AMENDMENTS TO
FEDERAL RULES OF CIVIL PROCEDURE
FEDERAL RULES OF CRIMINAL PROCEDURE
FEDERAL RULES OF EVIDENCE
AND
LOCAL (CIVIL) RULES, DISTRICT OF ALASKA
LOCAL CRIMINAL RULES, DISTRICT OF ALASKA
LOCAL HABEAS CORPUS RULES, DISTRICT OF ALASKA
LOCAL MAGISTRATE RULES, DISTRICT OF ALASKA

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Prepared by:
Thomas J. Yerbich, Esq.
Court Rules Attorney
U.S. District Court, District of Alaska

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Rule 8 "General Rules of Pleading"is amended in subdivision (c) to delete discharge in bankruptcy as an affirmative defense that must be pleaded.

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.

Rule 26 "Duty to Disclose; General Provisions Governing Discovery" is amended to address disclosure and discovery with respect to expert witnesses. One part creates a new requirement to disclose a summary of the facts and opinions to be addressed by an expert witness who is not required to provide a disclosure report under Rule 26(a)(2)(B). The other part extends work-product protection to drafts of the new disclosure and also to drafts of 26(a)(2)(B) reports. It also extends work-product protection to communications between attorney and trial witness expert, but withholds that protection from three categories of communications. The work-product protection does not apply to communications that relate to compensation for the expert's study or testimony; identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

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

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

The advantages hoped to be gained from Rule 26(a)(2)(B) reports so impressed several courts that they have ruled that experts not described in Rule 26(a)(2)(B) must provide (a)(2)(B) reports. The problem is that attorneys may find it difficult or impossible to obtain an (a)(2)(B) report from many of these experts, and there may **be** good reason for an expert's resistance. Common examples

of experts in this category include treating physicians and government accident investigators. They are busy people whose careers are devoted to causes other than giving expert testimony. On the other hand, it is useful to have advance notice of the expert's testimony.

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

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

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

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

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

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

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

witnesses, are virtually immune from discovery. A party who cannot afford this expense may be put at a disadvantage.

Proposed Rules 26(a)(4)(B) and (C) address these problems by extending work-product protection to drafts of (a)(2)(B) and (C) disclosures or reports and to many forms of attorney-expert communications. The proposed amendment of Rule 26(a)(2)(B)(ii) complements these provisions by amending the reference to "'information" that has supported broad interpretation of the 1993 Committee Note: the expert's report is to include "the facts or data ~~or other information~~ considered **by** the witness" in forming the opinions. The proposals rest not on high theory but on the realities of actual experience with present discovery practices.

Rule 26. Duty to Disclose; General Provisions Governing Discovery
(a) Required Disclosures.

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(2) Disclosure of Expert Testimony.

(A) *In General.* In addition to the disclosures 5 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 considered by the witness in forming them;
- **(iii)** any exhibits that will be used to summarize or support them;
- **(iv)** the witness's qualifications, including a list of all publications authored in the previous 10 years;
- **(v)** a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- **(vi)** a statement of the compensation to be 36 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.

[NOTE: Current subdivisions (C) and (D) are re-designated (D) and (E), respectively, without substantive change except that "new" (D)(ii) has been amended to include Rule 26(a)(2)(C) within the time that rebuttal evidence must be disclosed.]

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(b) Discovery Scope and Limits.

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(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 upon in forming the opinions to be expressed.

[NOTE: Current subdivisions (B) and (C) are re-designated (D) and (E) respectively without substantive change except the reference in new paragraph (E)(1) to Rule 26(b)(4)(A) or (B) has been changed to refer to Rule 26(b)(4)(A) or (D)]

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).

Rule 56 "Summary Judgment" has been extensively revised and restructured.

"Shall" Restored

The conventions adopted **by** the Style Project prohibited any use of "shall" because it is inherently ambiguous. The permitted alternatives were "must," "should," and — although infrequently — "may." Faced with these choices, the Style Project adopted "should."

From the beginning and throughout, the Rule 56 project was shaped by the premise that it would be a mistake to attempt to revise the summary-judgment standard that has evolved through case-law interpretations. There is a great risk -indeed a virtual certainty -that adoption of either "must" or "should" will gradually cause the summary-judgment standard to evolve in directions

different from those that have been charted under the "shall" direction. The Style Project convention must yield here, even if nowhere else in any of the Enabling Act rules.

Subdivision (a)

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

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

"If the movant shows": From the beginning in 1938, Rule 56 has directed that summary judgment be granted if the summary-judgment materials "show" there is no genuine issue of material fact.

"Show" is carried forward for continuity, and because it serves as an important reminder of the Supreme Court's statement in the *Celotex* opinion that a party who does not have the burden of production at trial can win summary judgment by "showing" that the nonmovant does not have evidence to carry the burden.

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

Subdivision (b)

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

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

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

Subdivision (c)

Point-Counterpoint: The major change in subdivision (c) is elimination of the point-counterpoint provisions of (c)(2), as explained above. The other subdivisions have been rearranged to reflect this change.

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

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

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

Accept for purposes of motion only: Subdivision (c)(3) of the published proposal provided that "A party may accept or dispute a fact either generally or for purposes of the motion only." This provision is withdrawn. It was added primarily out of concern for early reports that point-counterpoint procedure may elicit inappropriately long statements of undisputed facts. A party facing such a statement might conclude that many of the stated facts are not material and that it is more efficient and less expensive simply to accept them for purposes of the motion rather than undertake the labor of attacking the materials said to support the facts and combing the record for counterpoint citations. Elimination of the point-counterpoint proposal removes the primary reason for including this provision. The provision, moreover, creates a tension with subdivision (g). Subdivision (g) provides that if the court does not grant all the relief requested by the motion, it may order that a material fact is not genuinely disputed and is established in the case. Several comments expressed fear that no matter how carefully hedged, an acceptance for purposes of the motion might become the basis for an order that there is no genuine dispute as to a fact accepted "for purposes of the motion." The advantages of recognizing in rule text the value of accepting a fact for purposes of the motion only do not seem equal to the difficulties of drafting to meet this risk. The Committee Note to Subdivision **(g)** addresses the issue.

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

Subdivision (d)

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

Subdivision (e)

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

Subdivision (f)

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

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

Subdivision (g)

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

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

Subdivision (h)

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

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

Rule 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record

the reasons for granting or denying the motion.

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

(c) Procedures.

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

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

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

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

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

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

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

(1) defer considering the motion or deny it;

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

(3) issue any other appropriate order.

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

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

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

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

(4) issue any other appropriate order.

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

(1) grant summary judgment for a nonmovant;

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

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

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

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

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.

LOCAL (CIVIL) RULES

Rule 5.3 "Electronic Case Filing" – Subsection (a) amended by deleting the reference to January 3, 2006, in ¶ (1) and deleting ¶ (2) in its entirety. The deleted materials have become obsolete and superfluous. This amendment also resulted in the elimination of paragraphs within the subsection.

Subsection (c) amended to make electronic filing mandatory for all attorneys appearing in the case, whether admitted, appearing *pro hac vice*, or federal government attorneys not admitted to practice.

Rule 5.3 Electronic Case Filing
(a) **Cases Assigned to CM/ECF System**. Except as otherwise provided by this rule or order of the court, all pleadings, papers, and documents filed in all civil cases in this district must be filed electronically utilizing the Case Management/Electronic Case Filing ("CM/ECF") System.

* * * *

(c) **Registration.**

(1) *Password*.

[A] (i) Each attorney admitted to practice under D.Ak LR 83.1(c) or appearing under D.Ak LR 83.1(d) or (e), who files pleadings, documents, or papers in cases assigned to the CM/ECF system, must obtain a CM/ECF System password to permit the attorney to participate in the electronic retrieval and filing of pleadings and other papers in accordance with the CM/ECF System electronic filing procedures.

Rule 5.4 "Filing Documents Under Seal, *Ex Parte* or *In Camera*" – Subsection (d) amended to extend the requirement for including the authority for doing so to *ex parte* filings.

Rule 5.4 Filing Documents Under Seal, *Ex Parte*, or *In Camera*
(d) **Notation in Caption**. A document filed under seal or *ex parte* must include in the caption immediately below the title of the document the notation "Filed (Under Seal/*Ex Parte*) per (authority for filing under seal/*ex parte*)."

Rule 7.1 "Motion Prac tice" – Added new subsection (d) covering citations or references to materials not readily available to the public in printed form or to material readily accessible electronically on the internet. A copy of the cited or referenced materials must be appended to the pleading or paper filed. In addition the date of the material, or the date last viewed, must be provided. The party must also file a separate motion that the court take judicial notice of the cited or referenced material governed by the subsection. Current subdivisions (d) through (k) re-designated (e) through (l), respectively.

Paragraph (f)(1) amended to include reference to Rule 56. The 2010 amendment to Fed. R. Civ. P. 56, eliminated subsection (c), which provided the response times for summary judgment motions. In order to provided continuity and avoid confusion, because this district adopted two time standards for dispositive and non-dispositive motions in civil cases, this amendment became necessary. *No substantive change in current practice is intended by this amendment*.

Added new ¶ (f)(3) permitting the parties to increase the time by stipulation, without further court approval, for opposing and replying to oppositions to motions by 14 and 7 days, respectively.

Other amendments were non-substantive grammatical or stylistic only.

Rule 7.1 Motion Practice

* * * *

(d) **Citation of or Reference to Materials not Readily Available in Print**.

(1) Where citation or reference is made to materials or information not readily available to the public in printed form, or to an internet site, the citing party must attach a copy as an exhibit to the motion.

(2) The party referring to or citing material must file a separate motion that the court take judicial notice of the materials or information cited under Federal Rules of Evidence, Rule 201.

(3) The copy appended to the motion must clearly delineate on the first page thereof:

[A] the source of the material or information; and

[B] the date the material was obtained or last viewed.

* * * *

(f) **Time Limits**. Unless otherwise ordered by the court, provided by statute, or rule:

(1) for motions brought under Federal Rule of Civil Procedure 12(b),12(c), and 56, an opposition must be served and filed within twenty-one (21) days of service of the motion, and a reply, if any, within fourteen (14) days of service of the opposition;

(2) for all other motions, an opposition must be served and filed within fourteen (14) days of service of the motion, and a reply, if any, within seven (7) days of service of the opposition.

(3) The parties may, by stipulation filed with the court and without further order of the court, extend the time for filing an opposition by not more than fourteen (14) days and a reply, if any, by not more than seven (7) days.

Rule 7.3 "Telephonic Participation in Civil Cases" – Subsection (b) amended to reflect the changes in procedure required by current courtroom telephonic technology and equipment. The designation of the "Meet Me Bridge" telephone number to be utilized by the parties will be provided at the time the matter is set for telephonic participation by one, or more, of the parties.

Rule 7.3 Telephonic Participation in Civil Cases

(b) **Procedure.** The following procedure is to be observed concerning telephonic participation in court hearings.

(1) When telephonic participation is requested and granted, at the time the case is set for telephonic hearing the court will inform the parties of the "Meet Me Bridge" telephone number the party(ies) is(are) to call not less than five (5) minutes before the scheduled hearing time.

(2) Upon convening a telephonic proceeding, the judge or the court reporter will:

[A] recite the case name, case number, names and locations of parties and counsel, and the type of hearing;

[B] ascertain that all statements of all parties are audible to all participants; and

[C] give instructions on how the hearing is to be conducted, including notice that in order to preserve the record speakers must identify themselves each time they speak.

(3) A verbatim record must be made in accordance with D. Ak. LR 80.1.

Rule 10.1 "Form of Pleadings, Motions, and Other Papers" – Paragraph (a)(3) amended by designating the current paragraph as subparagraph [A] and adding subparagraph [B] providing that an electronically filed document must be word searchable. This requirement applies to documents or papers filed electronically, whether the document is converted to Acrobat format from a word processing program, *e.g.*, WordPerfect® or Word®, or scanned into Acrobat® format.

Subsection (i) renamed to more accurately describe its intent. Paragraph (1) requiring pinpoint cites to support factual assertions in all motions is adapted from Fed. R. Civ. P. 56(c)(1) (effective December 1, 2010). Paragraph (i)(2) is current subdivision (i) without substantive change with the proviso that the document cited be available on the CM/ECF system. This recognizes that in those situations in which the document cited is not yet available on the CM/ECF system is not possible to cite to the CM/ECF assigned document identifier.

Subdivision (m) is amended to increase the number of pages allowed for principal and reply briefs in dispositive motions under Fed. R. Civ. P. 12(b), (c) and 56 from 25 and 15 to 50 and 25, respectively. The length for all other motions remains 25 and 15 pages. This recognizes that in many instances, dispositive motions are of a nature that 25 pages is simply insufficient. This amendment should reduce the number of requests to file over-length briefs.

Rule 10.1 Form of Pleadings, Motions and Other Papers

(a) **Form in General**.

* * * *

(3) Electronically filed documents must be:
[A] in Adobe Acrobat Portable Document Format (".pdf"); and
[B] word searchable.

* * * *

(i) **Supporting Factual Positions**.

(1) A party asserting a fact in a motion must support the assertion by 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.

(2) A reference to a specific part of another pleading, motion, or paper in the record must, when available, include the document number and page assigned by the CM/ECF System.

* * * *

(m) **Length**. Unless otherwise ordered, principal briefs or memoranda of law in civil and criminal cases (including appeals) may not exceed:

(1) for motions brought under Federal Rule of Civil Procedure 12(b), (c), and 56, fifty (50) pages and replies twenty-five (25) pages; and

(2) for all other motions, twenty-five (25) pages and replies may not exceed fifteen (15) pages.

The page limitations in this subdivision are exclusive of pages containing a table of contents, table of citations, or reproductions of statutes, rules, regulations, ordinances, *etc.*

Rule 12.1 "Motion for Judgment on The Pleadings: Time to File" – [New] Sets the time within which a motion for judgment on the pleadings must be filed. The purpose of this provision is to resolve matters that can be disposed of sufficiently early in the proceedings to minimize unnecessary discovery.

Rule 12.1 Motion for Judgment on the Pleading: Time to File

Unless otherwise ordered by the court, motions for judgment on the pleadings must be filed not later than 60 days after the later of the date—

(1) the last pleading allowed is filed, or

(2) the moving party is served with an amended pleading.

Rule 16.1 " – Paragraph (c)(8) amended to delete the reference to dispositive motions. This amendment is necessitated to avoid any conflict with the amendment to Fed. R. Civ. 56(b) (effective December 1, 2010), which provides that a motion for summary judgment may be filed at any time until 30 days after the close of discovery. This amendment will not affect current practice. [Note: Although Rule 56(b) permits a district court to set a different time, a local rule is considered in conflict with a national rule when it essentially parrots a national rule. Failure to amend paragraph (c)(8) would likely run afoul of this application of the conflict rule.]

Rule 33.1 "Excess Interrogatories; Duty to Answer" – [New] Intended to expedite the discovery process. In the past, when served with an excessive number of interrogatories, some parties have waited until the last day to interpose an objection to all the interrogatories, thereby delaying the entire discovery process. Under the proposed rule, the receiving party is required to respond to the first number of interrogatories that does not exceed the maximum allowed by either answering the interrogatory or interposing an objection (other than that the number of interrogatories exceeds the maximum permitted). For example, if a party is served with 35 interrogatories, the receiving party must respond to the first 25 (assuming a greater number is not allowed by stipulation or court order) and may interpose an objection to the last 10 on the basis that the number exceeds the maximum allowed.

The receiving party may, however, waive the excess number objection and answer all or some of the excess interrogatories as the receiving party may, at its option, desire. The court will not generally treat the option of a party to answer excess interrogatories as waiving the objection except as to those interrogatories to which the party has responded other than objecting on the grounds that the number of interrogatories exceeds the maximum allowed.

Rule 33.1 Excess Interrogatories: Duty to Answer

(a) **Duty to Answer**. In the event that a party is served with a number of interrogatories in excess of the number permitted under Federal Rule of Civil Procedure Rule 33(a)(1), the stipulation of the parties, or the order of the court, the receiving party must answer or otherwise interpose an objection, other than an objection that the number of interrogatories exceeds the maximum allowed, to the first number of interrogatories that do not exceed the maximum number allowed.

(**b) Response to Excess Interrogatories**. The party receiving the interrogatories may, as to each excess interrogatory at the option of the party receiving the interrogatories, either:

(1) answer the interrogatory; or
(2) object to the interrogatory by signifying "Objection. *See* Rule 33(a)(1)."

Rule 37.1 "Discovery Motions" – Subsection (b) amended to make clear that the order to be entered under Fed. R. Civ. P. 37 is an order imposing sanctions.

Rule 37.1 Discovery Motions

* * * *

(b) **Standard for Imposition of Sanctions**. Prior to entering an order imposing sanctions under Rule 37, Federal Rules of Civil Procedure, the court will consider:

(1) the nature of the violation, including the willfulness of the conduct and the materiality of the information the party refused to disclose;

(2) the prejudice to the opposing party;

(3) the relationship between the information the party refused to disclose and the proposed sanction;

(4) whether a lesser sanction would adequately protect the opposing party and deter other discovery violations; and

(5) other factors deemed appropriate by the court or required by law.

Rule 39.3 "Exhibits"– Technical amendment to substitute "Data Quality Analyst" for "Case Management Clerk" in ¶ (c)(1) due to change in position title. No substantive change intended.

Rule 54.1 "Taxation of Costs" – Paragraph (e)(3) amended to eliminate the requirement that recovery of the costs of audio-visual depositions is limited to those ordered by the court or stipulated to by the parties to eliminate the conflict with 28 U.S.C. § 1920(2). *See also* Fed. R. Civ. P. 30(b)(3) (authorizing the use of audio-visual depositions without prior court approval.

Rule 54.1 Taxation of Costs

* * * *

(e) **Taxable Costs**. Taxable costs, as set forth by statute with the following clarifications, include:

* * * *

(3) *Deposition costs*. The reporter's charge for a deposition used, including an audio-visual deposition, is taxable.

[A] On a taxed deposition the reasonable expenses of the deposition reporter and the notary or other official presiding at the taking of the deposition are taxable, including travel and subsistence;

[B] all postage costs are taxable;

[C] fees for the witness at the taking of the deposition are taxable at the same rate as for attendance at trial and the witness need not be under subpoena; and

Rule 56.1 – [New] This rule, which basically limits each party to a single Rule 56 motion, is intended to prevent "end runs" around the page limitations of LR 10.1 and piecemeal litigation.

Subdivision (b) is similar to and patterned on Fed. R. Civ. P. 12(g)(2). This provision, which requires good cause for the filing of a successive motion for summary judgment, is consistent with the Ninth Circuit's decision in *Hoffman v. Tonnemacher*, 593 F.3d 908 (9th Cir. 2010).

Rule 56.1 Motion for Summary Judgment
(a) Single Motion. A motion for summary judgment must contain all the grounds upon which the moving party relies and address all causes of action or affirmative defenses raised in the pleading challenged.
(b) Limitation on Further Motions. Except upon leave of court for good cause shown, a party who makes a motion under Rule 56 of the Federal Rules of Civil Procedure must not make another motion under Rule 56 addressing a cause of action or affirmative defense that was available to the party but omitted from its earlier motion.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 12.3 "Notice of a Public-Authority Defense" is amended to provides that a victim's address and telephone number should be disclosed to the defense when a public-authority defense is raised only if the defendant establishes a need for the information. The amendment parallels a similar change made in 2008 to Rule 12.1, dealing with notice of an alibi defense, providing the court with discretion to order disclosure of the information or to fashion an alternative procedure that gives the defendant the information necessary to prepare a defense but also protects the victim's interests. The amendments are consistent with the Crime Victims' Rights Act (18 U.S.C. § 3771).

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 7 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 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

(i) 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.

(A) the disclosing party learns of the witness before or during trial; and

(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

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 prosecutors initial disclosure and the prosecutor's continuing duty to disclose under subdivision (b).

Rule 15 "Depositions" is amended to authorize a deposition taken outside the United States to occur without the defendant's presence in limited circumstances and only if the court makes specific findings. Under the amendment, the trial court must make case-specific findings before allowing such a deposition, including that: (1) the witness's testimony could provide substantial proof of a material fact in a felony prosecution; (2) there is a substantial likelihood the witness's attendance at trial cannot be obtained; (3) the defendant cannot be present at the deposition or it would not be possible to securely transport the defendant to the witness's location for a deposition; and (4) the defendant can meaningfully participate in the deposition through reasonable means. The amendments do not address the admissibility of the testimony produced by such a deposition; courts will continue to resolve that issue in accordance with the Federal Rules of Evidence and the Constitution.

Rule 15. Depositions

* * * *

(e) Defendant's Presence.

(1) ***Defendant in Custody***. Except as authorized by Rule 15(c)(3), the officer who has custody of the defendant must produce the defendant at the deposition and keep

the defendant in the witness's presence during the examination, unless the defendant:

(A) waives in writing the right to be present; or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(2) ***Defendant Not in Custody.*** Except as authorized by Rule 15(c)(3), a ~~A~~ defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant — absent good cause — waives both the right to appear and any objection to the taking and use of the deposition based on that right.

(3) ***Taking Depositions Outside the United States Without the Defendant's Presence.*** The deposition of a witness who is outside the United States may be taken without the defendant's presence if the court makes case-specific findings of all the following:

(A) the witness's testimony could provide substantial proof of a material fact in a felony prosecution;

(B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;

(C) the witness's presence for a deposition in the United States cannot be obtained:

(D) the defendant cannot be present because:

(i) the country where the witness is located will not permit the defendant to attend the deposition:

(ii) for an in-custody defendant. secure transportation and continuing custody cannot be assured at the witness's location; or

(iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and

(E) the defendant can meaningfully participate in the deposition through reasonable means.

COMMITTEE NOTE

Subdivision (c). This amendment addresses the growing frequency of cases in which important witnesses — government and defense witnesses both — live in, or have fled to, countries where they cannot be reached by the court's subpoena power. Although Rule 15 authorizes depositions of witnesses in certain circumstances, the Rule to date has not addressed instances where an important witness is not in the United States, there is a substantial likelihood the witness's attendance at trial cannot be obtained, and it would not be possible to securely transport the defendant or a co-defendant to the witness's location for a deposition.

Recognizing that important witness confrontation principles and vital law enforcement and other public interests are involved in these instances, the amended Rule authorizes a deposition outside a defendant's physical presence only in very limited circumstances where case-specific findings are made by the trial court. New Rule 15(c) delineates these circumstances and the

specific findings a trial court must make before permitting parties to depose a witness outside the defendant's presence.

The party requesting the deposition shoulders the burden of proof — by a preponderance of the evidence — as to the elements that must be shown. Courts have long held that when a criminal defendant raises a constitutional challenge to proffered evidence, the government must generally show, by a preponderance of the evidence, that the evidence is constitutionally admissible. *See, e.g., Lego v. Twomey,* 404 U.S. 477, 489 (1972). Here too, the party requesting the deposition, whether it be the government or a defendant requesting a deposition outside the physical presence of a co-defendant, bears the burden of proof Moreover, if the witness's presence for a deposition in the United States can be secured, thus allowing defendants to be physically present for the taking of the testimony, this would be the preferred course over taking the deposition overseas and requiring the defendants to participate in the deposition by other means.

Finally, this amendment does not supersede the relevant provisions of 18 U.S.C. § 3509, authorizing depositions outside the defendant's physical presence in certain cases involving child victims and witnesses, or any other provision of law.

The Committee recognizes that authorizing a deposition under Rule 15(c)(3) does not determine the admissibility of the deposition itself, in part or in whole, at trial. Questions of admissibility of the evidence taken by means of these depositions are left to resolution by the courts applying the Federal Rules of Evidence and the Constitution.

Rule 21 "Transfer for Trial" amended to include a victim as a person whose convenience is to be considered in making a change in venue.

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

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.

It does not apply to Rule 21(a), which governs transfers for prejudice.

Rule 32.1 "Revoking or Modifying Probation or Supervised Release" is modified to end the confusion over the applicability of 18 U.S.C. § 3143(a) — to which the current rule refers — to proceedings involving the release or detention of a person charged with violating a condition of probation or supervised release. The amendments make clear that only paragraph (a)(1) of § 3143, and not (a)(2), applies to the proceedings. The proposed amendments also clarify the burden of

proof in such proceedings, which, under the case law, 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.

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 the community rests with the person.

COMMITTEE NOTE

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.

LOCAL CRIMINAL RULES

Rule 16.1 "Omnibus Discovery in Criminal Cases" – Subdivision (b) amended to remove the reference to the obsolete standing form, USDC-48.

Rule 47.1 "Criminal Motion Practice – Subdivision (a) amended by adding LR 5.4 and 5.5 to the local rules applicable to criminal proceedings. This corrects an oversight in the 2009 amendments.

Rule 47.1 Criminal Motion Practice
(a) General. Except as otherwise ordered by the court or as specified in these rules, written motions in criminal proceedings are governed by D.Ak. LR 5.1, LR 5.4, LR 5.5, LR 7.1, and LR 7.2.

Rule 49.1 "Electronic Case Filing" – Paragraph (a)(1) amended by deleting the reference to January 3, 2006, as being obsolete and superfluous.

FEDERAL RULES OF EVIDENCE

Rule 804 "Hearsay Exceptions; Declarant Unavailable" amended to require the that the government — as well as the defendant — must show corroborating circumstances as a condition for admitting an unavailable declarant's statement against penal interest.

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 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 its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

* * * *

COMMITTEE NOTE

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.

LOCAL HABEAS RULES

Rule 1.1 "Scope" – In subdivision (a), current paragraph (a)(2) has been redesignated (c)(1) without substantive change and paragraph (a)(1) becomes the entirety of subdivision (a). Current subdivision (c) [effective date] is abrogated as obsolete. Current paragraph (a)(2) has been designated as paragraph (c)(1) without change. New paragraph (c)(2) makes it clear that these rules apply to all petitions for habeas corpus relief, including petitions under 28 U.S.C. § 2241.

Rule 1.1 Scope/Applicability

(a) **Scope**. These rules supplement the Rules Governing Section 2254 Cases in the United States District Courts ("Section 2254 Rules") and the Rules Governing Section 2255 Proceedings for the United States District Courts ("Section 2255 Rules") promulgated by the United States Supreme Court.

* * * *

(c) **Applicability**:

(1) These rules govern the procedure in the United States District Court, District of Alaska, on applications under 28 U.S.C. §§ 2254 and 2255.

(2) Except as otherwise specifically provided by statute, rule or order of the court, these rules and the Rules Governing Section 2254 Cases in the United States District Courts, apply to all petitions for habeas corpus relief filed in this court.

LOCAL MAGISTRATE RULES

Rule 3 "Criminal Matters Routinely Assigned to Magistrate Judges"– Paragraphs (6) and (7) amended by deleting the reference to "dispositive" or "non-dispositive" as potentially misleading as a matter covered by 28 U.S.C. § 636(b)(1)(A) may be dispositive and a matter covered by § 636(b)(1)(B) may be non-dispositive. No substantive change intended.

Rule 5 "Review of Magistrate Judge Civil Pretrial Orders" – Subdivision (a) is amended to make the procedure for review of non-dispositive motions dispositive motions uniform. Paragraph (a)(3) is former ¶ (a)(4) modified to make the procedure for obtaining a hearing on an objection to a non-dispositive matter the same as for motions made before the district judge.

Rule 5 Review of Magistrate Judge Civil Pretrial Orders

(a) **Nondispositive Matters under Rule 72(a), Federal Rules of Civil Procedure.**

(1) Unless otherwise ordered by a district judge:

[A] not later than fourteen (14) days after service of the objection, the opposing party must serve and file an opposing brief; and

[B] Unless ordered by the district judge, no reply may be filed to the opposition.

(2) Unless leave of court is obtained, for good cause shown:

[A] objections are limited to those matters fairly presented to or raised before the magistrate judge; and

[B] new matters or issues may not be raised for the first time in an objection to the decision of a magistrate judge.

(3) Hearings on the objections are governed by D. Ak. LR 7.2.

Rule 6 – Subdivision (c) is former ¶ (a)(3) relocated to make it applicable to objections and briefs in both dispositive and non-dispositive matters.

Paragraph (a)(1) amended by deleting the word "non-dispositive" and (b) amended by deleting the word "dispositive." *See* comment to proposed amendment to LMR 3.

Subparagraph (b)(3)[B] amended by substituting "serve" for "mail." Where appropriate, the transmission may be electronically. In those cases where the final findings and recommendations are filed, service will occur as provided with any other document filed electronically.

Paragraph (c)(3) is amended to provide for 3 business days to account for the 2009 amendment to Fed. R. Civ. P 6 and Fed. R. Civ. P. 45 eliminating the exclusion of intervening holidays and weekends

Rule 6 Objections to Matters under 28 U.S.C. § 636(b)(1) in Criminal Cases

(a) **Objections and Replies**. Unless otherwise ordered:

(1) an objection to orders entered under 28 U.S.C. § 636(b)(1)(A) or initial findings and recommendations entered under 28 U.S.C. § 636(b)(1)(B) must be filed within the time specified in Federal Rule of Criminal Procedure 59;

(2) any reply to the objection must be filed within seven (7) days after any objection is filed; and

(3) no briefs, other than the objection and reply will be permitted.

(b) **Initial Review by Magistrate Judge**. Unless otherwise ordered, an objection to a matter referred under §636(b)(1)(B) will be routed to the magistrate judge who:

(1) will promptly examine the pleadings and documents related to the objection;

(2) may—

[A] conduct such further hearings as deemed necessary, and

[B] make additional, supplemental or substitute findings and recommendations; and

(3) will, when the action deemed appropriate has been taken—

[A] forward final findings and recommendations to the district judge, and

[B] serve a copy on the parties.

(c) **Review by District Judge**.

(1) Unless leave of court is obtained, for good cause shown:

[A] objections are limited to those matters fairly presented to or raised before the magistrate judge; and

[B] new matters or issues may not be raised for the first time in an objection to the decision or findings and recommendations of a magistrate judge.

(2) The court may, on its own motion or the motion of any party, set the matter for a further evidentiary hearing before the district judge or it may remand the matter to the magistrate judge to take such further evidence as the district judge may deem necessary.

(3) A party requesting a further evidentiary hearing must serve and file a motion not later than three business (3) days after the transcript of the record is certified, which motion must:

[A] describe the nature of the evidence to be proffered and its relevance to the specific objections; and

[B] contain a statement of the reason the proffered evidence could not be presented to the magistrate judge.