



DECEMBER 14, 2010

BOARD OF GOVERNORS**PRESIDENT**

LINDA HITT THATCHER

PRESIDENT ELECT

SHARON A. SNYDER

1ST VICE PRESIDENT

GERARD J. GAENG

2ND VICE PRESIDENT

GLORIA WILSON SHELTON

SECRETARY

DAWN M.B. RESH

TREASURER

JAMES R. HAMMERSCHMIDT

NATIONAL DELEGATE

ABBEY G. HAIRSTON

**YOUNGER LAWYERS
REPRESENTATIVE**

PETER M. NOTHSTEIN

IMMEDIATE PAST PRESIDENT

GEOFFREY H. GENTH

ELECTED GOVERNORSSTEPHANIE LANE-WEBER, *CHAIR*

HON. NANCY V. ALQUIST

HON. JAMES K. BREDAR

MARIE CELESTE BRUCE

JOHN C. CHAMBLE

CHARLES N. CURLETT, JR.

HENRY EIGLES

MARTIN T. FLETCHER, JR.

STEPHANIE A. GALLAGHER

HON. SUSAN GAUVEY

LAWRENCE S. GREENWALD

HON. PAUL W. GRIMM

ROBERT W. HESSELBACHER, JR.

STEVEN P. HOLLMAN

JAMES A. JOHNSON

DALE P. KELBERMAN

DEBRA LAWRENCE

JAMES D. MATHIAS

JAMES J. NOLAN, JR.

LEE B. RAUCH

STANLEY J. REED

ROD J. ROSENSTEIN

MARK S. SAUDEK

MICHAEL SCHATZOW

RONALD J. TENPAS

JERROLD A. THROPE

P. ANDREW TORREZ

LINDA S. WOOLF

PAULA XINIS

RICHARDO D. ZWAIG

December 1, 2010 Amendments To Federal Rules of Civil Procedure 26 and 56

By Mark Saudek
Gallagher Evelius & Jones LLP

On December 1, 2010, significant amendments to Federal Rules of Civil Procedure 26 and 56 will take effect. These amendments will directly affect all litigators who practice in federal court. The amendments to Rule 26 establish reporting requirements for testifying experts who were not previously required to provide a report, and extend attorney work-product protection to certain discussions between counsel and testifying experts. The amendments to Rule 56 streamline and standardize the procedure for summary judgment briefing and rulings. The amendments specify penalties for failure to follow the new summary judgment guidelines, including the grant or denial of summary judgment and, under certain circumstances, the deemed admission of facts at trial.

SUMMARY

Rule 26. The amendments to Rule 26(a)(2) and (b)(4) set new standards for discovery of information from expert witnesses. The key amendments:

- Require disclosure of expected opinions and supporting facts from testifying experts who are not otherwise required to provide expert reports;
- Limit discovery to “facts or data” considered by the expert, rather than all “data or other information,” as required by the previous version of the Rule; and
- Extend attorney work-product protection to draft expert disclosures or reports and communications between expert witnesses and counsel, with three exceptions: compensation of the expert, facts or data provided by the lawyer that the expert considered in forming the opinion, and assumptions provided by the lawyer to the expert that the expert relied on in forming an opinion.

Rule 56. Rule 56 is amended to streamline and standardize the procedures for presenting and deciding summary judgment motions. While the substantive standard for reviewing summary judgment motions remains unchanged, the amendments impose more stringent requirements for the citation of record evidence. The key amendments:

- Require that parties asserting a fact that can or cannot be genuinely disputed provide a pinpoint citation to the record in support;
- Allow parties to submit unsworn written declarations under penalty of perjury, as a substitute for affidavits in support of or in opposition to a motion for summary judgment;
- Specify the court’s options when a party fails to properly support an asserted fact or respond to a properly supported assertion of fact: the court may allow the party to amend, deem the fact undisputed for purposes of the motion, or grant summary judgment;
- Recognize motions for partial summary judgment, those covering only certain claims or defenses; and
- Clarify the procedure for challenging the admissibility of summary judgment evidence.

RULE 26 - 2010 AMENDMENTS

Perceived problems. The 1993 revisions to Rule 26 authorized depositions of experts and required certain experts to disclose an extensive report. According to the Committee on Rules of Practice and Procedure, some courts read the disclosure provision to authorize discovery of draft reports and all communications between counsel and expert

witnesses. The Committee reported lawyer complaints that routine discovery into attorney-expert communications and draft reports had undesirable effects, including the following:

- Rising costs;
- Regular employment of two sets of experts—one for purposes of consultation and another to testify at trial—because disclosure of lawyers' communications with testifying experts would reveal their most sensitive and confidential case analyses;
- Impediments to effective communication between lawyers and testifying experts; and
- Adoption by experts of strategies that protect against discovery but also interfere with their work.

AMENDMENTS

Broader reporting requirements. Previously, Rule 26(a)(2)(B) required testifying experts to provide a written report detailing the expert's expected opinion and the basis for it only if the expert was "retained or specially employed to provide expert testimony" or if the expert's duties as to the party's employee "regularly involve giving expert testimony." Testifying experts outside of these two categories were exempt from the reporting requirement. The 2010 amendments add Rule 26(a)(2)(C), which mandates summary disclosures of the opinions and supporting facts to be offered by testifying experts who are not required to provide reports under Rule 26(a)(2)(B). This disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B). The Rules Committee states that the 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. A Rule 26(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 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 dual-purpose or "hybrid" witnesses under Rule 26(a)(2)(A) and provide the disclosure required under Rule 26(a)(2)(C). The Rule 26(a)(2)(C) 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 expert is expected to testify." The Rule 26(a)(2)(C) disclosure obligation does not extend to facts which are unrelated to the expert opinions the witness will present.

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

Nondiscoverability of counsel's theories and mental impressions. Rule 26(a)(2)(B)(ii) is amended to provide that expert disclosures must 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 override cases interpreting the 1993 Rule to require disclosure of all attorney-expert communications and draft reports. The 2010 Amendments to Rule 26(b)(4), discussed below, make this change explicit by providing work-product protection

to attorney-expert communications and drafts of reports or disclosures, including drafts of disclosures now required under Rule 26(a)(2)(C). The focus on "facts or data" is meant to limit disclosure to material of a factual nature and to exclude counsel's theories and mental impressions. At the same time, the intention is that "facts or data" be interpreted broadly to require disclosure of any material that contains factual ingredients considered by the expert, whatever the source. The disclosure obligation extends to any facts or data "considered" by the expert in forming the opinions, not only those relied upon by the expert.

Work product protection of expert drafts. Rule 26(b)(4)(C) extends work product protection to drafts of any report or disclosure required under Rule 26(a)(2), regardless of whether disclosure is required under Rule 26(a)(2)(B) or Rule 26(a)(2)(C).

Work product protection of certain attorney-expert communications. Rule 26(b)(4)(C) is added to provide work-product protection for certain attorney-expert communications regardless of the form of the communication (e.g., oral, written, electronic, or otherwise). The purpose is to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to 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, and it includes any "preliminary" expert opinions.

There are important limitations to the work product protection:

- **Work product protection does not apply to communications with Rule 26(a)(2)(C) experts.** The Rule does not 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. 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).
- **Bases for expert opinions remain discoverable.** 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 bases of those opinions. For example, the expert's testing of material involved in litigation, and notes of any testing, would not be exempted from discovery. Similarly, inquiry into communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel also are 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 gate keeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and related cases.

- **“Party’s attorney” should be interpreted broadly.** 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. In addition, protected “communications” include those between the party’s attorney and assistants of the expert witness.
- **Three exceptions.** The protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three areas:
 - **Expert compensation.** 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 potential sources of bias.
 - **Facts considered in forming expert’s opinion.** 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.
 - **Assumptions provided to expert by counsel.** 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.

- A party seeking discovery regarding attorney-expert communications that do not fall within one of these three exceptions must obtain a court order based upon 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 may 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). This protection, however, does not extend to the expert’s own development of opinions to be presented; those are subject to probing in deposition or at trial.

Time limits for rebuttal evidence modified. Subdivision (a)(2)(D) (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 respect to reports under Rule 26(a)(2)(B).

RULE 56 - 2010 AMENDMENTS

Perceived problems. Courts and judges have developed different practices and procedures for the filing and resolution of summary judgment motions. These practices and procedures vary from court to court and, on occasion, from judge to judge. The differing practices and procedures may create confusion and could lead to differing results.

AMENDMENTS

Wording changes. Subdivision (a) carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word—genuine “issue” becomes genuine “dispute.” “Dispute,” the committee asserts better reflects the focus of a summary-judgment determination. “[S]hall” also is restored to the place it held from 1938 to 2007 (i.e. “should grant” is changed to “shall grant”), to express the court’s obligation to grant summary judgment where appropriate.

Summary judgment available to individual claims, defenses, and parts of claims and defenses. The amendment to Subdivision (a) makes clear that summary judgment may be

requested not only as to an entire case but also as to a claim, a 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.

Statement of court’s reasons recommended. Subdivision (a) also adds a new direction that the court “should state on the record the reasons for granting or denying” a motion for summary judgment. Among other advantages, a statement of reasons can facilitate an appeal or subsequent trial-court proceedings. The form and detail of the statement of reasons are left to the court’s discretion.

Timing of filing. Subdivision (b) allows the filing of a motion for summary judgment at any time until thirty days after the close of discovery. The timing provisions in former subdivisions (a) and (c) are superseded. Scheduling orders or other pretrial orders can regulate timing to fit the needs of the case.

Standardized procedure. Subdivision (c) establishes a common procedure for several aspects of summary-judgment briefing:

- **Methods of supporting or opposing motion.** Subdivision (c)(1) addresses ways to support an assertion that a fact can or cannot be genuinely disputed: (A) citation to particular parts of the record, or (B) demonstration that materials cited are not admissible or do not establish the absence or presence of a material dispute. Subdivision (c)(1) does not address the form for providing the required support e.g., as part of the motion; as part of a separate statement of facts; as part of the argument in the memorandum in support; or in a separate statement of facts included in a brief or memorandum.
- **Citation to specific portions of record required.** 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 assertions of fact. This amendment indicates that 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.
- **Record citation not required for argument that assertions are incorrect.** Subdivision (c)(1)(B) recognizes that a party need not always point to specific record materials. A party may respond or reply, without citing any other materials, 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.

- **Objection as to trial admissibility permitted.** 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.
- **Court may, but need not, consider record materials not cited by parties.** 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.
- **Miscellaneous record issues.** 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.
- **No affidavit required.** A formal affidavit no longer is 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.

No rulings by default. 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 may not 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. Similarly, summary judgment should not 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.

Facts deemed undisputed if not contested in a procedurally proper response or reply. 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. 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.

Summary judgment to be granted only where warranted by law. 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 (summary judgment may not be granted merely because of procedural default). 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 may not 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.

Other orders may be appropriate. 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. The committee advises that a court may seek to reassure itself by some examination of the record before granting summary judgment against a pro se litigant.

Sua sponte orders. Subdivision (f) brings into Rule 56 text a number of related procedures that have developed 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;
- consider summary judgment on its own; or
- invite a party to file a motion, which will trigger the regular procedure of subdivision (c).

Facts not in dispute following motion. Subdivision (g) allows the court to conclude that facts are determined although it 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. 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.

Sanctions. 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.
- The Rule text is expanded to recognize the need to provide notice and a reasonable time to respond.
- Finally, the Rule revisions recognize the court's inherent authority to impose other appropriate sanctions.

* * * * *

The full text of Rules 26 and 56 are attached.