UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL RULES HEARING
JANUARY 14, 2009
SAN ANTONIO, TEXAS
8:30 A.M. TO 12:21 P.M.

TESTIMONY ON PROPOSED AMENDMENT
TO CIVIL RULES 56 AND 26

A P P E A R A N C E S

COMMITTEE MEMBERS PRESENT:

HONORABLE MARK R. KRAVITZ, CHAIR
PROFESSOR EDWARD H. COOPER - REPORTER
HONORABLE MICHAEL M. BAYLSON
HONORABLE DAVID G. CAMPBELL
HONORABLE STEVEN M. COLLOTON
PROFESSOR STEVEN S. GENSLER
DANIEL C. GIRARD, ESQUIRE
HONORABLE C. CHRISTOPHER HAGY
MR. TED HIRT
PETER D. KEISLER, ESQUIRE
HONORABLE JOHN G. KOELTL -- (PRESENT TELEPHONICALLY)
HONORABLE RANDALL T. SHEPARD
ANTON R. VALUKAS, ESQUIRE
CHILTON DAVID VARNER, ESQUIRE
HONORABLE VAUGHN R. WALKER
HONORABLE DIANE P. WOOD
PROFESSOR RICHARD L. MARCUS
MS. LAURA A. BRIGGS

STANDING COMMITTEE MEMBERS PRESENT:

HONORABLE JAMES TEILBORG
HONORABLE MARILYN HUFF
HONORABLE REENA RAGGI
HONORABLE LAURA TAYLOR SWAIN

COMMENTATORS:

HONORABLE ROYAL FERGUSON
HONORABLE G. PATRICK MURPHY
MALINDA A. GAUL, ESQUIRE
MR. BRIAN SANFORD
MICHELE Y. SMITH, ESQUIRE
MARGARET A. HARRIS, ESQUIRE
MR. WAYNE B. MASON
JOHN H. MARTIN, ESQUIRE
G. EDWARD PICKLE, ESQUIRE
MR. CARY E. HILTGEN
MR. KEITH B. O'CONNELL
STEPHEN PATE, ESQUIRE
CARLOS RINCON, ESQUIRE
MR. TOM CRANE

* * * * * *

(START TIME, 8:29 A.M.)

CHAIRMAN MARK R. KRAVITZ: Okay. I think we should get started.

On behalf of the Civil Rules Advisory Committee, I want to thank the staff and the judges of the Western District of Texas for their hospitality. I -- this is, as I was telling people, may be the height of my judicial career here, sitting in such august circumstances, and with one of the most talented juries I've ever had.

I want to thank all of the members of the Standing Committee who have been able to set aside time to be here today to -- to listen to the comments and also, I hope, participate and -- and ask questions.

I know that some have planes to catch later on. And I hope none of you will feel disserved if people run out several hours from now to catch a plane.

Judge Koeltl has as a must-teach at Colombia today or tomorrow, so he is participating by telephone. We welcome, Judge Koeltl as -- as well.

I think we should probably get started. Although it may be sensible for us to just take a moment for the audience and just sort of introduce ourselves to you. We obviously have name tags here, but to tell you who we are.

I'm Mark Kravitz and I have the great privilege

to Chair the Civil Rules Advisory Committee.

PROF. EDWARD H. COOPER: I'm Ed Cooper. I'm the -- a Professor at the University of Michigan Law School, and have the even greater pleasure of being the Recorder for the Civil Rules Advisory Committee.

Chilton Varner, I'm a practitioner from Atlanta, Georgia with the firm King and Spalding.

HON. VAUGHN R. WALKER: Good morning. I'm Vaughn Walker, District Judge, the Northern District of California in San Francisco.

CHAIRMAN MARK R. KRAVITZ: So to Steve on the --

HON. STEVEN M. COLLOTON: Steve Colloton, United States Circuit Judge for the Eighth Circuit from Des Moines, Iowa.

PETER D. KEISLER, ESQ.: Peter Keisler. I practice in the Washington D.C. office of Sidley & Austin.

PROF. RICHARD L. MARCUS: I'm Rick Marcus. I'm a Professor at Hastings in San Francisco, and I'm Associate Reporter of the Committee, specializing on discovery matters.

HON. DAVID G. CAMPBELL: I'm Dave Campbell, District Judge from Arizona.

HON. C. CHRISTOPHER HAGY: I'm Chris Hagy. I'm a Magistrate Judge from Atlanta, Georgia.

CHAIRMAN MARK R. KRAVITZ: Steve.

PROF. STEVEN S. GENSLER: Steve Gensler, Professor at the University of Oklahoma.

DANIEL C. GIRARD, ESQ.: I'm Dan Girard. I practice on the plaintiff's side, specialize in class actions. I'm from San Francisco.

HON. LEE H. ROSENTHAL: I'm Lee Rosenthal. I'm a District Judge in Houston, Texas.

MS. LAURA A. BRIGGS: I'm Laura Briggs. I'm the District Clerk in the Southern District of Louisiana. I'm the Clerk Representative on the Committee.

CHAIRMAN MARK R. KRAVITZ: Ted, why don't you go next.

MR. TED HIRT: I'm Ted Hirt from the Civil Division of the Department of Justice in Washington.

ANTON R. VALUKAS: I'm Tony Valukas. I'm a partner in the law firm of Jenner & Block in Chicago.

HON. MICHAEL M. BAYLSON: I'm Michael Baylson. I'm a District Judge in Philadelphia.

HON. JAMES TEILBORG: I'm Jim Teilborg, District Judge, Member of the Standing Committee, Arizona.

HON. MARILYN HUFF: Good morning. My name is Marilyn Huff. I'm a District Judge in the Southern District of California, and I'm on the Standing Committee.

HON. DIANE WOOD: I am Diane Wood. I'm on the Standing Committee. I'm on the Court of Appeals for the

Seventh Circuit.

HON. REENA RAGGI: I'm Reena Raggi, I'm also on the Standing Committee. I'm on the Second Circuit Court of Appeals in New York.

HON. LAURA TAYLOR SWAIN: I'm Laura Taylor Swain. I'm a District Judge in the Southern District of New York, and I Chair the Bankruptcy Rules Advisory Committee.

David Beck, practitioner, Houston, Texas. Member of the Standing Committee.

CHAIRMAN MARK R. KRAVITZ: Great. We're going to start with someone whom I've always been told is a great American ever since I got this position.

So Judge Royal Ferguson, welcome.

HON. ROYAL FERGUSON: Thank you, Your Honor. And may it please the Court, on behalf of the Western District of Texas, may I welcome the Rules Committee to our wonderful city and to our wonderful District. We're pleased that you're here and pleased that you would come.

I am here, by the way, first, to offer my condolences to Professor Gensler. What is it with the Sooners? You know, we -- we get you to the BSC -- BCS every year and you blow it.

PROF. STEVEN S. GENSLER: Do I have to take this?

CHAIRMAN MARK R. KRAVITZ: Yes, you have to take it.

HON. ROYAL FERGUSON: Anyway, I was with you all the way. I just don't know what happened. But maybe next year, right?

PROF. STEVEN S. GENSLER: Thank you.

HON. ROYAL FERGUSON: Okay. I am here to -- to first thank the Rules Committee for all the wonderful work you do. It's a -- it's probably a -- the stellar Committee. These are the stellar Committees of the whole federal court system and we appreciate your hard work and your scholarship.

We appreciate your work on Rule 56. I am here on speak about the count -- the point/counter point proposals in Rule 56. I have never been privileged to have that kind of a summary judgment motion presented to me. We don't have that rule in the Western District of Texas, but it seems to me that that rule will continue to complicate summary judgment procedure. And because of that, I would urge the Committee to -- to not put that into the rule.

I want to share with you something that Professor Sam Issacharoff wrote. I -- he was at the University of the Texas, my law school, and at Columbia. He may be at NYU now. But he wrote that, Summary judgment fundamentally alters the balance of power between plaintiffs and defendants by raising both the cost and risk to plaintiffs in the pretrial phrases of litigation, while

diminishing both for defendants.

And I believe that's correct. And I believe that summary judgment, as we have it today, has created an unlevel playing field. That's just my belief. I agree with Professor Issacharoff. And so I think if we were to do something that would continue to, in my view, complicate summary judgment -- because anytime lawyers are talking about undisputed facts, they're going to get into a disagreement about it, and the disagreement could go on and on. I think it will just add cost to our proceedings and I think it will -- it will further complicate summary judgment.

Now, I speak as one who has never been a part of a system with point/counter point. But I feel like it would be unwise for us to go in that direction.

Those are my comments. I told you I would take only a few minutes, Your Honor.

CHAIRMAN MARK R. KRAVITZ: Right. And Judge Ferguson is presiding over a jury trial soon, but if anyone has any question for Judge Ferguson...

We appreciate your comments. We have received quite a number of comments on Rule 56, some very much along the lines that you say. And we're going to continue to take all these comments seriously and ponder them as we move forward and -- and decide what to do on both Rule 56 and

Rule 26. So thank you so much.

HON. ROYAL FERGUSON: Thank you very much. And again, welcome to San Antonio. We hope you have a very pleasant stay here.

HON. MICHAEL M. BAYLSON: Judge, the only thing I want to say has nothing to do with Rule 56, although I'm interested in it. But I want to say on behalf of Judge Campbell, who's from Phoenix, and I'm from Philadelphia, that we hope you're going to root for the Eagles.

HON. ROYAL FERGUSON: You know, I like -- I like --

HON. MICHAEL M. BAYLSON: He gets equal time.

HON. ROYAL FERGUSON: I like both those quarterbacks. So I am neutral, just to let you know. I hope it's just a great game. I hope it's just a great game.

And Professor, my undergrad is Texas Tech, and you guys were so mean to us. I just had to say something about it.

Thank you, Your Honor.

CHAIRMAN MARK R. KRAVITZ: Thank you, Judge Ferguson. Thank you very much.

We've had a couple people who could not make it. I'm not sure whether it's the weather or not. For those of you who have a witness list, I've been told that Mr. Nelson and Ms. Kuchler -- and I apologize if I've mispronounced the

name -- will not be here.

We do have -- I'd like to take a personal point of privilege, if I could, and offer at least Judge Murphy the chance to speak. Welcome.

HON. G. PATRICK MURPHY: Thank you.

CHAIRMAN MARK R. KRAVITZ: I had a chance to meet you beforehand, but I wanted to give you an opportunity to speak now because I know you have a plane to catch, and we are very much appreciative of your willingness to come here and speak with us.

HON. G. PATRICK MURPHY: I appreciate the opportunity to be here. It's unusual that I would take the time to pull away from the court to participate in committee work, but I do think this is important. And all that I can add to what Judge Ferguson said is that I have tried that.

I'm the immediate past Chief Judge of our District, the Southern District of Illinois. And when I came on board as Chief Judge, we had the point/counter point system in effect by local ruling. And when it came time to revise our local rules, as we do periodically, we canvased the bar. And it came back something like 357 to three to doing the rule.

Now, we're a busy trial court. We get a lot of cases removed from Madison and Sinclair County, and that is what the Chamber of Commerce calls the judicial hell hole,

and that is what the plaintiffs lawyers call the last fair courts in the United States. That do not get along, as you might expect.

But what happened was, with this point/counter point system, is that an entire what's sometimes is called "cottage industry" developed around, well, what is disputed and what isn't disputed. Now, you would think it would be sufficient to just say, I dispute that; I don't agree with it. But that's not so at all because someone would motion us for a hearing. Judge, this really isn't disputed, but they say it is. That should be the end of the argument, but the argument then would be, Well, they can't dispute that. And this would go on and on and on. And the super structure of Rule 56 almost sunk the ship.

Now, we did the rule. We still grant summary judgments at the same rate. There's been no significant change in summary judgment practice or the use of it. It just takes less time and less money.

CHAIRMAN MARK R. KRAVITZ: I think for the members, it would be -- it would help us to understand that, because I would have thought that in any case on summary judgment, the question is: Are there genuine issues of disputed fact? And so whether that occurs in a brief, whether that occurs in a brief in a point/counter point statement, that's the -- what drives this.

So why do you think it is easier? Is it because you don't -- you were having motions to strike and procedural problems just about the dispute of this little counter point --

HON. G. PATRICK MURPHY: Absolutely.

CHAIRMAN MARK R. KRAVITZ: -- that kept you from focusing on --

HON. G. PATRICK MURPHY: Absolutely. Absolutely. Now, looking through the materials, I smiled because someone was concerned that Rule 56 was an underutilized tool. I have never had a civil case where I didn't get a Rule 56 motion. Not one. I mean, prisoner litigation, for instance, I set those and hear those. Even in prisoner litigation I touch Rule 56. Every class action that I have, and I have plenty, I have Rule 56. There is no case in my court where I do not get a Rule 56 motion.

Now, really you look at these motions, is there a disputed issue of fact or not? Is there something to have a trial about? And if you're not a good enough judge to figure that out, you're going to sink in this business. I probably shouldn't say that. I've been adverse a few times with the court. Judge Wood is here.

But look, that's the -- that -- that is -- that is the bottom line with me. I think my Chief Judge has talked about the language. I agree with that "must." If

there's no disputed issue of fact, surely you must grant the motion. But if someone wants to try this procedure, they're at liberty to do so, just like we did. But be careful because you're going to see that you're going to spend an inordinate amount of time on this very thing. And as Judge Ferguson said, Look, it's -- it's who can show up with the most troops and the most money and the most artillery that this is going to get advantaged. The small -- the small -- the small players are going to be disadvantaged.

Those are my comments.

CHAIRMAN MARK R. KRAVITZ: Well, thank you. But while you're here, I think it would be useful for, I think -- if you're willing to take some questions.

HON. PATRICK MURPHY: Well, I'll take all the time and questions that you need.

CHAIRMAN MARK R. KRAVITZ: That'd be great.

Judge Teilborg.

HON. JAMES TEILBORG: Thank you, Mr. Chairman.

Judge, as one who's presided in a district that has only the point/counter point, tell me mechanically what else is filed in addition, if anything, to the briefs themselves? In other words, is there some type of statement of facts that is filed separately or excerpts from deposition, that type of thing?

HON. G. PATRICK MURPHY: Well, what we -- the

rule, as it exists, would require the parties to confer, which is already mandated by the -- by the federal rules. And say, This is what we agree on and this is what we don't agree on. Well, the first thing that would happen is one side or the other would say, Judge, they won't meet with me. Then that person would say, Well, I told them that I was taking depositions in New York on that day. Then the other side would say, Well, you know, we have to get this done.

The judge is -- the judge would be -- he wants to take a look at this. And then it would -- it would just go on and on. So the first motion would be, They will not meet and sit down and go over it with me what is really disputed and what isn't.

And then someone would file their list of undisputed facts. These things are undisputed. And the other person then would say, Oh, no they're not. We dispute 2, 7, 9 and 11. Then it would be, They can't do that. But they did.

HON. JAMES TEILBORG: That was the old system, right?

HON. G. PATRICK MURPHY: No, this is -- this is under the point/counter point system that's proposed.

HON. JAMES TEILBORG: No, I'm asking what your -- what your system is now.

HON. G. PATRICK MURPHY: We just -- look, we -- we

assiduously followed the Federal Rules of Civil Procedure and applied them ruthlessly, but no more. No more than what's in there. We have tried to skinny up our local rules, make them simple, to learn them. And as it is now, if someone can come in and show us, Judge, there's just nothing here to have a trial about. Granted. Go on about your business.

CHAIRMAN MARK R. KRAVITZ: But I think what Judge Teilborg was asking, when -- when the movant files their brief and says, These are the facts and they're all undisputed and this is why I should get judgment. A, are there citations to the record in that brief?

HON. G. PATRICK MURPHY: I'm sorry, Judge, I didn't understand it that way.

CHAIRMAN MARK R. KRAVITZ: And B, did they -- did they submit an appendix or something with the excerpts from the depositions or the interrogatories?

HON. G. PATRICK MURPHY: Oh.

CHAIRMAN MARK R. KRAVITZ: I think that's what he meant.

HON. G. PATRICK MURPHY: Yes. I'm sorry. Yes.

HON. JAMES TEILBORG: I didn't make it very clear.

HON. G. PATRICK MURPHY: Well, I probably wasn't processing as well as you were -- you were talking. Yes, that is exactly what happens. And it's usually a pretty big

job. I'm sure the judges on the Court of Appeals, when they get the transcripts, they'll see that. A summary judgment motion, it's not unusual for it to be, you know, 9 inches to a foot thick. I don't know how you a void that.

CHAIRMAN MARK R. KRAVITZ: Dan Girard and then Mike.

DANIEL C. GIRARD, ESQ.: The question I had was asked.

CHAIRMAN MARK R. KRAVITZ: Okay.

HON. MICHAEL M. BAYLSON: Okay, the question I have, Judge Murphy, is, I think everyone would agree that point/counter point doesn't necessarily work in every case. There are surely some cases which are unique or they're so complex that going through this point/counter point system would not be efficient. And in the proposed rule, as I'm sure you saw, a judge can simply say, In this case we're not going to follow that procedure.

Given the fact that there are many District Courts, not withstanding your District, but there are many District Courts that still have point/counter point and like it and use it, and we've gotten letters from some judges in those Districts.

What's wrong with keeping the proposed rule as is, with the escape clause, as I call it? So if the judge doesn't want to do it in a particular case or -- you know,

in a number of cases where the judge thinks it's not right, the judge just issues an order to that effect.

HON. G. PATRICK MURPHY: Well, I just think there should be a presumption against rules where the exception eats the rule. And if you get, for instance, someone like me that has actually spent five or six years wrestling with that rule, I'm going to say, By administrative order, or with an order in each case, I'm not doing it. And I think all of my colleagues in the Southern District would do something like that.

Let's not forget, we have Rule 36.

HON. MICHAEL M. BAYLSON: But on admission.

HON. G. PATRICK MURPHY: Yes. I mean, it's right there. The -- the --

HON. MICHAEL M. BAYLSON: Now that may be an underutilized rule.

HON. G. PATRICK MURPHY: Well, there's no question about it that -- that it is. But if Rule 36 has proved unsuccessful, whether it be because of lassitude on the part of the lawyers or ignorance or whatever the case might be or the judge's unwillingness to do it, what would make you think that this new proposal would work?

And let me give you one other example that I think is related to this question -- that is related to this question. And that is -- by the way, looking at the

proposed limits of Rule 26 that were sensible to me and looks like they were nearly helpful. But Rule 26, for instance, laid out a very detailed way to prepare for trial. By local rules you will see a requirement for these detailed pretrial orders. Guess what, they're always inconsistent. I can't understand, in light of Rule 26 with your witness list, your exhibit list and the rest, what office these detailed, pretrial orders often serve when they're in conflict with the rule itself.

So I'm a minimus. I'm a minimus. I started my life as a grunt in the United States Marine Corps. You learn to do a few things very well; keep your weapon clean, make sure it's loaded, stay awake at night, as one Colonel said, Have a plan to kill everybody.

HON. LEE H. ROSENTHAL: Is that how you approach summary judgment?

HON. G. PATRICK MURPHY: You know what --

HON. LEE H. ROSENTHAL: Never mind.

HON. G. PATRICK MURPHY: I might add that my Marine Corps has worked very well. I have found that simplicity, simplicity works. Keep is simple. Have a few rules. Apply them just ruthlessly and it will work.

But what we're getting to, and I think this is what Judge Ferguson was hinting at in a manner that I couldn't quite reach, the super structure is about to sink

the ship. It just shouldn't be that expensive and difficult to get these cases worked up for trial. And I can just tell you our experience has been, we drank just as many summary judgments. Summary judgments come in every case. We just do it, we just do it quicker, and we do it cheaper. And that was the consensus of the Trial Bar.

Now, it is very hard in the Southern District of Illinois to get the Trial Bar to agree on anything. They even object to the idea that they have to meet and confer. As one lawyer said, Judge, I'll do anything that you say I have to do, but why do I have to go sit down with those people and talk to them?

CHAIRMAN MARK R. KRAVITZ: Oh, I'm sorry.

Judge Walker.

HON. VAUGHN R. WALKER: Yes. Judge Murphy, thank you very much for your testimony and the experience that you related in the Southern District of Illinois. I will tell you my experience in the Northern District of California is very similar to yours.

But let me ask you about the other provisions of the proposed rule, other than Subsection C. Do you have any objection to the other provisions, the non-counter point/ counter point provisions?

HON. G. PATRICK MURPHY: Well, not really. But I wonder -- Judge Easterbrook, for instance, supports the idea

it should say "must."

HON. VAUGHN R. WALKER: Right.

HON. G. PATRICK MURPHY: And that -- that seems sensible to me because if there isn't a trailable issue of fact, well, yes, the judge must do that. We're not at liberty to -- to have juries to decide cases where there's no issue in dispute. But does that mean then that my court of appeals gets a mandamus on every case where the judge doesn't see it the way one of the parties does? I don't -- I'm not sure what that -- I'm not sure what that -- what that means --

CHAIRMAN MARK R. KRAVITZ: Okay.

HON. G. PATRICK MURPHY: -- in that respect.

HON. VAUGHN R. WALKER: The present proposal does not use the word "must," which presumably would head off the petition --

HON. G. PATRICK MURPHY: For -- for mandamus.

HON. VAUGHN R. WALKER: Right. So --

HON. G. PATRICK MURPHY: But, I mean, it does seem sensible, wouldn't it? If there's -- if there's nothing to try, why would you -- why would you have the trial? There's always another one cued up, ready to go.

HON. VAUGHN R. WALKER: The other provisions of the proposal talk about the time for filing the response, and so forth. I gather that you have no objection to those

provisions of the proposals?

HON. G. PATRICK MURPHY: I don't. I mean, it's uniform. Everyone knows what the rule is. That -- that's -- that's fine.

CHAIRMAN MARK R. KRAVITZ: Chris?

HON. C. CHRISTOPHER HAGY: Judge, there's a lot of rules that could be broadly categorized as point/counter point and the details are different in each district. Some don't work, some do work. From what you've said, you have a problem with people arguing, Well, that rule is -- this fact is in dispute, this fact isn't in dispute.

Our rule and the rules I know -- our proposal, the rules that -- where it seems to work, require a party who says it is in dispute to cite to something in the record to prove it, and then it's up to us. There's no back and forth. Did your rule back -- when you didn't like it, require a party to -- to point to a spot in a record that --

HON. G. PATRICK MURPHY: It did. It did and we -- we just found that as we went back through it and we would look at the record and say, Well, you know, arguably it says that. Maybe it doesn't.

Judge, it just -- it just didn't work the way that it looked like it would work. The -- our rule -- the rule that we abandoned was put into effect with the best of intention. Because we spend an extraordinary amount of time

dealing with Rule 56 motions. As I say, they come up in every case. And -- and we were trying to find a way to speed it up. And it just didn't -- it just didn't work for us. And if -- if you think about it, anyone by local rule can have such a system, and if someone wants to try it, so be it. But I really wouldn't -- I really wouldn't want to do that again.

CHAIRMAN MARK R. KRAVITZ: And -- and in so far as Rule 26 is concerned, you're -- you're supportive?

HON. G. PATRICK MURPHY: That seems like -- that seems sensible to me.

CHAIRMAN MARK R. KRAVITZ: Okay.

HON. G. PATRICK MURPHY: So people aren't ambushed by the non-retained expert. That's always -- that's always a problem. As I understand it, the non-retained expert doesn't have to sign off --

CHAIRMAN MARK R. KRAVITZ: Right.

HON. G. PATRICK MURPHY: -- on the report as it now -- as it now -- as it now -- and you can get the information now by interrogatory --

CHAIRMAN MARK R. KRAVITZ: Right.

HON. G. PATRICK MURPHY: -- anyway. So I -- that seems like a very sensible proposal to me.

CHAIRMAN MARK R. KRAVITZ: All right. Well, I want to thank -- we've got a number of witnesses. Unless

there's any other questions, I want to thank you so much, Judge Murphy, for traveling here to this lovely spot, of course, but for taking the time out of your busy schedule to share your views with us. We really appreciate it.

HON. G. PATRICK MURPHY: Judges, thank you for having me. If you don't mind, I'm going to sit here and listen and I'm sure I'll learn something.

CHAIRMAN MARK R. KRAVITZ: You are welcome.

All right. I think the next person up is Malinda Gaul.

MS. MALINDA GAUL, ESQ.: Good morning.

CHAIRMAN MARK R. KRAVITZ: Welcome, Ms. Gaul.

MS. MALINDA GAUL, ESQ.: I like it when the first two people don't show up and so I get to be first. Thank you.

CHAIRMAN MARK R. KRAVITZ: May I could ask everyone to just say a little bit about the nature of their practice before they make their comments.

MS. MALINDA GAUL, ESQ.: Thank you very much.

My name is Malinda Gaul and I practice here in San Antonio. For about 25 years I have practiced doing employment law, representing employees.

As Judge Ferguson told you a few minutes ago, we don't do counter point here in the Western District of Texas. So I think it's sounds good because what we practice

is the shotgun method. Basically you get big summary judgment motions, everything's thrown at the wall and the defense hopes that something sticks so that they can get summary judgment granted. We get them in every single case. I haven't seen a case in the last couple of decades where I haven't had to answer summary judgment.

So I'm really interested in the point/counter point. But my concern in reading what the Committee has proposed is that if we're truly going to do a point/counter point, then I hope -- as the Committee has said; that they're not going to change the standard, they're going to change the burden -- but I'd like to see the standard and the burden applied to this point/counter point.

In other words, there should be material facts that affect the decision in the case. Not every single fact should be lined up. It shouldn't be 200 point/counter points. It should be the ones that are really going to be determinative of the motion.

So what I'm hoping is that if we do this system, that what the Committee will recommend, in addition to maybe just saying the point/counter point, is that, Movant, you're coming forward, you say that these are the material issues, they're undisputed, so that if we present on the other side a dispute, it's over. Summary judgment denied.

And then also I'd like to see us have a little

bit in the rules about the burden. Because I think the way -- when I was even listening to the two judges -- a fact, once you raise something to dispute it, that's it. On the defense side or the movant side -- I'm sorry, I'm always thinking of the defense side as the movant. But the movant is saying, Undisputed. They're supposed to present facts. On our side, the nonmovant, undisputed/disputed fact inferences.

It seems to me that the way summary judgments are looked at is we're trying the case on the paper, and that's not my understanding of what summary judgment is about. If there is a fact issue raised, motion should be denied.

CHAIRMAN MARK R. KRAVITZ: Including inferences?

MS. MALINDA GAUL, ESQ.: Yes. Yes. Yes. So, again, I would like to see something in the rules that talks about, you know, Movant, you say these are material issues and that if they're disputed, then case over, no summary judgment. If they're not disputed, you win summary judgment. And then also assigning the burden.

And finally, I'd like to say, just because we do get these cases -- summary judgments in every case, and because they are granted far more than they are denied, I'd like see oral arguments added. Because the -- in fact, the way we do it in the Western District, I -- one of the

Committee Members talked about timing. We have 11 days to respond and -- I hear -- and once we respond, that's it, we just wait. And I think we really need an opportunity to have an oral argument to make sure that before the judge decide something that's going to end everything, that we have an opportunity to address the facts.

CHAIRMAN MARK R. KRAVITZ: Okay. Thank you so much, Ms. Gaul.

We'll just see if there are any questions.

Judge Campbell.

HON. DAVID G. CAMPBELL: Yeah, if I could just ask a question. In the -- in the proposal in Rule 56(c)(2)(A)(ii), it says that the moving party is to provide, "A separate statement that concisely identifies in separately numbered paragraphs only those material facts..."

So it has that word in it. I'm understanding you want something more than that.

MS. MALINDA GAUL, ESQ.: I would just like to make sure that that term is defined. Because the way we're seeing it now in summary judgments, that's what you're supposed to be doing, but what we're seeing is statements of facts that go on for pages and pages and pages. And so I think as long as the definition of "material" is made very clear -- but that's my concern, is that we read that word, but we're not understanding what "material" means.

"Material" meaning that this is something that will decide the case.

HON. DAVID G. CAMPBELL: And -- but of course that will change, depending on the substantive law and --

MS. MALINDA GAUL, ESQ.: Yes, sir. Yes, sir, I understand that.

CHAIRMAN MARK R. KRAVITZ: Okay. Anybody else? Thank you, Ms. Gaul.

MS. MALINDA GAUL, ESQ.: Thank you for the opportunity.

CHAIRMAN MARK R. KRAVITZ: Thank you very much for sharing your observations.

MS. MALINDA GAUL, ESQ.: Thank you.

CHAIRMAN MARK R. KRAVITZ: Mr. Sanford.

Welcome, sir.

MR. BRIAN SANFORD: Thank you. My name is Brian Sanford. I am an attorney from Dallas, and I also practice primarily employment law on behalf of the employee, like Ms. Gaul.

I've got three points that -- what I have strong feeling about. And I'll just -- before I get to those, I'm not sure where I stand on the point/counter point. From the plaintiff's perspective, we do get a motion for summary judgment that includes a lot of facts that are in dispute. So when I get a motion for summary judgment, it will have,

you know, a recitation of all the bad things that my client has done, which are in dispute that -- it's all in there. So on the one hand, it might be nice to have things narrowed down to just the things that are in dispute, rather than all the bad things that the movant wants to put in that are in dispute, but makes it look, you know, as a first impression to the judge or the law clerk reading it, Wow, my client is really bad, until I can have my say.

So on the one hand, that would be nice to have that narrowed down. On the other hand, from -- you know, the movant is going to be framing what is material and framing the facts that are material that I'm going to have to respond to. And I don't -- I don't like that. But I have that right now.

I think the Northern District, where I'm from, several years ago we had sort of a point/counter point system and then went away from it. But I think it was largely ignored. Some of the judges, I think, tried to enforce it and some didn't and they just got rid of it.

CHAIRMAN MARK R. KRAVITZ: So you've actually practiced in -- in point/counter point at least before judges who insist on it as well as judges -- as well as judges who don't have it?

MR. BRIAN SANFORD: I did. It's been several years, ten plus years ago. But local rules required it in

the Northern District for a few years. Not many judges seem to enforce it, not many parties seem to comply with it. So I'm not -- I'm sure what where I stand on that.

But I do have -- there's three points that -- that on -- on other issues on Rule 56 that -- that I would like to have changed. One is the -- the rule that says that the motion should be filed 30 days after discovery. I have often asked a judge could we please have the motions filed before discovery is ended.

And I think if you look at the motion for summary judgment practice, it really becomes a substitute for trial. And if it's going to be a substitute for trial, it should have the safeguards to fairness and due process concepts of a trial. At trial the plaintiff has the burden of proof. The plaintiff gets -- and because the plaintiff has the burden of proof, the plaintiff has to go first, the plaintiff gets to cross examine at trial, the plaintiff gets to have rebuttal, and the plaintiff gets to go last.

If -- if someone was going to -- as a practical matter, I can't take a deposition of every single witness. So I'm always going to have a declaration that's from someone I don't have a deposition from. At trial I'm going to be able to cross examine that person. I'm going to be able to -- they're will be able to be a direct, a cross examine, a redirect, back and forth. I can't do that on a

motion of summary judgment.

If it's before the discovery deadline, I can notice that person up for a quick deposition, I can send out another set of discovery requests. I get that opportunity. If we're searching for truth, then there shouldn't be any reason why I can't continue to do that, and shouldn't have to have a special motion before the Court saying I'm -- Look, there's more declarations, I need more time for discovery. I'm going to delay the discovery deadlines, which have already past, the judge is going to have to then postpone things.

Why not have the motion required well before the discovery deadline in time for them to take all the depositions that the defense wants to take, and yet have an opportunity for the nonmovant to -- to cross examine any other defendants that come up or take any other discovery?

I -- in terms of fairness, I just don't see why that shouldn't be a policy. And I -- that's been granted by some judges. Some judges won't let me have that.

Second, along the same lines, is a sur-reply. The plaintiff retains the burden of proof, but motion for summary judgment practice turns that -- the trial practice on its head. Even though the plaintiff retains burden of proof, does not get to go first, does not get to go last. The movant frames the issues, the respondent gets one chance

to respond, and then there's a reply. At a minimum, there should be a sur-reply. Again, at trial, the plaintiff has the burden of proof, the plaintiff gets to go first and last because they have the burden of proof.

I have been -- the Eastern District of Texas has in the local rules automatic sur-reply. The others do not. I have been regularly denied a sur-reply in the Northern District.

The third point is I just -- I don't see why -- I like the idea of acquiring a -- findings for granting of summary judgment. I don't see the necessity of requiring a finding for a denial. Denial should be non-appealable. The defendant doesn't lose anything by denial. He still gets his defenses. He still gets trial. All he gets is that he's forced to a trial. So I don't think that -- that a judge should be required to have to explain the denial, especially if there is discretion, it's a "should" standard. If a judge can simply look at these declarations say, Look, if I'm a fact finder, I just may not find these declarations credible. This is what a jury is entitled to do.

So a judge should have absolute, in my opinion, discretion to deny summary judgment and not have to explain it. They still get a trial.

And I -- this is not in my written submission, but to have an oral argument would be a nice thing, which is

not the practice, at least in the Northern District. Thank you.

CHAIRMAN MARK R. KRAVITZ: Thank you for that, Mr. Sanford. Let me just see if anyone has any questions of you.

I very much appreciate you taking the time to share your views with us.

MR. BRIAN SANFORD: Thank you.

CHAIRMAN MARK R. KRAVITZ: Thank you.

Michele Smith.

Good morning, Ma'am.

MS. MICHELE SMITH, ESQ.: Good morning. Thank you for the opportunity to appear and comment to the proposed revisions of Federal Rules, Rule Procedure 56.

My name is Michele Smith. I've been licensed to practice in the State of Texas since 1992. I'm a shareholder with the law firm of MehaffyWeber. As a matter of background, I'm a trial attorney. I'm board certified in personal injury trial law, and a member of the American Board of Trial Advocates. I also serve as a member of the Local Rules Committee for the Eastern District of Texas. But candidly I will now admit I'm not an expert in federal -- on the federal rules.

In my nearly 17 years of trial experience, I've practiced almost exclusively on the defense civil side. My

practice focuses primarily on products and premises liabilities with some emphasis in the mass court area. I've also tried cases in medical malpractice and employment -- employment law area.

Today I'm here to testify as a Member of the State Bar of Texas, but also as a Member of International Association of Defense Counsel.

I'm a proud member of the State Bar of Texas, and I believe strongly in the civil justice system, and in protecting access to our courts. I've been one of the fortunate few in my generation who's had the opportunity to actual try a number of different of lawsuits in a variety of forums. That's really the exception rather than the rule these days.

Having said that, however, I also believe that there are cases, filed for whatever reason, that either have no merit because when they were filed they had no merit or because there have been facts that have developed that render them meritless through the discovery process. For these cases, I believe a meaningful summary judgment procedure must be available. In my time before the Committee --

CHAIRMAN MARK R. KRAVITZ: Shall be available or must?

MS. MICHELE SMITH, ESQ.: Must. Must be

available.

In my brief time before the Committee, I'd like to spend my time to make two primary points, and also end by just commenting on summary judgment in my practice if that -- if we have time.

First, there can be no discretion. There must no discretion in granting a full or partial motion for summary judgment when there is no genuine issue of material facts.

Secondly, the point/counter point pleading, I believe, is a useful and effective tool for focusing practicers and the judge on the key issues in the case and should help to reduce some of the confusion.

On the matter of there being no discretion in granting a full or partial motion for summary judgment, it is imperative that our rules offer clear discretion -- direction rather -- for presiding judges on what their obligation is once a summary judgment burden is met.

Use of the term "should" offers discretion, not directive. A court must grant a summary judgment that has proper -- been properly presented and when there is no genuine issue of material fact. It's as basic and fundamental as that.

Use of the term "must" is direct, simple, and straight forward. There's little to no debate on what that

term actually means.

Clear and unequivocal guidance is imperative, I believe, because in my practice most judges -- not all, but most judges -- particularly state court judges, do not like granting summary judgments. This is particularly true in the area of the state in which I practice, which is in the Beaumont and Houston area.

The reasons for this are varied, and I'm sure that they would differ by the individual judges, but from my experience, there are -- there's a subsection of judges who believe that -- that summary judgments just aren't appropriate; that all cases should be able to be reached by the jury, some worry about reversal on appeal, others are swayed by the emotion of the case.

For example --

CHAIRMAN MARK R. KRAVITZ: You're excepting Judge Rosenthal?

MS. MICHELE SMITH, ESQ.: Of course.

HON. LEE H. ROSENTHAL: That's Hard Hearted Judge Rosenthal.

MS. MICHELE SMITH, ESQ.: And I say most, not all. Not all judges.

For example, I -- and this is an example from my practice. In slip and fall case, a grocery store slip and fall case, it's much easier to get a summary judgment

granted when the amount in dispute is $500 when the evidence supports it. You take that same case with the same legal standard, being whether the water on the floor presented an unreasonable risk of harm, take that same case and put it in the context of a plant in an industrial facility where the slip and fall caused damages much greater than $500, those -- the legal standard that applies to those two cases is identical, and if the facts warrant it, there should be no grant -- no discretion in granting summary judgment simply because of the difference in damages. Yet frankly, this is the reality of civil litigation practice.

And my fear is that by retaining word "shall" instead of "must" that would give more of an opportunity for those types of inconsistencies to occur.

If a Court declines to grant a proper summary judgment because there is discretion, clients are forced to expend money on unnecessary discovery, pretrial and trial expenses.

I've had summary judgment denied many a'times with expressed -- expressly stated reason that, Hey, why don't you guys go to mediation and see if you can get it settled.

What happens is that -- that denial, by the way, can't be appealed, as you all know. Therefore, clients are put in the enviable position of having to go to mediation

and determine whether they want to pay some money -- a little bit of money to get out of the case and to avoid the -- the uncertainty of a trial in jurisdictions that may not be favorable. This cannot be a desired result.

Grating even partial summary judgment saves resources for both sides. That helps to narrow the issues and corresponding evidence. It also reduces time and expense to the court and jurors in advance. It may also posture a case so that a fair settlement may be reached in advance of trial.

In short, changing the terminology from "should" to "must," I believe it's imperative to making this rule really function and to making the summary judgement process meaningful. I believe that that strong and clear directive from the federal rules may also trickle down to the state court arena and make those summary judgments more in line with their local practice.

My second point is on point/counter point pleadings. As a member of the Eastern District Rules -- Local Rules Committee, this is a procedure that we have in place in the Eastern District of Texas. I believe it's -- it's -- it's been in place for some time. In my service on the committee, which has been about three years, we have tweaked the wording somewhat, but we have not done away with the procedure.

Candidly I want to say that I have not filed a motion for summary judgment where I have personally used the point/count point procedure. However, in preparing for my testimony today, I did discuss with some of the practitioners who do practice in that arena. And though it -- it does require more work on the front end, almost uniformly they felt that it was much harder for either side, either the movant or the responding party, to hide issues when the procedure was utilized. It forces counsel to become much more organized when they filed a motion and much more specific in responding. It allows issues to be highlighted more easily.

In the Eastern District of Texas, a statement of undisputed material fact is required by both the motion, and a response must be made to the statement of undisputed material facts with specific references in the evidence.

I believe that making practitioners focus their -- their pleadings early on can facilitate resolution of cases, either by the person filing the motion for summary judgment by looking at the evidence and knowing that they don't have a valid motion for summary judgment because of the statement of undisputed material facts, or by focusing the person responding to the motion for summary judgement to take a hard look before that hearing, before the Court uses his judicial resources to determine whether they really have

responses to the statement of -- of material facts.

So I do support the point/counter point procedure because I believe it saves money in the long run and it makes the process more meaningful.

Finally, just a quick -- if the Committee will indulge me, just a quick point on summary judgment practice. My -- I do have -- I do practice somewhat in the federal court. My -- my traditional experience has been more in the state court arena. During my 17 years of practice, I have been involved in thousands of cases. And in preparing for today, I cannot stand before the Committee and tell you how many motions for summary judgment I have personally filed. But I can certainly state with certainty that I do not file motions out of just habit or routine. I believe that that's a mistake. And I believe that by doing so, if you do not have a valid motion for summary judgment, it really affects your credibility before the judges before you practice.

Additionally, my clients aren't the type of clients that like to pay for summary judgments that don't have a prayer of be granted. But by filing -- and additionally I think another reason why I don't -- the practice is not abused, at least in my practice, in the area in which I practice, is often times by filing a motion for summary judgment you're educating your opponent on what the real issues in the case are. And I don't believe that

that's a good practice if you know you can't meet the summary judgment burden.

But in short, in those -- in those cases in which you do meet the summary judgment burden, it's important -- summary judgment is an important part of our civil justice system and I think it's something that we need to make meaningful and -- and make enforceable and I think it should be protected.

CHAIRMAN MARK R. KRAVITZ: Thank you very much, Ms. Smith. Let me see if anyone --

Judge Wood.

HON. DIANE WOOD: Yes. Thank you very much. I had two questions for you. And -- and actually Judge Murphy's comments also raised these. In the "should" versus "must" debate, there's a third possibility and I'm sure you've seen it many times in your practice and I'm sure everyone has. Which is that the motion for summary judgment is filed and it just, for some reason, doesn't get ruled on. And then, you know, maybe there's settlement or maybe the case gets all the way up to trial.

So I think one of the reasons the language "should" was chosen, with respect to the earlier revision, was in a sense truth and labeling. You know, the reality is that if the judge just somehow didn't feel ready to rule, he just didn't rule. It's not that you were saying that I'm

denying summary judgment. But -- and I wonder if the rule should even address that somehow or whether that -- you know how that factor should fit in.

And the other question I have for you is whether you think the same standard should apply for summary judgment on the entire case as it applies for partial summary judgments. Because one can imagine a case where the judge is right on the borderline for -- for a partial summary judgment. You know the case is going to have to go to trial anyway, so maybe you should just go ahead and let the whole thing go to trial.

So if you could comment on those two things.

MS. MICHELE SMITH, ESQ.: Let me see if I -- I'm hoping I understood your question. The first -- the -- well, let me start with your second question. Your second question is, do I believe that the "must" standard should apply to --

HON. DIANE WOOD: Apply to partials as well. Should you have the same standards for summary judgment --

MS. MICHELE SMITH, ESQ.: I believe when there -- when the evidence presented offers no genuine issue of material fact, that regardless of whether they're partial or full summary judgment that -- that the standard should be "must." I don't think that there should be any discretion in granting summary judgments that meets the burden of

proof, because frankly the burden of proof is not that easy to meet all ready.

And -- and --

HON. DIANE WOOD: And the other -- the other is just the reason the word "should," I think, is there is because no matter how we word the rules, some realists might say there's still going to be some discretion in the District Court --

MS. MICHELE SMITH, ESQ.: Absolutely.

HON. DIANE WOOD: -- as to whether to grant it or not. So, isn't "should" a little more honest, even though on some theoretical level "must" sounds right?

MS. MICHELE SMITH, ESQ.: I think that your -- your first question was -- was in the case of where you aren't able to get a summary judgment --

HON. DIANE WOOD: You just don't get a ruling.

MS. MICHELE SMITH, ESQ.: You just can't get a ruling. Well, I honestly have some practical experience with that. And I don't know that that -- well, I can tell you had a very unexciting run -- a fun conversation with a client earlier this week on that very issue in a case in which -- it's a products liability case where even their expert agrees that there wasn't a defect with the product. However, they still have a valid claim again the innocent retailer. And I had tell my client that we filed a motion

for summary judgment, but I really can't do anything about getting the judge to grant it or deciding it before trial.

So, I don't -- I mean, that is a problem. I would like to see some way that's addressed. I don't know if that -- that can be uniformly addressed in the rules, but it is certainly a problem in practice.

CHAIRMAN MARK R. KRAVITZ: Okay. Thank you.

Judge Murphy, go ahead.

HON. PATRICK MURPHY: Could I ask a question of Judge Wood?

CHAIRMAN MARK R. KRAVITZ: You're assigning this to the Court of Appeals?

HON. PATRICK MURPHY: I would never do such thing.

Judge Wood, what you're -- it sounds like what you're talking about in the question is in reality, judges may be in a criminal felony case and you'd be answering a mandamus with a prisoner and maybe have three class certifications under advisement, and when the federal rules say "must," you're saying, Does that mean literally you just stop everything and do it right then and there because somebody would like to have it?

I never thought of that, but I wish I had. That's a reality.

HON. DIANE WOOD: Well, sure. And that's the concern. And I don't want to get mandamus petitions from

every disgruntled litigant all over the Seventh Circuit saying, Well, you know, a month has gone by and Judge Murphy hasn't ruled on my summary judgment motion yet.

HON. PATRICK MURPHY: Yeah.

HON. DIANE WOOD: So, that's -- that's a worry.

CHAIRMAN MARK R. KRAVITZ: All right. Thank you. Thank you, Ms. Smith, very much.

Margaret Harris.

MS. MARGARET HARRIS, ESQ.: Good morning. And thank you all too for your service to the Bar, because I know you have a lot of other work to do. And thank you for allowing me to -- to come speak this morning. I apologize that my written comments were not timely presented to you, so you haven't had an opportunity to look at them.

I'd like to address two basic points, with a few comments about some other things.

CHAIRMAN MARK R. KRAVITZ: Would you tell us a little about your practice first.

MS. MARGARET HARRIS, ESQ.: I'm sorry. I am a -- have been licensed since 1981. I practice in Houston, Texas. Ninety plus percent of my practice is in federal court, and 90 plus percent is employment. Of the employment, 90 percent is employees. So, I'm usually the nonmovant, although occasionally there are some affirmative defenses that I can be the movant, but not when I file a

Rule 56 motion.

I don't want to belabor the point/counter point, but we don't have that in Southern District of Texas. I have had a privilege of having some cases in the Eastern District, and thank goodness I haven't had to deal with the point/counter point over there.

But just by way of example, my law partner is -- now has a case in the District Court of District of Colombia. And in dealing with the Rule 56 motion that was filed in that case, she obviously had to prepare a response, a brief, a legal authority, citations to the record, all the -- all the attachments to go with that.

But in addition, because the movant filed 109 statements of material facts, none of the -- well, most of them are paragraphs. Not, you know, like the statute of limitations runs on X day. I mean, that would be very simple. But most of these are paragraphs. They make inferences, they reach conclusions. She had to prepare a 18 -- 17-page response. It added six and-a-half hours to the time spent in responding to the summary judgment motion. She separately afforded this time from regular response.

Plaintiffs are -- in employment cases anyway, we've gotten to the point that we think that defense counsel must believe it's now practice to now file a Rule 56 motion. They do come in every single case, regardless of, you know,

how often we -- we do survive them. We go on. We win the verdict. We have an upheld appeal. That doesn't stop them. They still file a motion for summary judgment.

In employment discrimination cases, unlike breach of contract kind of cases, it's very complex. The facts are very, very complex. We're putting together pieces of the puzzle. We don't have direct evidence. Hardly ever do we have direct evidence. Even when we've got direct evidence because my client says, The decision maker said this to me, that's still disputed because the decision maker says, I never said such a thing.

So we've got these complex cases that we're building on circumstantial evidence. And the use of the word "material" is somewhat confusing to me. Because what is material in an employment discrimination case that's built on complex circumstantial evidence? We have one example that was ultimately decided by the U.S. Supreme Court around two years ago, I think, with Ashe versus Tyson Foods. In that case, the Supreme Court said, Yeah, it kind of was significant that the manager used word "boy" in reference to the African-American employees.

Now, the lower courts hadn't found that of any significance at all. Not in District Court nor the Court of Appeals found it significant. But the Supreme Court said, Yeah, it's kind of important and then that should have been

considered. So, I -- that sounds material to me. But it's a tiny piece of the puzzle when you have to look at all the other evidence as well. My -- so material has a -- has a -- I don't -- don't think a very good definition in our kinds of cases.

The other part of the rule that -- or what the rule doesn't speak to is inferences. Obviously when you're building a case on circumstantial evidence, you also are relying heavily on inferences. Like the use of word "boy." What does that mean? Does that mean the person was just a youngster in -- in -- in the eyes of the person who made the comment? Or does it mean that they're racist? That's an inference that one has to draw from those facts.

The courts -- the lower courts earlier would have labeled those stray remarks, making an inference as a matter of law that it was not material.

The Ashe case also dealt with the -- with the inferences that if the two applicants' qualifications were not so distinct that disparity jumped off the page and slapped you in the face, then that's not material, it's not relevant. And the Supreme Court said, No, no, that's the wrong inference. You can't make that kind of inference. You shouldn't do that.

But I would urge the Committee to include language acknowledging the importance of inferences and how

the lower courts should consider inferences. And I think the word "inferences" needs to be in the language of the rule. That is the law. The law is -- you should considered the facts. But the law is also to consider inferences. So if you can include one term in the rule, I think you should include both.

If I -- my written submission has some suggestions on -- on the wording. I've -- you know, I've explored within my myself. I'm not on the Committee. I don't know all the nuances. And I don't know about the --

CHAIRMAN MARK R. KRAVITZ: I hope you're not using the word "shall."

MS. MARGARET HARRIS, ESQ.: Shall. I kind of like that. I think if I were a District Court Judge, I might take a little offense if the rules were telling me I must do something. I would think that I'm intelligent enough to exercise my own discretion and I don't need the word "must" in there. But I'm not a District Court Judge.

I would like to -- if the Committee is going to us the point/courter point, I would ask you put some heat in it. If the movant is going to say, This is a genuine issue of material facts, these 109; these are all significant in the presented case, and if the nonmovant shows that one of them is disputed, the motion gets denied.

I mean, put some heat in it. I mean, if you're

going to do it, then make it very -- make them be very, very, very, very concise because there's going to be a penalty if you put one thing in here that the nonmovant proves to be wrong, you're going to lose your motion. That -- that would happen help. I think it would cut down a lot.

The -- if the District's going to practice this -- I mean, the judges have now at least four extra documents to go through. They have the movant's statements and the non-movant's response, they have the non-movant's statement and the movant's response, they have the revisions that apply to the motions. I mean, it just -- it adds incredibly.

I would just say that I agree with the comments that we should have a server clause because we do have the burden of proof. I agree there should be oral argument. I think it's a little difficult -- I talked to a judge in Chicago about that, and -- and she was telling me about how difficult that would be because she's already gone through the motions, she's ready to rule. And she at least agreed to reconsider her -- her own practice and say, okay, when she's gone through it and everything, she's got a few points, she can tell the parties, Look, this is where I'm likely to go. Y'all come in, we can discuss it.

I have had cases where I think it would have

made a difference. I have had a District Court grand summary judgment when there was just a misunderstanding of the record. He believed that there was some facts that were not, and so we added, what, a year and-a-half, two years to that case because it had to go up and come back down.

My only other comment is -- I think it's called 56(d) now, but -- or in the proposal, but 56(f) right now. 56(f) motions, I haven't done very many of them, but the problem is that it's not going to be considered before the motion for summary judgment is considered. We have, like, 20 days or 21 days, I think, in the Southern District to respond to the motion. So summary judgment motion was filed on Day One, 56(f) motion might not be filed until Day 10, and surely you're going to get to the summary judgment before you get to my request to say, Wait a minute, they've sand bagged me and I haven't been able to takes X's deposition.

So just take that into consideration when you're looking at that.

CHAIRMAN MARK R. KRAVITZ: Okay.

MS. MARGARET HARRIS, ESQ.: That's all my comments.

CHAIRMAN MARK R. KRAVITZ: Great.

PROF. STEVEN S. GENSLER: Let me --

CHAIRMAN MARK R. KRAVITZ: Yes.

PROF. STEVEN S. GENSLER: I think that the -- the role of -- the role inferences is very important, as you know. And I think you're suggestion is that inferences somehow make their way into the statement part of the point/counter point.

My question is: Have you found that in those cases where you've done this type of -- of briefing practice that you're unable to adequately address inference in the brief?

MS. MARGARET HARRIS, ESQ.: I personally have not done the point/counter point. We have one experience, and that's my law partner right now. Just in regular course of briefing, it is kind of hard. I mean, think about Hamlet. How do you reduce that to a point/counter point? Is the guy crazy or is he not? How do you decide was revenge appropriate or wasn't it? I mean, all those are inferences that you draw. Our cases are not the kind, usually, unfortunately, that can be resolved with the CSI sort of approach. You know, we've got the lab testing this and looking for DNAs and hairs.

And so our cases are approved more like we're the hounds barking at night. Little tiny -- little tiny things.

CHAIRMAN MARK R. KRAVITZ: Judge Walker.

HON. VAUGHN R. WALKER: This rather follows up on

Professor's Gensler's question. Why, given your practice, isn't a point/counter point approach advantageous in this sense? When you received 109 allegedly material facts from the moving party, why can't you just stand up before the judge, pick out the best one and draw a big red circle around it and say, Now, Judge this is disputed because of some fact that you pointed to in the record.

MS. MARGARET HARRIS, ESQ.: Two things --

HON. VAUGHN R. WALKER: And alternatively --

MS. MARGARET HARRIS, ESQ.: Two things. One is --

HON. VAUGHN R. WALKER: Let me ask the following question.

MS. MARGARET HARRIS, ESQ.: Okay.

HON. VAUGHN R. WALKER: Assuming that you get one of these motions from a savvy defense lawyer who doesn't file 109 points, but two or three or four of bare bones motions, why can't you respond with 109 allegedly disputed facts? So why isn't the point/counter point actually an advantage rather a disadvantage, given your practice?

MS. MARGARET HARRIS, ESQ.: Two things. One is that we would have already spent six and-a-half hours creating a written response to go in the record. The other is that I don't get an opportunity to stand up in front of judge and circle this and say, Judge, look at this. We don't get an oral argument. We get an oral argument in

Fifth Circuit, but we don't get it in the District Court.

Did that address your question?

HON. VAUGHN R. WALKER: And the other point which you made in response to Professor's Gensler's description incapsulating the inferences of these point by point approaches.

MS. MARGARET HARRIS, ESQ.: It's -- it's very difficult. I mean, I wish I were a more skilled writer in trying to describe body language, things like that that go on in the work place every day. I mean, I try to describe it as best I can from my client has told me, but -- I mean, I've had one client tell me, it's like, Of course I know he's racist; you can practically smell it. How do you put that in a brief? You can't.

HON. MICHAEL M. BAYLSON: Judge?

CHAIRMAN MARK R. KRAVITZ: Judge Baylson.

HON. MICHAEL M. BAYLSON: Can I -- it's my view that in employment cases, particularly which you gather you do most of, that the point/counter point is actually very plaintiff friendly because for two reasons. First of all, it require -- usually the defendant almost always is the moving party. Would you agree with that?

MS. MARGARET HARRIS, ESQ.: Yes.

HON. MICHAEL M. BAYLSON: And therefore, the defendant has the burden of preparing this -- this point/

counter point proposal, which in a lot of cases can take more time and more -- therefore more expensive for the defendant to prepare. But at the same time -- and -- and whether you get 109 points, paragraphs, or if you've -- you're in a district that doesn't require point/counter point, maybe you'll get 109 pages of a brief. Which ever you get, you -- then the burden turns to you to point out to the judge that there are disputed issues of fact, of material fact, correct?

Now, don't you think it is easier to do that in a point/counter point system where you can respond to specific paragraphs and point to specific depositions or affidavits in the record or supply an affidavit of your own client raising these issues of fact, and then that is more effective advocacy than just filing a brief with 109 pages of your own, or however many pages you choose to put.

MS. MARGARET HARRIS, ESQ.: My understanding is that in those districts that require the point/counter point, it's in addition to the brief. So we've already responded to 50 pages of argument that presents that view of the facts from the movant's side and the law from the movant's side. Then separate and apart from that, we have to respond to this other document.

HON. MICHAEL M. BAYLSON: Well, you're -- you're correct. Go ahead.

MS. MARGARET HARRIS, ESQ.: And if -- if it was so limited that there were four or five facts, then I would agree with you. You know, if -- if the facts are so significant that the movant is ready to say, Okay, if I lose on any one of these points, I'm going to lose my motion --

HON. MICHAEL M. BAYLSON: Let's say -- you're correct. But let's say those 109 and you -- you're willing to concede 100 of them, but you've nine that are very material, you just come back in your response and you say, Judge, you know, of those 109, 100 are ridiculous, but here are not -- here are nine that I can show you in the record there are issues for trial.

Isn't that -- doesn't that make it easier for you to demonstrate to the judge that a trial is required?

MS. MARGARET HARRIS, ESQ.: I wish it would. I wish it would.

HON. MICHAEL M. BAYLSON: Are you saying that Judges don't agree to these things or --

MS. MARGARET HARRIS, ESQ.: I'm saying --

CHAIRMAN MARK R. KRAVITZ: She doesn't do them.

MS. MARGARET HARRIS, ESQ.: I think having to wade --

HON. MICHAEL M. BAYLSON: Meaning you haven't personally done it. I understand that.

MS. MARGARET HARRIS, ESQ.: Yeah. I mean, having

to wade through all of this stuff, I am too nervous about how often summary judgments are granted in our cases. I don't feel comfortable telling a District Court judge, I disagree with these nine, and not even say anything about that other 100. I just don't feel comfortable doing that.

CHAIRMAN MARK R. KRAVITZ: Yeah.

HON. MICHAEL M. BAYLSON: Is -- I'm sorry.

CHAIRMAN MARK R. KRAVITZ: Go ahead.

HON. MICHAEL M. BAYLSON: Is your point that the -- your fear is that the point/counter point has the effect of stripping the facts from the inferences that have to go with the facts?

MS. MARGARET HARRIS, ESQ.: That same kind of thing happens in the briefs as well. But that is the same time of problem. And -- and so inferences come up in both.

The point -- the thing about the point/counter point is that it just adds so much time and work into the case for us. And I think, more importantly, for -- for the judges. They have these more papers to go through.

CHAIRMAN MARK R. KRAVITZ: Yes, Professor Marcus.

PROF. RICHARD L. MARCUS: I think you are the second person who has urged something like a rule provision in saying that if any one of the 109 is genuinely in dispute, the judge must deny the motion for summary judgment. Is that one of the things you were suggesting

would be useful?

MS. MARGARET HARRIS, ESQ.: Yeah.

PROF. RICHARD L. MARCUS: Because that -- that -- I'm wondering --

MS. MARGARET HARRIS, ESQ.: But --

PROF. RICHARD L. MARCUS: I'm wondering then if the judge grants the motion for summary judgment there's an appeal, and the Appellate Court concludes, without regard to Number 73 -- that's the one that was circled in red --

MS. MARGARET HARRIS, ESQ.: Uh-huh.

PROF. RICHARD L. MARCUS: -- that summery judgment clearly would be appropriate on the record in this case, but it must reverse because the judge is required to deny the motion if Number 73 is genuinely in dispute, even if the Appellate Court concludes that doesn't really matter, summary judgment would otherwise be appropriate.

MS. MARGARET HARRIS, ESQ.: I understand your point, but if it was not a significant fact, a significant matter in dispute, my position is that it shouldn't be in there to begin with. That's how you put --

PROF. RICHARD L. MARCUS: I understand.

MS. MARGARET HARRIS, ESQ.: That's how you put "T" in this rule if you're are going to do that. There should be some consequence.

CHAIRMAN MARK R. KRAVITZ: If you're just trying

to keep your statement shorter -- and we've all had statements that begin with the first sentence being, The date I was born....Well, that may or may not be material in the case. And your point is, why is that there if we're not really trying to focus on that?

HON. LEE H. ROSENTHAL: Judge?

CHAIRMAN MARK R. KRAVITZ: Oh, I'm sorry.

HON. LEE H. ROSENTHAL: Is that more like sanction though than a summary judgment based conclusion?

MS. MARGARET HARRIS, ESQ.: I think sanctions are different, Your Honor. I think sanctions are for abuse of the process, abuse of the courts.

HON. LEE H. ROSENTHAL: What you're describing isn't. As I hear you talk about it, it seems to fit that description; that is, you view these endless statements of undisputed facts as an abuse of what was intended to be a targeted and very specific set of facts limited to those that are both undisputed and material.

MS. MARGARET HARRIS, ESQ.: Uh-huh. And I hear you. But I can't imagine filing a motion for sanctions with the court that my opponent has filed --

HON. LEE H. ROSENTHAL: No, I'm not suggesting that. But it sounds like you're talking about -- and I didn't mean to interrupt you. I'm sorry. But it sounds as if you're talking about having the "T" as a kind of a

sanction based response to an improper filing of -- which is the re -- what Professional Marcus described is an Appellate Court looking at this from a summary judgment lense, and in fact what the judge was doing was saying, No, you screwed up the process and therefore I'm denying summary judgment.

MS. MARGARET HARRIS, ESQ.: Well, and I see your point about that. But if the Court -- if the Committee wants a rule that actually works, then I think it's -- it's better for the courts to have these five points. Okay, here's these five points. The case, you know, hinges on these five points. That makes the process a whole lot more workable.

PETER D. KEISLER, ESQ.: It is almost an estoppel concept? Essentially having asserted that this fact was material, you wouldn't then be able to go to the Court of Appeals and say, Even though there was a dispute, the fact really wasn't material because if it were, you'd be essentially taking the position below that it wasn't true. Is that the way you think of it?

MS. MARGARET HARRIS, ESQ.: I think that's a good way of putting it, yeah.

CHAIRMAN MARK R. KRAVITZ: Thank you very much.

MS. MARGARET HARRIS, ESQ.: Thank you so much.

CHAIRMAN MARK R. KRAVITZ: We appreciate it.

Mr. Mason.

We're going to -- we're going to keep going until around 10:15, if that works for everyone. We're going to take morning break.

Welcome, Mr. Mason.

MR. WAYNE MASON: Good morning. Thank you for the opportunity to speak with you. My name is Wayne Mason. I am a lawyer from Dallas. I have a national trial practice, which I've tried cases around the country in both federal and state court in various disciplines; anything from pharmaceutical/medical advice, catastrophic injury class actions, and the like. So, I have a diverse practice myself. I also have the privilege of being the Chair of the Federation of Defense & Corporate Counsel, and so I do speak on behalf of the membership as well today.

Let me say that I take it very seriously of being careful not to address things not having walked in the shoes of someone else. And so not having been a judge and certainly not a federal judge, I respect the comments that Judge Murphy and others that have submitted comments. And mine will be from a practitioner standpoint. My -- my experience, certainly, that I -- I cannot relate to that. Nor I can relate to the employment nature of the practice. And so I respect those practitioners that have already spoken with their experience as well.

I would speak first to the issue of Rule 56(a)

and the issue of the "must/should" distinction or "shall" thrown in there as well. It's a very important issue, I believe, as a practical matter. There is, in my experience, a frustration with respect to clients, with respect to the issue. I remember one in particularly, representing a multi-national company from Asia. A -- basically where the law was -- we were right on the law and right on the facts and the that motion is otherwise not granted. And trying to explain that to multi-national clients who do business in this country -- and quite frankly for national clients as well -- here, it is difficult to explain why it is that it meets the standard annunciated with respect to no genuine issue of material fact, yet there is not a granting of -- of the summary judgment.

CHAIRMAN MARK R. KRAVITZ: In the cases you had in mind, are there situations where there's -- it's not even acted upon, or are there situation is where it's just denied one word, no explanation?

MR. WAYNE MASON: Well, unfortunately both.

CHAIRMAN MARK R. KRAVITZ: Both.

MR. WAYNE MASON: And even in cases in which both sides have filed summary judgments, I believe that it is appropriate, one way or the other, for the Court to make a determination, but otherwise it is not ruled on.

And so the issue of clarity there, I think it's

very -- I think this issue of "should" and discretion is one that is -- is important to clarify. I do not believe that should be discretionary. I respect the judiciary and the many things that there are discretion with. But if we're going to have a system that -- I know that the Committee has said they're not dealing or changing the standards here, and I think that's very important. That's my concern with this issue of inference.

And in fact, sure, there's always there a trial where you can check the -- the body language, I think, was even referred today. But if the -- if the law is what it is and the standard is what it is and it's not changing, I think we need to be very careful about that. But in applying it, it is important, I believe, for people to be able to trust the fact that it will be ruled on. And I think it's a great frustration of practitioners is the fact that judges won't rule. That is more of a problem at a state court level than it is at the federal court level in my experience. But it is something that -- I think clarity here is important.

I do want to address this issue of cost for a moment because I know in some of the materials submitted there's been issues about additional cost, particularly with point/counter point, which I'll address in a moment. But the enormous cost to clients -- and I do do some work in the

commercial litigation area where I represent a company as a plaintiff. So it's not all defense oriented.

But the enormous cost of preparation for trial and trial -- and in many other cases that I'm involved in, we're not talking about let it go to the jury and it's a three-day trial. I mean, we're talking about three weeks, three months potentially.

Enormous expense involved potentially when motions are either not ruled on or denied when there is no genuine issue for material facts. And it's difficult and it's something that -- that cost, when you just oppose those costs associated with the briefing cost and the like, I believe that there's significantly greater, in my experience, with respect to the trial preparation and the trial itself.

The point/counter point, I had the privilege or not of practicing in jurisdictions that handle it both ways, and have had experience with it both ways. And a couple points just purely from a practitioners standpoint is that it does -- the point/counter point does force you to focus on the issues of your case of -- as a trial lawyer of what you can prove, what you can't prove, and whether it does survive.

I will tell you that there have been times in my office in which in a jurisdiction of point/counter point

where we have looked at it and not filed motions. And I know Judge Murphy says they're filed in every case, but I do not file them in every case in which I'm involved because of was focus and the -- the really pulling down the issues. I think it's a valuable tool for practitioners that -- that is beneficial.

CHAIRMAN MARK R. KRAVITZ: One thing we've heard is that sometimes the statements get very long, particularly complex cases. So, 109. But actually I've seen them 350 and -- and more than that. Like in a medical device case or a catastrophic injury case, give us some sense -- I mean, what are we talking about? It's not clearly five material facts when you file a motion.

MR. WAYNE MASON: Well, not necessarily. I think the comment was made before about the issue of savvy practitioners and people that recognize their audience, I believe, and how foolish it can be to file these -- as Judge Sedwick pointed out in his comment, 322, I think, points, and that it is appropriate to tone it down.

My experience is that what I call "motion lawyers" do dumping whether it's point/counter point or not, and whether it's a 109-page brief, or whether it's a 109 points that -- unfortunately, those are sometimes the case of the strategy and the style of which people operate, which is why I do want to address 56(h) in just a moment about

that.

Yes, sir?

CHAIRMAN MARK R. KRAVITZ: Go ahead.

PROF. RICHARD L. MARCUS: Could I just follow up with a question on something I think you said. I think you said, sometimes you find that the point/counter point analysis persuades you that you shouldn't proceed with and file a motion because of that focus that you reached using that process.

MR. WAYNE MASON: Yes, sir, I did say that.

PROF. RICHARD L. MARCUS: Have you had the reverse experience in districts that don't require -- that is, you file a motion and later you conclude, Oh, shoot, if only we had point/counter point we would have seen that this is not worth pursuing?

MR. WAYNE MASON: I can't say that that specific thing has come to mind; that if we had count/counter point that -- that specifically this wouldn't have occurred.

PROF. RICHARD L. MARCUS: More generally that -- that you weren't as fully focused because you haven't had to do that extra task.

MR. WAYNE MASON: Well, it's true. As a practical matter, you know, busy practitioners that have lots of work do and the like, sometimes, you know, their offices they -- you know, it -- it just -- too much gets filed, or let's get

the motion on file. And it's a good exercise. It's just a good exercise.

And I think from a cost standpoint, the other thing to consider is -- I'm sorry.

CHAIRMAN MARK R. KRAVITZ: No, no, no. I'm just going to say Judge Baylson has a question, Judge Colloton and then Judge Rosenthal. Okay, so you're to have to tinker, you know --

MR. WAYNE MASON: I'll be happy to answer the questions.

HON. LEE H. ROSENTHAL: If I the chance.

HON. MICHAEL M. BAYLSON: All right. Let me start, if I may. You have a national practice and I think that's an important perspective. One of the motivations in this Committee starting down this road was the volcanization, if I can call it that, of Rule 56. There was this proliferation of local rules throughout the country. And even within specific districts individual judges would have specific practice orders that differed one from other in various ways. And that -- we were told, and I think it's true to some extent, that this created a lot of problems for lawyers that practiced in many districts. So, I'd like you to -- that's -- that's one question.

The second question, which is related to that, is that we've also found, as we go through this process over

the last three years, that a lot of judges don't like to be told they have to do something in a specific way. And with great respect to Judge Murphy and Judge Ferguson, you know, they don't want to be told they have to do this point/counter point system and they don't -- they don't care for it.

So, and -- and you're an advocate of the word "must." But let me tell you, a lot of judges are going to be very unhappy if this rule ends up with the word "must." And that's a real problem, even though there are some case support for doing that, but there's case support the other way too. We've -- we've been through a lot of these cases.

So, from the standpoint of yourself with a national practice -- and forgetting for the moment that you happen to be defense rather than the plaintiff and that it applies both ways -- what value do you see to this being a national rule, you know, with a narrow escape clause in the point/counter point?

MR. WAYNE MASON: I think any time that you can have uniformity, it is a benefit. It is a benefit to clients, not just a convenience to me. The fact that I have a national practice, I take the burden on of learning the local rules. It's -- it's not a rule that you change just as a convenience for me because I happen to travel around the country and need to be familiar with -- with local rules

and the like. But I think there is a real benefit to the uniformity of recognition of the way in which we practice.

Now, I understand the human nature of -- of not wanting to be told what to do. And I respect that, certainly for a judge to want to have that determination. I would -- I would certainly push back with respect to the issue of "must" because I do think that that is a fundamental issue that is very important to the system, and that the discretion there is not an area in which I believe is appropriate for discretion, if in fact the standards that currently exist and as you've indicated will remain on there and in place.

And so I do believe, though, the exception that you referenced does give the opportunity for judges to opt out if they so believe that it is -- it is not appropriate. I -- I have read the statements of the judges that have submitted filings, and I certainly respect Judge Murphy, but I don't know that there's a human out cry from judges around the country opposing this. In fact, as I understand it, there are some that support it.

And so I do support it, but, you know, I understand that the system works both ways. The most important thing is, I think, this "must/should" issue.

CHAIRMAN MARK R. KRAVITZ: Judge Colloton?

HON. STEVEN M. COLLOTON: I have a question about

that "must/should" issue. And you know, prior to the stylistic provisions the Rule said, Judgment shall be rendered.

And so my first question is: Did you -- did you view that rule -- regardless of what the case law is right now, but just from the point of view of the practitioners, was that viewed as a mandatory rule or a discretionary rule?

MR. WAYNE MASON: Mandatory.

HON. STEVEN M. COLLOTON: Now, when it was viewed as mandatory by practitioners and you ran in scenarios like you described where judges did not rule, how often did clients of yours seek mandamus from the Courts of Appeals to get some kind of action from the District Court? Was that a practice that was followed?

MR. WAYNE MASON: Not -- not very often.

HON. STEVEN M. COLLOTON: Occasionally?

MR. WAYNE MASON: I would say occasionally.

HON. STEVEN M. COLLOTON: Yeah. Do you foresee that there would be more mandamus actions if the rule said "must" then when it used to say "shall?"

MR. WAYNE MASON: I wouldn't support it if I believe that to be the case. So, no.

HON. STEVEN M. COLLOTON: Why do you think it would not lead to more?

MR. WAYNE MASON: Well, because I believe that

the -- the "must" is a clarification that is the best choice of word to go back to the "shall" position that we were in before the stylistic change. And I think it -- it provides the best Claritin with respect to the issue.

HON. STEVEN M. COLLOTON: Okay. Thank you.

CHAIRMAN MARK R. KRAVITZ: Judge Rosenthal.

HON. LEE H. ROSENTHAL: Quick question. You referred to the dumping problem. And we've heard a lot about the dumping concern in the statements of undisputed facts that go on for pages and pages. One of the proposals that we've been presented with for trying to discipline that is some kind of numerical limit either in the rule or in a case-by-case basis that would require the movant to restrict the number of facts asserted to be both undisputed and material that entitled the movant to judgment as a matter of law to a certain number. Pick one, say, five for each claim on which summary judgment is sought, or each affirmative defense on which summary judgment is sought.

Do you have a reaction to whether that would be wise or effective?

MR. WAYNE MASON: I think the difficulty is the enormous spectrum of cases in which you see and we deal with. To say five in a complex -- you know, a very complex multi-party case, multi-issue case, might be difficult, although it could be deal with with that limitation, unless

you have leave of court, and then you can make your pitch as to why it could be dealt with that way.

The other way to deal with it would be not to limit it. And under Rule 56(h), make some changes, which I believe are appropriate with respect to getting the attention and cost shifting that I believe is appropriate to consider that might have an additional effect of fielding some of that dumping.

ANTON R. VALUKAS: Let me just go back to being a practitioner. Would you find it -- I mean, just general experience -- that it would be extremely unlikely that most practitioners would be looking to mandamus a District Court Judge on an issue like you've described?

HON. LEE H. ROSENTHAL: Particularly a judge --

ANTON R. VALUKAS: Yeah.

MR. WAYNE MASON: That is correct.

ANTON R. VALUKAS: And I'm trying to --

MR. WAYNE MASON: That is correct. And that is why I answered question as I did.

ANTON R. VALUKAS: I mean, I think that in the real world the idea is -- what you'll more likely to be doing is saying to your client is saying, Let's be patient, I've looked at the docket, there's time here, will get to it, versus questioning the Court of Appeals.

MR. WAYNE MASON: That is correct.

PETER D. KEISLER, ESQ.: Just to follow up on Tony's question and Judge Colloton's question. No one here, and you included, wants to create these mandamus options. They would have to be exercised in a significant degree. And you said that you thought that really what we'd be doing by adopting "must" is returning to the same world we were in when the word was "shall."

But you also said that -- and that that's where the experience existed that you drew from when you said the judges are sometimes just sitting on these motions, not acting on them, letting the case go to trial without the deciding it one way or another.

Doesn't that suggest that at least for purposes of the problem of judges not deciding summary judgment motions, what we do in this point probably doesn't matter?

MR. WAYNE MASON: I don't think so. I think that it very much does matter. When you use the term "should," it is a clear affirmation that I don't have to and it is -- it is -- you know, as pointed out, I believe, in your -- in your Committee notes, there was a reference to a "must" -- and I believe it was 56(g) in terms of "must," and that that is typically not, you know, followed. I'm not naive enough to -- to believe that there are times when summary judgments would still be denied under the "must" standard. But I do think that from the Committee standpoint and for -- for the

benefit of our civil justice system, that it -- the message should be that it is non-discretionary. And that that's -- and I'll tell you, the other elephant in the room -- and I know that it's not what the Committee is clearly talking about, but let's not kid ourselves. The state courts are looking to the rules that -- that are in place in the federal system. And there is already a major problem at the state court level in many jurisdictions of judges refusing to grant motions.

And so the -- the addition of the clarity there, I think, is really important. And the trickle down effect -- or trickle over -- I probably should say chaos -- trickle over effect, I believe, is an important issue as a practical matter.

PETER D. KEISLER, ESQ.: So the point is that using "should" will take the practice that already exists to some degree, that's bad and make it more common?

MR. WAYNE MASON: I absolutely fear that. That is one of the reasons I feel so strongly about this.

CHAIRMAN MARK R. KRAVITZ: Judge Walker.

HON. VAUGHN R. WALKER: Let me just -- following up on this discussion, the last sentence of the proposed Rule 56(a) states that the Court should state on the record the reasons for granting or denying the motion. So the same level of imperative implies to the judge, whether he's going

to grant the motion or deny it. So why doesn't that provide some protection against the situation that you filed and an individual judge, simply out of lethargy or inattention, sits on the motion and doesn't take action, as opposed to the situation that Judge Wood described where you had, perhaps, partial summary judgment should be granted on one part of the claim? The whole case is going to have to be tried anyway, so you might as well try everything. Or the situation in which the judge conclude that a trial is not going to be for the parties any more expensive than going through the summary judgment practice? Why doesn't this provide protection --

MR. WAYNE MASON: Well --

HON. VAUGHN R. WALKER: -- which you're seeking?

MR. WAYNE MASON: I think that the -- particularly as it relates to the partial summary judgment issue, that sometimes we take a select example with respect to that that it suggests that it's not a big deal to just go to trial and throw it in with the rest of the case.

Again, in practice, there are significant ramifications to the granting of the partial summary judgment, both on potentially narrowing the issues and even on things like settlement effect, where the case may not need to be tried. That there are times with the -- the granting of the partial summary judgment is so significant

that it does make a difference and it impacts the case. And therefore, I don't think it is --

HON. VAUGHN R. WALKER: Well, aren't -- aren't there situations where it doesn't really make any difference?

MR. WAYNE MASON: There -- there --

HON. VAUGHN R. WALKER: The trial is going to be the same, whether you adjudicate this particular claim or part of the claim or not.

MR. WAYNE MASON: Fair -- fair comment. But I think that the big picture issue of whether we're going to communicate the need for clarity in terms of granting summary judgments overshadows the potential example where one might think it would be better to send a case to the jury, and therefore leave it discretionary or to communicate that there is some discretion there.

CHAIRMAN MARK R. KRAVITZ: You had a point about cost shifting you wanted to make.

MR. WAYNE MASON: Well, I just -- my point, with respect to 56(g) and now (h) is that as a practical matter, I don't see it working in terms of the decisions or the determinations with respect to the bad faith of lawyers with respect to what has transpired and therefore ordering that -- that monies change hands. I think that a more reasoned approach with respect to whether the counsel have

acted in a reasonable or unreasonable way in filing 322, you know, 240 of which wee ridiculous or -- or a client -- or a lawyer who comes to the court and says, I need more discovery and I need to do this, and runs up a significant attorney's fees for another party is a real problem and one that should be addressed.

CHAIRMAN MARK R. KRAVITZ: But how would you handle that? The person who wins summary judgment gets their cost? The person who acts unreasonably gets sanctioned by some amount of the attorney's fees?

MR. WAYNE MASON: Well, I think we need to be careful about sanction. We still have Rule 11. So I would not impede on -- on Rule 11, which certainly exists. But it would be a cost shifting with respect to a determination by either side that -- that their conduct was inappropriate with respect to the filing of the motion and the reasonableness of the positions that were taken, and that either delay or that they've solved.

CHAIRMAN MARK R. KRAVITZ: Okay.

MR. WAYNE MASON: I would like to briefly address Rule 26. I don't think anyone has this morning. So if I could -- I apologize.

CHAIRMAN MARK R. KRAVITZ: That's okay.

MR. WAYNE MASON: I would support -- again, as a practical matter, I would support the extension of the

protection with respect work product to the disclosure experts. There are often times clients that we deal with on a regular basis in which witnesses are not normally testifying, not normally regularly testifying on behalf of the company, but that there is a need for communication with and that they might in this particular case provide some expert assistance to the Court and to the jury. And in those cases, of all people, those are the ones that should need the most benefit of communication with their lawyer. And the difficulty, as a practical matter again, is that depending on the jurisdiction of where we are, it's you have to consider, does the attorney/client privilege apply here? Does -- the control group test and the subject matter, what is the situation?

And I think that the protection that you appropriately apply to drafts and the things that -- that you have addressed would be appropriate to extend to that category of expert witnesses.

CHAIRMAN MARK R. KRAVITZ: Go ahead.

PROF. RICHARD L. MARCUS: Could you define that category, and would you include within that, for example, a plaintiff's treating physician?

MR. WAYNE MASON: Yes. And I'll tell you --

PROF. RICHARD L. MARCUS: You would include the plaintiff's treating physician?

MR. WAYNE MASON: Yes, sir. And I'll tell you that there is some debate certainly within our organization and I think the defense community as to whether this is -- what I just communicated to you is the right position. Because there is concern about, in a personal injury context, plaintiff lawyers having the ability to, you know, communicate with treating physician and shield those communications in the light of what impact that that might have. And this is a balancing test with respect to the litigation as a whole.

Again, it's not all in the personal injury context. There are plaintiff corporations that are in commercial litigation that are seeking and our acting as plaintiffs in the case. And all things considered -- considering all things, we felt like it was the -- the better reasoned approach, even though there are those that express that concern.

DANIEL C. GIRARD, ESQ.: Would a disclosure expert have the power to waive the confidentiality of communications if he or she decided to for whatever reason? Or would you make it non-waivable in the sense that it's like an opinion work product in some states?

MR. WAYNE MASON: Well, it comes down to the -- the issue of -- of privilege or immunity, and the issue of the analysis of the work product issue in the first place

and who has the ability to waive and -- and the application of that. And so I'm not sure I can answer that. I'd like to think about that.

DANIEL C. GIRARD, ESQ.: Wouldn't it potentially intrude on the state law also? Because right now I think that the privilege is usually when it's a work product. And when it's opinion work product, I think it's usually governed by state law. And if we try go into that realm and -- and create a rule, I think it potentially has got some real problems for us.

MR. WAYNE MASON: I'd like to think through that some more. Thank you.

CHAIRMAN MARK R. KRAVITZ: Judge Campbell.

HON. DAVID G. CAMPBELL: If I could just follow up on the point. I guess I'm a little surprised. Let me just make sure I understand you correctly. Your group, the Federation of Defense and Corporate Counsel -- if you're on a personal injury case and you're deposing the plaintiff's treating physician, who the jury is going to view as perhaps more objective than any other witness in the trial, and you learn that that physician met with the plaintiff's lawyers for three hours before the deposition, you're okay not being able to inquire into what was said during those three hours?

MR. WAYNE MASON: The short answer is yes. And the reason briefly is that our experience -- my experience,

is that so much time is wasted in depositions with respect to asking about questions like that and all the communications and things like that that are, as a practical matter, often a waste of time. The issue and the ability to ask a witness, a treating physician, whether they considered this or they -- you know, there's already the exclusion with respect to assumptions made and things like that to explore their opinions and things, or it's still there and right is there.

It's a very fair -- it's part of this debate I mentioned to you about the questions that have been posed by some. And there's not total agreement with respect to this. That is a very real example. But given the -- given the nature of in-house witnesses and employees and corporations that often times need to be worked with, dealt with in terms of the system and presented -- and not only in-house folks, but others that might be a professor in the light that might not normally give testimony like we believe that is appropriate.

PROF. RICHARD L. MARCUS: Wouldn't the professor -- the professor is going to be testifying as a witness?

MR. WAYNE MASON: Uh-huh.

PROF. RICHARD L. MARCUS: So would be specially retained and covered by our rule --

MR. WAYNE MASON: Well, in that situation, you're right. Yeah.

PROF. RICHARD L. MARCUS: You mentioned the three exceptions. You said, I think, that they seem to you adequate to permit inquiry of the plaintiff's doctor in your example.

MR. WAYNE MASON: Yes.

PROF. RICHARD L. MARCUS: So the three exceptions seem to you satisfactory, where generally the rule is written as proposed.

MR. WAYNE MASON: As a practically matter, trying lawsuits to a jury, I -- you know, it's got to be pretty egregious. And -- and the number of times of really making a difference in front of the jury, of the plaintiff's lawyer talking, and what was said and when, I think, that in my personal experience, that is often times not the best use of the jury's time, and not the best judgment on the part of a skilled trial lawyer.

PROF. RICHARD L. MARCUS: Oh, I'm sorry. I was thinking more general -- I was thinking more generally if -- asked whether I was correct in understanding that you regard the three exceptions to the inquiry about communications generally to be satisfactory to permit adequate inquiry?

MR. WAYNE MASON: Yes.

CHAIRMAN MARK R. KRAVITZ: Thank you very much.

MR. WAYNE MASON: Thank you.

CHAIRMAN MARK R. KRAVITZ: We very much appreciate your time and your comments.

I think at this point we'll take a 15-minute break to 10:30 when we will resume with Mr. Martin.

(OFF THE RECORD, 10:16 to 10:33 A.M.)

CHAIRMAN MARK R. KRAVITZ: Mr. Martin. Thanks so much for your willingness to appear before us today and share your thoughts with us.

JOHN H. MARTIN, ESQ.: Thank you very much, Your Honor. And I'm honored and privileged to be here. My name is John Martin. I have practiced civil litigation primarily on the defense side of the docket with Thompson and Knight in Dallas since 1974. I've actually practiced with the same law firm for all those years, which is becoming something of a rarity these days.

I'm here today to speak about both rules, and I will tell you a little bit about my practice and why I think I might have something hopefully of value to offer to you. My practice has involved, over the years, a lot of mass tort defense. More recently some legal malpractice defense and some general commercial litigation.

The mass tort defense has been involved a whole lot with mass air disaster cases. I've been privileged to represent several major U.S. airlines in mass disaster

cases. And those -- those tend to wind up with at least some component in Federal Court. And the way that normally shakes out is we'll wind up with some state court cases, we'll wind up with a Federal MDL, the case is filed in multiple districts, multiple jurisdictions around the country, consolidated MDL for discovery purposes.

And the reason I think that's important for some of these discussions is that perhaps more than some lawyers, I've seen a crying need for standardization and uniformity in some of these -- some of these practices, both in the discovery area and in the -- in the Rule 56 summary judgment area.

And this is particularly true in these air crash cases because it is fairly common -- can't always get this done, but it's fairly common to stipulate, even in the state court cases, where depositions are being taken that apply in all the cases to go by the federal rules with regard to times when they submit any kind of objections and things of that nature. Not always. That'd have to be done by agreement. Nobody can make anybody do it.

But -- but for that reason, I want to spend a few minutes following up on some of the things Mr. Mason talked about with regard to Rule 26, and then I'll -- then I'll conclude with some remarks about Rule 56.

CHAIRMAN MARK R. KRAVITZ: That'd be great.

JOHN H. MARTIN, ESQ.: I think it is -- well, I read with great interest Judge Kravitz's letter to Judge Rosenthal December the 9th. There are apparently some procedural scholars with concern that the rule is effectively recognizing that we actually have expert witnesses who act as advocates. Well, for those of us who are out there in the trenches, that is -- that is certainly not a surprise.

CHAIRMAN MARK R. KRAVITZ: It came as a surprise to the Academy.

JOHN H. MARTIN, ESQ.: I don't know. But one -- one point I want to make about this is that the -- yes, there are professional expert witnesses. Some people call them hired guns. Some people call them other things that I won't mention here. But -- and some of those folks are good, honest, expert witnesses, do a great job. And others, perhaps, are questionable. But this -- this rule really isn't going to impact those witnesses very much. Because as some of the comments have pointed out, they have figured out long ago ways to wire around this because they don't do draft reports. If they do, they do them in their computer and you're never going see the draft. They don't keep notes of their conversations with lawyers.

The problems come up when you hire a real, honest to goodness expert who may be the leading expert in

that particular field of science or whatever other expertise you're talking about who's never testified before, who's very uncomfortable with the process, who's not used to dealing with lawyers, who has no idea how to write a Rule 26 report, who has no idea what this process is all about. And it's just essential whether you're representing the plaintiff or the defendant to be able to have some candid education of that witness so that they can do a better job.

And what I'm leading up to is this: I think this rule will have a very positive effect on the system, of making it more likely that lawyers will actually use people who are really the leaders in their field. And that's the -- that's really the main reason that convinced me to support this rule. I'm one who has asked a lot of these questions of witnesses over the years.

CHAIRMAN MARK R. KRAVITZ: And have you unearthed the answer.

JOHN H. MARTIN, ESQ.: One time I got a draft report that just had a real nugget in it. It made the case go away. But that's one time in 34 years. And that's -- that's probably fairly typical as to how often it happens because it just doesn't happen very often. It was a witness in Boston, Massachusetts. I won't take up the time with the details of that.

Like Mr. Mason, I also support -- and there has

been some controversy about this on the defense side of the bar, but I also support extending work product protection to so-called disclosure experts. And I'm willing to give up the right to cross examine plaintiff's treating doctors about conversations they've had with the plaintiff's lawyer. Because in my experience, you don't get a lot of information there anyway, so it's largely a waste of time.

To be sure that my communications with company employees who may be giving expert opinion testimony are protected. Because you get into the situation where that conversation might be protected under one state's law of attorney/client privilege and not in another state, depending on which tests they adopt. So I feel -- I feel pretty strongly that -- that that protection is needed and will -- and will benefit the system.

CHAIRMAN MARK R. KRAVITZ: Professor Marcus?

PROF. RICHARD L. MARCUS: Sorry to break in here --

JOHN H. MARTIN, ESQ.: Sure.

PROF. RICHARD L. MARCUS: -- but could I follow up on what you just -- I think what you just said?

Do you find that this need to talk to the company's employees about the case is limited to or particularly true with those who are partly going to give some expert testimony?

JOHN H. MARTIN, ESQ.: Yes.

PROF. RICHARD L. MARCUS: Why?

JOHN H. MARTIN, ESQ.: Again, because very often you're talking to people who have never seen a courtroom before, don't know what a deposition is, and who really need some counseling about what this is all the about.

PROF. RICHARD L. MARCUS: Well, the thing I'm trying to get at is that it struck me as possible that the latitude in talking to the company's employees that you regard as important with those people who don't normally deal with litigation would be true of people who are not going to give expert testimony as well as with people who are going to give expert testimony. Am I wrong in that?

JOHN H. MARTIN, ESQ.: That may be true. But this rule is talking about experts. And I don't see how this rule could reach non-expert testimony.

CHAIRMAN MARK R. KRAVITZ: So what you're really concerned about is the -- obviously you're willing to extend it to treating physicians. But the company person who is charge of the water quality plant who's going to testify as an expert about how -- some process that occurs there, you want to be able to have a frank discussion with that person and not have that disclosed, except insofar as assumptions and facts?

JOHN H. MARTIN, ESQ.: That's -- that's right.

Now, Texas has gone through -- we went through a period where we were a control group state. And then the Supreme Court amended the rules of evidence, and -- and a very clear comment in the rule turned us into a subject matter study, which we always thought we were before the -- as someone said, before the case came out.

So I -- I've experienced it both ways. And so now we're a subject matter state, so it's okay. But there's -- Illinois, for example, I know, is still -- I think, is still a control group state.

HON. DAVID G. CAMPBELL: Mark, may I ask something?

CHAIRMAN MARK R. KRAVITZ: Yes. I'm sorry.

HON. DAVID G. CAMPBELL: I have a follow up question.

As we work through the process of deciding whether or not that protection should be extended to non-report experts, I think our primary concern is about the non-report experts who aren't affiliated with you and your firm and the treating physician. A law enforcement officer may give opinions about what's reasonable conduct in a civil rights case where somebody's claiming excessive force.

And we were worried about creating a situation where lawyers sort of have this confidential opportunity to talk with people who are independent parties, as much fact

witnesses, perhaps, as experts, and whether we give lawyers too much influence over people who aught not be influenced in that way.

We couldn't figure out a way to apply it to non-reporting employee experts and not apply it to non-report treating physicians or law enforcement officers.

Have you given any thought to that?

JOHN H. MARTIN, ESQ.: Yes, and I cannot figure a way to draw that line either. I view it as something -- as a defense advocate, I view it as something of a trade off. Yes, I would like to be able to ask the plaintiff's doctor those questions, but to me that's far less important than the ability to protect communications with employees who are being asked questions as an expert witness. If there was a way to draw that line, I would probably be in favor of it. I thought this through and I think -- I think I agree with you that there's no good way to -- to distinguish between the two types of non-report or disclosure only experts.

I -- I agree there's some concern about a lawyers' ability to influence a police officer, a treating doctor or somebody like that. I think these exceptions, the three exceptions, do give you some ability to ask those types of witnesses where did they get the facts they're relying on. For example, you can ask in a deposition, What is your understanding of the facts? And if they're totally

off base on the facts, I think you could then discover the source as an exception. The way I read it, I think you could ask for the source of those facts. And it might come out in that way. So that's -- that's the way I would deal with it.

Another -- the last point I was going to make on experts is -- and I don't know if this was deliberate or -- or what, but very often experts, particularly if it's an engineering consulting firm or somebody like that, there's a need to communicate with their staff members who are doing some of the basic work. Accounting firms might have an underling doing some of the basic number punching and that sort of thing, and those communications with the staff members aught to be just as -- just as protected as with -- as with the primary expert.

CHAIRMAN MARK R. KRAVITZ: So what we've been told is actually that's how you communicate with the testifying expert, because the staff member will never be deposed. And so you want to tell the testifying expert to do something, you tell the staff and they tell the testifying expert, and so there's no lawyer -- direct lawyer communication. Am I wrong on that?

JOHN H. MARTIN, ESQ.: Well, I've had staff members deposed.

CHAIRMAN MARK R. KRAVITZ: Okay. All right. You

have.

JOHN H. MARTIN, ESQ.: And I'll say that's not -- that's not my practice.

CHAIRMAN MARK R. KRAVITZ: They're deposed because they are doing -- crunching numbers; doing something that is empirical to the -- to the testifying experts.

JOHN H. MARTIN, ESQ.: I've had cases where the staff person was deposed and was -- was asked about all communications the staff person had with the lawyer, all communication the staff person had with the testifier, and that sort of thing. So I just think they aught to be protected. Each -- each one of them should be protected.

Okay. Finally on Rule 56, I don't want to just repeat what others have said. I do support the use of the word "must" for the reasons that others have stated.

I will also state categorically I do not, I have not, and I will never file a motion for summary judgment in every case. I think this -- I can't speak to what happens in employment cases. I'm going to go back and ask my partners who does employment law what their practice is. I would be shocked if they filed summary judgment motions in every case. But in my practice, that's absolutely not the case.

One of the prior speakers mentioned credibility with the courts. I practice before the same courts quite a

bit. I value my credibility to whatever extent I may have any, and I certainly don't file motions for summary judgment unless I think there's merit to them.

On the point/counter point, I have -- I have practiced in both types of jurisdictions and I -- I favor the -- I favor the point/counter point system, and I have found that it works well. We had it at one time in the Northern District of Texas, but we don't anymore. I'm about to file a motion for summary judgment and I think I'm going to numerically list the undisputed facts of the motion because but I think it helps the Court focus on the issues. I think it makes lawyers think through the motion for summary judgement.

As Mr. Mason said, I've had the same experience. When we get analytical about it, I know I have decided not to file motions for summary judgment. I think it makes lawyers do a better job in filing a motion. And in my experience, it -- it saves costs. I have not -- I've not had any experience with any of these 300 undisputed facts type motions. I've never seen one. I've certainly never filed one. I cannot conceived of filing one. I cannot conceive of filing a summary judgement motion that has more than a handful of undisputed facts that were material in support of a motion.

CHAIRMAN MARK R. KRAVITZ: Well, that's what I --

and I -- maybe they don't get filed in an aircraft crash case. I don't know. I haven't ever had one. But, I mean, in a case like that, with some sort of catastrophic huge thing, what do they look like? I mean, we've been told that in some of those cases that it's a thousand undisputed facts because, of course, the case is so big. Is that not true?

JOHN H. MARTIN, ESQ.: Under my -- and I'll give you a concrete example.

CHAIRMAN MARK R. KRAVITZ: Yeah, a concrete example.

JOHN H. MARTIN, ESQ.: I rooted to this without naming the case in -- in my letter. But I was privileged to represent American Airlines in the litigation resulting out of the crash of Flight 1420 in Little Rock, Arkansas, June 1, 1999. And typically we had -- we had federal court multi-district litigation in Arkansas, we had state court cases in Texas that could not be moved and transferred, and I believe a few stray state court cases somewhere else, if I'm recalling correctly. But the real focus was on the MDL in Little Rock.

After a certain amount -- after the MTSB investigation was completed and after a certain amount of discovery, we -- we not only agreed not to contest liability, we admitted that the pilots of the airplane committed certain acts of negligence which caused the crash.

We stipulated that in open court and we filed a written stipulation. Our experts admitted to that in their deposition. We were -- we were willing to give any -- well, the judge set up a procedure where the Warsaw Convention cases where there was no punitive issue. We tried first on damages only. Plaintiffs who were willing to waive punitive got damages only trials. But as always happens in these things, there were some hold outs. And there was a fairly large number of hold outs that resulted in about two years of very intensive discovery on whether this was a punitive damages case.

We filed a motion for summary judgment on very, very narrow grounds in order to try to eliminate the punitive damages issue. And the motion for summary judgment boiled down to this: That the -- that the sole producing or proximate cause of the crash was the pilot's failure to arm or manually deploy the spoilers, which are the little flap thingies that pop up when the plane lands that destroys lift on the plane and plants the wheels in the concrete so it doesn't keep going. And this was a wet runway that night. It had been raining.

And our -- our expert tests, MTSB's expert tests and the plaintiff's expert tests all showed that if they had done that, the plane would have stayed on the runway. The plaintiff's theory was that the pilots willfully and

knowingly flew into a dangerous storm. And our argument was, well, based on the undisputed evidence of the three sets of experts -- plaintiffs, defense, and MTSB -- that was not causative in the accident because they landed the plane, they got it on the ground, they would have stayed on the runway and nobody would have been hurt if they had simply pulled this handle back. And nobody could seriously contend that was gross negligence.

We filed that motion. Discovery went on and on and on. It sat there for I think a year and-a-half. I could be off on the months. I'm remembering back several years now. And so it was a very simple motion. Just as I've stated in a few words here, it was no more complicated than that. Now, I'm sure there was a recitation of the history of the flight, but the undisputed facts were just -- just what I -- what I stated.

The end result of it was, unfortunately, the MDL judge died, a new MDL judge was appointed. He immediately granted the motion, that went up on appeal and was affirmed unanimously by the Eighth Circuit.

CHAIRMAN MARK R. KRAVITZ: Professor Marcus.

PROF. RICHARD L. MARCUS: Using that example, I'm assuming this was back when the rule said "shall grant" the motion.

JOHN H. MARTIN, ESQ.: Yes, sir.

PROF. RICHARD L. MARCUS: And if it is true that you regarded that as the same as "must" how should a rule that says "must" operate in a situation like the one that you just described?

JOHN H. MARTIN, ESQ.: I don't have a good answer to how you make a judge rule on any motion. I don't think there's any way to do that. But I -- but I feel strongly that the -- the softening of the rule, which I believe the style change has done by changing it to "should" might send a message to some judges that they've got a lot more discretion on summary judgments than they think they do. That's -- that's my biggest concern about it.

CHAIRMAN MARK R. KRAVITZ: Judge Walker.

HON. VAUGHN R. WALKER: Thank you. You said that you're about ready to file a summary judgement motion in a district that does not require the point/counter point, but you're going to use that as a template to organize your motion. So I assume you see no obstacle using that approach where you think it's appropriate.

JOHN H. MARTIN, ESQ.: Correct.

HON. VAUGHN R. WALKER: And so the absence of a requirement in the federal rules would not prohibit you from invoking that tool when you thought it helpful?

JOHN H. MARTIN, ESQ.: That's true. However, if I may continue. I do believe standardization is important.

Many districts have this rule, I believe. I've seen a number -- over half -- I may be wrong about this, but over than half the districts have the rule. I've seen a lot of the comments that have been submitted in districts that feel like it works very well.

All I can tell you is I've practiced in both -- both types of jurisdictions and I think it works very well.

CHAIRMAN MARK R. KRAVITZ: Let me just -- Professor Gensler, I just follow up on that point. And I think it would be helpful to the Committee to understand why you think standardization or uniformity is important because -- is it because you can't find out what the judges want or is it that it's too disruptive to sort of have -- when you file a motion in one court, do it one way, then another way? Or is it because we have a unitary federal system and this is an important motion and it aught to be governed by the same procedure?

JOHN H. MARTIN, ESQ.: I think the answer is all of the above. I think -- I think more of us have national practices today. And really the only national practice I have is in this airline area. It's -- it's important that procedures be standardized from one -- from one district to the next. It is conceivable in some of these air crash cases that you could wind up without an MDL if there's only a few cases. And you'd like to have the ability to file the

same motion that looks the same in New Jersey and in California, and in Idaho, or wherever the -- wherever the cases are pending.

CHAIRMAN MARK R. KRAVITZ: Undoubtedly true. I guess the push back that we get is that there -- if you go to trial in different jurisdictions, there are going to be different rules. So for example, Judge Campbell will limit you in terms of the amount of time that you'll be able to do it. I don't do that. And you have to find out those differences. Maybe some judge allows -- makes you stand at a podium and another judge, like myself, lets you roam whatever you want to roam.

And so there are inevitably -- some judges have Rule 16 conferences in every case. Other judges only have it if the lawyers ask for it. Some judges always -- like myself, I always have oral arguments. Some judges never have oral arguments. And there's an infinite variety. And I guess, what -- what is it about summary judgment that's so important that you think that it should perhaps be uniform?

JOHN H. MARTIN, ESQ.: Well, I -- I would like to see standardization in some of those other things too, but that's beyond -- that's beyond what we're here to talk about. But in -- in general, I'm just a believer in more standardization of procedural practice throughout this unitary federal court system. But I think particularly in

summary judgement situations where you might be in a situation where you're filing the identical motion in multiple cases and all on the same incident in multiple courts. I think that's -- that's one good reason there.

CHAIRMAN MARK R. KRAVITZ: Right.

Professor Gensler?

PROF. STEVEN S. GENSLER: You just answered my question.

CHAIRMAN MARK R. KRAVITZ: Okay. Very good.

I'm sorry. Judge Wood?

HON. DIANE WOOD: I have not seen any evidence to suggest that reversal rates from grants of summary judgment are particularly different in -- when it comes to districts that use point/counter point versus districts that have less structured processes. But one answer to the question, if the evidence was there, if we get more accurate or better results from one system or another, then that's a system we gravitate toward.

And just I wondered if you, either from your own experience or that of your partners, have seen any difference in the reversal orders?

JOHN H. MARTIN, ESQ.: I haven't studied that. I really can't say. Anecdotally I don't really have an opinion as to whether the reversal rate is any different or not. I just don't have any sense for that.

CHAIRMAN MARK R. KRAVITZ: Judge Huff?

HON. MARILYN HUFF: On the Rule 26 issue, this is a discovery only proposed rule and cannot affect trial and cannot become a privilege without going through a different process. Do you have any concern, as a trial lawyer, that if this is adopted that then some trial judge at trial could permit inquiry into the items that were not the subject of discovery?

JOHN H. MARTIN, ESQ.: I've seen the Committee note that suggests that is this should be the practic at trial as well as during the discovery. And I would think that most judges would -- would honor that. I don't do this as creative privilege. I went to the University of Texas Law School and had Professor Bernie Ward for Civil Procedure. I know, I see some heads nodding here for the late Professor Ward. He was one of my favorites. And he hammered into us that work product was not a privilege, that it was immunity from discovery. And so I don't think by enacting this work product community or doctrine extending the Hickman versus Taylor work product doctrine into this area creates any privilege. So I don't -- I don't view it as a problem.

CHAIRMAN MARK R. KRAVITZ: I guess the flip side of that would be, how likely would you think it'd be -- it would be that a lawyer, having been barred from discovery,

is likely to stand up during the first of trial and then say, And tell me about your first conversation with Mr. Martin.

JOHN H. MARTIN, ESQ.: I think know some lawyers would do that. And if I was concerned in advice of trial that my opponent was going to do that, I would file a motion in limine and -- and --

CHAIRMAN MARK R. KRAVITZ: Try to --

JOHN H. MARTIN, ESQ.: -- try to -- try to nip it in the bud before it came up.

CHAIRMAN MARK R. KRAVITZ: Judge Campbell and then Judge Varner.

HON. DAVID G. CAMPBELL: But when you're in the stage of hiring experts and them preparing their reports and haven't gotten to the motion in limine, are you going to hire a second set of consulting experts because even though it may not come out during discovery, it might come out during trial and it's better to protect those communications?

JOHN H. MARTIN, ESQ.: I have -- in my experience I have on rare occasions hired consultants that I did not anticipate using at trial. And -- but my reasons for doing that would probably continue whether this rule is adopted or not. Because frankly, there's some people that are real smart but aren't great witnesses. And -- and I have hired

some of those people to help me learn the subject matter, to help me -- to help me find other witnesses and that sort of thing.

HON. DAVID G. CAMPBELL: If I can, then let me ask the question a little differently. When you're preparing the expert or working with the expert, because the party trial may inquire into what you did with the draft report or how many drafts were created, are going to follow the old practice if this rule is adopted and say, Don't create draft reports; don't take notes until I say because they can't ask about them in a deposition but they may ask you at trial.

JOHN H. MARTIN, ESQ.: No. No. I would -- I would go in -- if this rule is adopted as it is, I would operate under the assumption that they're not going to be able to go onto trial.

HON. DAVID G. CAMPBELL: How about if that comment was dropped out of our Committee note?

JOHN H. MARTIN, ESQ.: That would -- that would give me some concern if you dropped it out there now that it's -- if it had never been there in the first place, I don't think I would worry about it. But -- but now that it's in there, if you drop it out, you know what somebody is going to argue.

CHAIRMAN MARK R. KRAVITZ: You know those rules on statutory construction.

JOHN H. MARTIN, ESQ.: Well --

CHAIRMAN MARK R. KRAVITZ: It wasn't necessary.

JOHN H. MARTIN, ESQ.: Right. Right.

CHILTON DAVIS VARNER, ESC.: One follow up question, Mr. Martin. This proposed amendment builds on work product. And that's not a new concept. It's been a around a long time as a protection or immunity against discovery. In your practice before this amendment was ever proposed, do you run into trouble at trial with work product claims that have been asserted in discovery being evolved into the trial?

JOHN H. MARTIN, ESQ.: I cannot think of an instance where that's happened, Ms. Varner. It's possible. Thirty-four years is a long time, but I can't think of it.

CHAIRMAN MARK R. KRAVITZ: I thank you, sir.

JOHN H. MARTIN, ESQ.: If I could make one final comment. I think that the -- the study that the American College and the ALS have done on our civil justice system is vitally important to this process. I solute Ms. Varner and the other folks. Mr. Beck, I see, had to leave. I just -- I think we should all really be sobered by that report with the fact that such a hight percentage of cases will be resolved based not on the merits of the case. And I think the rule making process, as I said in my letter, is -- is just critical to -- to trying to lower the cost of

litigation, to trying to make the money that is spent on litigation spent on what's important and not wasted on what's not important.

CHAIRMAN MARK R. KRAVITZ: And you'll be heartened to know that Judge Rosenthal is one step ahead of you and she had the American College folks and the people from the Institute from Colorado speak to the Standing Committee yesterday about that. We had a great presentation, a lot of ideas. And we're hoping from the civil rules and -- to look carefully at all those things at a conference we are planning for the Spring of 2010. So stay tuned and stay involved. And we thank you very much, sir, for your comments.

JOHN H. MARTIN, ESQ.: Thank you very much.

CHAIRMAN MARK R. KRAVITZ: Mr. Pickle.

Now, I am intrigued by the fact that you're from Humble, Texas because I have told that there's -- there's nothing humble about it.

G. EDWARD PICKLE, ESQ.: Humble is -- you have to work on the pronunciation. It's Humble.

Now those of us that are from Humble know that it is also the home of a small oil and gas company that started there that eventually became known as Exxon. So it's a birth place.

HON. LEE H. ROSENTHAL: But it's origins were

humble.

G. EDWARD PICKLE, ESQ.: Very humble.

Ladies and gentlemen, Your Honors, good morning. I'm Ed Pickle. I'm Senior Government Affairs Counsel with Shell Oil Company in Houston. I have been with Shell now for 23 years, used to head their litigation department. Was initially hired in when Joe Morris, former Federal Judge, was general counsel and was creating an in-house litigation department. So had the privilege of handling cases on a first chair basis literally all over the country. And so it's been a great experience to be able to do that and it's almost exclusively been in federal court, thanks to the diversity jurisdiction in most of the cases we handle.

Besides the litigation experience, I have now, for the last several years, managed government affairs specifically focused on civil justice issues. I'm the past Chairman of the Product Liability Advisory Council, I'm vice-president of the International Association of Defense Counsel, on the boards of most of the major national groups that are devoted to civil justice activities that are trying to bring greater fairness, greater efficiency and greater effectiveness to our civil justice system.

If you'll give me a moment just for a couple of observations. When we think of foreign nations, we tend to identify those nations at least in a mind on the basis of

culture or tradition; the British Beefeaters, French fashion, the Leaning Tower of Pissa. For so long the initial image that came to mind of foreigners when they thought of the United States was opportunity, freedom, entrepreneurship, industry. What we find now -- and I find this especially in working for an international company -- the initial impression that I run into from foreign business people no longer thinks of those virtues, those qualities. The first thought is: Why do you people sue each over every everything all the time? It is our litigiousness, it is our uncertainty that has become an identifying concept for us that we are perceived, unfortunately, and with some justification, in many foreign locations as a country of the lawyers, by the lawyers, and for the lawyers.

The result has been and an exponential increase in the cost of litigation. We cannot compete on a global scale in a global economy if our civil justice system, our dispute resolution system is at least not competitive with other democratic developed nations. Presently it is not. As a percentage of gross domestic product, the cost of our tort system is over twice that of the United Kingdom or of Japan. It's bad enough that we are markedly more expensively, but we're markedly less efficient. When somewhere between 30 and 40 percent of every dollar spent in litigation ultimately goes to compensate the claimant,

something is broken within that system.

I don't have to tell you this. I mean, you live with it day in and day out, whether you're sitting on the bench or whether you're on this side of lectern. The effect is palpable. We have reached a stage where only government, large corporations, and consortiums of well heeled plaintiffs counsel can afford to take a major case to trial. We are pricing ourselves out of reach of the traditional litigant, the traditional plaintiff. And I say this both as a plaintiff and as a defendant.

We have to look for what we can do to bring greater cost rationality, greater common sense into how we are approaching litigation. Summary Judgment Rule 56, to me, is one of the most effective tools for managing costs within litigation. And to that end, I would respectfully submit to you that the rule, in terms of how it is to be applied, when summary judgment is to be granted, that there is no room for discretion. That if there is no genuine issue of material fact, summary judgment must be granted. That was the rule for 70 years. Certainly that is the position I have taken in every summary judgment motion that I had ever filed up until the stylistic changes in 2007. It was mandatory.

The cases are legion, expressing the meaning of the word "shall." Whether you go to Black's Law Dictionary

or look at what the U.S. Supreme Court has said, it is a mandatory, non-discretionary direction to act. That is what the rule historically has been.

Now, as several questioners have noted today and several commentators have stated, the fact that it has been mandatory for some 70 years did not necessarily mean that every judge followed that mandate. I am deeply concerned that if we create what is only its face and according to the Committee note, a discretionary standard, those judges that have some antipathy toward summary judgment, whether it is because they are over worked, whether they just don't like the practice, if we create that discretionary exception, you can drive a truck through it.

And those judges that had heretofore at least thought twice about whether or not they should grant or not grant a summary judgment are going to see that discretionary option as a total way out. And I would respectfully urge that we cannot afford to make it that easy.

CHAIRMAN MARK R. KRAVITZ: Have you -- in the last year plus since the style changed, have you had any experience with judges doing what you fear?

G. EDWARD PICKLE, ESQ.: In all candour, because the style changes are so recent, have just been out for a year, I find that most practitioners, at least from the judges I have dealt with, none have mentioned it. It's

always still treated -- at least in mind it has been treated as a intention that the standard would be mandatory. I just don't think people have caught up with the stylistic changes.

And with respect to -- I know many people on this Committee were involved in that style project. I just don't see how we can transform the word "shall" into "should." That at least in every other context I'm aware of through the stylistic changes in the rules, wherever "shall" appeared, it became "must." If there's another exception, I can't bring it to mind as I stand here.

So, I would strongly urge the Committee, please, to restore it to the standard that it should be. And that to me is really where uniformity is absolutely critical. We can talk about point/counter point, whether there aught to be opt-ins or opt-outs and whether it should be mandatory or not, but when it comes to the standard that is to be applied, there simply is no room for discretion, there is no room for deviation. That standard has to be the same universally.

With respect to the granting of partial summary judgment, I think we need to look at some of the realities as well. One of the arguments that was positive in the Committee notes as to why there aught to be some discretion is in cases of partial summary judgement. If the matter is

going to go on trial anyway, why risk a reversal by granting a partial summary judgment on one issue, Court of Appeals says you're wrong, send it back, then all of a sudden you get to retry the whole case.

Number one, if we look statistically at the number of cases that are tried, it is infinitesimally small. Very few cases go to trial. So I just don't think that's going to be that big of an issue in terms of risking a retrial on an issue. As a defendant, as a person normally filing summary judgment motions, the last thing I want to do is urge a specious or a questionable motion and then try the case and have to come back and do it all over again. That's just not common sense operation. And at least in terms of managing outside counsel now, I would absolutely insist that outside counsel not engage in that kind of practice.

The other issue that we need to be aware of is that partial summary judgment is critical in determining the value of a case and in helping participate settlement discussions. To the extent that we can take issues off the table, not only have we narrowed the focus and hopefully narrowed discovery, narrowed the issues, you have given that the parties have made some reasonable guidance from the Court's perspective where the parties may not have been able to agree that these issues are no longer on the table. That helps immeasurably in terms of both parties being able to

better evaluate a case and arrive at some kind of rational settlement that hopefully bears greater predictability and greater relationship to the actual value of the case.

With respect to the point/counter point issue, I have practiced in jurisdiction that did both. I practiced in jurisdictions that took a third approach and required that the parties submit a joint statement of material fact. I will tell you unequivocally the latter simply does not work, and I would encourage that we all forget about that.

With respect to point/counter point, I've heard what -- what the judges have said who spoke this morning. I still find it very difficult to understand how when you have refined issues down to clear specifics, that I have this issue and my opponent must respond to that specific issue with specific citations to the record. I can't conceive how that does not make a judge's job easier, as opposed to a throw-it-up-against-the-wall motion and a throw-it-up-against-the-wall opposition? And you hope that -- you know, if you're the opponent for a summary judgement motion, your whole job is to simply try to muddy the waters, to make things as complicated as you can possibly make them so that the judge is just going to throw his hands up and say, I'm not going it take the time to short through all this.

I can't help but think that it creates greater clarity, greater ease of work for the judge and the judge's

clerks, and certainly for the parties to be able to refine what those issues are to specifically focus in on.

In my personal experience, that is much the better way to proceed. If there is a problem, and obviously it happens, where a proponent of a motion comes in with hundreds or even thousands of supposed material facts, I would suggest that we need to perhaps look at some kind of cost allocution mechanism where there is -- you don't even have to call it that. But where there is abuse of the system, where something like that happens and simply doesn't make sense -- the parties know what the Court wants -- to be able to require then that the party that has so acted to reimburse the other side for its cost in having to respond to matters that were not really not germain.

Or perhaps the other option is when we talk about material facts, instead of "material" is it to talk about essential elements, essential facts. "Material" is a pretty broad term. If we're talking about traditional notions of civil jurisprudence, where there has to be a duty, a breach, damage and causation, the critical elements that go into each of those as part of a claim or as an affirmative defense opposing are really pretty specific. It shouldn't require a thousand-page litany of material facts to deal with the specific issues, especially if we're talking about a partial summary judgement motion that

focuses on only one thing.

So to the extent that the Court can require that the parties be reasonable in how they approach summary judgment, I think everybody is better served.

There's been mention this morning on timing for decisions. One of the biggest problems that we as practitioners have, our Courts simply will not rule on a motion. Whether it's because they're over worked -- and Lord knows, we know that most federal judges are over worked. They're certainly under paid. I hope that you can get that fixed in Congress at some point. But whether it's because they are over worked or because they just don't like the idea of a summary judgment motion, if perhaps we could look at some kind of time schedule by which the Court must rule on a motion and not wait until the day of trial.

CHAIRMAN MARK R. KRAVITZ: Yeah. And I -- I will confess, I -- this has been told to us a lot. And I just -- I'm trying to understand how this happens. So you moved for summary judgment, the discovery's ended, and the judge takes you up -- right the up to the trial date and -- and rules on it at that date, the morning of the commencement of trial?

G. EDWARD PICKLE, ESQ.: As you're coming in to start to argue the in limine motions, he'll, Oh, you know, I do need -- there's something with motions, so you know what's on and off the table.

And so then from a practitioner's standpoint and from a client's standpoint, it would help immeasurably. And I -- I -- again, I know the work loads are terrible and every additional requirement that we put on the judge makes the job that much harder, but to the extent that we could require some reasonable time frame in advance of trial.

The cost of trial preparation, as you know, is horrendous. And to the extent that we can take an issue off the table to cut down on the trial preparations, the cost savings really can make a difference.

CHAIRMAN MARK R. KRAVITZ: And when that happens, do you find that more often than not the judge just denies summary judgment because after all it was there from the start or that the judge does actually grant it partially so issues that you had prepared for trial wouldn't have had to be prepared?

G. EDWARD PICKLE, ESQ.: I've had both happen.

CHAIRMAN MARK R. KRAVITZ: Both.

G. EDWARD PICKLE, ESQ.: Typically if you're on the eve of the trial and the jury is getting ready to be impanelled, obviously the most common occurrence is the motion simply is denied, and without reasons being expressed therefore. But I've also had circumstances where, for example, punitive damage allegations would be stricken the morning the trial was getting ready to start. Both parties

had spent an awful lot of time preparing on that issue. It sure would have helped if we had known that further in advance. And in fact, we probably would have wound up settling case if that issue had been taken off the bench.

Briefly on Rule 26, we certainly applaud the changes that the Committee is recommending. We think they are much needed. I will emphasize, as Mr. Mason and Mr. Martin did, the absolute need for some kind of protection for work product when dealing with in-house potential experts. As a major energy company, we are an organization composed almost exclusively of scientists and engineers. Every case that we have almost always involves some kind of technical issue, where you're going to have an in-house witness testifying as a potential expert. It greatly impedes the ability to prepare the case, to work with the witness. And these are people who do not normally testify, who simply because they're frightened with the process, require a great deal of hand holding. We really need to be able to protect attorney work product of dealing with those kinds of witnesses.

Now, ideally, if it means, as Judge Campbell was noting, perhaps doing something specific for the employee witness as opposed to a doctor or the professional otherwise, maybe that's an approach. But if it means trading off such that I can't get into what went on with the

treating physician, if I have to make that trade, I'll do it in a minute.

But I think there probably aught to be some reasonable basis that we can distinguish between an in-house employee witness and somebody who is truly a third party and independent.

From the double witness standpoint, I think it's going to be a tremendous help not to have to do -- do old retainers. That is a gross waste of resources and of time and money. To be able to use one expert that can both consult with you and advise you, as well as act as a testimony witness, I think is going to cut down on cost tremendously.

CHAIRMAN MARK R. KRAVITZ: Thank you.

G. EDWARD PICKLE, ESQ.: On a whole, I really do appreciate the excellent work that the Committee has done in trying to address these issues. And I know they are certainly difficult to wrestle with and I applaud the obvious and thought that has gone into this process.

CHAIRMAN MARK R. KRAVITZ: Judge Walker has a question.

G. EDWARD PICKLE, ESQ.: Yes, sir.

HON. VAUGHN R. WALKER: Good morning, Mr. Pickle.

G. EDWARD PICKLE, ESQ.: Good morning.

HON. VAUGHN R. WALKER: You began your comments at

40,000 feet, if I can say that, by pointing out the tremendous expense of the court system in the United States, particularly compared with some other democratic industrialized countries such as the United Kingdom and Japan, as you cited. I assume you would concede that what we're doing with Rule 56 and Rule 26 will only chip away at the edges of that problem.

G. EDWARD PICKLE, ESQ.: Every chip is an advance.

HON. VAUGHN R. WALKER: But as Judge Kravitz pointed out, the Standing Committee is taking a look at these larger issues. While you're here, would you favor us with what you think are some of the major things that the Standing Committee and the Rules Committee could do that would make some significant impact on the problems that you described?

G. EDWARD PICKLE, ESQ.: I know there are a number of matters that the Committee already has been looking at; particularly, for example, revisions with respect to whether notice pleadings should become more specific. I think that would help tremendously to try to narrow the focus of the individual case and thereby narrow discovery. Obviously that is where most of the cost now lies. When you're doing multiple depositions, detailed interrogatories, electronic discovery to the extent that we can narrow it in and really have a set of issues, a claim, a defense to that claim, I

think that would help tremendously to be able to narrow that.

The Committee has already dealt somewhat with electronic discovery. I think there's probably still room to look there for what we can do to help further reduce costs. But it really is not at all an issue in a case now with companies such as mine. The cost of electronic discovery absolutely dwarfs the overall value of the case. It has become a tool of extortion to try to precipitate settlements.

I am concerned we continue to see a number of novel causes of action heretofore that never had been in entertained in common law that really aught to be disposed of at the summary judgment stage, and unfortunately sometimes are allowed to proceed too along and too far. There should not be a hesitancy if there really is not a basis in law with the nature of the claim that has been asserted, then let's dispose of it early. If you want, that's something the Court of Appeals can fix real quickly, and the parties really have not been out much in the way of resources.

CHAIRMAN MARK R. KRAVITZ: Professor Marcus.

PROF. RICHARD L. MARCUS: Can I descent to 40 feet and ask a little question about something you said on Rule 26? I think you said that usually Exxon finds in litigation

that it has in-house personnel who are going to give expert testimony --

CHAIRMAN MARK R. KRAVITZ: Shell does too.

G. EDWARD PICKLE, ESQ.: I was not going to let that pass.

PROF. RICHARD L. MARCUS: Oops.

G. EDWARD PICKLE, ESQ.: That's -- that's a small --

PROF. RICHARD L. MARCUS: I'll try to be humble about that mistake. Your company --

G. EDWARD PICKLE, ESQ.: Yes, sir.

PROF. RICHARD L. MARCUS: -- usually finds that to be true. And you also mentioned the double witness problem that is a problem we were addressing with the proposed changes.

My question is: Do you find yourself hiring a shadow consulting expert when you have an in-house person who will be testifying to whom you could talk about the case in order to have somebody else to talk to about the case?

G. EDWARD PICKLE, ESQ.: Generally not. I mean, again, it's a matter of cost. If you have the expertise there and it's freely available to you, why not exercise it and use it? I mean, it would only be a rare circumstance. And I can't give you a specific example of where I think I would tend to do otherwise.

The dual expert issue really comes more into play in the fact that I've got to have a testifying expert. And needless to say, the jury is often -- dubious is too strong of a word -- but believes that there may somewhat bias on the part of an employee who's a witness for his or her employer. So it's still not unusual that in addition to that in-house expertise, I will look out outside for independent third-party expertise, the best people I can find, and bring those in. And that's where I really need the value of not having to double up, so that I can -- if I need to consult with that individual, I can on a free basis without having to yet hire another outside expert.

PROF. RICHARD L. MARCUS: And as published, the Rule solved your problem there?

G. EDWARD PICKLE, ESQ.: I believe in practicality that it does. If -- if the matter is not discoverable, I think there is very little risk of somebody asking an open ended question at trial which they don't know the answer. At least as I was taught in first-year law school, that was considered a bad practice and I try to avoid it.

CHAIRMAN MARK R. KRAVITZ: Thank you very much.

G. EDWARD PICKLE, ESQ.: Thank you very much for your time.

CHAIRMAN MARK R. KRAVITZ: I appreciate it.

Mr. Young? Mark Young?

Well, we'll pass over Mark Young in case he comes back, and we'll go to Cary Hiltgen, if I pronounced that correctly. And if I haven't, I apologize.

MR. CARY E. HILTGEN: I believe my great grandfather pronounced it that way. My grandfather pronounced it Hiltgen.

CHAIRMAN MARK R. KRAVITZ: Okay.

MR. CARY E. HILTGEN: Good morning, everyone.

CHAIRMAN MARK R. KRAVITZ: Well, as one whose name is always butchered, I sympathize.

MR. CARY E. HILTGEN: It's a bad cross. My mother also chose a very good first name and it also gets spelled a number of different ways, and I've never won a Publisher's Clearing House because of that.

Good morning, ladies and gentlemen, Your Honors. My name is Cary Hiltgen. I am from a city north of here, Oklahoma City, the center of the United States, the crossroads of the interstate system.

CHAIRMAN MARK R. KRAVITZ: So what happened to that football team?

MR. CARY E. HILTGEN: They lost big. I was born on the K State campus, and my oldest daughter goes to OSU. Let's move on. I might get myself in trouble.

CHAIRMAN MARK R. KRAVITZ: That's fair.

MR. CARY E. HILTGEN: I started a small boutique

firm in Oklahoma City in 1994 that specialized in products liability of three types of equipment; construction, mining, and agricultural equipment. I now have 13 lawyers and we are now a national trial counsel to a number of companies within that industry, both on the tort side and on the commercial side. I am also -- so that you all know, probably seen in my paper, I've also been elected as the incoming president of DRI-Voice of the Defense Bar. So I've had the privilege and the honor of working with Mr. Martin. And so I'll try to keep my comments to what Mr. Martin and Miss -- and Wayne and others have said here before about various subjects to a minimum. But I would like to speak to some of the subjects that's come up because of my unique experience as being national trial counsel.

I have had, since 1990, cases in virtually -- I believe, thinking back there this morning, there's two states and Puerto Rico that I have not had a case in either state court or federal court since 1990.

I thought that it might add -- after reading the summaries yesterday, that it might help to talk about the real world experience of one or two corporations. So I probed one corporation that I've been national trial counsel for, it's a conglomerate. It's a Fortune 500 company. It's a leading manufacturer. And I handle more commercial cases for them than I do products cases. I've handled over 100

cases to conclusion for them up to this day. I have over 60 right now in litigation. And in all deference to His Honor, I have not filed a motion for summary judgment in even one half of those cases. I have filed summary judgements in 26 of those cases that I've closed over -- over 100 that I have closed. And there is a reason. Because of strategy.

Now keep in mind, there's two things that a client when they hire you wants. They want results and they want it cost effectively. So when we talk about cost, it's not what the -- what us lawyers or judges think about it, it's what our clients think about it. If I don't handle it effectively and -- and -- and in a manner in which they believe is cost effective, they're going to find other counsel. So I'm looking for methods to reduce the cost.

Now it makes no difference what -- on the plaintiff's side or the defense side, when I'm litigating against another manufacturer or I'm litigating against dealers or I'm litigating against customers of multi-million dollar pieces of equipment that we have an obligation to take care of 24 hours a day seven days a week for 20 years. Multi-million dollars are involved, but I don't call those complex cases.

I've filed, again, 26 motions for summary judgment. Why? Because my client does not want me to roll the dice in the courtroom. They want to get out of the

case, whether they're on the plaintiff's side or the defense side, as quickly and efficiently as they can. They don't like litigation. And I assure you, whoever is designated as the representative who's got to sit at counsel table, no matter whether the case is three days or three months or four months, and watch their life go by. They don't want to be there. That's not what they signed up with that company to do. I may enjoy it. My paralegals love to go to trial. I love to go to trial. But the clients don't want to be there. It's cost effective.

I believe in partial summary judgments in federal court. Now, I'm going to break them down. Ironically, out of those 26, 13 are state court cases and 12 were federal cases. I love to be in federal court. I got told a long time ago when I -- by a mentor was: When you write a brief, it's got to be brief because judges don't live and breath the case your with, so make it brief.

So when I look at every case and I teach my associates how to look at what -- how do get out of this case on summary judgment. That's the way we look at it. It becomes the elements to get out because somebody has already done it. I want to find out why. So when you -- I heard about all these statement of facts, my point -- in the case that I filed, keep it simple. Very few statement of material facts.

Now, I get a lot of counter responses with lots of facts because they're trying to develop a fact in issue to keep it from summery judgment being sustained.

I believe, like I say, partial summary judgments in the federal court actions. Out of those 12 cases, nine I got summary judgments. Out of those nine, four appealed. I got three great decisions on the appellate level from the Circuit Court, and there was a mistake made in the Third Circuit. And unfortunately, it's a published opinion.

CHAIRMAN MARK R. KRAVITZ: Judge Baylson feels that happening.

MR. CARY E. HILTGEN: Surace v. Caterpillar.

State court, four out of 13. One appeal, affirmed. The other three were not appealed. Of the remaining cases in federal court, I was able to settle them expect for one. 14 causes of action. Partial summary judgment on six of them. I won seven of them in the courtroom in three days. We waived the jury. And I lost one and got hit with attorney fees because I lost one because I'm not the prevailing party. Now that's a whole other subject.

But the point being, in federal court, partial summary judgements work. State courts, not -- not one time did a state court judge in any jurisdiction sustain a partial summary statement. They overruled them all.

And out of the nine cases, the nine cases that did not go to summary judgment, I tried five of them to jury trial, all of them by jury trial. The minimal trial was three weeks and longest one was five and-a-half months.

Now, which is the most cost effective to my client? It's the use of summary judgment. And the use of partial summary adjustment because it lowers the number of witnesses involved in the case, the issues involved in the case, the cost involved in the case. And ultimately the decision making that they have to make as to whether they're going to pay or how much they're willing to pay to forego pursuing the case to full trial.

But I suggest to you, if you take away and you make it discretionary, like it is in the state court, I assure you from the defense standpoint, from the plaintiff's standpoint on commercial cases, you are asking to exacerbate the amount of time and money involved. Because I have to do budges. I'm national trial counsel. I hire local counsel in every case I have to add in their time with what I'm going to have to do. Right now the largest single expense I have is learning the nuances of every state court or every federal district court. Every one is different. Every one has a different set of federal rules, local federal rules.

I just got -- learned that -- I got caught in the squeezed this week. I found out from the new federal

jurisdiction that I'm in, they don't limit requests for admissions. So now I got 152 requests for admissions on one of my expert witnesses. Consultant. Paid.

Uniformity, in my opinion, is what my client -- clients would love. When they walk into a courtroom where they can be sued in every jurisdiction in the United States, they would like to know, This is the way it's going to be played. Not, okay, now we got to spend 4- to $5,000 of our money just trying to figure out all of the little idiosyncrasies. But on a rule for summary judgment, there can be lots of discretion, but not on summary judgment. Not for the courtroom where it's supposed to be about the parties right to a fair, just and speedy resolution of their claims or defenses. They have the absolute right, if possible, to get rid of those claims. And so therefore, I'm for it.

Now, as far as -- I believe that I'm -- I have never had a motion for summary judgment where I did not have point/counter point. Again, my statement of facts go right down the elements. Whether I'm on the plaintiff's side or the defense side, I want it simple. Those complicated ones, that just gives you, Your Honors, the ability to say, Oh, there's question of fact. That's -- that, to me, is bad advocacy. If you're going to move for summary judgment...

And my favorite movie, *In Search of Bobby*

Fischer -- I don't know whether you've all seen it -- there is a part in there where the chest master is teaching the young boy how to play chess and they're going back and forth, moving like he learned in the park. And at some point the master just knocks all the pieces off -- off the board and he turns to young boy and he says, Now tell me your next seven moves.

I don't do that in advocacy. If I'm going to win a case, I don't want the other side to know every one of my moves. My client is not paying me to lose arguments by filing frivolous motions for summary judgment and spending their time and money. Plus, as national counsel, any decision you make may be in the rule quarter system and will be used against my client and me in a later case, and which fields an argument over here on behalf of his client. So I pick and choose what is appropriate for that client in that case because my job is to advocate their position.

And therefore, I believe that it should be "must" and we should have specific doing away of statement of facts. Thank you.

CHAIRMAN MARK R. KRAVITZ: Thank you very much.

Are there any questions?

We very much appreciate your sharing with us your own experience and your background. Thank you so much.

MR. CARY E. HILTGEN: Thank you.

CHAIRMAN MARK R. KRAVITZ: Keith O'Connell.

Welcome, sir.

MR. KEITH B. O'CONNELL: Thank you. Good morning.

As with bar speakers, I'm also all very grateful for this opportunity. And as with the other speakers, I too want to express appreciation for your selfless service. I have to say that -- not necessarily selfless service, but for that matter the witnesses that have testified in D.C. and here today, and will testify San Francisco. It just makes me really proud to be a lawyer. It really does.

I'm Keith O'Connell. I'm in private practice here. Was actually born and raised here. I have a little firm, eight lawyers. I've been in private practice for roughly 27 years. I'm really not here today in that capacity. I'm here on behalf of the Texas Association of Defense Counsel. Some of you are probably familiar with that organization.

The Texas Association of Defense Counsel is an association of approximately 2000 Texas lawyers whose practice primarily involves the defense of civil suites, and that runs the gambet from professional liability to commercial litigation to construction defects, labor employment. You can pretty much name it. Anti-trusts.

Judge Ferguson was actually a very active member before he took the bench. Mr. Beck, who serves on the

Standing Committees, Art -- or Tom Ganucheau assisted me on the Executive Committee. So anyhow, that's who we are.

I'm currently Executive Vice President. I'm not sure that has anything to do with why I got picked. It probably has more to do with where I live. But that's what I am. I will president of the organization in 2011.

CHAIRMAN MARK R. KRAVITZ: Congratulations.

MR. KEITH B. O'CONNELL: That's not what I keep hearing --

CHAIRMAN MARK R. KRAVITZ: For keep going.

MR. KEITH B. O'CONNELL: -- especially from former presidents, former presidents like Mr. Martin.

I promise what I have to say is going to be very brief. I do want to address Rule 56, that's primarily why I'm here. But I do want to make it clear to the committee that I have authority to represent on behalf of the far 2000 members that we -- we support the amendments.

As I said in the summary my testimony, you know, though positions have already been well represented and well articulated by the IABC, the Lawyers for Civil Justice, DRI, and others, so -- and I'm not planning on commenting on -- on those.

What I really have to offer today I provided in my summary by written testimony. As I understand it, as far as y'all are concerned, it's not necessary or desirable for

me to verbally reiterate that now. So I won't, unless somebody asks me about it. I wouldn't want to do that anyway because I'll probably get stuck with the indignity of losing that motion one more time. But I would respectfully suggest that -- that the proposed Rule 56(a) should be revised to mandate that the Court must grant judgement if the record shows there's no genuine issue, no genuine dispute of material fact and limits the entitlement judgements as a matter of law.

In my -- in my written statement, I offered anecdotal evidence; a case I handled in this court house that didn't resolve until this past summer, hopefully to demonstrate the importance of and the need for a clear mandate for -- for clear guidance and more certainly and more clarity in Rule 56. And hopefully to demonstrate in one sliver, in one case, in one court, in one district of many, the cost of allowing meritorious cases to remain in the system.

And of course I gave you numbers on what was inflicted on my clients; $200,000 in additional attorney fees and expenses two and-a-half years after the denial of the motion. $130,000 in settlements. And you know, for a widow with four kids, maybe that's a big deal. It's relatively nominal for that kind of case. But I guess my point was, it was coerced as much as I told the client that,

This certainly is going to save us, so don't worry, we're entitled to judgement as a matter of law. They just flat -- they just flat didn't want to invest any more money in the case and it settled. And I did suggest in my written testimony that the amount it settles for sort of corroborates, I think, my position about the merits of the case study.

Be that as it may, I did want to point out that there are some other costs, maybe a little bit lower, but -- and then maybe I can lead to something you haven't heard. Maybe not. But in that case, of course, everybody had increased cost, everybody who stayed involved. I was a target actually because co-defendant had -- the governmental entity had some immunity and caps. Obviously the co-defendant suffered additional costs and -- and -- and the plaintiffs for two and-a-half years of having to put up with me. After attorney's fees and expert witness fees and costs, I'm not sure the widow and the three children ever saw much of anything. And we didn't even get to the cost of trial and appeal because the case settled.

But I guess what I wanted to suggest to you respectfully is that I think we should consider other costs besides the monetary costs. I would just suggest to you that is a real cost for keeping meritorious cases from being heard. I think that there's a cost for the perception,

particularly among non-lawyers, that are court system is arbitrary. And -- and I suggest that there is a cost for perception that -- that judges don't and won't follow the law. And a perception -- the cost of the perception that our -- our civil system just flat doesn't work to the point where people think it's an -- in its entirety should be avoided.

And so is it any surprise or wonder that whenever we buy a computer or anything else in shrink wrap or apply for a job, that we're having to submit to binding arbitration without fair notice, without any bargaining.

And so I hear -- I hear these comments and stuff. I've had other summary judgments, but this is going to jury trial. I would suggest to you that what's destroying the jury -- or jury trials and making them vanish is a lack of confidence in our system, at least in part, and the view that it has become unpredictable, in addition to the unnecessary costs. I think those are real costs.

I do have to say -- what I thought I'd say last night is that I'm just flat humbled to be here before you. But I saw you today, I think maybe the word is intimidating. You know, you're federal judges and you're law professors and you're lawyers and you're impressively credentialed in your own right. And on top of all of that, you've been living with these rules and struggling with those amendments

for a good while. I suspect years. I can assure you, I have not.

And I did want to tell you that to prepare for my testimony I -- I did some stuff. I read the read the amendments. I read the report of Advisory Committee on the civil rules. I've read the written comments that were submitted. I listened to most of the pod casts at the D.C. hearing. Of course, I read Kennedy -- I read Kennedy versus Silas Mason Company. I read Anderson versus Leary, I read Celatex. I read Wright and Miller. I read cases stating that the Court has discretion to deny motions for summary judgment. And I read cases stating that the Court has no discretion granting the motions. I did all that. And then I read -- this is not really in particular order. But of course I read Professor Freedman's article in 2002 in the Law Review. And you can hardly do that the without reading Professor Shannon's article in the American Law Review, so I did all that.

And so I was thinking, you know, so what is it -- what is it -- I mean, y'all seen all that, and you've heard all that, and you've read all, and you've debated it more than once likely. And so what is it, you know, that I can offer you that you've not already read or heard or don't already know? And last night it occurred to me that maybe I can tell you I'll meet at your hotel right here. Of course

as it turns out, from what I've heard this morning y'all are leaving, so I can't help there either.

I don't mean that as a dodge, but, you know, we can discuss and we can debate in plain language of Rule 56 before the style change. We can debate or discuss the language of the holding in Kennedy and Celatex. We can debate or discuss the conflict among the lower courts about whether granting the motion for summary judgment is mandatory or discretionary, or whether given the state of the law at the time of the 2007 style change, the change would have reflected accepted practice. And we can talk about all that and debate it and so forth. My guess is that you've heard and read enough of that.

So I would just like to maybe suggest one thing, just to consider it. And you probably already have. And -- and I'm not going to ask you to agree with it. Just -- I don't know, let it wash over you. I mean, I would suspect that you all have already been through this. But just in case, I would suggest that -- that if nothing incredibly great appears that "should" fields discretion. I mean, it does. And by changing "shall" to "should" in the rule, by doing that, some level of discretion has been projected in the rule. This of course has caused all this great concern that we've all been talking about, the change in the standard, the breadth of discretion, how much discretion is

there? Is this going to make the rule under utilized? Is this going to make the rule effective? What's the standard of review there? Among other things.

And I just want to suggest that writing "discretion" into the rule -- just consider this. Writing "discretion" in the rule is not necessary. As I read the cases that discuss discretion -- or for that matter, the commentators who, you know, give examples of discretion, the kind of discretion that -- that they're talking about I don't think is inconsistent with a mandatory standard. I don't think it is. I think the discretion that the commentators talk about and the courts talk about when they're giving their examples are compatible with "shall," are compatible with "must."

I'm just asking you to consider this. You probably have all this. I have not seen a case -- I haven't lived with it for as long as y'all. I have not seen or found a case that says this: That a court has discretion to deny a motion for summary judgment where the court is satisfied; the motion is not premature; there has been adequate time for discovery; an adequate record to support the judgment has been made; the motion has been filed in accordance with a schedule order -- you know, the deadline, it's not filed on the eve of trial; proper notice has been given to the other side; the other side has had a reasonable

opportunity to respond; the movement has -- the movant has shown, based on an adequate record, that there is no genuine issue of material fact; the movant has shown, based on an adequate record, that the movant is entitled to judgement as a matter of law. In fact, I've have not seen a case that says, When all that happens, it's okay to leave that discretion to the court. I've haven't seen it yet.

The -- the cases discussing discretion were providing examples of -- you know, showing the need for discretion, I would submit, are examples of cases with those -- all those things did not occur. Not all of them did occur, but some of them did occur. In all of those examples in all those cases, that litany of things I just went through, one or more of them didn't -- didn't happen. And I would submit that in those instances, any court under the plain language of the old rule, using the language of command -- and probably Rule One and Rule 16 and maybe others -- but that any court under the old rule, or under a rule that says "must" would have both the right and the duty to either deny the motion or then continue it until there's -- it's more appropriate.

I would just say that -- that it aught to "must." And that if it is "must", the trial court -- the trial court will still have the discretion identified by the courts and the commentators. I think that. I would just --

I would ask you to consider it. And that with the word "must" we avoid the significant risk of that indefinite and unpredictable standard that I think is there now. And thank you.

CHAIRMAN MARK R. KRAVITZ: Thank you, Mr. O'Connell.

Mr. -- Judge Walker?

HON. VAUGHN R. WALKER: It's real -- you've done an excellent job of recounting the history and the gloss that matches to this concept we're talking about under the "should" versus "must."

And if I understand your argument, it is that -- obviously this gloss is as it is. But changing the rule from just that simple English word from "must" to "should" or "shall" to "should," tips the balance that courts and -- courts are going to place on all of this gloss that is going on.

Now, what would be your view if the rule were phrased in such a way that we didn't use either "should," "shall" or "must," but simply provided that a party may move for summary judgement on all or part of the plaintiff; if there's no genuine issue of disputed facts, the party is entitled to a judgment as a matter of law? Would that avoid the problem?

MR. KEITH B. O'CONNELL: Well, given the history,

I don't think it would. I mean, my argument would be entitlement means entitlement.

HON. VAUGHN R. WALKER: I'm sorry?

MR. KEITH B. O'CONNELL: My argument would be that if that was the way the rule was written, certainly the movant is entitled. And that's exactly what it is, entitled. Entitled. Period. There should be no discretion there either. But because of -- because of what's happened, because of the old rule, because of this law that's -- this conflict of law that's out there, because of the style change and because of this debate, I don't -- I think it needs a bigger fix than that.

HON. VAUGHN R. WALKER: And how would you propose that bigger fix?

MR. KEITH B. O'CONNELL: "Must." I think it needs -- I think it needs to be "must." And I think the courts, as I mentioned, will still have the discretion they need to run their court and do the right thing.

CHAIRMAN MARK R. KRAVITZ: Okay. Thank you very much for your -- for your comments. And good luck with your presidency.

MR. KEITH B. O'CONNELL: Thank you all very much.

CHAIRMAN MARK R. KRAVITZ: Mr. Pate. Stephen Pate. If I -- I may not have pronounced that correctly either.

STEPHEN PATE, ESQ.: You did.

CHAIRMAN MARK R. KRAVITZ: I did. Okay.

STEPHEN PATE, ESQ.: You know, I'm -- I'm going to start by saying that I know that I'm a real defense attorney because it's ten minutes -- five minutes until noon and everybody else has said everything that needed to be said before. So and since I've been picking a jury in 70 seconds now, I know I need to be brief.

Let me tell you who I am. My name is Steve Pate. Often it's pronounced Pâté. I am the vice president of the Federation of Defense and Corporate Counsel, and I am a partner at Fulbright and Jaworski where I'm the Chair of the Insurance Litigation Practice Group.

I've been thinking about what I can tell you that differentiates me from some of the other speakers. And that -- what differentiates me is my area of practice. You've heard from many products liability attorneys, you've heard from people who do commercial litigation. I primarily do coverage litigation, and I do bad faith extracontractual litigation. Coverage litigation is of course contract law, policies. And what I think I can tell you, want to point out to you, is how many times I've filed motions for summary judgement in what are essentially contract cases and they are denied in federal courts and in state courts.

What I can also tell you is though I do

primarily work for the carrier, I also do some policyholder work, and I've filed motions for summary judgment for the policyholder side and they are denied as well. I don't think it's the carrier. I don't think it's bias against the insurance company from federal judges. I think it's a situation where judges are reluctant to rule on summary judgment motions, even though it's a situation involving a contract which involves matters of law.

I'd also like to tell you a personal example of how many times -- several times I've had motions for summary judgement in policy cases, contract cases, filed by the policyholder's attorneys where I have filed my own motion for summary judgment and both motions are denied. You would think when you both have good counsel, that -- and it's a contract case, that maybe one side or the other is right on the law. But frankly, judges are reluctant to grant motions for summary judgment.

Now, giving you those examples leads me to this. I -- and it goes back to the point you were making with the last witness. I really think that the language aught to be "must." And we were talking about mandamuses and what might happen with the adding the word "mus"t to the language. I think that there is a fear that there will be more mandamuses. I have never seen a mandamus on a denial for a motion for summary judgement, and I too have a national

practice. I have never seen -- and I'll tell you why. Number one, I don't think a case has ever been strong enough for it; number two, as a practitioner, I don't like to mandamus a judge. You know the old saying, If you shoot at anything, you better kill it. Well, I've never felt like I wanted to kill it.

HON. VAUGHN R. WALKER: Hold your fire, please.

STEPHEN PATE, ESQ.: But I really don't think that that is going to happen. I think that it might be, if you add the word "must" and there's some denials of motions for summery judgment, you might have some more room for a lot more appeals, things of that nature. And that might be a good thing.

But here's the bottom line with me on the additional of the word "must." We all know that there's certain federal judges that are -- there's many Federal Judges who do not want to be told what to do. I clerked for one of them. He was a great man, but he sometimes would not abide with what the Circuit wanted him to do. I don't think that he would look at the word "must" and he'd say that that told him that he needed to do something. But I think there would be many, many federal judges, and perhaps even their law clerks, who would look at the word "must" and say, All right, this is what they're telling me now about what so effects that Anderson really means. That it means that

they're serious about this; that -- going back to 1938 when these rules were adopted, summary judgments were supposedly one of the most important rules adopted back in the 30's back when we adopted the federal rules; that they're very serious about this and that this is the way to resolve a case that should not be tried.

I also want to tell you that I think "must" would help in another situation. There are judges that use summary judgments as settlement tools. I thought it was very interesting that someone brought up just a while ago the fact that summary judgments were granted sometimes at the beginning of trial.

Not in federal court, but in state court this past year, I had an important motion for part partial summary judgment that had been on file for seven months granted the week before trial. I truly believe -- and I don't think the judge was bad man. I think he just -- I think he thought he was a mediator and not a judge, frankly. I think that he thought that granting that then was something in a way to get the case settled. And I think that if he really thought that was a good motion that he should have granted it seven months before. And if he had the word "must," maybe he would have thought about it a little bit harder.

Now, I don't think that there are two many

motions summary judgment filed. Even in my contract cases, I often recognize that there are genuine issues of disputed fact.

And I want to segue into -- from talking about "must" in talking about point/counter point. One of the things I like about point/counter point system -- I'm licensed in the Eastern District and I clerked in the Eastern District, I know -- I've done it over there. It makes you, both the plaintiff's attorney and the defense attorney, marshal their evidence and analyze their case.

And though this is not my personal experience, it's been the experience of an attorney that I know, that he had a good motion for summary judgment, he did point/counter point in the Eastern District and the other side gave up. The other side realized his case was not going to withstand summary judgment and they did not have to go through the rest of the process. I would hope that could happen in all districts.

Now, as far as the point/counter point system, the criticisms of it, one thing that I don't think we've said before is, even if you don't -- even if you have to do it, and even if the other side doesn't give you up, and even if the judge is not inclined to grant you motion for summary judgement, one of the reasons I like it is it really helps to educate the judges. It lays things out for the court so

that later on they can think of -- look at that. Even if they don't grant summary judgments, they can look at it, they know the case, it can help them with motions in limine and things of that nature. And I think that's important.

We've have a lot of discussions about the different facts and how many facts there would be. It is extremely foolish for a defense attorney to over play his hand and have a motion dismissed. I mentioned that I was a law clerk in the Eastern District. When I got in a motion to take to my judge, summary judgment -- summary motion judgement was listed, I think I already had an idea that there was some fact in these documents that was going to preclude summary judgment. So when I do it, I keep it short and simple and succinct. Because otherwise I don't think it's going to work.

So when we talked about all the -- when the plaintiff's attorneys talk about all these huge, long motions -- someone mentioned something about have a savvy defense attorney, I think -- I hope I'm a savvy defense attorney. I'm not going to misuse it. I'm not going to over do it because the judge would just think there's a factor. You got to do it right. But I think it's an efficient system, and I'd really like to see it adopted.

Finally, on Rule 26. Wayne was up here. Wayne Mason was up here and he's president of -- past president of

the Federation of Defense and Corporate Counsel, and we talked about this. I will be quite honest with you. When we first had the discussion, I was not for it because I wanted to get to the treating physician, ask them about what discussions he had.

CHAIRMAN MARK R. KRAVITZ: You were not for his proposal, but you otherwise support Rule 26?

STEPHEN PATE, ESQ.: Yes.

CHAIRMAN MARK R. KRAVITZ: Okay.

STEPHEN PATE, ESQ.: But now I am. And I'll tell you why. I did a lot of thinking about it. And I think John might have spoke about trade offs. He's exactly right. The benefit I get from asking a treating physician what was discussed between plaintiff's attorney and the treating physician is minimal. I get the same benefit by just asking the treating physician in front of a jury, Well, did you talk this lawyer here? Yes. The jury can draw its own conclusions.

I also don't think that juries think the treating physicians are actually necessarily the most objective people in the room. I think that -- you know, if you ask someone on the stand about -- even a treating physician, Did you talk with this attorney? Yes. What did he tell you to say? Well, he told me to tell you the truth. And that's the kind of thing you're going to get. That's

the real world.

So I don't think that -- and I know there's some others that probably disagree with me. But in the real word, I think it is a very, very good trade off.

It's right after noon and I thank you for having me.

CHAIRMAN MARK R. KRAVITZ: Well, hang on a second. Let's see if there's any questions.

I very much appreciate you -- your willingness to come here and give us your views both in writing and orally. Thank you.

STEPHEN PATE, ESQ.: Thank you.

CHAIRMAN MARK R. KRAVITZ: Carlos Rincon.

Welcome.

CARLOS RINCON, ESQ.: May it please the Court. Thank you so much for having -- having me and allowing me to participate in this process. I'll tell you, this was a -- kind of ear opening experience for me because I have an opportunity to do something I've never done before, and that is to listen to pod casts. And when you want to get out of having to pull down Christmas lights on your house or going to the office to listen to a pod cast on Rule 56, it's a great -- great rationale to get out of the house.

HON. LEE H. ROSENTHAL: Glad we could help.

CARLOS RINCON, ESQ.: My name is Carlos Rincon.

I'm a lawyer from El Paso, Texas. I -- about three years ago I ventured out to start my own law firm. I'm a defense lawyer. I think God put me on this earth to be a defense lawyer. I've been thinking about this. You know, I played defense in every sport that I ever participated in. I was focused on defense. I encourage my kids that when they play athletics to focus on defense. And I really enjoy being a defense lawyer in the civil litigation context.

I don't practice employment law, and I don't practice in the civil rights arena. My firm does some civil rights work. And the reason I mention that is when I was going through this testimony, I was very, very impressed with the qualifications and background experience of all the folks that were presenting in Washington D.C., and was trying to identify, well, what could I possibly mention to these nice folks that they haven't heard already?

Well, the first thing is, from my standpoint, I've submitted a written submission relative to the Rule 56 Amendments. I believe that the wording should be worded "must."

And when looking at the commentaries, hearing the testimony on that subject by the counterparts from my vantage point was that much of the dialogue has to do with just stopping the use of summary judgment practice and all the inequities that flow from summary judgement practice.

Now, my practice is heavily entrenched in transportation law. I'm happy to say that I represent the Union Pacific Railroad back home. I represent lots of trucking companies. And I do some across-the-border commercial litigation work. Relative to identifying cases that are proper candidates for summary judgment consideration in our office, and I think relative to our -- to our practice area with my colleagues, we are very cautious about identifying which cases to move on summary judgment for. We -- I've heard and I've read the testimony that in some areas employment law -- I know that the plaintiffs law in medical malpractice -- the malpractice in Texas is sort of final. It's on the -- it's on the case assignment sheet. You have to file summary judgment. And that's not the rule in our practice.

So, with respect to the comments that there's a -- there's this constant flow of summary judgment being filed in all closed cases that are -- in all cases, even in closed cases, that is simply not the experience what I think is going on in the El Paso Division of Western District. Our little community is very small, and I speak to a lot of plaintiffs, and I think I -- I'm not speaking, obviously, for them, but I think I appreciate and understand their experiences. So I think the observation that I'm not seeing summary judgement motions in every case to be filed is

adequate.

Secondly, another major volume of the commentaries that you all have heard is that summary judgment practice is eating away at -- at one of the core rights that -- that folks have. And that's getting into a courtroom, confront your accuser, eyeball the guy that made the decision to fire you or the person that breached the contract. And the suggestion is being made that that really is largely attributable to summary judgment practice.

But back home in El Paso, clients, plaintiffs and defendants, are becoming -- in the information age, they're becoming more sophisticated. And as that process develops, they're becoming more savvy about solutions. They want to talk about the end game. They come into your office, they want to understand, okay, what -- what is it going to cost them? What is the ultimate solution going to be?

And ADR, Alternative Dispute Resolution, mediation, is very popular. And it's something that not only defendants endure but plaintiffs are seeing that they have an opportunity to get a solution to their problem quickly. And I think more than anything else -- I've always -- I told my kids one of these days we're going to go to a museum and there's going to be a man in a suit holding a briefcase, standing like this, and they're going to have a

plaque that says, Trial lawyer; once roamed certain parts of North America, the United States. And I said, yeah. I mean, but that -- that is the case.

Now, in -- in many of these ADR settings, there's flexibility. And you can -- I think ultimately what some clients need is an opportunity to vent, tell their story. And that certainly happens. And so I think it's an unfair position to say that summary judgments are eroding the jury trial.

As I mentioned, I do not practice in the area of employment law, civil rights. I'm not going to go there. But I will say this: With the shifting of the legislature -- legislative activity in Texas, many, many folks that were doing automotive negligence are now doing employment law. I think right now their -- everybody is -- not everybody, but many people are doing employment law as a big part of their practice. So for those of us who don't do that area, we see that those filings are going up.

So as you all consider the statistics and data that you're being given about the number of summary judgment motions being granted in employment cases, I think it's also fair to consider the fact that there's been lots more filings and it's just -- that's just a shifting trend.

Relative to the final point I want to make on the -- on the "must" grant point is that in West Texas, our

federal courts in El Paso are extremely over burdened with narcotics cases from the bridge. It's just ridiculous. It's a tragedy. But it is what it is. And having a rule that by design allows a Court to keep a case on the docket that it really merits dismissal, I think would be a bad idea.

Now, I want to visit briefly on point/counter point and I'll be done. As you've heard, the Western District of Texas does not use point/counter point. But we do have a judge in El Paso that uses the point/counter point approach, and I believe that it is an effective approach. And again, speaking to some of the comments about why it's a bad approach, there's been a lot of submissions and discussions about the fact that ultimately what happens in this endeavor is that the small litigant, the litigant that is the least financially secure, or the small practitioner, is over burdened by this process having to respond to upteen -- you know, fact findings and things like and making references to the record.

First to uniformity. That -- I don't find that, see that in my practice. I believe that as a general rule, when I've experienced it in this Court -- I've actually experienced in this Court some serious cases; brain atrophy case that involved exposure to solvents. That was one of the -- one of the first that a major client of mine had ever

experienced in the United States. And then now currently I'm doing a contractural matter with summary judgement issues in the same Court. But what I found is that it really has forced the lawyers to sit down and evaluate their case. It is a lot work? Is it a lot of work. But the way I look at it is that the firms that are taking on these cases -- when you're sitting down with your client and you're doing something as the plaintiff's counsel, or the defense counsel for that matter, you have to understand, you know what the proof is going to require. It shouldn't strike anyone as any surprise that when it comes down to this issue, it's going to be a lot of work. But at the end of the day, I am convinced and -- and through practical experience through this particular court in El Paso, that the process ultimately does save time.

There's also been mention in the testimony previously that, again, focus on fact that this point/counter tends to disproportionately put heavier burdens on smaller firms and plaintiffs, and -- and I respect that position. But there are some districts, like in El Paso -- I tell my family, watch that movie, *The Verdict*. I said, Okay, in Dad's life the plaintiff's firm is the firm with the fancy conference room with the flat screen TVs, and the defense lawyers are in the library crawling up the ladder and getting books.

In many of the cases that I'm dealing with in the court and context, you can't make that generalization. But some of these plaintiffs firms are incredibility successful and they -- they have lots of horsepower.

CHAIRMAN MARK R. KRAVITZ: Drive fancy cars.

CARLOS RINCON, ESQ.: Lear jets. Not just fancy cars, but lear jet liners. And we've had a few of those come through El Paso. And I've never had too many cases against them, but we have -- certainly have had some.

The thing relative to the dispute -- and I obviously feel that the point/counter point is a good thing. I think the practice bears importance. The -- the contrary position has been that, you know, defense lawyers see a summary judgment, Oh, God, you know, a summary judgment. We get the bill right before Christmas and we're generally fulfil the hours. That is not the case.

Again, I -- part of my practice, especially in the trucking, I work with the insurances, and one of the things that I have noticed is that, you know, in a world of dwindling resources, more and more corporate organizations are becoming increasingly savvy about monitoring litigation. And there isn't going to be a summary judgment filed in any of my cases unless we have a briefing with in-house counsel, they approval the process, we weigh our chances.

And secondly, as part of just any -- you know,

case handling procedures, we're required to produce litigation budgets. And as expensive as summary judgement in practice is, jury trial, and the prep time for jury trial, including flying in experts and those types of things, still makes up at least 45 percent of the entire litigation cost of many of the cases that I handle.

So those are my accounts. You all have heard much of the same information through the various sources. I was trying to offer just a unique, personal perspective. And I really thank you very much for your time.

CHAIRMAN MARK R. KRAVITZ: And -- and listen, even hearing the same thing, but hearing it from different perspectives of people who have different practices, and people who practice in different areas, it's very helpful. And I thank you so very much.

We have a couple --

CARLOS RINCON, ESQ.: Yes.

CHAIRMAN MARK R. KRAVITZ: Professor Marcus.

PROF. RICHARD L. MARCUS: Just to cover my bases. Question: Our list of witnesses indicates that you are here to talk about Rule 26 as well as Rule 56.

CARLOS RINCON, ESQ.: That is correct.

PROF. RICHARD L. MARCUS: I didn't see anything about --

CARLOS RINCON, ESQ.: No, that -- that is correct.

I think was Gary Elden --

PROF. RICHARD L. MARCUS: Okay. Okay.

CARLOS RINCON, ESQ.: Or something like that.

PROF. RICHARD L. MARCUS: Enough said.

CARLOS RINCON, ESQ.: Thank you very much.

CHAIRMAN MARK R. KRAVITZ: Thank you. Thank you very much.

Tom Crane.

MR. TOM CRANE: Judge and Members of the Committee, thanks for having me. I'm Tom Crane. I work for a non-profit now. I work with people with disabilities. I do a lot of employed law. Prior to 2002 I had my own practice doing employment law and commercial litigation. When I represent -- when I do employment law, I always represented employees. I don't have any jets, I don't have any fancy cars. My cars are typically eight or nine years old before I trade them in.

I only came here to talk about Rule 56 also, and I want to talk about the "must" versus "should." That causes me a lot of concern. In my experience, I don't see the need make summary judgment more prevailing. It's just the opposite in my experience. It's been overly -- overly used. Used too often.

Contrary to some plaintiff's lawyers, you know, I can -- I can point to one case, maybe two, where the

defense lawyer did not file for summary judgement. But although otherwise as expected, it always happens. The defense lawyers I've heard today --

COURT REPORTER: Can you slow down, please.

MR. TOM CRANE: Sure.

The defense lawyers I've heard today who have not filed summary judgment, I wish they would appear in some of my cases because that doesn't happen where I'm from.

COURT REPORTER: Slower.

CHAIRMAN MARK R. KRAVITZ: Slower.

MR. TOM CRANE: Yeah. Thank you. And I practice here in San Antonio.

Regarding the point/counter point, I've done that a couple times in different jurisdictions --

CHAIRMAN MARK R. KRAVITZ: So -- so just to -- to clarify for you, you think that -- to use "must" for summary judgment? Am I understanding you correctly?

MR. TOM CRANE: I don't -- that's my theory.

CHAIRMAN MARK R. KRAVITZ: Okay.

MR. TOM CRANE: And I -- but I don't see the need to change that. That's my opinion.

CHAIRMAN MARK R. KRAVITZ: Okay.

COURT REPORTER: Regarding point/counter point, I've done that a couple times, and in my experience it was -- the uncontested facts was largely irrelevant. It

just wasn't used. We submitted it. The defense lawyer and I, we both did our uncontested facts, but it was never referred to or really used. And in my experience it was -- I found it very hard to encapsulate or put in a bullet a one- or two-sentence format, things -- relying on inferences or frivolity terms. Frivolity terms are hard -- sometimes they're regional and you have to explain them to make them -- to make a point. So I find it pretty cumbersome and difficult to use. Thank you.

CHAIRMAN MARK R. KRAVITZ: Thank you very much for your time and -- and your views.

And last, but certainly not least, Charles Miers.

Going once. This is a -- the professors will know this, if they don't show up, they forfeit their time.

Mr. Miers' -- we will consider his written comments.

And I want to thank everyone. First I want to thank the administrative office; John Rabiej, Peter McCabe, James Ishida. They've done a terrific job organizing this, dealing with logistics, which is telephones and the like, and the cabs. And I want to express the Committee's gratitude to each and every one of you from the administrative office. Terrrific.

I want again thank the Western -- our host, the

Western District of Texas, and all of those who participated. Believe me, this process is -- works as well as it does, and I do think it works well, because people like you take the time to share with us your view. Because we do not have all the wisdom, and we need to find out from you all in the trenches what's happening and -- and -- so that we don't -- do things that make your lives worse and -- and not better.

So I thank you for taking the time. We are adjourned until San Francisco on -- in early February.

(END OF PROCEEDING, 12:21 P.M.)

-oOo-

C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
WESTERN DISTRICT OF TEXAS)
SAN ANTONIO DIVISION)

I, Vickie-Lee Garza, Certified Shorthand Reporter, do hereby certify that the above-mentioned matter occurred as hereinbefore set out.

I FURTHER CERTIFY that the proceedings of such were reported by me, later reduced to typewritten form, and that the foregoing pages are a full, true and correct transcript of the original notes.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 30th day of January, 2009.

/s/ VICKIE-LEE GARZA, CSR
CA CSR #12573, Expires 4/30/09
Firm Registration No. 79