15 • illegality;

16 • injury by fellow servant;

17 • laches;

18 • license;

19 • payment;

20 • release;

21 • res judicata;

22 • statute of frauds;

23 • statute of limitations; and

24 • waiver.

25 * * * * *

Committee Note

Subdivision (c)(1). "[D]ischarge in bankruptcy" is deleted from the list of affirmative defenses. Under 11 U.S.C. § 524(a)(1) and (2) a discharge voids a judgment to the extent that it determines a personal liability of the debtor with respect to a discharged debt. The discharge also operates as an injunction against commencement or continuation of an action to collect, recover, or offset a discharged debt. For these reasons it is confusing to describe discharge as an affirmative defense. But § 524(a) applies only to a claim that was actually discharged. Several categories of debt set out in 11 U.S.C. § 523(a) are excepted from discharge. The issue whether a claim was

excepted from discharge may be determined either in the court that entered the discharge or — in most instances — in another court with jurisdiction over the creditor's claim.

Changes Made After Publication and Comment

No changes were made in the rule text.

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

COMMITTEE NOTE SHOWING REVISIONS

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

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

1 **(a) Required Disclosures.**

2 * * * * *

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

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

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

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

14 and signed by the witness — if the witness is
15 one retained or specially employed to provide
16 expert testimony in the case or one whose
17 duties as the party's employee regularly
18 involve giving expert testimony. The report
19 must contain:
20 **(i)** a complete statement of all opinions the
21 witness will express and the basis and
22 reasons for them;
23 **(ii)** the facts or data ~~or other information~~
24 considered by the witness in forming
25 them;
26 **(iii)** any exhibits that will be used to
27 summarize or support them;
28 **(iv)** the witness's qualifications, including a
29 list of all publications authored in the
30 previous 10 years;

31 **(v)** a list of all other cases in which, during
32 the previous 4 years, the witness
33 testified as an expert at trial or by
34 deposition; and
35 **(vi)** a statement of the compensation to be
36 paid for the study and testimony in the
37 case.
38 **(C)** *Witnesses Who Do Not Provide a Written*
39 *Report.* Unless otherwise stipulated or
40 ordered by the court, if the witness is not
41 required to provide a written report, this ~~the~~
42 ~~Rule 26(a)(2)(A)~~ disclosure must state:
43 **(i)** the subject matter on which the witness
44 is expected to present evidence under
45 Federal Rule of Evidence 702, 703, or
46 705; and

47 (ii) a summary of the facts and opinions to
48 which the witness is expected to testify.
49 **(D~~C~~)** *Time to Disclose Expert Testimony.* A
50 party must make these disclosures at the
51 times and in the sequence that the court
52 orders. Absent a stipulation or a court
53 order, the disclosures must be made:
54 **(i)** at least 90 days before the date set for
55 trial or for the case to be ready for trial;
56 or
57 **(ii)** if the evidence is intended solely to
58 contradict or rebut evidence on the
59 same subject matter identified by
60 another party under Rule 26(a)(2)(B) or
61 (C), within 30 days after the other
62 party's disclosure.

63 **(ED)** *Supplementing the Disclosure.* The
64 parties must supplement these
65 disclosures when required under Rule
66 26(e).
67 * * * * *
68 **(b) Discovery Scope and Limits.**
69 * * * * *
70 **(3)** ***Trial Preparation: Materials.***
71 **(A)** *Documents and Tangible Things.* Ordinarily,
72 a party may not discover documents and
73 tangible things that are prepared in
74 anticipation of litigation or for trial by or for
75 another party or its representative (including
76 the other party's attorney, consultant, surety,
77 indemnitor, insurer, or agent). But, subject to
78 Rule 26(b)(4), those materials may be
79 discovered if:

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

97 subject matter. If the request is refused, the
98 person may move for a court order, and Rule
99 37(a)(5) applies to the award of expenses. A
100 previous statement is either:
101 **(i)** a written statement that the person has
102 signed or otherwise adopted or
103 approved; or
104 **(ii)** a contemporaneous stenographic,
105 mechanical, electrical, or other
106 recording — or a transcription of it —
107 that recites substantially verbatim the
108 person's oral statement.
109 **(4)** ***Trial Preparation: Experts.***
110 **(A)** *Deposition of an Expert Who May Testify.* A
111 party may depose any person who has been
112 identified as an expert whose opinions may
113 be presented at trial. If Rule 26(a)(2)(B)

114 requires a report from the expert, the
115 deposition may be conducted only after the
116 report is provided.
117 **(B)** *Trial-Preparation Protection for Draft*
118 *Reports or Disclosures.* Rules 26(b)(3)(A)
119 and (B) protect drafts of any report or
120 disclosure required under Rule 26(a)(2),
121 regardless of the form in which ~~of~~ the draft is
122 recorded.
123 **(C)** *Trial-Preparation Protection for*
124 *Communications Between a Party's Attorney*
125 *and Expert Witnesses.* Rules 26(b)(3)(A) and
126 (B) protect communications between the
127 party's attorney and any witness required to
128 provide a report under Rule 26(a)(2)(B),
129 regardless of the form of the

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

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

163 **(ii)** for discovery under (D~~B~~), also pay the
164 other party a fair portion of the fees and
165 expenses it reasonably incurred in
166 obtaining the expert's facts and
167 opinions.
168 * * * * *

Committee Note

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

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

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

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

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

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

detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

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

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

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

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

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

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

Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed. These discovery changes therefore do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and related cases.

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

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

First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert's study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by a person or

organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.

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

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

Under the amended rule, discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii) — that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. A party's failure to provide required disclosure or discovery does not show the need and hardship required by Rule 26(b)(3)(A); remedies are provided by Rule 37.

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

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

Changes Made After Publication and Comment

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

~~**Rule 56. Summary Judgment**~~

1 ~~**(a) By a Claiming Party.** A party claiming relief may~~

2 ~~move, with or without supporting affidavits, for~~

3 ~~summary judgment on all or part of the claim. The~~

4 ~~motion may be filed at any time after:~~

5 ~~(1) 20 days have passed from commencement of the~~
6 ~~action; or~~
7 ~~(2) the opposing party serves a motion for summary~~
8 ~~judgment.~~
9 ~~**(b) By a Defending Party.** A party against whom relief is~~
10 ~~sought may move at any time, with or without~~
11 ~~supporting affidavits, for summary judgment on all or~~
12 ~~part of the claim.~~
13 ~~**(c) Serving the Motion; Proceedings.** The motion must be~~
14 ~~served at least 10 days before the day set for the hearing.~~
15 ~~An opposing party may serve opposing affidavits before~~
16 ~~the hearing day. The judgment sought should be~~
17 ~~rendered if the pleadings, the discovery and disclosure~~
18 ~~materials on file, and any affidavits show that there is no~~
19 ~~genuine issue as to any material fact and that the movant~~
20 ~~is entitled to judgment as a matter of law.~~
21 ~~**(d) Case Not Fully Adjudicated on the Motion.**~~

22 ~~(1) ***Establishing Facts.*** If summary judgment is not~~
23 ~~rendered on the whole action, the court should, to~~
24 ~~the extent practicable, determine what material~~
25 ~~facts are not genuinely at issue. The court should~~
26 ~~so determine by examining the pleadings and~~
27 ~~evidence before it and by interrogating the~~
28 ~~attorneys. It should then issue an order specifying~~
29 ~~what facts — including items of damages or other~~
30 ~~relief — are not genuinely at issue. The facts so~~
31 ~~specified must be treated as established in the~~
32 ~~action.~~
33 ~~(2) ***Establishing Liability.*** An interlocutory summary~~
34 ~~judgment may be rendered on liability alone, even~~
35 ~~if there is a genuine issue on the amount of~~
36 ~~damages.~~
37 ~~**(e) Affidavits; Further Testimony.**~~

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

55 ~~the opposing party does not so respond, summary~~
56 ~~judgment should, if appropriate, be entered against~~
57 ~~that party.~~
58 ~~**(f) When Affidavits Are Unavailable.** If a party opposing~~
59 ~~the motion shows by affidavit that, for specified reasons,~~
60 ~~it cannot present facts essential to justify its opposition,~~
61 ~~the court may:~~
62 ~~(1) deny the motion;~~
63 ~~(2) order a continuance to enable affidavits to be~~
64 ~~obtained, depositions to be taken, or other~~
65 ~~discovery to be undertaken; or~~
66 ~~(3) issue any other just order.~~
67 ~~**(g) Affidavit Submitted in Bad Faith.** If satisfied that an~~
68 ~~affidavit under this rule is submitted in bad faith or~~
69 ~~solely for delay, the court must order the submitting~~
70 ~~party to pay the other party the reasonable expenses,~~
71 ~~including attorney's fees, it incurred as a result. An~~

72 ~~offending party or attorney may also be held in~~

73 ~~contempt.~~

74 **Rule 56. Summary Judgment**

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

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

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

78 claim or defense — on which summary judgment is

79 sought. The court shall grant summary judgment if the

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

81 material fact and the movant is entitled to judgment as

82 a matter of law. The court should state on the record the

83 reasons for granting or denying the motion.

84 **(b) Time to File a Motion.** Unless a different time is set by

85 local rule or the court orders otherwise, a party may file

86 a motion for summary judgment at any time until 30

87 days after the close of all discovery.

88 (c) **Procedures.**

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

92 **(A)** citing to particular parts of materials in the
93 record, including depositions, documents,
94 electronically stored information, affidavits
95 or declarations, stipulations (including those
96 made for purposes of the motion only),
97 admissions, interrogatory answers, or other
98 materials; or

99 **(B)** showing that the materials cited do not
100 establish the absence or presence of a
101 genuine dispute, or that an adverse party
102 cannot produce admissible evidence to
103 support the fact.

104 (2) ***Objection That a Fact Is Not Supported by***
105 ***Admissible Evidence.*** A party may object that the
106 material cited to support or dispute a fact cannot be
107 presented in a form that would be admissible in
108 evidence.
109 (3) ***Materials Not Cited.*** The court need consider only
110 the cited materials, but it may consider other
111 materials in the record.
112 (4) ***Affidavits or Declarations.*** An affidavit or
113 declaration used to support or oppose a motion
114 must be made on personal knowledge, set out facts
115 that would be admissible in evidence, and show
116 that the affiant or declarant is competent to testify
117 on the matters stated.
118 (d) **When Facts Are Unavailable to the Nonmovant.** If a
119 nonmovant shows by affidavit or declaration that, for

120 specified reasons, it cannot present facts essential to
121 justify its opposition, the court may:
122 (1) defer considering the motion or deny it;
123 (2) allow time to obtain affidavits or declarations or to
124 take discovery; or
125 (3) issue any other appropriate order.
126 (e) **Failing to Properly Support or Address a Fact.** If a
127 party fails to properly support an assertion of fact or
128 fails to properly address another party's assertion of fact
129 as required by Rule 56(c), the court may:
130 (1) give an opportunity to properly support or address
131 the fact;
132 (2) consider the fact undisputed for purposes of the
133 motion;
134 (3) grant summary judgment if the motion and
135 supporting materials — including the facts

136 considered undisputed — show that the movant is
137 entitled to it; or
138 (4) issue any other appropriate order.
139 (f) **Judgment Independent of the Motion.** After
140 giving notice and a reasonable time to respond, the
141 court may:
142 (1) grant summary judgment for a nonmovant;
143 (2) grant the motion on grounds not raised by a party;
144 or
145 (3) consider summary judgment on its own after
146 identifying for the parties material facts that may
147 not be genuinely in dispute.
148 (g) **Failing to Grant All the Requested Relief.** If the court
149 does not grant all the relief requested by the motion, it
150 may enter an order stating any material fact — including
151 an item of damages or other relief — that is not

152 genuinely in dispute and treating the fact as established

153 in the case.

154 **(h) Affidavit or Declaration Submitted in Bad Faith.** If

155 satisfied that an affidavit or declaration under this rule

156 is submitted in bad faith or solely for delay, the court —

157 after notice and a reasonable time to respond — may

158 order the submitting party to pay the other party the

159 reasonable expenses, including attorney's fees, it

160 incurred as a result. An offending party or attorney may

161 also be held in contempt or subjected to other

162 appropriate sanctions.

Committee Note

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

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

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

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

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

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

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

Subdivision (b). The timing provisions in former subdivisions (a) and (c) are superseded. Although the rule allows a motion for summary judgment to be filed at the commencement of an action, in many cases the motion will be premature until the nonmovant has had

time to file a responsive pleading or other pretrial proceedings have been had. Scheduling orders or other pretrial orders can regulate timing to fit the needs of the case.

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

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

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

Subdivision (c)(1)(B) recognizes that a party need not always point to specific record materials. One party, without citing any other materials, may respond or reply that materials cited to dispute or

support a fact do not establish the absence or presence of a genuine dispute. And a party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact.

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

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

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

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

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

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

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

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

Subdivision (e)(3) recognizes that the court may grant summary judgment only if the motion and supporting materials — including the facts considered undisputed under subdivision (e)(2) — show that the movant is entitled to it. Considering some facts undisputed does

not of itself allow summary judgment. If there is a proper response or reply as to some facts, the court cannot grant summary judgment without determining whether those facts can be genuinely disputed. Once the court has determined the set of facts — both those it has chosen to consider undisputed for want of a proper response or reply and any that cannot be genuinely disputed despite a procedurally proper response or reply — it must determine the legal consequences of these facts and permissible inferences from them.

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

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

Subdivision (g). Subdivision (g) applies when the court does not grant all the relief requested by a motion for summary judgment. It becomes relevant only after the court has applied the summary-judgment standard carried forward in subdivision (a) to each claim, defense, or part of a claim or defense, identified by the motion. Once that duty is discharged, the court may decide whether to apply the summary-judgment standard to dispose of a material fact that is not

genuinely in dispute. The court must take care that this determination does not interfere with a party's ability to accept a fact for purposes of the motion only. A nonmovant, for example, may feel confident that a genuine dispute as to one or a few facts will defeat the motion, and prefer to avoid the cost of detailed response to all facts stated by the movant. This position should be available without running the risk that the fact will be taken as established under subdivision (g) or otherwise found to have been accepted for other purposes.

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

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

Changes Made After Publication and Comment

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

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

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

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

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

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

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

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

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

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

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

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