 44, and 46. "State" has a similar definition in the Civil Rules (FRCP 81(d)(2)) and the Criminal Rules (FRCrP 1(b)(9)).

III. Background and Purposes

The time-computation project culminated in amendments that took effect in 2009, revising the method of computing time in each set of federal procedural rules. For purposes of computing time under the Appellate Rules, "state" holidays are included within the definition of legal holidays. The ambiguity in the meaning of "state" and whether it includes American commonwealths and territories when determining legal holidays was raised very late during the public comment period on the time-computation changes. Clarifying the term "state" so that it would include American commonwealths and territorial holidays as legal holidays was deferred for one year to allow full study and consideration.

A commonwealth is defined to be an insular area, which has entered into a written agreement establishing a formal relationship with the federal government. The Northern Islands of Mariana and Puerto Rico are two American commonwealths. The American territories are unincorporated insular areas. They are unincorporated because not all provisions of the United States Constitution apply to them. Instead, Congress enacted an Organic Act which organized the local government in these territories. American Samoa, Guam, and the United States Virgin Islands are the only American inhabited territories. Several American islands and atolls, and a reef also are included in this definition, but they are uninhabited.

The advisory committee considered including "possessions" in the definition of "state." The Criminal Rules includes "possessions" in its definition of state. The Civil Rules had considered including possessions in the definition of "state," but declined to do so because: (1) no American possession currently exists; and (2) the addition of "possessions" to the definition may be misinterpreted to include United States military bases overseas. The jurisdiction over the latter is governed by agreements with foreign nations upon whose land the base is located. "Possessions" was not added to the definition.

The term "state" also appears in several other Appellate Rules. The certificate-of-appealability provision in Rule 22(b), which was added in conformance with the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, includes the word "state." The clarification of "state" in Rule 1 has no impact on Rule 22(b), because case law has held that the District of Columbia, Guam, Puerto Rico, and the Virgin Islands are treated as "states" under the applicable statutory provisions regarding federal habeas corpus. The status of American Samoa and Guam under the case law is not

clear, but if these territories are not subject to the federal habeas provisions then the applicability of the certificate-of-appealability will not arise.

Rule 26(a)(6)(C) includes within the definition of "legal holiday" a "day declared a holiday by the state" for purposes of computing forward-counted periods. The clarification of the term "state" was intended primarily to eliminate any ambiguity in treating holidays declared by a commonwealth, territory, or the District of Columbia as a legal holiday.

Under existing Rule 29(a), a "State, Territory, Commonwealth, or the District of Columbia" are listed as entities that may file an amicus brief without a party's consent or the court's permission. The amendment to Rule 1 clarifying the term "state" makes the reference to "Territory, Commonwealth, or the District of Columbia" redundant, and these latter terms are unnecessary and have been deleted in the amendments to Rules 29(a).

The term "state," as amended in Rule 1, appears in Rule 44, which implements *28 U.S.C. § 2403(b)*. The statutory provision requires that notice be given to an appropriate state officer if the constitutionality of any state statute is drawn into question. The statute does not define "state." The clarification of the term "state" makes clear that the rule's provisions apply to a commonwealth, territory, or the District of Columbia and notice must be provided to them if the validity of a statute enacted by one of them is challenged.

Rule 46 sets out the requirements to practice law before an appellate court. The amendment to Rule 1 makes clear that lawyers admitted to practice before the highest court or bar of a "state," including a commonwealth, territory, or the District of Columbia, meet the eligibility requirements of Rule 46 to practice in the appellate courts.

During the public comment period, a suggestion was made to include "tribes" within the meaning of "state." The term "state" as used in Rule 1 has not been interpreted to include Native American tribes. Public comment suggested that Native American tribes are sovereign governments and the Appellate Rules should treat them with as much respect and dignity as states. It was contended further that tribes qualify as "territories" under various statutes and that courts have recognized tribes as having, in fact, greater status than territories in certain respects. The advisory committee determined that the suggestion merited further consideration and study. But it decided to proceed with the amendment to Rule 1, rather than deferring action until it had sufficiently studied the suggestion to expand the meaning of "state" to include Native American tribes.

IV. Advisory Committee Materials

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§ 2.03 Analysis of Appellate Rule 4

I. Text of Proposed Amendment to Appellate Rule 4 and Committee Note

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

Rule 4. Appeal as of Right--When Taken.

(a) Appeal in a Civil Case.

* * *

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if *Federal Rule of Civil Procedure 58(a)* The material within the following brackets is overstruck in the original. [(1)] does not require a separate document, when the judgment or order is entered in the civil docket under *Federal Rule of Civil Procedure 79(a)*; or

(ii) if *Federal Rule of Civil Procedure 58(a)* The material within the following brackets is overstruck in the original. [(1)] requires a separate document, when the judgment or order is entered in the civil docket under *Federal Rule of Civil Procedure 79(a)* and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or

- 150 days have run from entry of the judgment or order in the civil docket under *Federal Rule of Civil Procedure 79(a)*.

(B) A failure to set forth a judgment or order on a separate document when required by *Federal Rule of Civil Procedure 58(a)(1)* does not affect the validity of an appeal from that judgment or order.

* * *

Committee Note of 2010 Amendment

Subdivision (a)(7). Subdivision (a)(7) is amended to reflect the renumbering of Civil Rule 58 as part of the 2007 restyling of the Civil Rules. References to Civil Rule "58(a)(1)" are revised to refer to Civil Rule "58(a)." No substantive change is intended.

II. Explanation

The proposed amendments to Rule 4(a)(7) correct cross-references to Civil Rule 58(a), which was renumbered as part of the restyling of the Civil Rules, effective December 1, 2007. The amendments to Rule 4 were not published for public comment because they are technical and conforming.

III. Background and Purposes

As part of the comprehensive style-revision project, Civil Rule 58(a) was amended in 2007 to break out certain motions, which do not require a separate document for purposes of entering a judgment, from a single Rule 58(a) into separate paragraphs--(a)(1) through (a)(5). Appellate Rule 4(a)(7) contains a cross reference to Civil Rule 58(a)(1) before it was renumbered in 2007. The correction of the cross reference was inadvertently omitted in 2007, when other conforming cross references to the Civil Rules were made.

§ 2.04 Analysis of Appellate Rule 29

I. Text of Proposed Amendment and Committee Note

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

Rule 29. Brief of an Amicus Curiae.

(a) When Permitted. The United States or its officer or agency, or a The material within the following brackets is overstruck in the original. [State, Territory, Commonwealth, or the District of Columbia] state may file an

amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

* * *

(c) Contents and Form. An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. The material within the following brackets is overstruck in the original. [If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1]. An amicus brief need not comply with Rule 28, but must include the following:

(1) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

(1) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

The material within the following brackets is overstruck in the original. [(1)] **(2)** a table of contents, with page references;

The material within the following brackets is overstruck in the original. [(2)] **(3)** a table of authorities--cases (alphabetically arranged), statutes, and other authorities--with references to the pages of the brief where they are cited;

The material within the following brackets is overstruck in the original. [(3)] **(4)** a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(5) unless the amicus curiae is one listed in the first sentence of Rule 29(a), a statement that indicates whether:

(A) a party's counsel authored the brief in whole or in part;

(B) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) a person--other than the amicus curiae, its members, or its counsel--contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;

The material within the following brackets is overstruck in the original. [(4)] **(6)** an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

The material within the following brackets is overstruck in the original. [(5)] **(7)** a certificate of compliance, if required by Rule 32(a)(7).

* * *

Committee Note of 2010 Amendment

Subdivision (a). New Rule 1(b) defines the term "state" to include "the District of Columbia and any United States commonwealth or territory." That definition renders subdivision (a)'s reference to a "Territory, Commonwealth, or the District of Columbia" redundant. Accordingly, subdivision (a) is amended to refer simply to "[t]he United States or its officer or agency or a state."

Subdivision (c). The subparts of subdivision (c) are renumbered due to the relocation of an existing provision in new subdivision (c)(1) and the addition of a new provision in new subdivision (c)(5). Existing subdivisions (c)(1) through

(c)(5) are renumbered, respectively, (c)(2), (c)(3), (c)(4), (c)(6) and (c)(7). The new ordering of the subdivisions tracks the order in which the items should appear in the brief.

Subdivision (c)(1). The requirement that corporate amici include a disclosure statement like that required of parties by Rule 26.1 was previously stated in the third sentence of subdivision (c). The requirement has been moved to new subdivision (c)(l) for ease of reference.

Subdivision (c)(5). New subdivision (c)(5) sets certain disclosure requirements concerning authorship and funding. Subdivision (c)(5) exempts from the authorship and funding disclosure requirements entities entitled under subdivision (a) to file an amicus brief without the consent of the parties or leave of court. Subdivision (c)(5) requires amicus briefs to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel contributed money with the intention of funding the preparation or submission of the brief. A party's or counsel's payment of general membership dues to an amicus need not be disclosed. Subdivision (c)(5) also requires amicus briefs to state whether any other "person" (other than the amicus, its members, or its counsel) contributed money with the intention of funding the brief s preparation or submission, and, if so, to identify all such persons. "Person," as used in subdivision (c)(5), includes artificial persons as well as natural persons.

The disclosure requirement, which is modeled on *Supreme Court Rule 37.6*, serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs. *See Glassroth v. Moore, 347 F.3d 916, 919 (11th Cir. 2003)* (noting the majority's suspicion "that amicus briefs are often used as a means of evading the page limitations on a party's briefs"). It also may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief.

It should be noted that coordination between the amicus and the party whose position the amicus supports is desirable, to the extent that it helps to avoid duplicative arguments. This was particularly true prior to the 1998 amendments, when deadlines for amici were the same as those for the party whose position they supported. Now that the filing deadlines are staggered, coordination may not always be essential in order to avoid duplication. In any event, mere coordination--in the sense of sharing drafts of briefs--need not be disclosed under subdivision (c)(5). Cf. Eugene Gressman et al., Supreme Court Practice 739 (9th ed. 2007) (Supreme Court Rule 37.6 does not "require disclosure of any coordination and discussion between party counsel and amici counsel regarding their respective arguments ...").

II. Explanation

The proposed amendments to Rule 29(c)(7) require an amicus curiae to make three separate disclosures concerning the authorship and financing of an amicus brief. The disclosure requirements, which are modeled on *Supreme Court Rule 37.6*, serve to deter a party from using an amicus brief to circumvent page limits on its brief. The requirements also are intended to help judges determine how much weight should be accorded to the brief based on whether the amicus itself considers the issue sufficiently important to justify the cost and effort of filing an amicus brief.

The amicus must first disclose whether one of the party's lawyers wrote part or all of the amicus brief. If the amicus submits a brief that was written entirely by a party's lawyer, it must disclose this fact. But less obvious borderline situations involving partial authorship of the brief can be expected to arise with some frequency, especially because amicus counsel and the party's counsel are encouraged to coordinate the submission of their briefs to prevent duplicating arguments. The potential for revising the amicus brief in light of comments or suggestions made by the party's counsel at such discussions is apparent. The proposed amendments to Rule 29(c)(7) do not require the amicus to disclose the discussions between itself and the party's counsel coordinating submission of briefs. But if the amicus brief is revised as a result of such discussions, the revisions, no matter how small, should be disclosed.

The amicus must also disclose whether a party or a party's lawyer contributed money to fund the preparation or submission of the brief. The disclosure requirement does not apply to general membership dues contributed by the party

or its lawyers to the amicus. Thus, general membership dues need not be disclosed under the rule. But any direct or indirect payment to the amicus to defray the cost of preparing or submitting the brief must be disclosed, e.g., printing costs.

The third item that must be disclosed by the amicus is whether any person other than the amicus, its members, and its lawyers contributed money to fund the brief's preparation or submission; and if so, the identity of each such person or entity. "Person" includes artificial persons as well as natural persons, e.g., organizations, corporations. Though a party or the party's lawyer who is a member of the amicus organization would not be required to disclose a financial contribution to the preparation of the brief under this disclosure requirement, the party or party's lawyers would have to make the disclosure under this second disclosure requirement.

The disclosure statement must be placed immediately after the statement identifying the amicus curiae required under subdivision (c)(5), which follows the Rule 26.1 corporate disclosure statement, the table of contents, and table of authorities in the brief. The statement must be made in all briefs, including cases in which no financial or drafting assistance was provided to the amicus in preparing or submitting the brief. Thus, a negative report must be made. The disclosure requirements do not apply to a brief filed by the United States, its officers or agency, or a "state," as defined in revised Rule 1.

The Rule 26.1 disclosure statement by a corporation filing an amicus brief should be placed immediately before the table of contents in the front of the brief. Rule 29(c) subparagraphs were renumbered to account for the reorganization.

The proposed amendments to Rule 29(a) delete the reference to a "Territory, Commonwealth, or the District of Columbia" as unnecessary in light of the new definition of "state" in Rule 1(b).

III. Background and Purposes

The proposed amendments to Rule 29(c)(7) are modeled on the disclosure requirements in *Supreme Court Rule 37.6*, which was adopted in 1997. The amendments are intended to deter lawyers from circumventing the page and word limits on the parties' briefs. They are also intended to make the amicus process more transparent and more helpful to judges.

Unless filed by the United States or a state, an amicus brief may be filed only by leave of court or consent of all parties. The extent to which an individual judge relies on or even reads an amicus brief is entirely within the individual judge's discretion. Appellate judges share many different views on the usefulness of amicus briefs. Some take a negative view, giving little or no attention to them, while others take a very positive view, favoring them as an additional helpful resource. The majority of judges fall somewhere between the two. The proposed amendments elicit information that will better inform judges when they are determining whether to permit the filing of an amicus brief and evaluating the weight that should be accorded to the brief. The proposed amendments establish a uniform practice among the circuit courts in line with the practice before the Supreme Court.

The concerns that animated the promulgation of *Supreme Court Rule 37.6* apply to proposed Rule 29(c). Parties were suspected of ghost-writing briefs filed by an amicus in cases before the Supreme Court either to evade page limits on the party's brief or to obtain the support of an amicus who could not or did not want to incur the expense of writing a brief itself. In either event, information on the party's involvement in the preparation of an amicus brief was seen to be helpful in assisting justices in ascertaining the true strength of the amicus's conviction in its brief. An amicus that is not willing to incur the expense of preparing a brief may not be genuinely interested in the brief's subject matter.

Under the proposed amendment, an amicus must disclose that its brief has been ghost-written in part or in full by a party's lawyers. It must also disclose any financial contributions from the party or party's lawyers defraying the costs of its brief. The disclosures can correct misleading impressions that the party's position is supported by others. Many

incidences of such covert practices have been reported in the case law. *See*, for example, *Glassroth v. Moore, 347 F.3d 916, 919 (11th Cir. 2003)* (amicus briefs used often to evade party's page limitations); *Nat'l Org. For Women, Inc. v. Scheidler, 223 F.3d 615, 617 (7th Cir. 2000)* (party's lawyer admits to paying lawyer of prospective amicus for preparing brief); and *Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997)* ("The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect extending the length of the litigants' brief. Such amicus briefs should not be allowed. They are an abuse.")

The advisory committee also considered adding a provision requiring the party and its lawyers to disclose membership in the amicus organization, based on the change initially proposed in 2007 to *Supreme Court Rule 37.6* But it declined to do so after the Supreme Court decided not to require such a disclosure after receiving critical comment, which pointed out that the proposal would deter lawyers from joining organizations that might become amici and deter groups from seeking amici status.

IV. Advisory Committee Materials

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§ 2.05 Analysis of Appellate Form 4

I. Text of Proposed Amendment and Committee Note

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

Form 4. Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis

* * *

7. State the persons who rely on you or your spouse for support.

Name [or, if under 18, initials only]	**Relationship**	**Age**

* * *

13. State the The material within the following brackets is overstruck in the original. [address] ***city and state*** *of your legal residence.*

Your daytime phone number: (____)

Your age: _____ Your years of schooling:

The material within the following brackets is overstruck in the original. [Your] Last four digits of your social-security number:

II. Explanation

The proposed revision of Form 4, Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis, limits the disclosure of personal-identifier information on the form consistent with the privacy provisions of Rule 25(a)(5).

III. Background and Purposes

Rule 25(a)(5) incorporates by reference the privacy protections provided in *Bankruptcy Rule 9037*, Civil Rule 5.2, and Criminal Rule 49.1. Under these provisions, social security numbers (except the last four digits) and the names of minors must be redacted from all filings. In addition, home addresses must be redacted from filings made under the Criminal Rules. Revised Form 4 limits the disclosure of a social security number to the last four digits, eliminates the provision asking for an "address" and substitutes "city and state," and requires only the initials of any person under the age of 18 years.

4 of 5 DOCUMENTS

Moore's Federal Practice: 2010 Amendments to the Federal Rules

167A Moore's Federal Practice: Proposed Amendments to Federal Rules

167A-167A Moore's: 2010 Amendments to the Federal Rules C

C. Federal Rules of Criminal Procedure

§ 3.01 Summary of Proposed FRCrP Amendments

Rule 12.3. The proposed amendments to Rule 12.3 provide that, when a public-authority defense is raised, a victim's address and telephone number can be disclosed to the defense only if the defendant establishes a "need" for the information. This change parallels a similar change made in 2008 to Rule 12.1, which deals with disclosure of similar information about a victim when an alibi defense is raised.

Rule 21. The proposed amendments to Rule 21 require a court, when a defendant moves to transfer a case to another district for trial on grounds of convenience, to consider the convenience of victims--as well as the convenience of the parties and witnesses and the interests of justice--in determining whether to transfer all or part of the proceedings.

Rule 32.1. The proposed amendments to Rule 32.1 make clear that only paragraph (a)(1), and not paragraph (a)(2), of *18 U.S.C. § 3143(a)* applies to proceedings involving the release or detention of a person charged with violating a condition of probation or supervised release. The amendments also clarify the burden in such proceedings, which, under the case law, requires clear and convincing evidence that the person will not flee or pose a danger to any other person or to the community.

§ 3.02 Analysis of Criminal Rule 12.3

I. Text of Proposed Amendment to Fed. R. Crim. P. 12.3 and Committee Note.

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

Rule 12.3. Notice of a Public-Authority Defense.

(a) Notice of the Defense and Disclosure of Witnesses.

* * *

(4) ***Disclosing Witnesses*****.**

* * *

(C) ***Government's Reply***. Within 14 days after receiving the defendant's statement, an attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name, address, and telephone number of each witness--**and the address and telephone number of each witness other than a victim**--that the government intends to rely on to oppose the defendant's public-authority defense.

(D) ***Victim's Address and Telephone Number***. **If the government intends to rely on a victim's testimony to oppose the defendant's public-authority defense and the defendant establishes a need for the victim's address and telephone number, the court may**:

(i) **order the government to provide the information in writing to the defendant or the defendant's attorney; or**

(ii) **fashion a reasonable procedure that allows for preparing the defense and also protects the victim's interests.**

* * *

(b) Continuing Duty to Disclose.

(1) ***In General.*** Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name, of any additional witness--and the address, and telephone number of any additional witness other than a victim--if:

(The material within the following brackets is overstruck in the original. [1] A) the disclosing party learns of the witness before or during trial; and

(The material within the following brackets is overstruck in the original. [2] B) the witness should have been disclosed under Rule 12.3(a)(4) if the disclosing party had known of the witness earlier.

(2) ***Address and Telephone Number of an Additional Victim-Witness.*** The address and telephone number of an additional victim-witness must not be disclosed except as provided in Rule 12.3(a)(4)(D).

* * *

Committee Note of 2010 Amendment

Subdivisions (a) and (b). The amendment implements the Crime Victims' Rights Act, which states that victims have the right to be reasonably protected from the accused, and to be treated with respect for the victim's dignity and privacy. *See 18 U.S.C. § 3771(a)(1) & (8)*. The rule provides that a victim's address and telephone number should not automatically be provided to the defense when a public-authority defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense, but also protects the victim's interests.

In the case of victims who will testify concerning a public-authority claim, the same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (b).

II. Explanation

The proposed amendment to Rule 12.3 provides that the address and telephone number of a victim whom the government relies on as a witness to oppose a defendant's public-authority defense may not be disclosed, unless the

defendant establishes a "need" for the information. On a showing of need, a court may order the government to disclose the victim's address and telephone number, or it may fashion an alternative procedure that gives the defendant sufficient information to prepare a defense while at the same time protecting the victim's interests. The same procedures and standards apply to an additional victim-witness identified before or during trial as part of the parties' continuing duty to disclose. The amendment is consistent with the Crime Victims' Rights Act (*18 U.S.C. § 3771*).

III. Background and Purposes

Rule 12.3 requires the defendant to "disclose the name, address, and telephone number of each witness the defendant intends to rely on to establish a public-authority defense." The rule also requires the government to disclose the same information about each witness it intends to "rely on to oppose the defendant's public-authority defense." To protect a victim's security and privacy, the proposed amendment to Rule 12.3 requires that the defendant make a showing of "need" before the government discloses the victim-witness's address and telephone number to the defense when the government is relying on the victim-witness to oppose the defendant's public-authority defense. Neither the text of the rule nor the Committee Note defines the meaning of "need." In the context of the rule, the defendant's need is related to information necessary to prepare a defense. Because the facts on which a court will determine a defendant's showing of "need" will vary, the amendment does not provide greater specificity, providing broad discretion to the court to evaluate the defendant's showing.

Instead of ordering the government to disclose the personal information about a victim on a showing of need, the court may fashion an alternative procedure that provides sufficient information to the defendant to prepare for trial without disclosing the victim's address or telephone number. The alternative procedure may include, for example, ordering the government "to provide the information in writing to the defendant or the defendant's attorney" or scheduling a face-to-face meeting or a meeting by video teleconference between the victim, the prosecutor, and the accused's attorney.

The proposed amendment to Rule 12.3 alters the traditional reciprocal discovery obligations of the defendant and the prosecutor (*see Wardius v. Oregon, 412 U.S. 470 (1973)* (requiring reciprocal discovery)). A defendant must continue to provide the government with names and addresses of witnesses who support the defendant's public-authority defense. But the government is not required to automatically disclose the same type of information to the defendant when a victim is the witness for the prosecution opposing the defendant's public-authority defense, unless the defendant persuades the court that the information is needed.

The amendment to Rule 12.3 parallels an amendment to Rule 12.1 made in 2008, which provides that the same information about a victim is not automatically disclosed when an alibi defense is raised in a case. The amendments to Rule 12.1 and Rule 12.3 are intended to implement the provisions of the Crime Victims' Rights Act, which provides that a victim must be reasonably protected from an accused and be treated with respect for their dignity and privacy (*18 U.S.C. § 3771(a)(1)* and *(8)*). Though the number of cases in which a public-authority defense is raised is small, the change to the rule is intended to underscore the judiciary's concerns for the rights of victims.

IV. Advisory Committee Materials

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§ 3.03 Analysis of Criminal Rule 21(b)

I. Text of Proposed Amendment to Criminal Rule 21(b) and Committee Note

New material is underlined.

Rule 21. Transfer for Trial.

* * *

(b) For Convenience. Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties, any victim, and the witnesses, and in the interest of justice.

* * *

Committee Note of 2010 Amendment

Subdivision (b). This amendment requires the court to consider the convenience of victims--as well as the convenience of the parties and witnesses and the interests of justice--in determining whether to transfer all or part of the proceeding to another district for trial. The Committee recognizes that the court has substantial discretion to balance any competing interests.

II. Explanation

The proposed amendment to Rule 21(b) requires a court to consider the convenience of a victim--as well as the convenience of the parties and witnesses and the interests of justice--in determining whether to transfer all or part of the proceedings to another district for trial. The amendment applies *only if* a defendant moves to transfer the case for convenience in the first instance. It does not apply to a defendant's motion for transfer based on prejudice under Rule 21(a).

III. Background and Purposes

A series of Criminal Rules amendments were made in 2008 to implement specific rights provided under the Crime Victims' Rights Act that emphasize the judiciary's sensitivity to the rights of victims. The proposed amendment to Rule 21 is consistent with those amendments. Unlike the proposed amendment to Rule 12.3, which implements a specific right provided in the Crime Victims' Rights Act, i.e., a victim must be reasonably protected from the accused, the amendment to Rule 21 does not implement a specific right established by the Crime Victims' Rights Act, other than the general right to be "treated with fairness and with respect for the victims's dignity and privacy." The amendment to Rule 21 parallels an amendment to Rule 18, which requires the court to consider the convenience of a victim as well the defendant and witnesses in setting the place of trial within a district.

A concern was raised that the proposed amendment would elevate a victim's interest above the defendant's and witnesses' interests in having the trial held at a convenient location, especially because the victim can force the issue by challenging the court's ruling with an mandamus action. The Committee Note addresses this concern and highlights the court's substantial discretion to balance any competing interests. In addition, the rule is activated only when the *defendant* initially moves to transfer the trial to another district. Absent the defendant's motion, neither the victim nor the government has the right in the first instance to file a motion requesting that the trial be transferred to another district on the grounds of convenience under Rule 21(b). Thus, the interests of the victim and the government are not considered if the defendant is satisfied at having the trial held in the prosecuting district.

IV. Advisory Committee Materials

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§ 3.04 Analysis of Criminal Rule 32.1

I. Text of Proposed Amendment and Committee Note

New material is underlined.

Rule 32.1. Revoking or Modifying Probation or Supervised Release.

(a) Initial Appearance.

* * *

(6) ***Release or Detention.*** The magistrate judge may release or detain the person under *18 U.S.C. § 3143(a)(1)* pending further proceedings. The burden of establishing by clear and convincing evidence that the person will not flee or pose a danger to any other person or to the community rests with the person.

* * *

Committee Note of 2010 Amendment

Subdivision (a)(6). This amendment is designed to end confusion regarding the applicability of *18 U.S.C. § 3143(a)* to release or detention decisions involving persons on probation or supervised release, and to clarify the burden of proof in such proceedings. Confusion regarding the applicability of § 3143(a) arose because several subsections of the statute are ill-suited to proceedings involving the revocation of probation or supervised release. *See United States v. Mincey, 482 F. Supp. 2d 161 (D. Mass. 2007)* . The amendment makes clear that only subsection 3143(a)(1) is applicable in this context.

The current rule provides that the person seeking release must bear the burden of establishing that he or she will not flee or pose a danger but does not specify the standard of proof that must be met. The amendment incorporates into the rule the standard of clear and convincing evidence, which has been established by the case law.

II. Explanation

The proposed amendments to Rule 32.1 make clear that only paragraph (a)(1), and not (a)(2), of *18 U.S.C. § 3143* applies to proceedings revoking or modifying probation or supervised release. Under § 3143(a)(1), the court must detain the accused unless it finds by *clear and convincing evidence* that the accused "is not likely to flee or pose a danger to the safety of any other person or the community if released....." If the court releases the accused, it may impose conditions under *18 U.S.C. § 3142(b)* or *(c)*. The proposed amendments also clarify that the burden of proof in these proceedings is to establish by clear and convincing evidence that the person will not flee or pose a danger to any other person or to the community. The burden of proof is consistent with case law.

III. Background and Purposes

Rule 32.1 incorporates by reference the provisions of *18 U.S.C. § 3143(a)*. But § 3143(a) by its terms applies to proceedings involving a defendant who seeks release after conviction pending a motion for acquittal or a new trial. Rule 32.1 invokes the provisions of § 3143(a) and applies them in revocation proceedings, equating the situation of a person released on probation or supervised release to that of a defendant convicted and awaiting imposition of sentence (*see United States v. Giannetta, 695 F.Supp 1254, 1256 (D. Me. 1988))* . The integration of the rule and statute is not seamless and has caused confusion.

Section 3143(a) contains two paragraphs, (1) and (2). Existing Rule 32.1 invokes subsection (a), which includes paragraphs (1) and (2). But only the provisions of § 3143(a)(1) clearly apply, while the provisions of § 3143(a)(2) appear to be inapposite in most circumstances, dealing with unrelated topics. Case law in general has consistently held, after lengthy and difficult analysis, that only subsection (a)(1) applies to revocation proceedings. The general reference to subsection (a) and the issue whether (a)(2) applies, however, continue to cause some confusion as noted in *United States v. Mincey, 482 F.Supp.2d 161 (D. Mass. 2007)* . The proposed amendments make it clear that Rule 32.1 invokes only § 3143(a)(1) and ends the uncertainty about the applicability of *18 U.S.C. § 3143(a)* to proceedings involving the release or detention of a person charged with violating a condition of probation or supervised release.

The proposed amendments also clarify that the person seeking release for violating probation or supervised release must show by clear and convincing evidence that the person will not flee or pose a danger to the community. Rule 32.1 integrates the "clear and convincing" burden of proof fixed under § 3143(a)(1) and applies it to persons seeking release for violating a condition of probation or supervised release. It has been argued that § 3143(a)(1), including the burden of proof, does not apply to proceedings involving the release of persons violating probation or supervised release under Rule 32.1 because § 3143(a)(1) by its terms does not allow a court to detain a person "for whom the applicable *guideline* promulgated pursuant to *28 U.S.C. 994* does not recommend a term of imprisonment." The Sentencing Commission has issued only "policy statements," but no "guidelines," for a person whose probation or supervised release has been revoked. It has been argued that because the Sentencing Commission has not issued a guideline, the provision does not apply to revocation proceedings. Courts have rejected the logic of the argument, which would exclude all cases involving violations of a condition of probation or supervised release (*see United States v. Mincey, 482 F.Supp.2d 161 (D. Mass. 2007)* ; *United States v. Giannetta, 695 F.Supp 1254, 1256 (D. Me. 1988)* ; and *United States v. Loya, 23 F.3d 1529, 1531 (9th Cir. 1994))* .

A more serious challenge is raised when a policy statement does not recommend a term of imprisonment for a particular violation of a condition of probation or supervised release. Under such circumstances it has been argued that the "clear and convincing" burden of proof does not apply. Nonetheless, courts have applied the clear and convincing standard contained in § 3143(a)(1) and imposed imprisonment for a violation of a condition of probation or supervised release even though the policy statement did not recommend imprisonment (*see United States v. Redcap, 505 F.3d 1321 (10th Cir. 2007)* (sentence imposed for violation of release condition prohibiting drinking alcohol). Unlike guidelines, policy statements are not binding on the courts. The Commission determined that policy statements provided greater flexibility to both the Commission and the courts to address violations of a condition of probation or supervised release. Because the court has the discretion to impose imprisonment in every revocation case, the exclusion in § 3143(a)(1) does not apply. Consistent with the case law, the proposed amendments specify that the clear and convincing burden of proof is the governing standard.

IV. Advisory Committee Materials

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167A Moore's Federal Practice: Proposed Amendments to Federal Rules

167A-167A Moore's: 2010 Amendments to the Federal Rules D

D. Federal Rules of Evidence

§ 4.01 Summary of Proposed FRE Amendments

Rule 804. The proposed amendments to Rule 804(b)(3) require the government to show corroborating circumstances as a condition for admission of an unavailable declarant's statement against penal interest. The current rule requires only the defendant to make such a showing.

§ 4.02. Analysis of Evidence Rule 804(b)(3)

I. Text of Proposed Amendment to Rule 804(b)(3) and Committee Note

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

Rule 804. Hearsay Exceptions; Declarant Unavailable.

* * *

(b) Hearsay exceptions.--The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

(3) Statement against interest.--A statement The material within the following brackets is overstruck in the original. [which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless] that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate the its trustworthiness The material within the following brackets is overstruck in the original. [of the statement], if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

* * *

Committee Note of 2010 Amendment

Subdivision (b)(3). Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. A number of courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. *See, e.g., United States v. Alvarez, 584 F.2d 694, 701 (5th Cir. 1978)* ("by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)"); *United States v. Shukri, 207 F.3d 412 (7th Cir. 2000)* (requiring corroborating circumstances for against-penal-interest statements offered by the government). A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.

All other changes to the structure and wording of the Rule are intended to be stylistic only. There is no intent to change any other result in any ruling on evidence admissibility.

The amendment does not address the use of the corroborating circumstances for declarations against penal interest offered in civil cases.

In assessing whether corroborating circumstances exist, some courts have focused on the credibility of the witness who relates the hearsay statement in court. But the credibility of the witness who relates the statement is not a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses.

II. Explanation

Rule 804(b) excepts from the hearsay rule certain statements made by a declarant who is unavailable to testify as a witness. Rule 804(b)(3) establishes a hearsay exception for statements made by an unavailable declarant, which are against the declarant's pecuniary or proprietary interests, or which can subject the declarant to civil or criminal liability. If the statement tends to expose the declarant to criminal liability and is offered to exculpate the accused, it is admissible under the rule only if corroborating circumstances are shown that clearly indicate the statement's trustworthiness. The proposed amendments to Rule 804(b)(3) level the playing field and require the government to show circumstances that corroborate the veracity of an unavailable declarant's statement against penal interest *inculpating* the accused as a condition for admission.

III. Background and Purposes

The current rule was aimed at preventing an accused from enlisting the help of a declarant who could confess to a crime without assuming any risk because all the evidence was directed at the accused, or the declarant could protect his interests simply by invoking the privilege against self-incrimination. But the rule does not subject statements inculpating an accused to the same corroborating-circumstances reliability standard. The asymmetrical requirement has been assailed as unfair, unwarranted, and possibly unconstitutional, because it requires only the defendant to provide corroborating circumstances indicating the trustworthiness of a declaration against penal interest. The same conditions for admission do not apply to declarations made by a prosecution witness inculpating the accused.

Despite the text of the rule, which does not impose the requirement, a number of courts have imposed the corroborating-circumstances requirement to declarations against penal interest offered by the prosecution (*see United States v. Alvarez, 584 F.2d 694 (5th Cir. 1978)* ; *United States v. Franklin, 415 F.3d 537, 547 (6th Cir. 2005))* . But the case law is not uniform. Other courts have not addressed the issue or have expressed inconsistent positions (*compare United States v. Casamento, 887 F.2d 1141 (2d Cir. 1989)* (requires corroborating circumstances) with *United States v. Bakhtiar, 994 F.2d 970 (2d Cir. 1993)* (corroborating circumstances not required for statements offered by prosecution).

The proposed amendments establish a uniform standard, which assures both the prosecution and the accused that the rule will not be abused and that only reliable hearsay statements will be admitted under the exception. The amendments resolve the split in the case law between courts that require corroborating circumstances indicating the trustworthiness of statements by a prosecution witness and courts that do not recognize a corroborating circumstances requirement.

Though the Department of Justice did not--in the end--oppose the amendments, it initially argued that the standard was not required because statements against penal interest inculpating the accused were subject to a separate constitutional *Confrontation Clause* standard of reliability based on "particularized guarantees of trustworthiness." The advisory committee recognized that the *Confrontation Clause* at that time required that a declaration inculpating an accused must meet the standard of reliability, but the extant rule did not include a provision explicitly requiring any showing of trustworthiness. The committee was concerned that an accused's counsel might not be aware of the *Confrontation Clause* reliability requirement and, without a specific reference in the rule, the accused might fail to timely object to the admission of the declaration against penal interest, inadvertently waiving the protection.

The advisory committee decided to recommend that the rule be amended to require "particularized guarantees of trustworthiness." While the proposed amendments were pending Supreme Court review in the course of the rulemaking process, however, the Court issued its opinion in *Crawford v. Washington, 541 U.S. 36, 53-54 (2004)* , which shifted the focus from the "reliability" of a declaration to a focus on whether the hearsay was testimonial. Courts after *Crawford* have held that a statement against penal interest is admissible under Rule 804(b)(3) only if made in informal circumstances and not knowingly to a law enforcement officer--the same requirements of admissibility announced in *Crawford*.

In light of *Crawford*, the Supreme Court recommitted the amendments to the advisory committee for further consideration. A few months later, the Supreme Court issued another opinion that addressed the admissibility of statements against penal interest. In *Whorton v. Bockting, 549 U.S. 406 (2006)* , the Court found that the *Confrontation Clause* does not require a showing of particularized guarantees of trustworthiness for government-offered statements in nontestimonial situations. In other words, the *Confrontation Clause* provides no protection against unreliable hearsay if the hearsay is nontestimonial. ("Under *Crawford*, on the other hand, the *Confrontation Clause* has no application to such statements and therefore permits their admission even if they lack indicia of reliability." *Id. at 420* .) The prosecution would have to show only that a statement tends to disserve the declarant's interest to be admitted under the rule. As a result, the need to amend Rule 804(b)(3) to require a standard of reliability became more apparent.

The case law since *Crawford* has made it clear that a statement that is inadmissible under Rule 804(b)(3) would also be inadmissible under *Crawford* and vice-versa. Statements made against penal interest to a law-enforcement officer that are inadmissible because they are testimonial under *Crawford* are also inadmissible under Rule 804(b)(3) because they are self-serving and unreliable. Statements that are inadmissible under the rule because they are insufficiently disserving are also inadmissible because they are testimonial under *Crawford*. Only non-testimonial statements made to friends or acquaintances can be admissible under the rule. And the corroborating circumstances requirement is intended to ensure their reliability.

The rule has required corroborating circumstances to support the admission of exculpating statements made against interest. But there is some confusion about the meaning of "corroborating circumstances" in the case law (*see United*

States v. Garcia, 897 F.2d 1413, 1420 (7th Cir. 1990) (meaning of corroborating circumstances is unclear). In addition, there is inconsistent case law on what supporting evidence can be proffered to show corroborating circumstances. Some courts consider independent evidence supporting or contradicting a declarant's statement when assessing the corroborating circumstances requirement (*see United States v. Mines, 894 F.2d 403 (4th Cir. 1990)* (court considers independent evidence). Other courts consider independent corroborative evidence to be irrelevant and focus exclusively on the circumstances in which the statement was made (*see United States v. Barone, 114 F.3d 1284, 1300 (1st Cir. 1997)* . The advisory committee recognized that proffering independent corroborative "evidence" was a common means of verifying the veracity of a statement and that it should be considered in determining whether the corroborative circumstances requirement has been met, but the committee decided *not* to take a position on the issue either in the text of the rule or the Committee Note.

Though the rule does not address the meaning of "corroborating circumstances," case law identifies several factors that may be useful in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement (*see United States v. Bumpass, 60 F.3d 1099, 1102 (4th Cir. 1995)* . The factors include the following:

1. the timing and circumstances under which the statement was made;

2. the declarant's motive in making the statement and whether there was a reason for the declarant to lie;

3. whether the declarant repeated the statement and did so consistently, even under different circumstances;

4. the party or parties to whom the statement was made;

5. the relationship between the declarant and the opponent of the evidence; and

6. the nature and strength of independent evidence relevant to the conduct in question.

In accordance with longstanding principles, however, the credibility of a witness testifying about a hearsay statement against penal interest is not a proper factor for the court to consider in assessing corroborating circumstances. Determining the credibility of a testifying witness lies within the province of the jury. The credibility of an in-court witness is never relevant in determining the admissibility of any hearsay statement.

The advisory committee also considered whether the corroborating circumstances requirement should apply in civil cases. A few reported cases have applied the corroborating circumstances requirement to civil cases (*see American Auto. Accessories, Inc. v. Fishman, 175 F.3d 534 (7th Cir. 1999)* . The committee concluded that no change to extend the requirement to civil cases was appropriate because the case law was not sufficiently developed.

IV. Advisory Committee Materials

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