JUDICIAL CONFERENCE OF THE UNITED STATES

ADVISORY COMMITTEE ON CIVIL RULES

HEARING ON EVIDENCE)
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REPORTER'S TRANSCRIPT OF PROCEEDINGS
HELD ON: MONDAY, FEBRUARY 2, 2009

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WITNESS LIST

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San Francisco, California February 2, 2009

P R O C E E D I N G S

(Whereupon, the hearing commenced at 8:31 a.m.)

JUDGE KRAVITZ: We have quite a number of witnesses. So we're going to try to get started on time. I wanted to thank each and every one of you for taking the time out from your busy lives to come talk to us today about our very important proposals on Rule 56 and Rule 26. I have a number of items to mention and then we're going to go around and introduce ourselves to you and then we'll start.

First, I'm told that there is one mic for two people up here. So you'll have to move the mic back and forth. I've also been asked to say if people could identify themselves, that is to say members of the committee, by name when they speak, it will help with the record.

I want to particularly thank the judges who have -- at each stage of our hearing across the country have taken the time out from their very busy days and often traveled very far to share with us their experiences. This is -- this process is essential to the rule-making process, and we are very, very pleased that the judges have taken the time to go through our

rules and appear before us.

A few words to the speakers. This is our third hearing. We had a hearing in Washington in November. We had about 17 or 18 witnesses. Then we had one in San Antonio in January where we had another 18 or 19 witnesses. The members of the committee have worked hard to read the written comments that you give us.

So I think -- you, of course, can say anything you like, but I think the things that will be most helpful to the committee members are specific experiences or specific examples of ways in which you think these proposals will work well or will not work well.

So I guess I'd just ask you at this stage to be as specific as possible. Generalities will be fine for the record, but they may not be particularly influential at this stage of the proceeding.

Also, if you have ideas about ways in which the proposals could be either reworded or could be reworked to address some of the criticisms that have been leveled against them, that, too, would be enormously helpful for the committee.

My name is Mark Kravitz and I'm a district court judge from New Haven, Connecticut and I have the

great privilege and honor to chair the civil rules advisory committee, and I think right now I'd like to go around with my colleagues and have everyone introduce themselves to you and then we'll start with Judge Lasnik as our first one.

PROFESSOR COOPER: I'm Edward Cooper, the University of Michigan Law School and reporter for the civil rules committee.

JUDGE ROSENTHAL: I'm Lee Rosenthal. I'm chair of the standing committee. I'm a district judge in Houston, Texas.

PROFESSOR MARCUS: I'm Rick Marcus. I teach at Hastings, about two blocks from here. I'm the associate reporter of the committee with focus on discovery matters in regard to the committee's work.

MR. HIRT: I'm Ted Hirt from Washington, DC. I'm in the civil division at the US Department of Justice.

JUDGE HAGY: I'm Chris Hagy, United States magistrate judge, from Atlanta, Georgia.

JUDGE WALKER: I'm Vaughn Walker, district judge from San Francisco, and this is the building in which my papers get graded.

PROFESSOR GENSLER: I'm Steven Gensler from the University of Oklahoma College of Law.

JUDGE COLLOTON: Steve Colloton, US circuit judge for the Eighth Circuit from Des Moines, Iowa.

MR. KEISLER: Peter Keisler with the Washington DC office of Sidley Austin.

JUDGE KOELTL: I'm John Koeltl. I'm on the civil rules committee. I'm a district judge in the Southern District of New York.

JUSTICE SHEPARD: I'm Randy Shepard. I'm chief justice of the Indiana Supreme Court.

MR. GIRARD: I'm Daniel Girard. I'm a civil practitioner, a plaintiffs lawyer here in San Francisco.

MR. RABIEJ: I'm John Rabiej, civil rules committee support office.

JUDGE WEDOFF: Gene Wedoff. I'm a bankruptcy judge in Chicago and the liaison for the bankruptcy rules committee to the civil rules committee.

MS. BRIGGS: I'm Laura Briggs. I'm the clerk of court in the Southern District of Indiana and I'm the clerks representative on the committee.

JUDGE KRAVITZ: Great.

MR. McCABE: And I'm Peter McCabe. I'm assistant director of the administrative office of the courts and secretary to the court.

JUDGE BAYLSON: And I'm Michael Baylson and I

am a district court judge in Philadelphia and a member of the committee and chairman of the Rule 56 subcommittee.

JUDGE KRAVITZ: So right before we get started I do want to express the committee's gratitude to Chief Judge Kozinski and all the members of the Ninth Circuit family for allowing us to have this hearing here and in particular Susan Newell who has organized this gathering, and we thank her very much.

And I would also like to thank Vaughn Walker for doing all of the work to organize our stay here in San Francisco.

So Judge Lasnik?

JUDGE LASNIK: Thank you, Mr. Chairman and members of the committee. My name is Robert Lasnik. I'm the chief judge in the Western District of Washington up in Seattle, and it's my great privilege to testify here today.

I want to thank the chairman and members of the committee and the very excellent staff you have for extending me a number of courtesies, including allowing me to testify first so I can catch a plane back to Seattle and deal with my pending PSLRA class actions and a patent case summary judgment motions I have in the next few days.

First I want to start with two reasons why I really wish I could fully support all of the committee's recommendations and the first one brings me to that joke. If you've already heard it, please bear with me. There are two answers to this joke.

How many federal judges does it take to change a light bulb? The first one is just one. He holds the light bulb up and the entire world revolves around him. But the one I want to talk about is the second answer, which is: "Change? Change? Who said anything about change?"

And of all the organizations I've been associated with I have never seen one more resistant to change than the federal judiciary. And I can't tell you how many times I've seen an excellent good innovative idea met with the response, "But that's not how we do it."

So I really commend you for taking on this project, for doing all the hard work you did, for hanging in there. And if the only answer I have for why we shouldn't do this was change, I wouldn't be here.

The second one I will get to at the very end of my remarks. However, despite those two very good reasons why I wish I could support all the proposals, I

must say that we in my district and I personally are opposed to the 56(c) point-counterpoint method.

You know, obviously after hearing as many witnesses as you have, no one could argue that reasonable minds can differ about whether or not this point-counterpoint procedure is an improvement when it comes to administering justice. Obviously, very good trial judges find it helpful to what they do, but the naysayers are not just people who say no to change.

They are people who have tried the method and found it to be wanting for their purposes. And, of course, you have the letter from a truly great trial judge, Claudia Wilken, and you have the letter from one of my colleagues on the chief district. He's the chair of the Ninth Circuit, chief district judge, Jack Sedwick, who spends a lot of time in Arizona and has dealt with both and finds the procedure not helpful to reaching just results and more time-consuming and more expensive.

On my court I think with Tom Zilly and Barbara Rothstein and Bob Bryan, again, for the most part we have reasonable minds in the men and women who are judges in our court. Of course, we do have Judge Coughenour, too, but let's set him aside.

But the change will definitely have an added

impact in a significant number of cases in the way judges handle summary judgments and to me the burden of proof is on the people who are asking for the change here when you have, if not -- you know, I don't know what the exact statistics are, but certainly a significant minority are using the CR 56 rule as is. They are not clamoring for uniformity or begrudging those districts that have adopted other procedures through the local rules. And so why force that significant minority to change?

Yes?

JUDGE KRAVITZ: Judge, could I just -- while you were on that point. What we have heard often from practitioners who practice around the country is that with something as important as summary judgment there is value to uniformity in a uniform federal system, and that we obviously don't have that now. And I think, you know, one of the motivations of the committee starting its work was to say uniformity perhaps is important and we should have a uniform system for dealing with Rule 56.

You may be in favor of uniformity but not this rule or you may view that uniformity is not that important as it relates to the papers and I just didn't know which it was for you.

JUDGE LASNIK: I think uniformity is a goal that should be considered by your committee in doing rules, absolutely. But when you come right down to it, what the lawyers really want are good judges who are handling the cases in an efficient manner.

And, you know, I had a discovery dispute the other day where they attached all of the e-mails and one of the ones that my law clerk highlighted for me because I would never have found it was an e-mail from one practitioner to the other that said, "Hey, I've been in the court of that Lasnik. He's one smart dude. Your summary judgment motion is not going to be granted."

You know, that's really what the lawyers are talking about with the judges. And, you know, the process is much, I believe, less important to them than the quality of the bench. You look at sentencing guidelines and see the wide variety of departures from different parts of the country, and I know your court probably departs, like my court does, a lot more than Judge Rosenthal's court does. And yet in trying to enforce that uniformity on a national judiciary is very difficult to do and maybe it isn't even the right thing to do when you come right down to it.

Judge Rosenthal, you looked like you wanted to

ask me something.

JUDGE ROSENTHAL: I did have one question.

Putting aside for the moment whether the default in the national rules should be point-counterpoint or some other process, if the default allows for a case-by-case variation but does not invite or allow for in the rule text a local rule exemption for variation, does that raise a concern on your part? Is there a view that a case-specific ability to deviate is inadequate?

JUDGE LASNIK: Well, I think we have a case-by-case ability to deviate now in the sense that somebody like Judge Bryan has a standing order that he will use once every five years that says we're going to do it the point-counterpoint way in this case and here's why. But to make us do a standing order in 99 percent of our cases to avoid a local rule and to pretend that we have uniformity I don't think is an honest way to deal with the situation.

JUDGE ROSENTHAL: So your concern at bottom is with the point-counterpoint?

JUDGE LASNIK: Yes, it is. Thank you.

Yes?

JUDGE BAYLSON: Hi. I very much appreciate you and so many of our colleagues coming here today to

speak about this.

Just by way of background, I do think it's important to note that we first started approaching Rule 56 because we think in general it is a rule that needs some corrections because it really doesn't work in practice for a lot of reasons that are in the committee notes, and I won't go through them here. So we've set about to do a better Rule 56 because it's filed in some districts in virtually every civil case and takes a great deal of time of judges. So we think it calls for improvement.

The second thing is that there are many districts with local rules of one kind or another of Rule 56, which sort of, at least in committee, evidences a dissatisfaction with the national rule.

Do you see a problem -- and this is sort of a converse of Judge Rosenthal's question. Do you see an inadequacy in just allowing a judge in a specific case to avoid point-counterpoint? Why isn't that sufficient? Because our proposal, as I'm sure you know, allows a judge in a specific case to exempt the lawyers from following that procedure.

JUDGE LASNIK: Yeah. And if it were a situation where the default rule made the most sense in the vast majority of cases and you could opt out of it

in a specific case, I wouldn't have a problem with that, but what we really will end up with is the districts maintaining the way they do things now because we have tried it and found it wanting or we have tried it and found it too cumbersome and too expensive.

And I believe that if there are -- there are problems with summary judgment, that they probably have -- they will be there no matter what system you use. The problems may have to do with lawyers who are churning cases inappropriately, lack of training and education among the lawyers.

Our bar up in the Western District -- and they practice nationally. We're talking about firms that have a national practice up there. We're not pioneer country anymore. They are very satisfied with the way cases are handled in the Western District of Washington under the existing CR 56. And I think to force us to enter orders, case-specific orders will make us feel like, you know, why are -- why is this national committee forcing us to go through what we think and our lawyers think is basically a charade.

JUDGE KRAVITZ: Judge Rothstein, I think, told me that you all had point-counterpoint at one point and then you switched.

JUDGE LASNIK: No. I don't think we've had it up there, but we've all used it either --

JUDGE KRAVITZ: In individual cases.

JUDGE LASNIK: -- in individual cases or we sit in other -- you know, the Ninth Circuit, the advantage of having 13 districts is we can come to each other's help occasionally, as Judge Sedwick and the other Alaska judges have done with Arizona and San Diego and the border states that are inundated with criminal cases. So we've all used it at one time or another.

You know, I'll be the first one to say if you don't have a lot of experience using it, you may not be using it as efficiently. But the Northern District of California had that experience, Judge Sedwick has that experience, and some of our judges have spent a great deal of time in districts that have it, and they don't like it.

The last thing I wanted to get to is the second reason why I wish I could support all of it -- and we do support the rest of it. Our only concern is with 56(c) -- is I think that a lot of our colleagues don't appreciate how much time and effort you all put into the work you're doing and that your motives and your agenda is purely to improve the federal

judiciary.

And no one knows that more than my colleague Tom Zilly who chaired the bankruptcy rules committee during one of the most difficult times possible and spent a great deal of time putting together what I think are great bankruptcy rules under tremendous time pressure because of the Reform Act.

And so for somebody like Judge Zilly, Judge Rothstein and myself to have to criticize the rule is a difficult thing for us to do. My penance is paid on the national budget committee where I chair the congressional outreach subcommittee. The "get me the money committee" is what Bob Broomfield calls it, and it is the one committee where you know that you are on it because of merit. If you have a senator or a congressman who is a powerful person, it merits you being on the budget committee. Mine is Senator Patty Murray in Seattle.

But we put in an incredible amount of time and don't always get a lot of appreciation when we talk about cost containment and we talk about other things. But the reason I mention it is we are headed for a difficult time. We'll be okay in fiscal year '09 and the expected appropriations bill to fund this year will come by the end of this month and hopefully it will

have a judges COLA in it.

But going forward it's going to be a difficult time and we're going to be asked to do more with less. And when judges really don't want to take on a procedure that they see as more expensive for the lawyers, more time consuming and, therefore, more expensive for themselves and less efficient, it hurts morale frankly to have a situation like that, especially when you're being asked to do more with less, to cut out career law clerks, to restrain spending on travel, to suddenly have to put in standing orders to use the rule you've always used or to find yourself dealing with a new rule when there's really no groundswell within your bar to change things is something that will definitely have an impact on morale.

So for those reasons I urge the committee to not adopt the point-counterpoint measures.

JUDGE KRAVITZ: Thank you.

JUDGE LASNIK: Thanks very much. I appreciate it.

JUDGE KRAVITZ: Thank you for coming down here and sharing your views. I'm sure the locale had nothing to do with you coming down here.

JUDGE LASNIK: Well, the timing, it's always a

pleasure to come to San Francisco. You know, I also chaired the Ninth Circuit judicial conference and I've had an opportunity to work with Susan Newell who's just an incredible person. It is always a pleasure to come to San Francisco. As Judge Walker says, it's the place where our decisions come to die. It's also the place where a lot of the United States Supreme Court cases are born.

JUDGE KRAVITZ: Travel safely.

Judge Hamilton?

JUDGE HAMILTON: Thank you, Mr. Chairman, and thank you all for the opportunity to speak at the hearing.

I also appreciate very much the careful attention that you all and your staffs are doing on these important proposals. They are technical, they are arcane, but they really are very important.

Let me explain briefly why I am here. As the saying goes, good judgment comes from experience. Experience often comes from bad judgment. In 1998, motivated, I think, by many of the same concerns that are driving the national proposal, our district adopted a local rule that is similar in many ways to the proposal you all are considering. We experienced some significant problems and made substantial changes in

2002.

If the committee intends to go forward with the proposed national change, I offer these observations and suggestions based on the experience of our court and our bar with that rule.

Frankly I hope the committee and the nation can learn from some of our mistakes. I also should say that I'm speaking on behalf of all of my colleagues with the exception at one point of surreplies, which is just a majority of my colleagues on the district court.

I'd like to talk really about three things, not everything that's in the written submission. First is on limits to the point-counterpoint submissions, second is the surreplies, and third on flexibility in enforcement.

When we first adopted the requirements for point-counterpoint statements of material facts and disputed material facts, we required that they be filed as separate documents as the pending proposal, as I understand it, would. A significant problem emerged quickly. The separate point-counterpoint documents provided a new arena for unnecessary controversy. We began seeing huge, unwieldy and especially expensive presentations of many hundreds of factual assertions with paragraphs of debate about each one of those.

By the end of the briefing the complete documents for the disputed or undisputed facts ran well over 100 pages. By way of a few examples, and I say this for the record, these are all cases in which there would be one plaintiff in an employment discrimination case or a civil rights case. These are run-of-the-mill cases.

A case called Rotor versus Hendricks Hospital, 489 paragraphs of facts, a total of 300 pages of briefs and statements. A case called Jackson against Service Engineering, 347 paragraphs. Curley versus Dill, 335 paragraphs. Harvest against Prestige Group, 548 pages of submissions on a routine summary judgment motion where the defendant tried to dispute 582 of the plaintiff's 675 assertions of disputed material facts.

And the case called Kirby versus Anthem where the final product was 117 pages of point-counterpoint with 331 paragraphs being contested. Those are all things that I found quickly that I had dealt with myself in the few years that this rule was in effect.

We found that lawyers were too often using statements and responses to argue every conceivable evidentiary objection and point of relevance, sterile objections, trivial arguments that would never be made in a trial in front of a judge with limited time or a

jury with less patience than that. Junior associates were seeming to treat the whole process, the statements, as a kind of graduate course in evidence law where you got the best grade by trying to raise as many objections as you possibly could.

And these objections and arguments were being made on paper simply because they could be. And in substance what we were seeing was an exponential increase of the kinds of motions to strike all presented through the point-counterpoint paragraph-by-paragraph debates. And the rule, frankly -- the result was very far from the goal of Rule 1 that I know we all share of a just, speedy and inexpensive determination of civil actions.

Now, we were not united on all of this, but we were troubled by these developments and our court was reluctant to abandon the point-counterpoint rule entirely. We had seen some benefits, some clarity in presentation by requiring the format, but we found a simple and effective correction in 2002.

Instead of requiring the facts to be presented in a separate document, we now simply required that the moving party's brief contain a statement of undisputed material facts within the pages of the brief. The non-moving party's brief similarly must contain a

response to the moving party's statements and any additional facts again within the page limits of the briefs.

This simple solution just takes advantage of page limits on briefs, which I assume are universal. We're fairly generous. We allow 35, 35 and 20 in our court. This step requires attorneys to use their space wisely, and it's been very effective in reducing the volume and I think expense. That's what I hear from lawyers that I have talked to and from my colleagues.

It's not perfect.

JUDGE KRAVITZ: Judge Hamilton, excuse me. I didn't mean to interrupt you.

JUDGE HAMILTON: Please.

JUDGE KRAVITZ: Are they required to have citations to the record?

JUDGE HAMILTON: Yeah. We have all that. But, you know, each sentence you've got to pinpoint cites on the record and all that. And that's helpful. That's very helpful. I was not originally a fan of this idea, and I came around to say, okay, that's a good thing to see.

But by just using the page limits we let people use their professional judgment instead of feeling as though they have to contest every single

point.

JUDGE COLLOTON: Are they still formatted as individual points?

JUDGE HAMILTON: Yes.

JUDGE COLLOTON: Or are they just in the text of an argument?

JUDGE HAMILTON: Right.

JUDGE COLLOTON: No. I mean, are they set out separately as individual facts or are they just weaved into the text of an argument?

JUDGE HAMILTON: We allow flexibility. In the statement of facts, just as you would expect in an appellate brief, you lay out your facts with the citations and then you put your arguments after that. And that works -- that works pretty effectively.

Yes?

JUDGE WEDOFF: But in numbered paragraphs so that there can be a response to the numbered paragraph?

JUDGE HAMILTON: We are a little more flexible about the format than necessarily now requiring a single sentence, but it is very clear if you're the moving party, if you make a specific assertion and there's not a specific rebuttal, then we'll treat it as undisputed --

JUDGE KRAVITZ: As undisputed. Okay.

JUDGE HAMILTON: -- for purposes of the motion.

JUDGE KRAVITZ: And we've heard -- some suggestions are we should cap the number of statements of fact so we don't have 500, and your solution is by having the page limits on the brief, the lawyers end up capping themselves.

JUDGE HAMILTON: Exactly.

JUDGE BAYLSON: I'm sorry. Judge Hamilton, as you know, the national rule at the moment doesn't refer to the briefs at all. Whatever our proposal would be, would you see an advantage if a national rule discussed briefs and required that if there were not to be these separate statements, that the brief would contain specifically designated -- alleged asserted undisputed facts with pinpoint citations for the record?

JUDGE HAMILTON: I think I agree with that, yeah. I'm not sure as I'm sensitive to all of the nuances of the national rule that you are, but I just don't want things to get worse for our district.

JUDGE KRAVITZ: Judge Koeltl and then Chief Justice Shepard.

JUDGE KOELTL: Don't you still get voluminous affidavits in support and in opposition for the motion

for summary judgment? And if lawyers in your district used the point-counterpoint to develop a whole new practice of motions to or some challenge, couldn't you still get them from the affidavits?

JUDGE HAMILTON: No, we don't. You know, obviously, we get massive submissions of exhibits, deposition excerpts and so on. Some -- some people will try to fix the problems in their cases with lengthy affidavits and the like. There is some of that, but the experience before we went from the separate statements to putting it in the briefs has been a dramatic change in our district. Yes, there are ways to abuse just about any system, but having the separate and unlimited point-counterpoint was just inviting difficulties in my experience.

JUSTICE SHEPARD: Well, that's really the question I wanted to ask. It seems to me if you had, for example, no limit on briefs, then what can happen would happen, as you described earlier. Wouldn't one say the same thing about a decision to put a limit on the number of pages in a statement of facts if it were a separate matter and what -- why did you choose to put the limit in the brief rather than keep what you had in '98 and put a limit on the number of pages in the statement of facts?

It seems to me you've done the same thing, but what did you perceive to be the benefit of creating the limit inside the brief as creating the limit inside the statement of facts?

JUDGE HAMILTON: Well, I think the limit is the opening brief -- the opening party's submission is 35 pages rather than saying 35 plus 35 or something like that.

In addition --

JUSTICE SHEPARD: I understood that, but did you not have the authority to decide that the statement of facts could only be 35 pages? Was that --

JUDGE HAMILTON: Oh, I'm sure we could have, yeah.

JUSTICE SHEPARD: Why did you think it better to place the limit inside the brief rather than --

JUDGE HAMILTON: Because the limit is -- the effective limit is lower that way and you reduce the number of documents that need to be prepared, that need to be edited, et cetera.

So I think that was pretty effective.

JUDGE WALKER: Judge Hamilton, can I direct your attention to the specific committee proposal. If I understand your thinking, the problem that you foresee with the proposal is with the separate

statement aspects of it which is contained in subparagraphs (1), (2) -- certainly (1) and (2) of (c), but that you do not find problematic the balance of the proposal requiring when citing to a specific claimed dispute of facts or undisputed fact, that that must be supported by reference to the underlying evidentiary material, the depositions, the interrogatory responses, the documents and so forth. That would be the portions beginning with (c)(4) through (c)(6).

Is that a fair interpretation of your statement?

JUDGE HAMILTON: Well, I think it is, yes. Yes. The benefit that we experienced was from the requirement for specific evidentiary citations. And obviously the problem arises, let's say, in a typical employment discrimination case where the decision-maker puts in as fact number 33 how do you base this decision upon the employment attorney's agenda. The counterpoint to that is in a lot of cases it's going to have to be: "See my whole brief. It's all my evidence. It's circumstantial."

JUDGE KRAVITZ: And I had one the other day, which was "there was no hostile work environment."

JUDGE HAMILTON: "See paragraph 5 of my affidavit."

So for the reasons that I've discussed, if you intend to move forward with the point-counterpoint format, I would urge you to consider some effective limitations on length. I won't say that is the only way to do it, as Chief Judge Shepard has pointed out. Those are the reasons we chose to do it and it worked for us.

If you disagree, I would ask you to at least please write the rules in such a way that local rules could impose such limitations effectively.

Yes?

MR. KEISLER: Judge Hamilton, you said in your written testimony that you thought these changes could affect outcomes and I'm just wondering whether in your experience -- was there some systemic effect on outcomes with point-counterpoint that makes it more likely to be granted, less likely to be granted, more likely in particular types of cases?

JUDGE HAMILTON: That comes to the third point that I wanted to address, which is flexibility of enforcement, Mr. Keisler.

I think the point-counterpoint part of that introduces new levels of expense and new levels of complexity in the federal rules that, frankly, lawyers who are more sophisticated and familiar with the rules

will use to beat up lawyers who are not as sophisticated.

And we began to see a lot of debate and motions along those lines. One more extreme example that I saw was "strike this paragraph because it repeats something that we said in our own submission" or "strike the headings in the statement of material dispute of facts because" -- it was just -- it was silly.

That in our experience with all of these extra -- the extra friction that was generated by the opportunities to criticize the opponent's failure to comply strictly with the rule was to introduce a new provision that says the Court may in the interest of justice or for good cause excuse failure to comply strictly with the terms of this ruling. Because you're not going to see strict compliance from an awful lot of people.

And that has been very helpful in sending a signal to the bar, as a few decisions from the court will as well, saying, "Look, don't bother us with the minor deviations here, with the numbering systems or whatever they might be." But I -- but the opportunities look too good to beat up the opponent could wind up affecting outcomes.

Judge?

JUDGE ROSENTHAL: Within the changes that you've imposed has there continued to be a need to exempt particular cases that depart from the rule or do we take care of the cases that don't seem to fit this point-counterpoint structure well by forgiving non-compliance at the back end?

JUDGE HAMILTON: I don't exempt anything from that rule.

JUDGE ROSENTHAL: Is that pretty common within your district?

JUDGE HAMILTON: I believe so. I haven't heard of anybody being exempt.

JUDGE ROSENTHAL: How about in pro se cases?

JUDGE HAMILTON: We give them a signal. We send them a rule. We are flexible, very flexible with pro se litigants. The main thing we want from the pro se litigants is at least give us a signed affidavit of what you're telling us.

JUDGE ROSENTHAL: And do any judges have standing orders that deviate from the local rule?

JUDGE HAMILTON: Not that I'm aware of.

Professor? Go ahead.

PROFESSOR MARCUS: Judge, your example of an employment discrimination case causes me to remember

things we've heard that you haven't mentioned about point-counterpoint. One argument has been that this arrangement interferes with the ability to argue inferences, like whether there was a basis for suspecting gender or race-based discrimination.

Have you found in your experience that that kind of consequence followed from the point-counterpoint method of doing things?

JUDGE HAMILTON: No, no.

PROFESSOR MARCUS: You wouldn't think we should worry about that?

JUDGE HAMILTON: I have not seen that. The Seventh Circuit, which grades my papers, is a pretty well-developed body of law on the way, for example, in a discrimination case the plaintiff can develop what it calls a convincing mosaic of circumstantial evidence to put the case together.

It's just that you have to take the individual tiles of that mosaic, lay them out in your factual statement and then put the narrative together that supports the case. But I think it's been helpful to at least letting people -- focusing people on the specific evidence that supports this.

JUDGE KRAVITZ: Do you want to mention the surreplies as well?

JUDGE HAMILTON: Yeah. I want to wrap up as quickly as I can. That could be helpful. On this I speak only for a majority of our court. I know that this may drive people crazy to give a surreply of right, but we see all the time in the district court reply briefs from moving parties that either raise new evidence or object to admissibility for the first time of a non-moving party's efforts. And it just seems to me basic fairness the non-moving party has to have an opportunity to respond to those.

We keep it short. We keep it limited with a short time frame. We've also seen that come in very handy so far in avoiding at least one appellate reversal where the seventh party was complaining after losing on summary judgment, there was all this new evidence put into the reply brief. And so the Circuit's response in a case called Bell v. Daimler Chrysler was look at the Southern District's Local Rule 56.1(d). It lets you file a surreply. If you didn't take advantage of that, don't come complaining to us about it.

It was effective, it was limited, and I recommend it with those kind of limitations just to be fair.

For other points I'll be happy to stick with

what I said in my written submissions. I appreciate your patience and, if there are other questions, I'll answer them.

JUDGE KRAVITZ: Judge Hamilton, thank you so very much.

JUDGE HAMILTON: Thank you again.

JUDGE KRAVITZ: Some of your ideas and the way you dealt with it in your court is different than what we've heard before. So it's been very valuable.

JUDGE HAMILTON: Again, thank you very much for all the time that you all put into this. It affects all of our daily lives.

JUDGE KRAVITZ: So we're now going to switch to Anchorage, Alaska, I believe, and Judge Holland who's been good enough to be with us.

And how's that volcano doing?

JUDGE HOLLAND: At last report it hadn't done anything yet. It's burping.

JUDGE KRAVITZ: Well, that's good.

I want to thank you, Judge Holland, for being willing to share your views with us today. We know that -- from the written submissions that the Alaskan judges have a unique position here since you don't have point-counterpoint in Alaska but have a lot of experience dealing with it in Arizona. So I thank you

for being willing to share with us your experiences.

JUDGE HOLLAND: Thank you very much, Judge Kravitz.

Members of the advisory committee, I thank you and I thank our Mr. Ward and your Mr. Copeland for making it possible for me to make a virtual appearance. Instead of flying what, 1,500 miles or something like that, I walk about 200 feet to be with you today. And I really appreciate the opportunity to do it this way.

As you may know, I am senior judge for the District of Alaska. I've been with our court for almost 25 years. Our Chief Judge, Jack Sedwick, has been with our court since 1992. In addition to our Alaska work, both of us take assignments from the District of Arizona and my recollection is that both of us have been doing that for approximately ten years.

We take run-of-the-mill civil cases. We're both on the draw there. We get everything from very complex patent cases to the mundane student loan recovery cases. We see motions for summary judgment in many of those cases.

As you've mentioned, Alaska operates under the Rule 56 as presently formulated and always has. There's no local rule here on the subject.

Arizona, on the other hand, has a Rule 56.1, which, very much like the proposed Rule 56(c) requires a separate statement of facts in connection with every motion for summary judgment.

As a consequence, we are in a position to make some comparisons, I think, although I will confess right up front that no one has seen this change coming and has done no empirical study, no study at all, frankly. What we're sharing with you is our best anecdotal response to the proposed rule change.

We, Judge Sedwick and I, hold our other judges, our other active judges, two of them are opposed to this rule change, and our other senior judge, Jim Singleton, joins us in opposing this rule change. Rule 1 of the Federal Rules of Civil Procedure informs us that the purpose of the Federal Rules of Civil Procedure is to, quote, "secure the just, speedy and inexpensive termination of every action or proceeding," end quote.

I submit that, in our opinion, proposed Rule 56(c) does not comport with the expression of purpose in Rule 1.

The proposed Rule 56(c) requiring a separate statement of facts in substance says very explicitly that each motion for summary judgment is to be

supported by a memorandum of points and authorities and a mandatory separate statement of facts. A response is required and also a mandatory bundle of facts. A moving party statement of facts, is also required. Finally, a reply memorandum with mandatory responses to any new facts that are asserted in response to the motion.

In our Arizona practice, this procedure typically results in a lengthy chronological explanation of what the case is about. That sort of presentation more often than not does not comport with the sensible assembling of facts in support of various issues that a motion presents.

In other words, under the present practice we have almost universally an effective, meaningful statement of facts key to the issue that the attorney feels entitles him to motion for summary judgment. With the separate statement of facts, quite simply, we doubled the number of documents that a court must analyze, assemble and evaluate for purposes of deciding a motion for summary judgment.

As a consequence, the proposed Rule 56(c) increases the amount of time an attorney has for preparation of such motions, responding to them, replying to them, and necessarily in process it

increases the cost to the litigants.

But there is from a personal standpoint a more important problem that we perceive with the proposed change and that is that it does not facilitate, in our opinion, the work of the Court.

The present Rule 56 requires a moving party to show that undisputed facts entitle that party to a judgment as a matter of law. Presently that proposition is put forth by the moving party in a well-considered single memorandum. Today a district judge receives all of the information needed to decide and understand a motion for summary judgment in three pleadings supported by references to affidavits, depositions and documents.

The point-counterpoint summary judgment motion practice in Arizona routinely doubles the number of documents that a court must coordinate in order to decide a motion. It requires an artificial separation of the material facts from issues that have to be decided in a case. Local rules, as has been mentioned earlier, typically place limitations on the memoranda in support of motions for summary judgment. Those limitations, in effect, put a fence around the motion practice -- a very useful one.

Under the proposed practice and under the

Arizona local rule that fence is in substance let down and as a consequence the page limitations that have been imposed, I think, largely as a result of civil justice reform 10 or 15 years ago, become almost a dead letter because the separate statement of facts even requiring separate paragraphs and single subject statements simply offer to counsel another opportunity to argue its case.

District judges, in my opinion, perceive in the main well-crafted single memoranda of points and authorities in support of motions for summary judgment. That system works well for us in Alaska. In Arizona we spend much more time doing summary judgment motion practice simply because of the presence of the requirement of that sterile statement of facts that duplicates what as a practical matter counsel also have to put in their memorandum of points and authorities.

An additional problem in that respect that is spawned by the point-counterpoint system for dealing with motions for summary judgment, and that has to do with the subject again mentioned already that, for reasons that are not apparent to me at all, the point-counterpoint approach to summary judgment motions spawns separate motion practice.

In Alaska we don't see that. In Arizona we

see it routinely. I estimate between a third and a half of the cases that give us summary judgment motions will involve a motion to strike something for some reason, usually a squabble over the evidentiary support of the statement of facts.

JUDGE KRAVITZ: Judge Holland?

JUDGE HOLLAND: Yes?

JUDGE KRAVITZ: You don't see motions to strike with respect to affidavits in Alaska?

JUDGE HOLLAND: I cannot say it has never happened. It probably has, but not with the frequency that we see it in Arizona. In Alaska the questions of materiality and the evidentiary support of the affidavits and the deposition experts, those -- those squabbles exist, but, in our experience, they are addressed in the memoranda.

There is -- there is an interesting variant between the Arizona rule and that proposed as Rule 56(c). The Arizona rule doesn't appear to place any limitations on the type of facts that may be put in the separate statement of facts that's required. The proposed rule says that only those material facts that cannot be generally disputed should be in the separate statement of facts.

I'm playing prophet here just a bit, but given

our experience with the motion practice and subsidiary summary judgment motions in Arizona, I think it's a foregone conclusion that that only requirement will be another occasion for subsidiary motion practice, contentions by counsel that the statement of facts of the opposing party has not been limited only to material facts.

The response to that, as I'm sure you can imagine, is going to be, "Well, we think it is material, but, Judge, if you disagree with us, it's just necessary background anyway. You need to understand what this case is all about."

You know, that may be true, but I submit to you that the more effective way to deal with all of these things is to leave Rule 56 exactly the way it is today. In our opinion, that rule works. It works well. We do not have problems with subsidiary motion practice, but I fear that we will be confronted with it if Rule 56(c) is adopted.

It's an old saw that I hesitate to repeat, but there's some truth to it. "If it ain't broke, don't fix it." In our opinion, Rule 56 isn't broken as presently formulated. With sensible page limits on Memorandum and good work -- good attorney work product, which happily we see regularly, a party's position can

be well and adequately put forth in a form that is most useful to the court, that is, in the context of the legal issue to be decided in a single memorandum of points and authorities.

District judges of Alaska oppose the change to Rule 56(c).

JUDGE KRAVITZ: Thank you, Judge Holland. There's some questions here and Judge Rosenthal has one right now.

JUDGE HOLLAND: I saw the hand go up.

JUDGE ROSENTHAL: I actually don't have a question, Judge, although I wanted to express my appreciation for your remarks, but also given the description of the happy state of summary judgment practice in Alaska, do you have any vacancies in your court?

JUDGE HOLLAND: We -- we will have one coming up in what? A year or a year and a half when Judge Sedwick goes senior.

JUDGE KRAVITZ: I think she's looking for volunteers to come down to Texas.

JUDGE HOLLAND: Well, I'll tell you. Volunteering for the District of Arizona keeps me pretty busy.

JUDGE KRAVITZ: I hope you do it only in the

wintertime.

JUDGE HOLLAND: Well, I get asked about that all the time and, quite frankly, I tell Arizona lawyers, "Look, you guys don't want to come up here in the wintertime. I don't want to go to your territory in the summertime." And I don't.

JUDGE KRAVITZ: A wise judge. I don't know if there are any other questions.

I will say I thank you again so very much, Judge Holland, and your chief judge, Judge Sedwick, for taking the time to share with us your views. I very much appreciate it and the committee does as well.

JUDGE HOLLAND: We're glad to do it and thank you for the opportunity to do it in this efficient way.

JUDGE KRAVITZ: Great. Thank you.

So we have Judge Wilken right now. You get the award for the nearest appearance.

JUDGE WILKEN: So far I'll say.

JUDGE KRAVITZ: We nonetheless appreciate your taking the time out from your busy day to share your views with us.

JUDGE WILKEN: Well, thank you for inviting us.

I'm Claudia Wilken. I'm a district judge in

the Northern District of California and I sit in one of our divisional offices across the Bay in Oakland.

I'd like to start by thanking all of you for the work you've been doing on Rule 56. I agree that Rule 56 very much does need to be revised and I appreciate the efforts that you've made to revise it.

As a member of our court's local rules committee and sometimes the chair of it, I know how hard it is to write a rule that is clear and fair and devoid of unintended ambiguity, makes all the lawyers and judges happy in all the different types of cases. And I know what's even harder is to struggle and fight over every word and phrase, put them out and then have everyone come in at the last minute and criticize them and try to micromanage them.

So I'm here reluctantly, not because I do wish to micromanage, but just because of the one point of Rule 56(c), the point-counterpoint one which I feel strongly about and which our court feels strongly about and which our court, as others have mentioned, has had some experience with that I would like to pass along.

As I mentioned in the memo that I sent previously, we did have a court meeting and talked about this, and unanimously our actives and seniors and magistrate judges agree that we did not wish to go back

to the point-counterpoint rule that we did have in the past.

I didn't manage to get you my written testimony in time. I have written it out and I will e-mail it to you. I won't go into it all at this point because a lot of the points have been covered, but it will be available.

As I mentioned, we had the local rule from 1998 until 2002, which was about 15 years. I started in '93. So I had, I guess, a few years under that practice requiring a point-counterpoint statement. And the way it worked in our district was the attorneys would file first a point counter -- a point and then a counterpoint statement of numbered paragraphs and then they would file a brief which would contain again a statement of facts and the legal argument. We had a page limit for the briefs, which included the facts and the legal argument, but no page limit for the point-counterpoint.

Now, I suppose we could have had a page limit for the point-counterpoint, but the real problem with it is the duplication. If we have point-counterpoint and then a statement of facts, it's duplicative. We're reading the things twice. We can't have only one and not the other because the point-counterpoint is not a

good way of telling a story, particularly if you're trying to include only material undisputed facts and you're not including the background facts.

You're not including facts that aren't material, but you need to know them because you can't understand what happened if you don't. Or perhaps facts that aren't disputed, the dispute doesn't matter, the party might argue, but the relative facts need to be there or you can't understand the narrative.

So you do need both, but yet they are essentially saying the same thing, but the best way to say it is in the narrative because that's the way that you can understand it.

JUDGE KRAVITZ: Judge Wilken, sometimes we've heard, though, that -- and we've probably all had experience with this, that lawyers sometimes don't actually come to grips with each other's points in these narratives and that at least the point-counterpoint is a disciplining mechanism that -- that I have to state a fact. I have to have support for it and you can't abate it. You actually have to accept it, dispute it and put the cite in there.

And did you find that that was -- that that happened and that that was helpful or not -- or there was more to handle?

JUDGE WILKEN: What I found -- we changed our rule in 2002. So from 2002 to now we've been doing it the other way. What I found is that what you point out can be done in statements of fact because what we do require, and this rule could require as well, is that the statement of fact be that every point be supported by a citation to the record.

JUDGE KRAVITZ: I see.

JUDGE WILKEN: So the parties file their declarations, their depositions, their -- excerpts, their excerpts of discovery, and then a statement of facts, each sentence or each one that -- with any kind of possibility of being disputed contains a citation so you can go and check it.

The other side, because its counter statement of facts in a narrative format, and they darn well better address all those points because if they don't, it's going to be pointed out in the reply and we're going to notice it. So the opposing statement of facts is the same way. It has all the citations and you can compare both stories side by side, but each is a narrative. Each is a story that's understandable.

In the reply then the moving party can come back and say, hey, I pointed out this fact and you'll notice that there was no citation to dispute that

fact.

JUDGE KRAVITZ: And you can accept that fact and deem it, in effect, admitted at that point or accepted?

JUDGE WILKEN: Right.

JUDGE BAYLSON: I think every judge would agree that point-counterpoint does not work for every single case. Why is it not adequate to give the judge the power to excuse the requirement in this specific case?

JUDGE WILKEN: Well, what I would do, I'm afraid, is excuse it in every case, and I think a lot of people would. To me the answer to that is it's easier to start from the default of the simple and move to an added requirement when needed than to start with a default of the more complicated and move to a default of the less complicated.

So that would be the way I would foresee it would be to have the rule be more simple and not require that, but to have judges in the individual complex case, who find that useful, order in that particular case rather than the contrary.

JUDGE BAYLSON: Do the lawyers in your district with this rule that they must give pinpoint citations, do they always follow that?

Well, let me rephrase the question. If it's not followed, do you give them another chance or do you just impose the penalty of non-compliance, whatever that may be?

JUDGE WILKEN: We generally in our district do have oral argument. So I would probably say, "You made this point in your brief, but you had no citation. Is that in the record somewhere? Where is it?"

And then otherwise it would be case by case. If I thought it was a meritorious case and it would be form over substance not to give them a chance to submit something after the hearing, I might do that. If I think it's a weak and frivolous case, I might take advantage of that failure to grant summary judgment.

The person that it's hardest on, and I don't mean by plaintiff and defendant, but the non-moving party, I think, has the harder time of it with the point-counterpoint because the moving party can have the list of facts in the order it likes and have the facts that it wants. The way Rule 56 would require the opposing party to oppose it is by going point by point and then if the opposing party has other things it wants to say, it has to say them at the end.

So the opposing party's additional points that it thinks are important are stuck at the end and they

are sort of out of order. They are out of context. It's not as understandable a narrative.

So I think that it's particularly hard on the opposing party to express something that's meaningful and easy to understand and read.

JUDGE ROSENTHAL: Do you find yourself needing to on a case-specific basis exempt or -- cases from the rule that you have now or is it flexible enough that it -- all the cases seem to be able to operate within it?

JUDGE WILKEN: The rule we have now, of course, is no point-counterpoint.

JUDGE ROSENTHAL: Right.

JUDGE WILKEN: So, yes, that is very flexible. It's your basic free statement of facts, argument of law.

I suppose if someone wanted to, they could order a point-counterpoint. I never have, but we don't need -- we haven't felt the need to exempt anyone from that particular format.

JUDGE ROSENTHAL: Does your rule specify that the brief has to have a statement of facts section with pinpoint citations followed by the argument?

JUDGE WILKEN: Yes. And yours could as well. But you asked a question at the beginning what could be

done in the proposed rule to make it responsive to our difficulties with it, and I think really it would be quite easy just to cut out the point-counterpoint part but leave the improvements on the timing of it and on the briefing of it and on the factual citations. Because that part comes in in a later paragraph and that could stay but simply be applied to the narrative statement of facts of the point-counterpoint.

JUDGE BAYLSON: Do you think judges, yourself or your judges or judges generally would have an objection to the national rule of having a requirement that briefs contain pinpoint citations?

JUDGE WILKEN: Oh, not at all. I think that's necessary. I think that's preferable for sure, yes.

Yes?

JUDGE HAGY: Does your rule specifically provide that if a party fails to respond to a fact that you deem material, that it will be deemed material or deemed -- excuse me, deemed admitted or deemed undisputed?

JUDGE WILKEN: It doesn't actually say that, I don't think, but that's kind of the default. If someone says something and you don't respond to it, certainly the argument in the reply would be, "My opponent didn't respond to this. So you have no choice

but to agree with me that it's true because I had a cite and they didn't."

JUDGE HAGY: So you have no objection to specifically letting the litigants know if they don't respond it could be deemed undisputed?

JUDGE WILKEN: I don't see a problem with that as long as it's supported by a citation. If you just say it --

JUDGE HAGY: No. If one supports it and the other doesn't respond.

JUDGE WILKEN: But, yes, I think it would be perfectly reasonable to say if someone has a statement of facts supported by admissible citations and no one responds to it, that one would take that statement of fact as true unless it were frivolous or something.

I did want to answer, though, Professor Marcus's question on inferences. I think that the inference problem is another problem of point-counterpoint. Because I suppose it's a matter of semantics, but one might argue that an inference is not a fact. So if you're having a point-counterpoint statement and you're having facts, you know, light red, car approaches, you couldn't put in that and from this we infer that thus and such happened.

And yet in order to understand the narrative,

in order to understand what's really happening, you need to point out the inferences.

So, again, either your point-counterpoint wouldn't really be facts if it included inferences or, if it were construed to mean that you can't propose inferences in your point-counterpoint, then they wouldn't be there and you'd again have to read the facts to even have any kind of understanding of what was trying to be said in the case. So I do think the inference is -- raises the problem.

JUDGE KOELTL: Judge, did you change your rule in 2002 because the lawyers through your lawyers committee found it a problem? Or did you change it because the judges thought there was a problem in administering it?

JUDGE WILKEN: My recollection is mainly it was judge driven. I don't recall hearing a lot of complaints from lawyers. One of the complaints was from me because I found it -- I would always read them. I would see these statements of point-counterpoint and the statements of fact and I knew they were going to say pretty much the same thing, but I was sort of -- felt like, oh, well, if we're making them file these things, I better read them. And I was finding myself reading the same thing twice. So

it was mine and others of our judges I think that --

JUDGE KRAVITZ: Do you have a sense as to how the bar has reacted to the rule change?

JUDGE WILKEN: We haven't had any complaints.

JUDGE KRAVITZ: At least to you.

JUDGE WILKEN: Pardon?

JUDGE KRAVITZ: At least to you. Right?

JUDGE WILKEN: I'm still on the local rules committee. So I would hear about them if we had them.

So we -- we agree with the national uniformity. I'm very sympathetic to that. We have -- being in the district we're in, we have lawyers from all over the country practicing before us. Lawyers that we know that have offices here practice all over the country and complain to us about lack of uniformity.

So we're very sympathetic to that and very much in agreement with it, but, again, I feel that the simpler to be supplemented with the more complex is a better way to go than starting with the more complex and having to default back to the simpler.

So that would be our recommendation. I don't want to repeat what others have said, but if you have other questions, I'd be happy.

JUDGE KRAVITZ: Thank you very much, Judge

Wilken.

JUDGE WILKEN: Thank you.

JUDGE KRAVITZ: That was very helpful.

Well, it's important to hear from judges, but it's also important to hear from practitioners as well since you all have to live with these rules. And the first practitioner up is Michael Nelson.

Welcome, sir.

MR. NELSON: Thank you. Thank you, Judge Kravitz. Good morning, committee members.

I guess it's unusual for me to follow four judges who all seem to be somewhat uniform in their dislike for 56(c) and this point-counterpoint. Unfortunately, I think I disagree with some of what they are saying, although I'm really not sure I understand what the problem is.

In a motion for summary judgment there is a statement of facts offered by the movant and then those facts are agreed to or not. That has to happen in the process. I'm not sure why the new version of Rule 56 makes that any more complicated. And as I understand the process and division by this rule, there will be a statement of facts which people have to argue about or submit to.

I just had a case involving forgery where we

said, in essence, this document is fraudulent and we made a statement and pointed out the document. They had to respond to that. They made a lot of statements about the document, but in the end they couldn't rebut the fact that it was a forgery. It became the foundation for the motion for summary judgment. That just has to happen.

So from the standpoint of the concern that the judges have expressed and others have expressed about this is now going to create a lot of work, I just don't see it.

JUDGE KRAVITZ: I think the point that I was hearing today that I hadn't focused on before is that there's a -- we have page limits on briefs and it's a disciplining thing. We don't have page limits or number limits on statements of material fact and I think what we're hearing today is that those sometimes grow to gargantuan numbers and --

MR. NELSON: I, too, was astounded by form 89 allegations, 300 pages of it. But if you go right now to the proposed rule on case-specific procedures, the procedures the subcommittee don't see apply unless the court orders otherwise. I think this all comes down to case management.

And on very complicated cases with a lot of

complicated legal issues you're probably going to have briefs that are much more detailed in requirement, but I think the courts on the front end with some of this has looked at that with latitude that's already in this proposed rule.

So I didn't want to address that. My primary purpose to be here today is to stand up strongly for use of the word "must." Quoting from the Liberty Lobby case, "Petitioner suggests and we agree that this standard mirrors the standard for a directed verdict on the Federal Rules of Civil Procedure 15(a), which is that the trial judge must direct the verdict if under the governing law there can be but one reasonable conclusion as to the verdict."

Now, I know that case is cited by others for a proposition that says the courts still have discretion. Okay. Well, then we need a rule. Does the court have discretion or is the court obligated to award when it's appropriate and just and there's no undisputed facts?

And I think what's also at work here is courts are struggling or you folks are struggling with how courts manage cases. There's a lot of latitude in these rules, in the proposed rules.

In addition to the latitude of changing the

procedure there's latitude to consider other materials in the record. There is latitude to allow time to obtain additional discovery, issue any other appropriate order, afford an opportunity to respond. These are all things courts can do as it manages the summary judgment process.

But if there are no undisputed facts on a very important issue, I think courts should or must, better said, be required to give the relief sought by the movant. And to say the rule should --

JUDGE KRAVITZ: Have you had much experience with judges saying that you're entitled to summary judgment, but I'm going to exercise my discretion not to give it to you?

MR. NELSON: They never say it that way, of course, and that's the problem.

JUDGE KRAVITZ: They probably wouldn't say it that way even if the rule said "must." Right?

MR. NELSON: That's right. They find some issue that needs to be tried, but at the very least we would at least have a clear standard. It's not clear right now.

The other thing I'd like to leave you with is this uniformity issue.

JUDGE BAYLSON: Well, excuse me.

MR. NELSON: Sure.

JUDGE BAYLSON: When you say the standard is not clear, one of the things that we've been avoiding is making any changes in any substantive standard of law. That's for the Supreme Court or Congress to do, not our committee.

For years, the rule said "shall." The last year and a half it said "should." We haven't tinkered with the standard at all. So if the standard is reviewed, that seems to me to be a different problem, and -- because one thing we don't want to do is change a verb and have lawyers argue that we're changing the standard.

MR. NELSON: But we've already started to see things like negative discretion written about some of these documents. So the court has a right to dismiss a case but has the negative discretion not to order that. That's in some of the writings that have been submitted.

You have the discretion, notwithstanding the fact that there's no dispute or there's no real dispute on the facts, this case just needs to get tried. And that's absolutely been written in here and I do think the board -- the rule should say "must" to clarify that, no, if there's no undisputed facts, it should be

awarded -- summary judgment should be awarded to the movant.

There's seven or eight different I'll call them rationales for giving the court latitude in the committee's report. One I'll call the instant replay where, "yeah, I know I read it in the record, but I just want to see it." There's a cost benefit analysis of, "well, it's really costly to take these things up on appeal only to get them handed back down to us."

Yeah, but do you know how expensive it is to get a case ready for trial and take videos of experts and fly people all over the country and get witnesses together and prepare four sets of exhibits and marshal the resources to try a case?

And then there's this other argument that, well, why should we grant a motion for summary judgment if there's still other issues to be tried on a similar claim and we've got to hear them anyway.

Most of my work, a lot of my work is insurance bad faith, and if you use it as a breach of contract, there's a bad faith component to it. Well, it's the same case, but we usually dispense with the bad faith when appropriate and then try the breach of contract. So I don't see the strength of that argument.

There's one in here that I really have to take

up with you, and that's the trial pressures. You know, if we have to consider these motions, and we may have to grant them, that's going to run us into our own trial calendars and that may necessitate putting trials off as opposed to "I can't grant the motion for summary judgment so we'll try the case because you're out of time."

It just seems to be a little bit of a backwards look at that perspective. It's really expensive to bring these cases to trial, and motions for summary judgment should be and do narrow these cases very appropriately when amended by courts.

On uniformity, briefly. I'm handling a case right now in district court where before I can file a motion for summary judgment I have to send a letter to the judge outlining what my motion for summary judgment is. The party opposing it has to then write a letter. And then if the court sees the wisdom in the filing of that motion will grant permission to file the motion for summary judgment.

In another state, this state is New York, there seems to be some cross-pollination between this concept of attorney affidavits that are used all the time, but you don't see those in other jurisdictions. And those affidavits can run on for weeks.

So we absolutely have to have a uniform set of rules. And I practice nationally. I know I can probably speak for a lot of the folks that I've practiced with in saying if you give us some general standards we can all make this a lot easier on the practitioner side.

Thank you very much.

JUDGE KRAVITZ: Thank you, Mr. Nelson. I very much appreciate -- oh. Mr. Marcus?

PROFESSOR MARCUS: Just one follow-up, if I may, connected with uniformity and your first point on point-counterpoint.

I'm assuming that you appear in jurisdictions that have various kinds of arrangements about whether one has to do a point-counterpoint or not. Do you approach motions for summary judgment differently in those different districts and, if so, how?

MR. NELSON: It's form over substance as far as I'm concerned. There's three components to this motion. There is the law, there is the argument, and then there's the facts. And it's up to the parties to hassle about the facts and the court looks there and says, yeah, the record's there or not. Ultimately this all plays out in the argument section of whatever document you're calling it.

JUDGE WALKER: So I gather then that you don't think you really need a separate statement of disputed or undisputed facts?

MR. NELSON: Oh, I think it makes it cleaner, but do you have to have a title that calls it a separate statement of facts? No. I'm hearing here some judges say let's put it in the briefing, but it's still going to be a section of statement of undisputed facts. Why not have a rule that says three components, argument, law, statement of facts?

JUDGE WALKER: Let me follow up on another point and that is your "must" versus "should" point with Michael Baylson. Do you perceive situations in connection -- in connection with motions to dismiss in which a party is entitled to have the claim dismissed but the judge refuses to dismiss it?

MR. NELSON: Yes.

JUDGE WALKER: You do find that?

MR. NELSON: Yes. I could give you one clear example.

JUDGE WALKER: Well, to what do you attribute that?

MR. NELSON: Frankly, in this particular case, it was a national antitrust case involving four of the largest automobile writers in the country. Motions to

dismiss should have been granted. They were denied. Motions for certification were granted. We went to the Eleventh Circuit and said this should not have been certified on an interlocutory 23(f) appeal. It should have been certified.

And the Eleventh Circuit said in essence, you're right, this claim has no merit. In essence, it should have been dismissed on a motion to dismiss stage notwithstanding the fact that armies of lawyers litigated this case for about four years. So it should have -- the motion to dismiss should have been granted.

JUDGE WALKER: How was that other than a disagreement amongst the judges who were involved as to the application of the standard for dismissal?

MR. NELSON: I'm not sure I understand your point.

JUDGE WALKER: Well, is there something about the procedure governing motions to dismiss, that is in Rule 12, that does not give a standard by which a court is to grant or to deny the motion to dismiss that requires that the standard of the court's action be included when it comes to summary judgment?

MR. NELSON: Well, obviously at the pleading stage you have to accept all the facts plead as true.

That's really the big difference between that and a motion for summary judgment. So you accept those facts. And then assuming you have to go past the motion to dismiss stage, then, of course, you get into factual discovery, but it's the same issue. Okay. Now the factual record's developed. Is there a legal claim?

JUDGE WEDOFF: Mr. Nelson, I'm a bankruptcy judge in Chicago and I've had experience with a number of trials that are very different from the ones that you've described, trials that have a couple of local witnesses and are over in an hour. In the context of trials like that, can you see that it might be valuable for a judge to have the opportunity not to go through extensive briefing and decision-making on a motion for summary judgment and simply let the case be tried?

MR. NELSON: If it's just a couple hour deal, I can certainly understand why you'd be more inclined rather than get into the paper record. But at the same point, I do think if it's a slam dunk on paper, shouldn't a party not -- party who's entitled to judgment not be forced to go through the expense of trial for what would be a frivolous lawsuit?

JUDGE ROSENTHAL: If it's a slam dunk, who could argue?

JUDGE KRAVITZ: Judge Colloton.

JUDGE COLLOTON: Let me clarify Chief Judge Walker's question and maybe rephrase slightly. I think maybe the question was given that Rule 12 for motions to dismiss does not say the motion must be granted if it's warranted, why do you think it's important that Rule 56 should say the motion must be granted?

MR. NELSON: Because it's a matter of law. Parties are entitled to legal relief when they are entitled to it.

JUDGE COLLOTON: But I think the question, though, is isn't that also true with respect to Rule 12 even though the rule doesn't say it?

MR. NELSON: I absolutely agree with that, though, too, that if a party's entitled to the relief of having litigated an unmeritorious legal claim, they should get that as a matter of right.

JUDGE KRAVITZ: But I think the point that they are trying to make with you -- through you is -- you need to hit the ball back is the rule.

Rule 12 doesn't use the word "must" but has a legal standard and that legal standard is out there and judges apply it or don't, and there are those that have done it correctly or incorrectly. Whereas, this whole debate about "should" and "must" is a debate about

whether we put the standard in the rule itself as opposed to doing the case law.

MR. NELSON: I completely understand the question. I just must not be responding clearly. I think, in essence, even though the wording in the standards may be different, I think the end result is still the same -- the court should take that case away from the plaintiff.

JUDGE COLLOTON: But if I could just make one more point through you. As I read your letter, you were expressing concern that for many years Rule 56 did include a standard, unlike Rule 12. It said "shall be rendered," and you say the Supreme Court in the Celotex case said that is a mandatory term. And you have concern that changing it to "should," which the committee note says is a discretionary term, caused a change in the law. Whereas, Rule 12 has just been out there with judge-made law up to the present.

MR. NELSON: Even with --

JUDGE COLLOTON: Is that an accurate characterization of your concern?

MR. NELSON: I think that's an adequate characterization. I think "shall" is just going to create more and more mental leeway with the judge.

JUDGE KRAVITZ: Okay. Thank you very much.

What we're going to do is press forward and take a break around 10:30. So those of you who are calculating time, keep that in mind.

Mr. Jackson? Welcome, sir.

MR. JACKSON: Thank you. Glad to be here. I appreciate being here and having the opportunity on this important rule change, which you're contemplating.

Looking at the lists of witnesses that are here today and that were in San Antonio and that were in Washington, DC, it's very clear that both the bench and the bar take this activity very seriously.

I think it might also be nice if you could supplement the views from practitioners and the judges with big consumers of court resources across the United States. I am senior vice-president and general counsel of State Farm Mutual Automobile Insurance Company, and I've had the honor of holding that position for all of seven months now.

Ten years prior -- for the ten years prior, however, I was the chief litigation officer of State Farm. I have been there 21 years, and I have a former life of nine years in a private law firm where I was a partner specializing in civil litigation.

It is important to us to look at summary

judgment. We had a case not recent -- not too long ago where a judge was asked to certify a 48-state class action. Eventually we filed a well-thought-out motion for summary judgment. It was denied. It went to verdict. Bad verdict for the company. We appealed it. Eventually the Illinois Supreme Court ruled as a matter of law the case had no merit and used the reasoning in our motion for summary judgment. That came in a state with the "shall" in the rule.

So we raised some questions in preparation to coming here today to have a dialogue with you. We went back and looked at the last three years of litigated cases involving State Farm or any of its affiliates, and these would be first-party lawsuits, not the auto accident cases, slip and fall premises cases that occur all the time, and I'll come back to those in just a minute.

So we look at those cases from a three-year period, 11/20/05 to 11/20/08. And what we found was interesting. First of all, there were about 6,500 of those cases. 82 percent of them were in the state court, as you'd expect, and 18 percent were in the federal court. We only had a full summary judgment rate of resolution of 3 and a half percent. It was actually lower in federal court than in state court.

All of the applicable rules in state court and in federal court during this survey used the word "shall" except for Pennsylvania. And, by the way, in Pennsylvania, we didn't see the same rate of summary judgment that we see in the other states, but with this sample it's probably not fair to draw too much from that.

You can also look at what we do when we look at various strata. Getting back to the conversation that you just had with the gentleman before me, 25 percent in that first layer of cases, those cases were resolved under either voluntary or other dismissals before a summary judgment case. Three and a half percent of our cases were resolved by summary judgment.

The third layer or stratum, the biggest one, as you would expect, 70 percent of our cases settle. And less than 2 percent go to verdict. And so you can step back and you can ask yourself, if all of these cases were resolved in a universe of rules that used the word "shall," why would you be bothering with the change of the rule when we went to "should."

And that's a fair question and I'll attempt to answer that in just a second.

The types of cases that we looked at ran the

gamut from simple breach of contract cases, bad faith litigation, even antitrust allegations, employment litigation and cases seeking class certification.

When we look at the state laws that are used to govern summary judgment practice, they tend to follow the federal rule. And if the disposition rate for summary judgment is so low when the rule said "shall," we believe that the rule when it reads "should" will probably result in fewer summary judgments over time.

Second, because the states tend to follow the federal rules, we expect over time if the rule is not changed that the states will follow that practice.

Third, as I noted at the beginning, when a motion for summary judgment that has merit is not granted, there is an increased cost of litigation -- I'll state the obvious -- five times that cost, at least according to this little survey that we did.

Also, those costs that go into the litigation system, they come out on the other end in the form of higher goods and services in America. For State Farm those costs are factored into our insurance rate. We handle thirty-five to forty thousand claims a day. Those claims are handled hopefully efficiently, quickly, and paid when owed.

But our rates -- they look at those claims and we try to project how much it will pay in resolving these claims, and that includes litigation costs. So for us and particularly our policyholders -- I want to come back to that -- at any one time in a day we have 120,000 lawsuits where our policyholders are the defendants.

Yes, sir?

PROFESSOR MARCUS: I'm sorry to interrupt, but just one question. It's something you didn't mention.

Did you perchance compare your costs of making summary judgment motions in places where there was point-counterpoint requirement and places where there was none?

MR. JACKSON: Great question. No, we did not. We looked at just this other issue. We could probably get better granularity and look at that. And so we'll see what we can do and, if I can get in time to respond to you by the end of the month, I'm not sure. We'll look at the submissions and we'll see what we can find out. Thanks for that question.

PROFESSOR COOPER: This is Ed Cooper. In the same vein, when you speak of 3 and a half percent summary judgment, does that mean total case termination?

MR. JACKSON: Yes.

PROFESSOR COOPER: Do you have any figures on partial grants?

MR. JACKSON: We can get that information. We had a few of those in this study of 6,500. There were -- there were some partial summary judgments, but the issue for us was we still maintained those cases have to be litigated to a conclusion. And when you run that out there still is a cost. But that is something that would have to be factored in in any kind of empirical review of cases resolved by summary judgment.

One thing I also wanted to mention is that --

JUDGE KRAVITZ: To follow up on your data, most of your cases are being resolved by settlement, and the settlement comes after the decision on summary judgment and before?

MR. JACKSON: As a general rule, yes. We don't file motions for summary judgment in every case because sometimes, believe it or not coming from an insurance executive, we don't have a case to file a motion for summary judgment in. But in those cases where we did that is what we found.

JUDGE KRAVITZ: Okay.

MR. JACKSON: The other thing that I wanted --

yes?

JUDGE KOELTL: Have you done any sort of cost benefit analysis? If you were only getting 3 and a half percent of the motions granted, why from a cost benefit analysis would you make the motion rather than attempting to settle the case or tell the party on the other side the case doesn't settle, we'll go to trial?

MR. JACKSON: Great question. We had 28 class actions filed after Hurricane Katrina. We've won all of them because they were all seeking basically the same relief, coverage. And if we lose the summary judgment motion in one of those courts, when we're looking at the contract and all of the -- all of the effects that flow from an adverse ruling on the contract, we were not going to settle that case until we heard from the Fifth Circuit or the Supreme Court of Mississippi or Louisiana.

So there always is a question as to whether or not you cut your losses and settle. The fact that we settle so many cases we obviously factor that in, but it would depend on the type of case and what the issue is.

If I can, I'll conclude. With 120,000 lawsuits involving our policyholders themselves, and these are traditional third-party cases and they are

traditionally handled in the state courts, there is a real economic impact on them if their cases are ripe for summary judgment and then they have to proceed with -- this is not a plea to grant more summary judgments. It's a plea to consider what the effects -- real-world effects might be if more and more rules switch to a "should" as opposed to a "must."

As we look at those cases, we conclude that it's in all of our interests here today in this wonderful courtroom that we have a strong property casualty industry in America. Because who pays for a lot of the defense of these cases, the settlements of these cases and the judgments on these cases?

So what we think is at the end of the day a rule that makes good sense is efficient and fair and we proposed it in the letter to you again today. Please take another look at the use of the word "should" and consider how it might be changed to "must" or some other identification.

MS. BRIGGS: Can I ask a quick question? In your statistics you did say that 3 and a half percent of the cases were resolved conclusively in summary judgment. In what percentage overall of the cases are you even filing motions?

MR. JACKSON: I'll have to go back and take a

look at that. We've got 224 summary judgments out of 6,500. I just don't know the answer to that as I stand here today.

JUDGE HAGY: This is Chris Hagy. I take it you don't have any objection to leaving the word "shall" as opposed to the word "must" or going to "should"?

MR. JACKSON: Personally I do not, but I understand that there's other considerations as to whether that word is -- is more appropriate than "must" or whether it causes more indigestion than changing it to "must."

JUDGE BAYLSON: Can I just ask you. And I'm not suggesting by asking this question that this is a good idea, but I would just like your views on it.

Suppose that we were to propose that the rule said "must" and then put a comma, "unless for good cause stated on the record," granting summary judgment?

MR. JACKSON: That would be a step in the right direction. That would be a step in the right direction.

JUDGE BAYLSON: Thank you.

MR. JACKSON: Any other questions or comments? If not, I want to thank you again for this

opportunity.

JUDGE KRAVITZ: Thank you, Mr. Jackson. That was -- we very much appreciated the empirical work that you put into your data. And if you can massage it some more and answer some of these questions by the end of the month, that would be great. Thanks much.

We're going to go right now to Mr. Dunne from Sedgwick and then we'll pick up with Mr. Ross.

MR. DUNNE: Thank you very much, Your Honor. I appreciate it.

Let me start with Rule 56. Somebody suggested that shouldn't it be the same as Rule 12, and the answer to me is no. Rule 12 doesn't have any strict standard and, therefore, you get less motions granted under Rule 12.

And I'm a defense lawyer. I represent big corporations and I want summary judgments granted and I think in many instances they should be granted and I don't think they are granted enough.

JUDGE KRAVITZ: And when you say they are not granted enough, are you saying that judges are denying them but that they are acting on them or are you saying that -- which we've heard where judges are essentially pocket vetoing them, just letting the time go and getting to trial and then saying, okay, we're going to

try the case?

MR. DUNNE: You took my speech right away from me. Because it depends on the judge. Different judges in this room will do different things, but I suspect none of you will do what some of the judges we see around the country do. Some of them are big believers in the Seventh Amendment. They love the right to jury trial. And if you give them an opportunity, they will take everything to the jury. You can't get a non-suit. You can't get a summary judgment. You can't get a motion to dismiss. That's their philosophy.

I think their philosophy should be moderated. I think I would if I would rule the world.

JUDGE KRAVITZ: That's in federal court or state court?

MR. DUNNE: Both. It's both. And with candor, more in state. It really is. I mean, federal judges -- believe me, all of us in this room will do anything we can to get in federal court. That's a given. But, but even getting to federal court doesn't necessarily solve the problem, particularly depending on judges who -- who don't like to work as hard as other judges.

And judges who don't like to work as hard as other judges don't like to grant summary judgments.

And I don't like to give them anything to hide behind and I think if you take the "must" away and put in "should," you give it to them. I think it's too difficult on the defendants.

I really think -- I think what happens in this room, you have a skewed representation of the judiciary. You think every judge is going to be like you. It isn't true out there. There are judges who are much less competent, much less vigorous, much less anxious in solving the problems of the litigants and getting through the cases and they just don't want to -- their idea is "If I deny this, it will settle. If I deny this, it will have to go to jury." They don't want to go to jury. They will settle, mediate. You know, judges use the system as much as anybody else.

And we would like to make it more certain in the system so that when I tell a client we're going to file a motion for summary judgment, I have a better idea of how we're going to do on that summary judgment. And just -- I think I'm repeating myself. I would sure love to have Rule 12 changed.

JUDGE KRAVITZ: Well, we can put a "must" in that --

MR. DUNNE: That's what I'm saying.

JUDGE KRAVITZ: -- while we're at it.

MR. DUNNE: Well, just a few more notes. In many cases, particularly in federal court, and so the cases are large and a lot of them are cross-actions and a lot of them mass appeals and not granting the summary judgment would be the equivalent of granting cert. I mean, it's that big of a deal. It's a huge deal and it's a huge swing in money when you deny summary judgment. It's a huge swing when you grant it, but, but for the types of people who are doing work in your court, the summary judgment is the penultimate part of the case.

Point-counterpoint, just to comment on that. This is totally my own position. If the judges want it, happy to do it. I thought they wanted it. I really did. I mean, so we were doing it like crazy and getting good at it and efficient at it. And now we see they don't want it, they don't read it. We're happy not to do it, believe me. That's just me, but, I have -- you know, I have a practice that's pretty encompassing.

Just Rule 26, disclosure of experts. I think the changes are terrific.

Interesting. In the last six months I've had two plaintiffs lawyers call me up and say, "hey, on

experts can we have a stipulation," and usually the stipulation is very similar to the changes in Rule 26. So it's not just the defense bar. It's the bar.

And the problem is expert discovery -- and I'm preaching to the choir, I think -- has become crazy. For a corporation I go on -- at the outset of a case the lawyer goes into the corporation and says, "I want to talk to people who are knowledgeable about the facts of this case." They don't want to have to list those people as experts. They don't want to have to do anything, but good practice requires you to do that.

What happens is if you start saying everybody who's looked at the files is an expert, anybody who has an opinion is an expert, then we have to start turning over names that we're not ready to turn over, we don't want to turn over. It creates a totally artificial atmosphere in the corporation and it creates a totally artificial atmosphere with respect to the testifying expert. Because in order to have a testifying expert who does a good job, you almost have to have a consulting expert because you can't talk to the consulting -- I mean, the testifying expert in a sophisticated fashion. You can't say, "I think this is a weakness. What do you think?"

All the things that the lawyers should do to

get a great declaration and to prepare a good defense, you're really stymied from doing this because you're worrying about the collateral cross-examination of the experts. And the truth is the collateral cross of an expert is frequently the most effective thing in front of a jury. The jury has no idea about the expert statistics, you know, and all that kind of thing, but they sure love the testimony about how much a lawyer makes and how much he works for Safeway and all that stuff.

Now, that's still going to be available, but they go beyond that. And so I've had depositions in which the plaintiffs lawyers, good plaintiffs lawyers spend the whole four, five hours on the collateral. "Well, what did Mr. Dunne tell you here? Did he write that word? Is that your word or Mr. Dunne's word?" And it goes on and on and on.

So, anyway, it -- it creates a huge problem for us in just drafting the declarations. We need more certainty as to who's an expert and who's not. We need shorter depositions and that does it. I think you get the same result. I think you get the same amount of justice. I think the rule changes are good.

Thank you.

JUDGE KRAVITZ: Thank you.

Judge Walker?

JUDGE WALKER: Let me ask you, Mr. Dunne. If Rule 56 included the "must" language that you advocated and you ran into one of those judges of the kind you described that you were kind enough to except all of us from, and that's appreciated, would you in the event you were denied a summary judgment seek mandamus before the Court of Appeals?

MR. DUNNE: I do frequently. I do. It's a hard way to go in the Court of Appeals.

JUDGE WALKER: You do it now?

MR. DUNNE: I try to, yes.

JUDGE WALKER: When a judge denies a motion for summary judgment that you think you're entitled to judgment on you bring it to the Court of Appeals?

MR. DUNNE: I say, "Will you -- will you certify this? Would you give me leave to grant?" Some judges, if it's a close call, will actually do that.

JUDGE KRAVITZ: Well, that's not mandamus.

MR. DUNNE: That's not mandamus. All right.

JUDGE KRAVITZ: Certification.

MR. DUNNE: Certification. But that's a hard way to go. I mean, one of the things we like about Rule 23 in class actions now is you get the interlocutory appeal, and that's very valuable to us.

But the one -- the problem with the "must" versus "shall" or the "must" versus "should" is the "should" is discretionary, much harder to get reversed on appeal. And if you have the "shall" or the "must," it's less discretionary and much easier to get reversed on appeal. At least my feeling is that would happen.

JUDGE KRAVITZ: Thank you.

Mr. Marcus?

PROFESSOR MARCUS: If I could follow up.

MR. DUNNE: Sure.

PROFESSOR MARCUS: If it were changed to "must," would that be a reason for you to look more seriously at petitioning the Court of Appeals for mandamus and not asking the district judge to certify under 1292(b)?

MR. DUNNE: Now that you bring it up, yeah. Probably, yeah.

JUDGE KRAVITZ: Good idea, Professor.

Thanks, Mr. Dunne.

Ms. Ross?

JUDGE KRAVITZ: I bet the weather is better here than where you practice.

MS. ROSS: I couldn't believe how warm it was when I got off the plane.

I'm Mary Massaron Ross. My practice is as an

appellate lawyer. About half of it is in state court, about the other half of it is in federal court. And in that capacity I most often represent defendants, but I represent plaintiffs in commercial cases generally. And so I have experience, I think, with the rule from the different sides, movant and opponent.

I'm here today to talk about Rule 56 and the first point and to me the most important is to change the language back to "must" because I think the language, when it said "shall," was always understood to be mandatory. Judges understood it to be mandatory. State courts, and I'm from Michigan, and our state in the wake of the Celotex trilogy adopted a whole new process for summary judgment that made that a much more useful tool for all the litigants and has been very effective.

When that word was changed from "shall" to "should," it now conveys discretion, a hope, an expectation, but not an obligation. And that's a major problem.

I submitted written comments, and I'm not going to go through all the points that are in them, but I did want to highlight and underscore a couple of points. One is the human side of the equation.

I think everybody in this room or most of the

people in this room, we're all lawyers, we're judges, we're advocates in courts. It's very easy to forget how what we do is perceived by individuals, the participants in litigation.

When you try to explain to a client that there isn't any genuine issue of material fact, that you've brought your motion, that you've pointed out that this defense or this claim should be dismissed, but nevertheless the judge can deny it and then there's no standard, that undermines respect for the rule of law. And it really has a very detrimental effect particularly for those litigants who are not sophisticated consumers of legal services. And I think that's something that we should all be concerned about.

In addition, I wanted to just touch on the costs of litigation. I'm sure the committee has heard about the economic costs. I'd like to just mention the emotional and psychological costs because I haven't heard that talked about. And some of the clients that I represent, particularly my local government clients, those emotional costs can be very real.

I think about, for example, jail officials where a jail suicide may have happened. It is an emotional event. It's a profoundly traumatic event.

It's traumatic for the person who's suing in the wake of the jail suicide. It's traumatic for the people who are being sued. And the trial is going to relive that entire experience.

If, indeed, there is triable issues of fact under our federal constitutional standards for 42 USC 1983, then obviously that case should go to trial. On the other hand, if there are not, that's a case where absolutely that motion should be granted. And I think that kind of cost should be taken into account.

I wanted to also touch on the partial summary judgment issue because that's been raised.

As an appellate lawyer, I see from time to time cases where there are what I would call an aberrant result, a huge judgment in a type of case where that kind of judgment is very atypical and the facts don't warrant it. And often those examples come where the litigants and the trial court did not pare away claims that should have been taken out of the mix, and what ended up was a sort of generalized presentation to the jury in which the jury's question was sort of was this a good thing. And that's a problem.

The partial summary judgment is an absolutely wonderful tool to pare away those claims so that what

is left for the jury are the focused factual disputes that juries are so wonderful at resolving.

And let me just look -- I did want to comment because the mandamus question became up again this morning and it came up I know in an earlier hearing. And as an appellate lawyer one of the things that I do very regularly is talk to trial lawyers both at my firm and at other firms and talk to clients and explain why they shouldn't take an appeal, and I'm pretty successful at it.

There are many times when litigants come in and say, "This is a horrible discovery rule. I don't know what the bench is thinking about. This is just going to be awful." The same thing with the denial of a motion for summary judgment.

The federal appellate courts have been very uniform to say that mandamus is not a procedural vehicle for circumventing the rule against piecemeal appeals. The extraordinary writs are discretionary. The appellate courts are very careful of their goal in the system.

So I don't think that changing the language back to a mandatory word, which it was for many, many years, is going to create some kind of problem with people rushing off to file mandamus actions. There's a

lot of downside to that. It's expensive. It gets the trial judge mad at you if you lose. And the appellate courts are not likely to -- to view those with favor because they don't want a lot of interlocutory appeals.

There's a lot of other points that could be said. I guess I'll just say one last point on point-counterpoint and then I'm happy to answer any questions. I really didn't focus on point-counterpoint in a written submission. I think it is a useful tool. I think what's important, of overarching importance is that whether it's that tool or a requirement that the parties focus by having citations to the record and specifically discussing the facts.

What you want, it seems to me, in the summary judgment context is that the litigants be disciplined and the court be disciplined to look at record facts. The Michigan courts in the last ten years or so since the Supreme Court issued the decision in Maiden versus Rozwood which I cited in my papers at another decision, have been very consistent about requiring the non-movant to come forward with admissible evidence.

If it's a police report and a hearsay statement prior to the Maiden case in our state courts, the courts would sometimes look at that anyway. Now

the state courts in following what they understood the federal courts were doing have required that that evidence be admissible evidence. If it's a document, it should be accompanied by an authenticating affidavit, for example, or deposition testimony.

That's the best way to be sure that both parties present a focused factual dispute and the court can then decide this is a factual dispute that needs to go to the jury.

JUDGE KRAVITZ: Ms. Ross, thank you very, very much for your time and your testimony and your traveling.

MS. ROSS: Thank you so much for the opportunity.

JUDGE KRAVITZ: At this glorious location.

Okay. So I think what we'll do is take our break now and we'll start up with Ms. Arkin. We're going to -- we have a lot of witnesses. So I'd really like this break to be as close to ten minutes as we can get it, humanly get it. Okay?

(Recess taken.)

JUDGE KRAVITZ: Well, I'm dying to use this gavel. Large numbers of our crew. They are on the way. Okay.

All right. Well, before we get started I

wanted to say something that I should have said at the outset, which is we're very blessed to have judges with us today and practitioners, but we're doubly blessed because we also have law students with us today. And we have law students from the Santa Clara University Law School and Dean Hsieh who is with -- whose civil procedure class is large, but they've been shuttling in and out within the confines of this glorious courtroom.

So, anyway, we are very, very happy to have you here and hope that you're learning a little bit about what goes into those rules that you learn about in class.

Ms. Arkin?

MS. ARKIN: Good morning.

JUDGE KRAVITZ: Welcome.

MS. ARKIN: It's a pleasure to be here. Thank you for the opportunity to testify before you today.

Just to give you some perspective, I have opposed summary judgments since 1984 when I started as a paralegal for a prominent plaintiffs law firm and I -- and through becoming a partner in that law firm and another major plaintiffs law firm, I've been one of the people who actually pulled all the depos and discovery and does the separate statements because in

California since that time they have had this point-counterpoint both in the federal system and California state court. I'm very familiar with it.

Over the years it has become a much more elaborate, time-consuming, resource-intensive prospect, and I echo all of the sentiments expressed by the judges who testified this morning. I agree that it is -- it's not the best use of my time or your time.

I'm a big, big fan of uniformity. In fact, I serve on the California Judicial Council Advisory Committee for Civil and Small Claims, and one of the things we have tried -- several years ago they went to uniform statewide rules on case management and we are now trying to get that for trial, pretrial and trial rules, and have encountered difficulty with the judges.

But I believe uniformity is appropriate. I also agree with Judge Wilken very strongly that you start with the simple and then on a case-by-case basis you allow change.

So no point-counterpoint is meant as a mandatory rule, but given the flexibility afforded to federal judges, they can use that in an appropriate case. I would only caution that the rule be cast in the form of good cause for changing from the basic rule

because we discovered in California that absent that, individual judges will simply make their own standing rule that it's always -- that every case warrants point-counterpoint.

So I think there has to be some reason for it. It doesn't have to be extensive or elaborate, but there needs to be some reason why the judge is using it in this case.

PROFESSOR MARCUS: I'm sorry to interrupt.

MS. ARKIN: No problem.

PROFESSOR MARCUS: It's something you didn't mention. I think you said that over the years you've been working with point-counterpoint, motions have become more burdensome to deal with?

MS. ARKIN: Yes.

PROFESSOR MARCUS: Am I right, you think that really wasn't because of point-counterpoint but something else?

MS. ARKIN: No. I actually believe it is to do with point-counterpoint because in the early days they were much more simple. They were easier. There were fewer facts to deal with. I believe that defense firms now and I've made maybe four summary judgment motions in my career. I'm always opposing them.

They -- they have become far more elaborate in

terms of the number of facts and the precise nature of each single fact and the -- and I have to say that the cases I deal with, insurance bad faith, mass torts, employment, construction defect, they are very complex cases and I don't think they are suitable for summary judgment in almost every case.

So the nature of the case increases the complexity, but I think the defense firms increase the complexity deliberately in order to make it more difficult to oppose and more likely that it will be granted because it's just so much to get through, and if the plaintiff doesn't -- and this -- and I wanted to address your question about inferences, too, because I agree with Judge Wilken on that.

As these cases get more complex, the point-counterpoint gets more complex, you have a statement of fact in evidence and you have to come up with evidence that directly contradicts that fact or the judge should or must grant that motion. But that doesn't allow for, as Judge Wilken discussed, the narrative, and the narrative is where the inferential facts come in. That's very difficult to argue that in a separate statement.

And California's separate statement requirements have become more rigid in terms of now you

can't even put objections in your separate statement. You must always cite to the -- you must say whether it's disputed or undisputed as to the type of evidence. It doesn't afford the opportunity to explain why, while that fact is true, there's actually a good reason why summary judgment shouldn't be granted.

So -- so on the good cause -- I think there should be good cause if the judge is going to change it.

On the "must" versus "should," one of the statements was that "should" -- using "should" won't result in fewer summary judgments granted. And that's a good thing. As far as I'm concerned --

JUDGE KRAVITZ: I -- as the defense bar tells us, the summary judgment is rarely granted, and the plaintiffs bar tells us that summary judgment is always granted. And I figure that the truth is somewhere in between.

MS. ARKIN: Absolutely. It is not always granted, but it is often granted where it should not be. And that's where my experience is particularly helpful, I think, because not only have I opposed hundreds of summary judgment motions, and most of them are not granted, but I have reversed on appeal dozens which were granted.

Yes, ma'am?

JUDGE ROSENTHAL: If the rule was written as it is now, do you find yourself arguing with the word "should" that although there are no facts in dispute material to your -- the other side's entitlement to judgment, the judge should nonetheless deny summary judgment?

MS. ARKIN: Well, yes, I do. I don't actually argue it, no. I believe it.

JUDGE ROSENTHAL: Okay. I'm really directing my question more to the way in which you frame your argument to the judge, that is, have you argued differently since the rule became "should" instead of "shall"?

MS. ARKIN: Yes. And, again, that goes back to the inference issue. I think that where -- when a judge looks at everything and just has a gut feeling that there is a case here, there's something here, even though the plaintiff, especially the pro se plaintiff, has not been able to identify specific facts in dispute, but the judge really feels like there is a case there, then it should go to trial and the judge should have the ability to say, "Okay. You didn't do a great job on your opposition, but I think there's a case here and I want to see it go to trial." I believe

the Constitution demands that flexibility.

JUDGE BAYLSON: Can I? You know, your point and a point of some of the other speakers this morning, particularly some of the attorneys who primarily represent defendants, assume that we're trying to tinker with the standard. And we're not. This is a procedural thing. Now, we already have point-counterpoint and now it's fine, that to us is procedural. That's the province of this committee, and it's an important issue.

But "must," "shall," "should," in our mind at least, we're not tinkering with the standard. The standard has been set by the Supreme Court in the trilogy. And it's confusing in some respects, but, you know, it's not our province to correct that.

So what's the big -- why is it such a big deal as to what word we use if we're just talking about procedural and not changing the standard?

MS. ARKIN: Well, then why is there a push to change "should" to "must"?

JUDGE BAYLSON: Well, ask some of your colleagues.

MS. ARKIN: I would have left it "should." So what different --

JUDGE BAYLSON: Would you have a problem if it

said "shall"? We're not suggesting that there's any change in the standard when "shall" became "should."

MS. ARKIN: Okay. I'm with that. I'm good with that then. Leave it at "should."

JUDGE HAGY: Leave it at "shall." That's the word. It's "shall."

MS. ARKIN: Well, but now it's "should."

JUDGE KRAVITZ: We shall not use "shall" anymore.

MS. ARKIN: Well, the committee notes itself discuss the fact that "shall" has some flexibility, I believe, that "should" has flexibility, and that "must" probably doesn't.

So I agree. The Supreme Court has set the standard, but the case law has evolved such that flexibility is available, and I want the further of that.

JUDGE KRAVITZ: Judge Walker?

JUDGE WALKER: Ms. Arkin, I agree with you with respect to point-counterpoint, as my colleagues know, but tell me from your practical experience, given your practice, why point-counterpoint isn't to your advantage to attempt to defeat summary judgment by allowing you to raise a number of issues that would preclude a court from rendering summary judgment? So

why isn't point-counterpoint a plus rather than a negative for you?

MS. ARKIN: In some cases it is handy to have a specific fact stated and you have specific evidence that refutes that fact. That's local and it's easy to show the court, hey, look, there it is.

The problem is -- and that applies in cases where one witness says the light was red and another witness says the light was green.

In most cases, however, the complexity of the facts -- the complexity of the legal principles that apply make that kind of clear-cut, this is disputed kind of evidentiary fact very difficult to relay to the court.

And just as one example, most of my career has been spent in the insurance bad faith context and, as you may be aware, especially in the state court, but it is also for federal court cases, the genuine dispute doctrine. If there's a genuine dispute as to whether or not the insurance company's decision was unreasonable, then there's no bad faith.

Well, reasonableness is traditionally a jury's province and to find -- the way the case has evolved in the insurance bad faith context, if an insurance complaint simply had an expert write an affidavit and

say, you know, based on the facts they had, the information they had, it was completely reasonable for them to deny this claim. And the plaintiff's side would, of course, say, no, it wasn't reason -- their expert would say it wasn't reasonable.

The courts were traditionally and consistently granting summary judgment on the basis -- on the basis that as a matter of law the insurance company acted reasonably even in the face of a plaintiff's expert saying it wasn't reasonable for these reasons.

Fortunately, the California Supreme Court last year issued an opinion saying that this is not something that can normally be determined as a matter of law. It's an issue of fact. There are very limited circumstances in which that can be decided. But until the Supreme Court came out with that decision we were losing summary judgments at a rapid rate on that issue because it's complex and because it's intricate in terms of the legal principles involved.

So a simple point-counterpoint works in a very small number of cases, as you suggest, and does not work in the majority of cases that I've seen and the resultant workload increase because of point-counterpoint has been astronomical for plaintiffs who can least afford to do it.

Does that answer your question?

JUDGE WALKER: Facts are nuanced. They're not --

MS. ARKIN: They are. They absolutely are in most of the cases I've dealt with in my career.

One thing I'd like to mention before I check to see if there are any other questions, and it wasn't in my written testimony, but I will supplement that with comments before the deadline, is on (c)(3), which is the provision saying that you can say it's undisputed for purposes of this motion only or generally.

I would caution you to be careful and perhaps change this wording a little bit. In California state court the statute is silent. The Central District accepted rules are silent.

I have suffered motions in limine precluding evidence on issues that I deemed undisputed for purposes of summary judgment. In California and in the federal courts you only have to show one disputed fact to overcome summary judgment. So there are times where I -- I believe that fact is in dispute, but because of the time and effort needed to go find the evidence to dispute that fact I have for the purposes of that motion said it's not disputed.

And then that's been turned around and I've been attacked at trial saying I stipulated to the facts. This is a trap for the unwary and I think the default should be that a fact is undisputed for purposes of the motion only unless the party otherwise indicates that it's for general purposes. Because I think you're going to find a lot of people tripping themselves up on that and it's going to engender tons of appeals because people are -- they're -- they don't dispute the fact and later it's held against them when that's not what they intended. So I just would like to sound the warning on that.

JUDGE KRAVITZ: And we've heard that from others.

MS. ARKIN: Oh, good. Okay. You mean I'm not original?

That's really all I have to --

JUDGE KRAVITZ: No. It's just support for your conclusion.

MS. ARKIN: Good. That's good.

The other thing I mentioned in my testimony was a longer notice period for summary judgment and a later filing period for summary judgment. In California we changed from a -- a 21-day notice period with the opposition --

JUDGE BAYLSON: You know in our proposal that that could be changed by a local rule or by case management?

MS. ARKIN: Again, though, I think the default should be the most protective of the jury trial for the plaintiff and -- and a judge for good cause can pull that back rather than the other way around.

Because in California, that's why we changed our statute. We found that a 14-day opposition period is basically what we had and -- and like the proposal here, there was an opportunity to oppose the motion on the basis that further discovery was needed.

We found and the legislature agreed that it was -- it was much better overall for a longer notice period so that discovery tailored to the issues raised in the summary judgment motion could be conducted. And I think that's a very important point so that if the goal is fairness, then the plaintiff gets the summary judgment motion, has at least 60 days to do discovery, and then the opposition is filed and the court -- that's as good as you're going to get to give to a court on what the real genuine issues are.

If there's nothing further? Thank you so much.

JUDGE KRAVITZ: That's it? Thank you very

much, Ms. Arkin.

Mr. Lederer? He's not coming today. Not coming.

Ms. Cabraser? Welcome. You're well known to this committee and I look forward to your views.

MS. CABRASER: Thank you.

Thank you, Your Honor, and thank you to the committee. Actually, every time this committee convenes in public should be an expression for thanks from the bar for your unceasing and dedicated work on the ongoing project of the federal rules. In fact, although it's only February 2nd, we'd like to offer a blessed Valentine's Day to the committee who do so much for our lives and our practice and those of our clients.

JUDGE BAYLSON: What about Groundhog Day?

JUDGE KRAVITZ: I can see some criticism is about to come.

MS. CABRASER: Well, this is not one of those -- this is not one of those "with all due respect" arguments.

With all great respect, much of the most acclaimed work of the committee in improving and clarifying the federal rules has been the trend toward identifying and adopting best practices that have

evolved throughout federal civil practice in making them part of the rules in order to provide additional uniformity, which in general is a very good thing, and additional guidance, which is also a very good thing both to judges and practitioners.

And we've seen that, for example, with respect to the additions to Rule 23, fleshing out the class action settlement approval process of Rule 23(e), providing factors and standards and guidance for the appointment of class counsel in Rule 23(g).

And I think, although at first blush adding the detail of the default point-counterpoint procedure to Rule 56 might seem a part of this trend, we would caution that in many cases, perhaps the most complex cases, the requirement of numbered point-counterpoint as an addition to the already existing Rule 56 procedure is not a best practice and that it not be adopted.

It exists. It's out there. We all know about it. I have practiced as a private lawyer since 1978 both in the Northern District of California under various iterations of the local rules and elsewhere in the federal system and in many state courts as well. I've had occasion to be required to file such statements. And I've also defended and filed summary

judgment motions without that requirement and have been unable to perceive any improvement in terms of outcome.

I have perceived a vast difference in the number of hours that is spent when point-counterpoint is required and the number of dollars that is certainly spent on both sides and the amount of time and effort that judges must devote to sifting through these statements when they are proffered.

And I'm not one of those who believe that many judges are lazy and would benefit from additional make-work projects. It's been my experience that most judges work harder than most of us lawyers and certainly for less per hour. They have limited staffs, limited resources, and there's a lot of demand, a lot of competing demand on those resources.

So devoting those resources to this additional requirement has to be given very, very considered consideration under a cost benefit analysis. Is it going to make adjudication fairer, more cost effective and quicker? I think, unfortunately, in most situations the answer is -- is no. There will be either no change or there will be a negative change.

This is one of those areas in which federal judges should have flexibility. They already have

flexibility under Rule 16(c)(2)(P) to adopt a statement of undisputed fact, point-counterpoint in an appropriate case or to use other methods to get at the facts in any given summary judgment situation, and they can do that at any point in the summary judgment process. They can do it after the initial briefs come in, after the responsive briefs come in, and they can surgically modify the procedure to the problem at hand.

The concern that I have as a practitioner and the concern that Public Justice, which is the public interest law firm whose hat I'm wearing today, has is that utilizing this as a dominant rule, a default rule, a rule to use if less good cause is shown is going to -- is going to add to the box of binders and briefs in all summary judgment situations without creating a net benefit in most of those situations.

The concern about analyzing a dispute into numbered statements of undisputed fact is also an inferential one. It is in the nuances that many disputes live and that the truth is most often to be found.

Public Justice is a proponent of the jury trial, is concerned with upholding the constitutional right to a jury trial. We would note that there is no

specific constitutional right to summary judgment and that only in situations where it's abundantly clear that there is not a material issue of disputed fact on which a claim or an issue or a case can turn should summary judgment be entered.

Now, that is not to say that our goal is to make summary judgment more difficult to achieve in those facts that warrant it because I've noted plaintiffs make summary judgment motions, too.

When we make them we're very cognizant that we are the party with the burden of proof. We are generally in litigation and certainly must be in summary judgment motion. And in cases where it is a legal dispute, not a factual dispute, that burden can be met and overcome without the need of endless statements of undisputed facts.

For those many cases in which each side wishes dearly to educate the judge as to the merits of its position, we would submit that an underutilized rule, Rule 16, is the place for the education of judges via fact and argument, and it can be done in a way that doesn't burden judges because it can be done in the real time of a pretrial conference without the boxes and binders.

For those situations in which there is a

desire on one side or the other to resolve the dispute short of a full-blown jury or bench trial, there's also the opportunity to use a summary jury trial, which again enables inferences and nuances to come into play.

The concern with deconstructing complex disputes in the statements of undisputed fact is that by such a deconstruction, some truth is lost. Facts are the bones, but it is the connective tissue, the inferences that create a living body.

Mosaics are made up of tiles, but if the tiles are numbered and stacked, the picture disappears. It doesn't become easier to see the picture for who should be the prevailing party.

Finally, it's been my experience being involved in both bench trials and jury trials, and this has happened many, many times, that we go through a summary adjudication process. The summary judgment motion is denied. When the trial is conducted, whether it is a jury trial or a bench trial, facts that may be quite material come into evidence in the course of that time that were not enumerated or argued or submitted to the court in summary judgment stage.

In the summer of 2007, I was part of a bench trial that took place in California state court. There

had been the California equivalent of the summary adjudication motion right before the trial. It took hundreds of hours to brief, to prepare for, to enumerate the facts, to obtain the affidavits, to submit the effort -- the evidence, and I know that it took the court many, many, many hours considering all of that before the court entered both an oral and a written denial of that motion.

When the very same issue was presented in the course of a bench trial, at which we had someone working with us as to time and exhibits, the matter was raised, testified to, evidence was admitted on -- in an hour and 45 minutes in the course of one morning at trial.

The summary judgment exercise was a waste of judicial time and resources. It would have been less a waste of judicial time and resources had the procedure that many federal courts across the country use today been available, and that is simply reasonable page limits with respect to briefs, statements of fact in the briefs, the necessary affidavits, et cetera.

We hope that the committee does not act to limit the discretion that the federal courts and federal judges have in this area to use the procedure that best suits the controversy, which in most cases

will be one that does not utilize the point-counterpoint.

There was a question -- there was a reference to the use of surreply brief, and we would certainly recommend that if point-counterpoint becomes the default position that a surreply brief would be required at the end to make sure that there is no injustice and that evidence is not left out. There's a paradox there. If you are making an improvement to the federal rules that requires yet another brief or another submission, then I think that's a strong argument that the reform is possibly counterproductive.

JUDGE KRAVITZ: I take it you would not oppose, I guess it was Judge Wilken's suggestion, maybe Judge Hamilton's, that in a -- if it were not point-counterpoint, that in a brief one would be required to actually cite to the record for whatever facts you're advocating or either disputing or undisputing?

MS. CABRASER: Absolutely. I think that is salutary because, A, it does force the parties where they have specific evidence, specific facts to bring it to the court's attention and it saves the court's time and resources.

JUDGE BAYLSON: You and your -- the group

you're representing today handle cases in many different courts across the country. Do you see value in uniformity in Rule 56?

MS. CABRASER: I believe the requisite level of uniformity in Rule 56 comes from the substantive law on summary judgment, the Supreme Court trilogy. I think the requirement of evidence requires a statement of facts. The pinpoint citation suggestion would be more than enough uniformity.

If disputes were all uniform, then we certainly could have a uniform summary judgment or summary adjudication procedure, but the federal courts entertain such a vast and diverse array of cases that it's very typical to see this particular uniformity proposal providing a net gain.

JUDGE BAYLSON: Well, what -- would you have issues if the point-counterpoint system was made optional by the judge in the local rule for certain types of cases for some other very --

MS. CABRASER: I believe it's optional now and certainly well known. Judges can do both under Rule 16. I think the concern about making it optional again would be a semantic one to assure that it did not become the default or an automatic provision. The "good cause shown" language might be a good way to do

that. It also might be something that could be written into the notes. That's one way to get at the facts that are truly undisputed in a particular cases.

JUDGE BAYLSON: Well, you're right about all of that, but do you see any value or detriment to the rule itself pointing out the option of point and counterpoint, and if the judge wanted to use it or one of the parties wanted to advocate it, the procedure would be in the rule so you would at least have as a starting point a national optional point-counterpoint rule as opposed to leaving it to an individual judge's whim or a local rule, recognizing, as you say, that, you know, if a particular judge wanted to do it a particular way, that that would probably happen, but at least there would be a standard.

MS. CABRASER: It's a close question, Your Honor. I think on balance I would favor not setting it forth in the black letter rule as an option because, again, that has a way of becoming the default position. I understand it's a sensitive issue because we would want to make sure that any judges who aren't aware of it as an option for a particular case would be aware of it. But I think given the fact that it's in part of various court's local rules at various times and it is now, I think -- I think it's sufficiently

known and perhaps a notation in the notes.

JUDGE KRAVITZ: Judge Walker.

JUDGE WALKER: Ms. Cabraser, can you give us any help on the "should" versus "must" debate that we've been hearing so much about?

MS. CABRASER: Well, I was going to say that point-counterpoint should not become a part of Rule 56. With respect to "must" or "should," it is a philosophical question of great depth. To me "must" or "shall" in the federal rules has to do with what lawyers must do, deadlines, matters jurisdictional.

"Should" has to do with what judges do. And I think as long as these are Federal Rules of Civil Procedure and are not attempting to change substantive standards, "should" is a better and safer verb than "shall" or "must," and I think the committee made the right move when it clarified the rules to go from "shall" to "should" in Rule 56.

JUDGE KRAVITZ: Thank you very much.

Mr. Glaessner? Oh, I'm sorry. Did I miss someone?

Mr. Moscato? I'm sorry. I'm working off two sheets here. I shouldn't do that. Mr. Moscato. Sorry about that.

MR. MOSCATO: No problem.

Thank you, Judge Kravitz, and thank you members of the committee. I'm here today on behalf of the National Employment Lawyers Association, a group of over 3,000 plaintiffs employment lawyers around the country, and I wanted to add my thoughts or the organization's thoughts as to a lot of the things we all have heard so far in these various hearings. And I 0have four things in particular I want to talk about.

But the first thing is the issue of the cost and burden upon the non-moving party of the point-counterpoint procedure. Ms. Cabraser is one of the lucky few in her firm or one of the lucky few among our membership who have a certain amount of resources available to them and manpower and woman power to deal with these motions. The vast majority of our members are working by themselves as solo practitioners or in offices of three or fewer attorneys generally with no paralegal support.

As a result, the cost of responding to these summary judgment motions has become -- is incredibly burdensome on the vast majority of our members.

JUDGE KRAVITZ: Can I just test that a little bit? If instead of having point-counterpoint you had a brief and you had to respond to everybody's -- to your opponent's statement of material facts with a pinpoint

cite to the record, how would that make your life easier and cheaper and -- than putting it in a point-counterpoint statement?

MR. MOSCATO: It's a fair point. There certainly -- the cost and burden of responding to a summary judgment motion isn't going to go away.

JUDGE KRAVITZ: Right.

MR. MOSCATO: But it does add that extra layer of having to go through and seeing these examples that I've tried to list in my submission, examples of over -- throughout the country folks who were faced with hundreds of separate paragraphs of so-called disputed facts and having to respond to each in turn one at a time without talking about the global context of what those facts mean in putting them together.

JUDGE KRAVITZ: You think there will be fewer if they are required to put it in a brief that has page limits on it?

MR. MOSCATO: Correct. Because you can put the story together within the context in which those facts belong.

JUDGE BAYLSON: Well, with regard to that, do you have any objection to the national rule stating that briefs must contain pinpoint citations to the record?

MR. MOSCATO: No objection whatsoever.

Again, my only point is the story that most -- the vast majority of my membership faces, which is being submerged with these lengthy statements of facts which takes their time away from being able to deal with the real merits of the underlying summary judgment motion. And that gets lost in the shuffle for everybody, not the least of which is the judge who's also required to go through and deal with these points and counterpoints.

One of the proposals that I put forward in our papers is -- deals specifically with the part of the proposed rule that speaks to being concise and limiting the points to those that are material. If the committee is going to move forward with the point-counterpoint system, there at a minimum needs to be a procedure by which those motions that don't meet those requirements, that are not concise and aren't limited to material facts, that -- to make it easier, to lighten the load on the non-movant in responding to those.

The proposal that I put forth in my statement is to permit a non-moving party to move to strike the entire statement, not individual points, which essentially makes it so they can go through it and

respond to the entire statement, but if it is -- it's basically one of those -- judges will know what a statement looks like that shouldn't be.

We can't be talking about a specific number limitation on the number of facts. Cases are going to be different, but it's one of those you know it when you see it that are going to be a general category of statements of facts that just don't meet the conciseness that you all have in mind, and you should have in the rule or at least the comments of the rule, there should be a specific procedure by which judges can strike the entire statement and -- and force the moving party to try again.

The second point I wanted to make is with respect to the arguments that we've heard already today from Judge Wilken and others regarding inferences, and I want to plead specifically about the kinds of cases that my members are handling, which are employment termination cases.

Those kind of cases are particularly not well suited for the point-counterpoint mechanism, specifically because our cases are the types of cases on which the plaintiff relies heavily on the inferences that can be drawn from the facts, disputed or undisputed, and those inferences depend on fixing those

facts in the broader context of other facts.

So we've heard that generally. I wanted to point to some examples of how that works in the kinds of cases that I would represent.

So, for example, let's say that we've got a -- a fact in the statement of facts that it is undisputed that the plaintiff was tardy on one occasion. That may be true or it may be disputed. Under the current iteration of the proposal the only method of dispute would be to contradict that fact with other facts in the record, but there are many other things that are going to be in play. For example, the asserted fact might be factually accurate, factually true, but misleading in the way that it's being stated by taking it out of context.

So, for example, if the employee -- if there's a statement that the employer has a written rule that clearly prohibits tardiness, that might be technically accurate, but there might be a question of whether the employees are aware or unaware of that rule, how lax the company is in enforcing that rule, the company's practice of generally ignoring the rule or giving some latitude.

JUDGE BAYLSON: Can I interrupt you?

MR. MOSCATO: Yes.

JUDGE BAYLSON: This is a point that we've heard before and it's an important point. What is the -- and I understand about inferences and, of course, we all understand what the shifting burdens are in employment cases, but what is the -- what is the hardship of putting that rebuttal either in the response to the moving party's statement that tardiness is not allowed and this plaintiff was fired, in putting that in your response or, as the rule would allow, adding additional facts that the rule was ignored or the rule wasn't, you know, sporadically enforced and things like that.

And isn't that -- and the second part of my question, isn't that a better way of getting it -- or at least an equally good way of getting it across to the judge that there are factors in this case? How are you disadvantaged by having to put that in a separate statement as opposed to putting it in your brief?

MR. MOSCATO: I think Ms. Cabraser said it real well when she was talking about the mosaic and separating out those tiles and putting them in a pile where you then can't see the context. What the point-counterpoint procedure requires is to specifically dispute that particular fact about whether or not I was tardy.

If I add those other facts in a long list of facts in my counterpoint, that might get lost in the shuffle as to how that relates back to the original fact that's been put before you.

JUDGE KRAVITZ: Just so we -- and I happen to come from a district that has this. And the way I personally use it is I actually read the brief first and the brief gives me the mosaic and it gives me all the inferences and it says, "Yes, he was tardy. But guess what? That's not why he was fired. It's because of some other thing."

And I use the point-counterpoint statement as a resource, much like the boxes with the eggs sort of thing, in order to figure out whether people do have citations and also figure out what the fulcrum is, I mean, where the fulcrum -- what moves the summary judgment thing.

So I think -- I guess I can just say we may or may not do point-counterpoint, but I do think people have a wrong view of point-counterpoint. I really don't know of a judge who says, "I've got this case and I think the first thing I'm going to do is read the point-counterpoint statement." You wouldn't know enough about the case.

I mean, you read the brief. It tells you what

the issues are, it tells you the mosaic, it tells you the inferences, and then you use the point-counterpoint as a resource in a way to make sure the parties don't try to evade their responsibility of gleaning an issue. And I just -- point-counterpoint may have -- may be the wrong way to go, but I think it's not the wrong way to go because it avoids the mosaic because that really is the brief.

Do you have a response to that?

MR. MOSCATO: I agree with you that the brief is really where the judge should be focusing his or her energies on. The parties --

JUDGE KRAVITZ: Do you have an example of judges that don't read the briefs, all they read is the point-counterpoint?

MR. MOSCATO: No. But the idea is adding that incredible cost and burden both on the non-moving party and the moving party, and the judges to go through that exercise in a very limited amount of time takes away from the ability to really focus on "let me see if I can put this mosaic together."

JUDGE KRAVITZ: I understand.

PROFESSOR MARCUS: Could I put together two things you've been talking about, I think, to see how they fit together? I believe you endorsed a motion to

strike the entire statement, and I thought that was largely directed to situations where it was far too large and included lots of unimportant stuff.

Your description on inferences, however, suggests that in the kind of cases you're remembering, the problem from your perspective would be that the moving party's statement leaves out too much stuff. And I'm wondering how these fit together.

Would the motion to strike really be important in your kind of cases or are you thinking about in other kinds of cases?

MR. MOSCATO: I think both -- both things are true. On the one hand, we are forced to respond to these lengthy and burdensome lists of facts, many of which aren't material, and which we also leave out inferences. And the procedure doesn't allow us to argue the inferences through the point-counterpoint mechanism.

So I agree with you that the -- what I suggest is that the potential procedure to deal with the lengthiness of the initial statements of facts by moving to strike it doesn't address that second part of the problem. I absolutely agree with that.

PROFESSOR MARCUS: Would you think there could be a temptation to make a motion to strike the by times

or respond to the content of the statement of facts?

MR. MOSCATO: That -- I can't really speak to whether individuals would be tempted to do that. I can see how you might see that as a potential problem. I would hope that people would not use that procedure in order to buy time and really to say, look, this is not what you have in mind here with this point-counterpoint mechanism.

MR. KEISLER: We've had witnesses appear here who tend to make motions for summary judgment and they always said we would never file something, like your Iowa example where there are 1,100 separate statements of material fact. We try to keep them as short as possible. And we've had lawyers who respond to motions for summary judgment saying exactly what you say, which is that they see a lot of this. And it sort of makes me wish we could subpoena the lawyers who actually file the 1,100 plus statements of fact to understand what's going on.

But in your experience and that of your members, how do judges react when there are these oversized statements of material fact? I mean, it would be my presumption that not only would it be bad strategy for somebody seeking summary judgment to want more rather than fewer statements of material fact to

be potentially initiated, but that also judges would be very hostile and angry to be presented with the kind of filings that you're talking about.

I'm wondering if that intuition is correct or not in your experience.

MR. MOSCATO: In my talking to members around the country who are dealing with these sorts of motions the reality is actually something -- is quite different from what you have suggested, which is that most judges in many parts of the country are so hostile to the plaintiff's case to begin with that having a 600-page summary judgment motion that lays out all of the reasons why the motion should be granted, they are treating that as ammunition for why they really shouldn't be granting the motion for summary judgment.

And if you've got 600 facts to respond to and you're only really able to deal with 400 of them in a meaningful way, and there are some that get lost in the shuffle, that gives some judges the opportunity to latch on to, well, look, there's a dispute in these facts.

MR. KEISLER: I'm only worried that you're going to face a gotcha -- right? -- which is that you think a lot of this stuff is garbage, but you can't be sure that if you let some go by, it won't be the

fulcrum on which you lose your case.

MR. MOSCATO: Correct, correct. And to just let some of those slide where we are fairly confident they are not the kind of facts that really should be decided in a summary judgment motion is really putting a lot of trust in the judge to agree with us. So it's not really an adequate mechanism for responding. We're really going to have to -- if this is a procedure, to respond to each and every one of these facts whether or not they really are material to the issue.

JUDGE BAYLSON: Is it your -- you're not going to report back to the committee that federal judges are hostile to the plaintiffs or plaintiffs in employment cases or did I misunderstand you?

MR. MOSCATO: Well, my membership are folks who represent plaintiffs in employment cases. I can only speak to those.

JUDGE BAYLSON: Do you see a lot of hostility?

MR. MOSCATO: A lot of hostility around the country on plaintiff employment cases and the numbers bear that out. I pointed out in my submission to some of the statistics toward the end of my submission. Two studies, one a recent study by Kevin Clermont and Stewart Schwab in the *Harvard Law and Policy Review*

that showed plaintiffs in employment cases win rate of 15 percent as compared to a win rate of 51 percent in non-jobs cases.

Also, pretrial adjudications plaintiffs are winning those pretrial adjudications 3.59 percent of the time as compared to 21.05 percent in other plaintiff types of cases.

JUDGE KRAVITZ: Some of those statistics can be used a lot different ways. I mean, there are some statistics that would suggest that when plaintiffs employment cases go to trial they lose at a higher rate than any other category of case and when they win they get reversed by the Court of Appeals at a higher rate than any other category, which might suggest that perhaps not enough summary judgments are being granted.

MR. MOSCATO: Well, on that note, the other -- apparently it's available. The Federal Judicial Center did a study fiscal year 2006 in which it found that in employment discrimination cases plaintiffs were losing 73 to 75 percent of summary judgment motions as compared to 60 percent in all cases. That's a meaningful, large distinction.

JUDGE HAGY: Well, that included partial summary judgments.

MR. MOSCATO: It does.

JUDGE HAGY: So it can be misleading. My experience is 50 percent of employment law cases still sue the president of the company just to get his attention and then you have to have a barnstorming after that, and that inflates that statistic.

MR. MOSCATO: It can. Of course, statistics can tell lots of different stories.

JUDGE HAGY: Yeah.

MR. MOSCATO: So when you're looking at those numbers, 60 to 75 percent, that's a meaningful difference and one that tells a story that's rarely consistent.

Briefly, just to finish off the point on the inferences, one of the other proposals that we put forward in our statement is that if there's going to be a point-counterpoint process adopted by the committee, at a minimum the non-movant should be expressly permitted to articulate in its response the reasonable inferences that might be drawn from those facts that are listed and to point out two other facts in the record that support those inferences so that that mosaic is right there for the judge as he or she is looking at the point-counterpoint statement.

Moving on to point number 3 that I wanted to

make was the question of a potential for surreply. In employment discrimination cases motions for summary judgment are almost always being framed by the party that doesn't have the burden of proof at trial. The plaintiff has the burden of proof at trial and the plaintiff is usually responding to a motion for summary judgment.

So our members are telling me that they are experiencing over and over in a lot of these districts of being sandbagged by briefs that are providing abbreviated and unclear statements of the arguments at issue in the case and essentially tactically being written to prevent a cogent response and then waiting for the reply brief to --

JUDGE KRAVITZ: And do your members find that when that happens and they ask the judge to respond by a surreply because the reply brief has raised something that's never been raised before, that judges are routinely denying them?

MR. MOSCATO: Absolutely, absolutely. It was not one of the issues that we were focusing on when we first went through this -- this process. And when I went out to my membership to look for some -- some of their experiences on point-counterpoint, a number of them came up to me, "Hey, what about this other issue?

We're having a hard time. We're not getting the opportunity to surreply." And so I figured that I should bring that forward.

Lastly, on "must" versus "should," I don't have anything meaningful to add to that that hasn't already been said other than to remind the committee of the context in which this debate is ongoing. There had been, as far as I understand, especially with respect to this group, employment discrimination cases, there is no outcry that federal courts are denying summary judgment motions in cases where they should be granted. Quite the opposite is true, at least appears to be true from the empirical data that's available to us that I pointed to a little bit earlier.

JUDGE KRAVITZ: Great. Any further questions?

Thank you.

JUSTICE SHEPARD: Mr. Chairman, this last point is the one I wanted to ask you about. Your folks, according to your written submission, win dispositive motions a very small percentage of the time, but they do win sometimes. And I gather you stand for the idea that where you move for summary judgments and supply affidavits and exhibits that say plaintiff was discriminated against on the basis of

age, the employer responds in one way or another, and the trial judge says -- the district judge says -- says to you or says to the employer, "I am persuaded that there are no disputes of fact here that are genuine and it also seems to me based on these facts that the plaintiff is entitled to judgment as a matter of law. You simply haven't made your showing."

Do you stand for the idea that the judge should be able to say, "I think plaintiff was discriminated against, all the stuff is here in the record, and I'm going to make plaintiff go to trial anyway?" And that would be okay with you.

And I'm trying to figure out why that is. And the only reason I've been able to figure out is that you think that as a matter of differential impact it hurts the guys on the other side of the teepee from you relatively higher than it hurts you. Is that the reason why you think a judge ought to have the discretion to do what I just described?

What would you say to your client about that? Would you say, "Ah, this is the way the cookie crumbles"?

MR. MOSCATO: Well, I can only speak from practically what happens and what the numbers are reporting to me as to what happened, and the scenario

that you're suggesting, it just doesn't -- it doesn't happen.

JUSTICE SHEPARD: No, but you believe it should. I mean, you stand for the proposition that it ought to. You wouldn't say it's a good thing. You would say the district judge should have the discretion to say that to your client that day, "I think you've established through your motion everything that the law requires. I really don't have any doubt in my mind you're entitled to judgment as a matter of law, but I really like trials or some other reason."

MR. MOSCATO: And I'd have a difficult time standing before you in my position, my organization position, that the parties are entitled to have their day in court to tell you that, well, only if it's impacting the other side. So I'll leave it at that, though, that maybe -- maybe I agree with you.

MS. BRIGGS: Can I ask a question?

JUDGE KRAVITZ: Sure. Go ahead.

MS. BRIGGS: With regard to what you characterize as sandbagging, how well would that be addressed if there was a limited right to surreply that allows you to specifically respond to evidence that wasn't previously cited by the movant and objections that were made to the admissibility by the non-movant's

evidence?

MR. MOSCATO: I'm sorry. Can you repeat that?

MS. BRIGGS: Just a very limited right of surreply. Basically if new evidence were provided in a reply, you were able to respond to that, or if there were objections made to the admissibility of evidence, you as a non-movant decided earlier you could respond to that in a surreply but nothing further, would that address any of the sandbagging issues?

MR. MOSCATO: I think it would and I think it would specifically favor a standard that makes it clear in the procedure that anything that's new, any new material on either side, either in the opposition, in the reply or in the surreply, should be disregarded by the court. So limited by surreply makes sense, yes.

MS. BRIGGS: Thank you.

MR. MOSCATO: Thank you.

JUDGE KRAVITZ: Thank you very much.

Mr. Glaessner, we're now ready for you.

MR. GLAESSNER: Thank you.

JUDGE KRAVITZ: I guess I should say we're at this point where commentators are commenting on both Rule 26 and 56. It's a lot of material. We've heard a lot already and we'll continue to hear a lot. So I

guess I'd ask you to be as focused as one can with the time provided.

MR. GLAESSNER: Thank you very much, Your Honor.

My name is Peter Glaessner. I'm a partner with Lombardi, Loper & Conant. It's an Oakland civil litigation firm. I've practiced for 26 years in federal and state court. Currently the focus of my trial practice is employment litigation. So I found some of the comments made this morning interesting. I'll try to respond to them with my own experiences. And finally --

JUDGE KRAVITZ: Plaintiff or the defense side?

MR. GLAESSNER: On the defense side.

And then, finally, I am a member of several national defense organizations, DRI, FDCC that has other members here today, but also I'm past president of the Association of Defense Counsel of Northern California and Nevada.

Let me speak, if I can, to three issues, one concerning Rule 26 and the other two regarding Rule 56. I strongly support these changes to Rule 26 and I only want to speak to a very small issue that I see lurking perhaps in the proposed rule change. This has

to do with the subject of what I will call non-retained experts under Rule 26(a)(2)(C).

The rule as proposed would provide that non-retained experts would be identified along with first a description of the subject matter of their testimony and, second, with a summary of their facts and opinions. Non-retained experts in state court in California have been disclosed for a number of years now. We're not required to provide any descriptive information, but it's an important facet of expert witness disclosures in California.

The point that I wish to make is this, and you have to distinguish between non-retained experts who are an employee of a defendant company or plaintiff company versus not employed: When a non-retained expert is employed I think everything that's proposed in this rule makes sense. It is not problematic because the lawyers will have the ability to ascertain the information.

When the non-retained expert, however, is not employed by the party who is identifying that expert, such as, for example, when a defendant chooses to identify a plaintiff's treating doctor or a federal or state investigator such as an NTSB investigator, the lawyer who prepares the disclosure may well not know,

in fact, may be ethically precluded from not knowing at that stage what that person's opinions will be. And the only way we find that out in the state court many times is to take the deposition of a plaintiff's treating doctor for a defendant or, whether plaintiff or defendant, subpoenaing and taking depositions of neutral investigators, federal and state.

So while I support all the rule changes in 26 and I support this one, I wish to simply point out that there is one carve-out where a lawyer in good faith would be trying to comply with this rule yet might not be able to comply with this rule because the witness's knowledge, the witness's opinions might not at that point be within that lawyer's reservoir of knowledge.

JUDGE KRAVITZ: But the opinions would be known to the lawyer at some point before the lawyer designates the person -- I mean, in other words, in the treating physician example, let's say you felt that you couldn't talk to the doctor, the doctor wouldn't talk to you, to take the deposition. The doctor says this person is, you know, completely healthy and doesn't have a problem at all, then you would designate the treater as your expert and presumably cite to the deposition.

MR. GLAESSNER: That would be true assuming

that the doctor had been deposed in your case. It's not always the case, though, for reasons of cost and other reasons, availability, that that doctor might not be --

JUDGE KRAVITZ: Help me to understand that. SO you don't know what the treater is going to say. The treater for all you know is going to say that this person is completely disabled and it's your client who did it, and you would nominate that person as your own expert?

MR. GLAESSNER: Out of excessive caution, we do that sometimes in state court because we then depose them under the state court rules. So we want to preserve the right to rely on that person even though we may under certain circumstances withdraw them or not depose them.

JUDGE KRAVITZ: From a timing --

MR. GLAESSNER: I'm sorry?

JUDGE KRAVITZ: It's a timing issue.

MR. GLAESSNER: It's a timing issue in large part, yes.

JUDGE KRAVITZ: It sounds like that.

MR. GLAESSNER: So small point regarding Rule 26. Let me turn to Rule 56 briefly.

First and foremost, I join in many others who

said it far more eloquently than I will that I am concerned with the change that has occurred in Rule 56, changing "shall" to "should", and in my view either should revert to "shall" or for reasons that I understand stylistically should be changed to "must."

I won't burden this committee with an explanation of all my reasons. I think they've all been fairly well stated by various people before me. I do think there are some significant differences, though, in the text for Rule 12 and the text of Rule 56 as it was written that should not be lost through the stylistic changes that are occurring.

And I would also point out one thing in responding in part to comments made this morning. Cases at the Rule 12 stage are based upon noticed pleading. Very little is required under federal rules of state claim under noticed pleading. By the time the case reaches summary judgment stage the case has been through, in my experience, extremely thorough discovery.

It is a case that is already become quite expensive for the parties and a case in which, if summary judgment is not resolved or at least narrow the case significantly, will result in a lengthy trial, particularly in an employment case. I will tell you

most of my cases are in the three- to five-week range in terms of trials.

JUDGE KRAVITZ: In employment cases?

MR. GLAESSNER: In employment cases, yes.

JUDGE ROSENTHAL: Single party cases?

MR. GLAESSNER: Single party cases, yes. Sex/gender discrimination, age, harassment, retaliation. Usually those cases have five to eight claims.

And summary judgment is an important tool, even if summary judgment is not granted in full, to narrow down the case because if you can get the issues confined, even for a trial, then it shapes the entire duration of the trial and the nature of the evidence, what evidence might be admissible. It's an extremely useful tool even though it may not result in complete summary judgment.

But the consequence of summary judgment being denied, and we could debate endlessly whether denial is appropriate or not -- that's not the purpose of this committee -- is for every defendant there is a tremendous cost to going forward to trial. I would tell you from my own experience in recent years in employment litigation that -- and I represent primarily public entities and non-profits, not Fortune 500

corporations, that the cost of a trial for our practice is conservatively $50,000 and often well more than $100,000. It's a very expensive proposition.

And so when others speak to you today about this issue of "shall" or "must" and so on and so forth, there's a real -- there's a real issue, there's a real cost to defendants. And not always is it Fortune 500 companies. Oftentimes these are non-profits. These are companies that work on a shoestring and they are looking at you and saying, "How can I afford to go forward and defend this case?"

"Well, your remedy is summary judgment. You can't get out at the Rule 12 stage, but you do have an opportunity at summary judgment and we'll give it our best shot."

Let me turn to my third -- yes? I'm sorry. Judge Walker?

JUDGE WALKER: Yes. If I can, Mr. Glaessner. Why isn't the answer to your point that you are making this argument in the wrong forum in that what we say the substantive standard is for granting or denying summary judgment doesn't matter? What matters is what the Supreme Court provides and what the circuit courts interpreting Supreme Court opinion provide and not the text of the Federal Rules.

So why does it matter? Couldn't we say "should," "must," "shall" or whatever?

MR. GLAESSNER: Well, I think it matters for several reasons. First of all, I think it matters because we have lived with and -- our practice, our federal practice has been geared toward what is in Rule 56 for many, many years. There was a strong historical depth behind Rule 56 and the word "shall" appears there, which doesn't, as you pointed out earlier this morning, appear in Rule 12. There is a distinction there.

It also in Rule 56 says that summary judgment shall be granted -- or should be granted now when a party is entitled to judgment as a matter of law.

It's always been my training in 26 years that when a party is entitled to judgment as a matter of law, that is -- that is a mandatory directive. That is not a discretionary "should." I respectfully believe that, although I'm sure that many feel that this change is stylistic only, I stand before you and tell you I believe that there's always a great potential outside of this room and this committee that some will perceive this as more of a sea change in Rule 56.

I've served on a state judicial council committee where we all have our opinions amongst

ourselves. We were all very reasonable people, very competent lawyers and judges. And yet at the same time we all spoke about how many people outside of the room or the committee might not be aware of how we view things. And I'm concerned about that, quite frankly.

I don't know if that answers your question, but that's my immediate response to it.

JUDGE WALKER: So if I understand what you're saying is that it's true that the language of the rule does not determine the substantive standard, but there may be a perception in the bar and in the public that the language of the rule does have an effect on the standard that is used to grant or deny these motions. Is that it?

MR. GLAESSNER: Well, I don't think it's limited to perception. I think if you look back historically, the language in the rule of "shall" is significant in how some cases have decided summary judgment motions. I don't know that I would necessarily concur that it's solely a matter of perception.

Now, let me turn, if I can, to my third point very briefly. This has to do with what's been talked at great length today, point-counterpoint. Being a practitioner in California, I've grown up with this

practice. It's called "separate material statements of fact" in our local jurisdiction.

I, frankly, am not a tremendous advocate of this process, but at the same time I do think it serves one very valuable function. I think I'll explain it this way.

Separate statements are an adjunct to briefing. The mosaic, as has been said before, is going to be the opposition brief, but the separate statement tells the court and tells everyone these are the facts, these are the only facts that matter for the purpose of this motion.

So to take a very simple example and why I believe separate statements are useful, let's take a garden variety sexual harassment lawsuit. Let's assume that the evidence in discovery reveals the following: That the plaintiff testifies that there were three acts of -- discrete acts of sexual harassment that occurred on the job and only three and we've got that through the testimony of the plaintiff.

So when the defendant brings the motion, the defendant wants to be clear that there are only three acts. The separate statement allows for clarity. It allows for focusing. It allows for everyone to start on the same page. Here are the three acts of sexual

harassment.

If you don't have that separate statement, then you always run the risk that the plaintiff will try to suggest, well, maybe there are other acts that constituted sexual harassment. Even though their testimony has been given the record should be clear.

And so the real value in the separate statement is providing focus and providing structure to the motion that follows. The plaintiff can, of course, always add additional facts as the rule proposes, and that happens in California all the time. But at the end of the day a clean clear motion for summary judgment in that case benefits by having the separate statement list the three acts that the plaintiff contends constituted sexual harassment and then, as we know, the court can then apply the law to that and determine is this sufficiently severe or pervasive. It's a very straightforward, structured way to present a motion.

Comments have been made today about 500 separate statements of fact, hundreds of pages. I have not, Your Honor -- I suppose I'm going to plead ignorance on that, but it strikes me that even if that occurs it's the most counterproductive way for the defendant to bring a summary judgment motion that I've

ever heard of in all of my years.

The idea as expressed by our Governor Jerry Brown when he was Governor 30 something years ago for a defendant is "less is more." The fewer facts you need to put before the court and claim are material facts that are not in dispute that are necessary for the defendant to win, the stronger the motion is going to look. If someone brings 500 facts that they claim are material facts before the court, frankly, they haven't been trained in our firm, and God bless them.

So those are my comments and I'd be glad to answer any questions.

JUDGE KRAVITZ: Mr. Marcus.

PROFESSOR MARCUS: I'm sorry to return you to your first point, but just so I'm clear on what you said about Rule 26(a), disclosure of something about the expected opinion testimony of someone who will testify as an expert but isn't a retained expert.

Background there is that there was a concern, particularly from the plaintiff's side, say, regarding the treating doctor who may often offer such testimony and the difficulty of getting anything like a complete report from the treating doctor, which I think responds to some of your concerns, though, from the other side, if you read me.

Am I right in understanding that what you would propose is that the plaintiff have no obligation whatsoever to disclose anything about the expected opinion testimony of the plaintiff's treating doctor?

MR. GLAESSNER: Well, I can tell you in California there is no requirement-specific disclosure, but what I think should apply under these Federal Rules that you're reviewing is that any party should be required to state the subject matter of their testimony. Subject matter should not be a question. You presumably know what the general subject matter of that testimony may be.

It may be that if you have an uncooperative treating doctor, the plaintiff's lawyer may not know the opinions in that case, although I think that's fairly unusual in my experience. It's far more common if I was saying, though, that the defense lawyer has no opportunity to know the plaintiff's treating doctor's opinions unless there's been a deposition predisclosure.

PROFESSOR MARCUS: Well, I guess, to follow up, one of the things that I can remember some lawyers saying, I believe generally defense side lawyers, was sometimes, "If you just give me a sketch of the nature of the opinions the plaintiff's treating doctor is

going to offer, I don't need to take a deposition; but if you don't tell me what those are, I have to take a deposition."

Rule 26(a) permits the other side to take that deposition, and I'm a little surprised that the suggestion that somehow the sketch that the rule tries to be cautious about, a summary of the facts and opinions to which the witness is expected to testify, asks too much.

MR. GLAESSNER: It may only in those rare cases. I can see that I may be dealing with an niche situation, not the mainstream. I'm just pointing out that there may be situations in which a defendant or a party in excess of caution wants to identify treating doctors without knowing what their opinions are because they have not been deposed through a deposition process. Otherwise, I agree with the rule as written. I'm not trying to suggest that the rule should be rewritten. I'm just pointing out there may be a practice area where there may be an exception.

PROFESSOR MARCUS: Thank you.

JUDGE KRAVITZ: All right. We're going to -- all right. Before we take our luncheon break we're going to hear from Mr. Zappala.

You have the distinction or the difficult task

of keeping us from our lunch.

MR. ZAPPALA: Understood. It's not the first time. It's like in trial when you look at the clock and you realize that starting a long cross-examination to going to kill the jury. So you don't do that. And I won't do that before this committee.

First of all, I do believe that the committee does share from experience of counsel. I've been practicing law for 28 years. I've practiced in a small firm. I'm with Lewis Brisbois at this point. I've handled personal injury cases for plaintiffs. I'm currently the chair of commercial litigation practice in a firm with 700 lawyers, and I've seen this element from both sides.

I am a proponent -- as you might gather from the credentials that I've told you about, having worked on the defense side, having represented commercial interests, I am a proponent of this "must" language in the summary judgment statute.

In California we have had that "shall," "people must." We've had that standard. I don't think that it's been a disservice to the bench or the bar. I think the community at large in commercial litigation cases in particular but in other types of civil disputes benefit from knowing that there's a

consequence to having a case decided at summary judgment.

I found that that is a very strong incentive on the part of the litigants to carefully look and evaluate the merits of the cases when they are faced with that consequence of the summary judgment.

And in many examples in my experience, for instance, my adversary can't stipulate. He can't just cave in. So if I lay the case out and the litigants know that there's going to be a winner and there's going to be a loser because of this "must" component in the summary judgment, there is an opportunity to resolve that case rather than spend the litigants' resources and the court's resources where they are not necessary.

In the context of a commercial litigation case, we do have noticed pleading. The kitchen sink comes in. Pare that case down. Get rid of the points that really don't matter. Do it under the circumstances where everybody is informed that there is a "must" consequence to that. If a claim is going to be pursued and I can eliminate it through evidence, through principles of law, there are no nuances that allow that to be gone in the summary judgment process. It refers back to the mosaic.

Our system of justice needs to be nurtured and summary judgments trim away the dead wood and leave a healthy tree for the judicial process as opposed to having the component of let's throw it all up and see what sticks. I do think that this is a principle that is worthy of protection in a mandatory approach and a mandatory fashion.

In terms of the point-counterpoint or statement of disputed and undisputed facts, again, it was interesting to hear from the judge in Alaska saying, "Look, if the thing ain't broke, don't fix it." In California we're looking at it from the other side. We've had the separate statement approach for going on two decades and, again, there's something very persuasive in having very identified points of fact.

I can give you a really quick example in some complex liability product cases. If there is a component of a product that you use to seal a pipe that a plaintiff is claiming is -- has benzene in it, and I can demonstrate because I have the chemist who -- who created this product who had the test done 35 years ago, there's no benzene in there, why not get that party out of the lawsuit? And if there's a benzene exposure, it should not include every product this guy drove by in 20 years of the work history.

Another product liability example is product identification. This comes up in a myriad of cases, asbestos cases, just run-of-the-mill product liability cases. If a defendant can demonstrate through a claim to plaintiff that you can look at this widget, this component, and a certain stamping pattern is not there, then it cannot be sourced to that defendant, that is a reason that you need a summary judgment procedure.

And you can lay that out in a point-counterpoint fashion that makes it abundantly clear what the material fact is. The material fact is that the plaintiff cannot identify a certain defendant as being the manufacturer of the product. It's elemental if you lay it out very succinctly, very directly. It's a material fact as a matter of law that the defendant is entitled to a judgment.

And it's for those reasons that I --

JUDGE KRAVITZ: Judge Koeltl?

JUDGE KOELTL: You live with point-counterpoint in state court practice and not in federal practice?

MR. ZAPPALA: Yes, yes.

JUDGE KOELTL: Does that raise any problems for you?

MR. ZAPPALA: I just think that in the state

practice it has been in my experience, at least in the Northern District, notwithstanding what Judge Wilken said, I -- I went back and found a statement of facts in a brief that I filed 13, 14 years ago.

The courts have looked at -- I think have looked at it in that way, in not in a very regimental box. The widget was manufactured in Waukeshaw and then the supporting evidence is not there. I do think we do need a more uniform approach and I think point-counterpoint provides that as opposed to, well, maybe we'll do it in this case, maybe we won't in another case.

So I think we should break for lunch unless you have any questions.

JUDGE KRAVITZ: Professor Marcus won't let you go.

PROFESSOR MARCUS: I'm looking for an answer of no. I looked at your written statement and I ask this question because of the heading over the part about our witness list where you appear which says you were going to talk about Rule 26, also. I didn't see anything about that. So I just want to make sure.

MR. ZAPPALA: You're right and it is no. It was my error.

PROFESSOR MARCUS: Good. Thank you.

JUDGE KRAVITZ: Very good. Thank you.

MR. ZAPPALA: Thank you.

JUDGE KRAVITZ: Thank you very much.

Okay. So we're going to break for lunch, and we're going -- so we have a lot more witnesses. So we're going to take a 45-minute lunch. So we're going to be starting again at ten of 1:00. 12:50. All right?

(Whereupon, a lunch recess was taken from 12:04 to 12:53.)

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AFTERNOON SESSION

JUDGE KRAVITZ: Well, I said that we must start at ten of and it just goes to show you how much power is to the word "must."

So Mr. Williams?

Thank you. I'm keenly aware of how many billable hours are sitting in this room and I thank you very, very much for your patience.

MR. WILLIAMS: We're happy to do it, Your Honor, and coming from a locale where it was 10 degrees when I left, any excuse to come to San Francisco I will jump at.

My name is Marc Williams and I'm an attorney practicing in Huntington, West Virginia and I'm currently serving as president of DRI. I'm here to speak on behalf of Rule 26 and Rule 56. I would like, if I could, to go to Rule 26 first.

We are supportive of the amendments, particularly those that address the question of privilege as it relates to retained experts and the procedures that have been set forth for the handling of expert reports. I would like to address specifically today, in addition to what's in my written submissions, the scenario where you have non-retained experts,

whether it be an employee of a corporate defendant or a corporate plaintiff, a person who has knowledge that arguably might rise to the level of expert testimony but who's not employed by one of the parties, who would be designated as an expert under the provision of the rule that allows for a description of the nature of their testimony, which I think is very helpful.

I would ask, however, that the committee consider extending the protection that has been drafted in the amendment for retained experts to protect the communications between counsel and retained experts, that that be extended to non-retained experts as well for a couple of specific reasons.

First of all, the most likely occasion for a corporate defendant to be using a non-retained expert would be where an employee is positioned because of their knowledge obtained through the course of their employment that they be in a position to testify as an expert at trial, whether it be on an engineering matter or a pharmaceutical case regarding scientific issues.

It's important that there be protection of the communications between counsel and that witness. Normally, if it's a corporate defendant, there would be an argument that there could be an extension of protection to an employee, but, however, I often see

the case in my practice where I'm calling upon retired individuals who have a wealth of knowledge about the subject matter of litigation, no longer employed by the corporate defendant, but in a position to give very helpful expert testimony at trial.

Under those circumstances --

JUDGE KRAVITZ: You don't retain them. They volunteer.

MR. WILLIAMS: That's correct. Generally it is done with permission. Oftentimes the circumstance is where they may have an ongoing relationship, a consulting relationship or whatever with the company. They certainly don't testify on a regular basis, but because of that niche of knowledge that they have they would be in a position to provide expert testimony.

I have seen the argument made in those cases that the normal protection that I would be able to claim if I was working with a corporate employee who I would put up as a witness does not extend once they -- once that employee leaves the actual employment of the company. And I think that that can be solved by extending the protection, communication protection to non-retained experts just in the same way as it is for retained experts. It provides consistency across the board and I think that would be valuable.

PROFESSOR MARCUS: When you say "normal protection," where does that normal protection come from?

MR. WILLIAMS: Well, perhaps I misspoke. The protection that would exist under the proposed amendments that would provide -- well, maybe I'm misunderstanding your question.

PROFESSOR MARCUS: Well, I took you to mean something else. I thought you were talking about attorney-client or some other protection that would exist if this person were an employee but for some reason is not available because this person is retired and is no longer --

MR. WILLIAMS: Well, normally you would be entitled to some level of attorney-client protection if their employee -- if you represent the corporate defendant and they are an employee, there is some limited protection that would be available to them as an employee if they are testifying regarding that as within the scope of their employment.

Subject to some dispute I'll acknowledge and there's a variance as to whether or not if they had individually retained counsel that it would be the same, but nonetheless once they have left the employment, any argument that we might have

evaporates.

PROFESSOR MARCUS: Well, I took you to be talking about that, and what I'm trying to point out is whether what you're saying is that you would like a rule to take up where the attorney-client privilege leaves off.

MR. WILLIAMS: Exactly.

PROFESSOR MARCUS: You're, in essence, asking for us to undertake something that the attorney-client privilege doesn't provide for already?

MR. WILLIAMS: That's exactly it. Essentially it would be a work product protection that would protect the communications between these employees when they -- former employees when they are being prepared for litigation. So it would protect the communications that I would have with a witness that I would be preparing for testimony at trial even in a circumstance where they were not a normally retained expert.

Now, frankly --

JUDGE KRAVITZ: Well, you can solve that by just simply retaining them. Right? I mean, you don't have to retain them for $100,000. You can retain them for costs or 5,000 or a thousand dollars and then you have all the protection that you would have for a retained expert.

MR. WILLIAMS: That's true. But believe it or not, I have had some witnesses who prefer not to be retained.

JUDGE ROSENTHAL: Are they specially employed? Is there some sort of employment arrangement? I'm just trying to figure out why --

MR. WILLIAMS: There's some circumstances where the nature of their ongoing relationship precludes them or, as an example, I have had cases where I have utilized a witness from a different company but who had similar knowledge regarding the issue that is in dispute and because of their relationship with the other company they were not able to be retained.

But notwithstanding that question of whether or not it would solve it through retention, any non-retained witness ought to be able to talk to counsel and achieve the same sort of protection to those communications as retained witnesses.

Yes, sir?

JUDGE WEDOFF: How does your rationale then apply to any fact witness that you might want to talk to?

MR. WILLIAMS: Well, the difference is is that a fact witness is giving facts and an expert witness is

giving opinions. Therefore, there is a difference in the quality and the scope of their testimony.

JUDGE KRAVITZ: But often these non-retained experts could be both. Right? Could be both fact witnesses and give opinion.

MR. WILLIAMS: And sometimes they do. For instance, in the example of my understanding is that in San Antonio, Judge Campbell raised the question of treating physicians and how that issue would play out. I can tell you that it may be possible to excise a provision to make a -- to account for those witnesses who have a blended fact witness responsibility and expert witness responsibility and, to the extent that there could be language that would help accomplish that, we'd be happy to try to provide that to the committee.

In regards to Rule 56, I would like to address the "shall" versus "must" dispute. And I want to, first of all, raise the question or address the question that was raised this morning about the incidents of mandamus and the likelihood that if the committee were to adopt a rule that says summary judgments must be granted in cases where there are no disputed issues of material fact, that that would increase the likelihood that unsuccessful parties

looking for summary judgment would be seeking mandamus. I don't see that as likely.

In my practice, a lot of which is in federal court, the process of discussing even interlocutory appeals are very limited. It is something that almost never comes up in terms of mandamus simply because it is so unfavored and the risks are so high.

I think the consequences, however, for a corporate defendant or really any unsuccessful movement -- movant in a case of where "must" would be present would be that you would have a much better possibility of getting relief at the Court of Appeals. I mean, if the standard is "must," if the wording is "must," and understanding Judge Baylson's arguments regarding that the standard hasn't changed, but if the wording is "must" and you have a legitimate factual scenario where there is no dispute and the court for whatever reason exercises discretion and says, no, this case needs to be tried for some reason, I think that the responsible attorney would be advising their client, "No. Don't go up and try and get a mandamus. Consider that issue one that you can take up on appeal. If we have protected the record, then the appellate court will have an opportunity to review that."

JUDGE KRAVITZ: After the trial.

MR. WILLIAMS: After trial.

JUDGE KRAVITZ: And the argument would be the record at trial established all these facts, but actually we should have been granted summary judgment if it's based on the summary judgment record?

MR. WILLIAMS: Well, you could have the option, for instance, if -- it would depend on how the trial develops, but I have seen appeals go up after trial where unsuccessful movants for summary judgment claimed that there was error in failing to grant the summary judgment because the facts as it turns out in trial were the same, that there was no difference between the assumed facts for the purposes of the motion and the facts that were ultimately resolved during the trial.

JUDGE KRAVITZ: Right. And then you should get judgment as a matter of law at the close of the evidence.

MR. WILLIAMS: Correct. And then it's usually the case that that doesn't happen either.

I would also like to address the question of whether or not we have a change in the actual standard that Judge Baylson raised and Judge Rosenthal also raised. It occurs to me that when we had a change in

language that goes from "shall" to "should," even if it is designated as largely stylistic, when we insert the possibility of discretion into that scenario we are creating doubt.

And, in fact, in my practice I have seen, not from judges but from practitioners, making the argument throughout the preparation of a case for trial and through mediation and motion practice that there actually is a difference in the standard now, that there is -- the court should exercise discretion.

While recognizing what the Celotex trilogy still says, arguments are being made to district courts that I have seen that the court should exercise discretion and allow the case to go to trial for a various number of reasons, whether it's inferences that should be drawn or should be preserved with the jury, whatever it might be. And, in fact, I have one case in front of the Fourth Circuit Court of Appeals now where that issue is raised. Luckily, that judge declined to exercise that discretion. So we'll see if the Court of Appeals agrees.

But if we are not changing the standard, if the standard is the same that it has always been as it came out of Celotex, then we are allowing the problem to exist when we change the language to create that

possibility of doubt. Whether it is perception among the trial bar or the public at large, I don't know that that's particularly relevant. The issue is is that we have created doubt as to the certainty of the entitlement for summary judgment.

MR. KEISLER: Mr. Williams?

MR. WILLIAMS: Yes.

MR. KEISLER: Can you explain what the argument that's being made before the Fourth Circuit is? Is it that the district court denied summary judgment -- or granted summary judgment and the non-movant is saying to the Court of Appeals that the district court should exercise its discretion to deny summary judgment even though summary judgment might otherwise have been justified?

MR. WILLIAMS: Essentially -- the oral argument was this past week. Essentially the argument that's being raised is not directly stating that the court should have exercised discretion except to this extent: It is a product identification issue that was the basis for summary judgment in a chemical exposure case and the argument is that the court should have exercised the opportunity to let all inferences that may come from certain testimony go to the jury even though those -- the facts underpinning those inferences

was not -- were not in dispute.

So to that extent they were taking the position that the court has discretion for that set of facts to allow the case to go to the jury notwithstanding the fact that, although we're not a point-counterpoint district, that there was really no dispute as to the facts as presented before the court for resolution in that motion.

JUDGE BAYLSON: Wouldn't you say --

JUSTICE SHEPARD: I'm sorry. Go ahead.

JUDGE BAYLSON: Well, this is different. Do you want to follow up on that?

JUSTICE SHEPARD: No, on the same point.

It seems to me quite an ordinary idea that where different inferences can be drawn from the same fact that might lead to a different outcome as applied to law, that the movant doesn't win. Is there something wrong with that idea?

MR. WILLIAMS: Well, the district court made the decision that the inferences that the plaintiff was seeking to draw from the facts were not valid. They were justified.

JUDGE KRAVITZ: Were not reasonable?

MR. WILLIAMS: Were not reasonable.

JUDGE KRAVITZ: The non-movant gets the

benefit of all reasonable inferences.

MR. WILLIAMS: Right.

JUDGE BAYLSON: Let's go back to this question of standards, of the changing standards.

There's no doubt under the enabling act that this committee and the other advisory committees can propose procedural changes such as pleading standards or discovery rules as we've been doing, but I think Rule 56 is slightly different because it comes up close to and some argue it impedes on the constitutional right to a jury trial.

So I think when we deal with Rule 56 we've got to be very careful in distinguishing what might be purely procedural, which is point-counterpoint, for example, and what is the choice of verbs which some lawyers say are impinging on their right to a jury trial.

Now, I think we all agree that in the trilogy the Supreme Court said there are no genuine issues of fact. Summary judgment is appropriate, but in one case, the Anderson case, the court said just in two different bases, you know, on the one hand, you've got to do it; on the other hand, you, the district court, don't have to.

So we're in a little bit of a no man's land,

in my view, and I think that is what is, you know, causing a lot of these problems. And I think that to the extent -- at least some have said and some this morning have said that using words like "must" impede -- takes the judge too close to the deprivation of the Seventh Amendment right because that may be a reason -- why a judge may have a good reason why he or she wants to preserve that jury trial right even though technically there may not be any disputed issues of fact.

Do you have any comment on that?

MR. WILLIAMS: Well, I understand that argument and I've seen it in some of the papers that have been presented and I've heard it mentioned briefly this morning. I think the way to resolve that potential problem is by carefully drafting the note to make sure that to the extent that you --

JUDGE BAYLSON: Is that rule making by note writing?

MR. WILLIAMS: Well, all of us use the notes as an aid for the interpretation or the understanding of this process. It's something we rely on and it's an opportunity that we have to sort of understand a little bit more of what goes on in this process.

If there is some concern about infringing upon

a Seventh Amendment right or violating the rules and enabling act provisions, I think that it would be necessary to explain in the note that the change from "should" to "must" is intended not to change the standard but to clarify the fact that the change from "shall" to "should" was nothing more than a stylistic change and, therefore, we are not infringing upon an individual's right to have a trial heard by jury but only in those cases where there is really nothing for the jury to hear.

I mean, we do have the right to trial by jury, but realistically that right ends at the point that the fact-finder has no facts to find. And under the circumstances, whether it's a complex case or a simple case, the judge has an obligation, in my opinion, to grant summary judgment.

And in my practice I see it both as plaintiffs and defense. In commercial cases increasingly plaintiff's counsel are utilizing summary judgment as a mechanism to hone the issues or to, you know, dispose of the case short of trial.

JUDGE BAYLSON: Let me -- could I ask one more question?

MR. WILLIAMS: Yeah.

JUDGE BAYLSON: Let's take the case in which

there is a very novel issue of law and it's an important issue of law and it has not been resolved by the particular circuit in which the district judge sits.

The facts are not disputed, but this district court judge thinks that this case is going to be appealed and it's going to be an important appeal and he or she thinks that the record would be better if the facts were presented in a trial with direct exam, cross exam and closing arguments where all the contentions were made and jury interrogatories as well, which you don't have on summary judgment.

MR. WILLIAMS: Sure.

JUDGE BAYLSON: Is that a legitimate scenario why a judge might deny summary judgment even though the facts are undisputed?

MR. WILLIAMS: In my opinion, no. Regardless of the judge's individual belief that the record might be better developed at trial, which one could make the argument that any record is better developed at trial -- I don't know if that's necessarily the case. I think oftentimes the record is more muddled at trial. But once the court reaches the --

JUDGE BAYLSON: That might give the appellate court, you know, an out and say, well, we're not going

to decide this issue because this record is too muddled.

MR. WILLIAMS: Well, I suppose the court has the opportunity or the appellate court has the opportunity upon reviewing the record to say that there are some issues that need to be resolved and send it back, but from the district court's perspective once the court makes the decision that there are no material issues of fact, at that point the -- the analysis changes to what is the law that would be applied to that -- to those facts even -- even if he or she believed that it would be better to develop the record through a trial.

The last thing I'll add is on point-counterpoint. I have to admit that I have limited experience with this as the districts where I practice do not have point-counterpoint, although I have some limited experience in other districts.

I can tell you that my experience is that it is a helpful aid. And, in fact, the procedure that is proposed under the amendment is one that I often use, even though I'm not in a district that requires it, in the development of cases for -- to make a determination whether or not I think a motion for summary judgment should be filed or once one is filed to determine

what's the best way to posture the facts in opposition to that motion.

It seems to me that to the extent that there are problems with the system as it exists in those districts that have point-counterpoint that have been described here today, it can be resolved through appropriate restrictions in terms of limits like we do with page limits or some other local rule provision.

But under those circumstances we support it. We think it provides value and it enables the lawyers and the court to precisely identify the issues that are in dispute. And I think, Judge Kravitz, you probably described the mechanism for the use of it better than anyone else.

So with that, I'll stop on that issue unless there are other questions.

JUDGE KRAVITZ: Thank you.

MR. WILLIAMS: Thank you for letting me have the opportunity to speak. I was supposed to speak in DC and got waylaid by a trial. So I appreciate the opportunity.

JUDGE KRAVITZ: No problem. DRI has been good about sharing their views on our rules for a long time and I thank you for doing so.

Mr. Herling? Welcome sir.

MR. HERLING: Good afternoon. My name is Dan Herling. I practice here in San Francisco with Keller & Heckman in their San Francisco office.

Over the years I primarily have done defense work for product liability. The last several years I've expended to commercial litigation and intellectual property. So I have taken the opportunity to file motions for summary judgment as the plaintiff as well as the defense. I want to speak to you briefly today about Rule 56 and 26.

As far as the must/should debate, and I think it's a fascinating one as I've sat here and listened to it today, I want to tell you a real story about what's happening in the courts, specifically in the Northern District of California where I have several summary judgment motions pending. And I think that the issue is that though I fully appreciate the comments being presented today that it's not a substantive rule, that's the way it's become.

And perhaps for me personally "must" and "should" I learned when I was a young officer in the Navy that when my XO told me I should do something, that was one thing, but when he told me I must do something, that was something very different.

And what I've had experience with recently was

the definition when we brought a summary judgment motion against in the Northern District and we won, but the argument was that because it was an issue of whether there was sufficient facts for malice that the Court had the discretion under this "should" standard.

Now, I know that that's not what the use notes say and I know it's not what this committee meant, but that's what I am hearing. Now, fortunately, the judge disagreed and granted it, though I've been told that if we don't settle the case it's going to be an issue in front of the Ninth Circuit. So that's something that I deal with on a daily basis.

JUDGE ROSENTHAL: Was there an opinion in that case?

MR. HERLING: Yes.

JUDGE ROSENTHAL: And did it address that argument?

MR. HERLING: Not -- it just said it's not related. The court said that issue was raised, but the issues of fact aren't sufficient to raise that issue in his judgment.

But it is a real thing. I mean, it's happening out there. And for all of everyone's good intentions about how it shouldn't be argued, it's being argued. I'm not saying judges are buying the argument,

but they are continuing to see it.

The point-counterpoint. I've had the opportunity to practice in the State of California as well as the federal courts for all -- this is -- this will be my 30th year of practicing law and I've gotten very used to this point-counterpoint statement. And it's not this uncaged boast that's been described, at least in my experience. And, in fact, I think -- and I think the idea was it's a tool. It's a tool to present your side of the story. It's not the story.

And so my view is that the statement of undisputed facts or the point-counterpoint as has been described is not only a tool for the court. It's a tool for counsel because it enables or ensures that counsel hone their arguments. I mean, whether your case is simple or complicated, you've tried enough cases, and certainly most people on this panel have, that we know that most trials turn on five to ten, maybe eight main facts.

And I tell my -- if I have an associate that hands me a first draft of a summary judgment motion and there's more than twelve facts, I hand it back to them and say that's a loser. It's just a reality. So I don't think it's this terrible situation that would occur. I do believe that it's a tool that, if used

properly, enables everyone to really hone in front of the judge and say, "These are the facts. This is what we have to pay attention to in this case."

JUDGE KRAVITZ: And so my understanding is here in the federal court in San Francisco you don't have to do this anymore?

MR. HERLING: That's correct.

JUDGE KRAVITZ: But do you find -- I know you've got to be a little careful as Chief Judge Walker is here, but do you find that --

MR. HERLING: Well, he's --

JUDGE KRAVITZ: -- that it's more inefficiently handled or, I mean, does it hamper you at all?

MR. HERLING: No. I think what happens is, at least for myself and some of my other colleagues, is that we're so used to doing it that we try to write the briefs with that in mind. Even though we may not call it that, we know we have to marshal those facts together.

And I understand that someone coming in for the first time and looking and say, oh, my goodness, this is terrible. But really if you do it enough, you know it's a good tool. I want to use it as part of the overall -- you know, we've heard, you know, of a mosaic

or the overall story. It's just one piece of the entire information.

Rule 26, I'm very much in favor of all of the proposed revisions. I do want to talk a little bit about the communications with what is being called non-disclosure experts or non-retained experts. And I think there's two types. There's one where you have employees of companies that have a certain amount of expertise, whether it be technical or scientific or medical expertise, in that those communications are protected under the attorney-client privilege.

However, when you move along that continuum and then they become expert -- testifying experts, then there's this gray area. The continuum is absolute attorney-client privilege to a testifying expert or at least in California practice anything I say to my expert the other side has an opportunity to find out what it was.

JUDGE KRAVITZ: Is that because of waiver basically, that by putting this person on, you are deemed to have waived whatever privilege would otherwise apply?

MR. HERLING: Well, not necessarily waiver. It's just that the retained expert, we have to -- the retained expert is an outside expert. Anything that we

say to them --

JUDGE KRAVITZ: Right.

MR. HERLING: But I'm saying that when we get into this argument with counsel on both sides -- and I made the same arguments. I'm entitled to everything you told that person. In fact, I got in that argument Friday on an expert who was a non-retained expert because it was a state court case. I think that as we move along this continuum there has to be some clarity as to the protection of attorney-client.

And I understand the three exceptions and I think they are all good ones, but then we have this gray area as to -- and I think the best way to explain this is through an illustration currently I'm dealing with.

I have a case where we have an opinion letter, an IP opinion letter that was written ten years ago. I don't know whether the facts found in that opinion letter are true, false, slanted. I have no idea. I have to go back and find someone inside that corporation to look at that and say the assumptions in that letter are accurate, the factual assumptions on how the piece of equipment operates and, therefore, the ultimate opinion is correct, before I can take that letter and hand it to an outside consultant.

Because if I just give that letter to that outside consultant, I don't know whether that opinion letter is factually accurate. So I need to have someone vet that. But then I'm faced with the conundrum that if I vet it through the same person I'm going to use as the non-retained expert, I run the risk of having that vetting process exposed and maybe that those facts are inaccurate.

It may be that those facts were not exactly 100 percent put forth in the right way, and the reasons are in this particular case because we have a Japanese client and they were interviewing Japanese engineers and there's translation issues and things like that.

As I read these rules right now, I still have a conundrum. I still have a problem. And so then I end up finding myself trying to figure out a way to give this information or maybe select somebody else to be the right inside person to testify, and I may be compromising myself and then my client because I can't use that person because that person has been used as a vetting expert because of communications. So that's an issue I think we ought to think about.

Now, at the same time I think there's a difference between a non-retained employee expert and a non-partisan non-employee expert, and that would be

your position or your investigator and things like that.

So I just would ask the committee to think about that issue because it's a real-life one we have to deal with on a daily basis.

JUDGE KRAVITZ: Thank you very much.

MR. HERLING: Thank you.

JUDGE KRAVITZ: Mr. Packer. Welcome.

MR. PACKER: Thank you. Good afternoon, members of the committee. My name is Tom Packer. I've practiced here in San Francisco for the past 28 years, and in recent years my practice has also taken me up to Oregon on a day-to-day basis. And I thought I'd make just a couple of points regarding the expert issues, Rule 26, and one specific point on the summary judgment issue that has been talked about today.

On the issue of Rule 26 and the experts, it's interesting. We were in Oregon. I don't know how many of you are aware in the state courts in Oregon, expert disclosure, much less all the information we're talking about, is not even required prior to trial. So it's a real treat as opposed to talking about all of the ins and outs of expert disclosure certainly in the federal system.

We have many of the same issues in California,

but I was -- in reading the proposed rules for Rule 26, they don't seem to be -- at least today, I don't know if you've heard so much in the other hearings, but the core of it doesn't seem to be so much in dispute in terms of trying to streamline and make the whole expert discovery process more efficient.

To the extent there are -- whether in the committee or otherwise, there are still questions about that, I just want to say that reading them from a civil practitioner standpoint, they're a real breath of fresh air. Because the way that many attorneys are forced to deal with retained experts, for example, is outdated, outmoded.

Many attorneys won't even talk with an expert by phone or in person, in other words, verbally, and here we are in an age of texting, e-mail, word processing and whatnot, and yet the attorneys are being strained because of fear of excessive and inordinate expense of discovery into all of those communications.

So I think what you've done and at least what you're considering here takes a whole process a long way and allows practitioners like us to practice in the 21st century and not back in times where you get on the phone or talk with an expert. And in the end the goal, I think, is to have the courts and the juries receive

better-prepared experts, better-prepared expert reports, and I think that's what will result from these rules that are being proposed.

In terms of the employee expert, if you will, that's been discussed today, my point of view on that is that just because a business is sued doesn't mean -- and I know this isn't the exact point that's being raised and is touched on by the rules -- doesn't mean the attorney-client privilege should be waived if there is an employee who has a special expertise.

But beyond that, affording that employee's communications with the attorney at least the basic work product protection that retained experts would have goes a long way towards allowing a business to defend itself, frankly, because sometimes the most effective -- sometimes only the most real knowledgeable expert, the product, for example, at least in some, is that employee expert. And the proposed rules, I think, are, frankly, fair and necessary and not to disadvantage a company just because it happens to have expertise on staff.

The more -- the grayer areas, as Mr. Herling, just mentioned, have to do with the third category of experts, which are the treating physicians, the treating accountant, if you will, the professionals who

are fact witnesses but may have -- may have expert testimony to give.

And providing an attorney summary so that -- and many of them will not even want to do reports, and you can't force them to do a report, obviously, but I think the goal is to avoid surprise if an attorney does know that that professional -- that that fact witness, if you will, turns -- who turns out to be a professional may have expert opinions, nonetheless, that if there's some advance warning of that and, you know, nonetheless allow the attorneys to talk with that fact witness with some work product protection -- excuse me, work product protection, I think that would still advance the goals of efficient expert disclosure and ultimately expert discovery so that attorneys can somewhat really talk with these witnesses with the two or three exceptions about if you give them any information or documents or whatnot to base their opinions.

JUDGE WALKER: Mr. Packer.

MR. PACKER: Yes.

JUDGE WALKER: What is it that you found so illuminating in your experience in Oregon? Is it the text of the rule or the custom or practice? What --

MR. PACKER: I just made the point that in

Oregon there is no disclosure of experts in the first place.

JUDGE WALKER: None whatsoever?

MR. PACKER: In the state courts. There's just much less discovery is what we're talking about. There is no disclosure of experts whatsoever. And I think this made the point as an introductory remark that certainly you are all trying to increase the uniform procedures throughout the country. The states -- those states are a patchwork of different discovery mechanisms and different rights to discovery with California having expert discovery disclosure and discovery while Oregon does not.

It has no particular relevance in this other than to illustrate that, to the extent we do have expert discovery, it should be -- it's perhaps all or nothing. Fair and open and efficient or not have it at all, which I don't think is -- we're going there at this point in space.

JUDGE KRAVITZ: Professor Marcus?

PROFESSOR MARCUS: Could I follow up a little bit with your concern about employees of the company when you represent the company?

At least one of the witnesses that appeared before us in San Antonio emphasized something along the

line that, "well, almost everybody who works at my company is an expert in his or her job." And I think you said, well, you often need to talk to people who were hands-on participants in what the lawsuit is about.

Does this really have anything to do with whether they might give testimony covered by Rule 702 or they just happen to be employees who have information about what the lawsuit is about?

MR. PACKER: Well, those employees that you -- just happen to have the expertise because of their background in the company and happen to have some knowledge about what happened or some relevant facts. And those are -- you know, essentially in many ways they are fact witnesses in terms of --

PROFESSOR MARCUS: Would it be your position that if the protection you are suggesting we extend is extended it would apply only to your communications with them when they are talking to you wearing their expert hats or all communications that you have with them have anything to do with the lawsuit?

MR. PACKER: Well, in the first place, if they are -- if they are, as you say, a fact witness, if you will, I think the attorney-client privilege applies from the start. In other words, they are an employee.

I'm their attorney. They're an employee of the company and I'm their attorney.

So to the extent, though, that we want them to go beyond that, beyond the facts of the case and give expert testimony, then, of course, there's still an argument that they're still attorney-client communication at that point.

But if they are getting information beyond what they normally get in the course of their employment, then the same protections, the attorney work product protections, should apply just as with retained experts because it's a -- there -- it's a special position that they are adopting as opposed to just observing something. And I think that's what -- that's what I see the gist of the spirit of the rule is is that if they do go beyond something and I give them some additional information, for example, or whatnot, what we ordinarily have --

PROFESSOR MARCUS: Has it been your experience that -- I think you said, certainly many have, that the regime since 1993 with regard to reports and intrusion into the lawyer's interaction with retained experts, outside retained experts, has produced some bad consequences and made people go through gymnastic exercises.

Have you found that to be true when you're talking to these company employee-type folks, also?

MR. PACKER: To the extent that, you know, an attorney will -- on the other side will engage in the same type of deposition, for example, of an expert that has been mentioned before, and I saw some other testimony of going to everything that has been communicated, every circumstance, every meeting, et cetera, et cetera, yes.

The same inefficiencies exist in that situation with an employee as with a retained expert, and that's what I see these rules trying to address in terms of trying to streamline the discovery and offer some work product protection so that not every single bit of just communication is not necessarily open to discovery, but what's important is. And --

MR. HIRT: So are you saying that you want parallel treatment in terms of your -- your thought processes whether or not it's an employee or a retained witness?

MR. PACKER: Yes.

And one last comment on the point-counterpoint and I'll make it very short. As you know, in California we do have the same -- we have a point-counterpoint system. There have been

descriptions of the mosaic being -- attorneys allowed to present to the court the mosaic of facts and inferences and whatnot, but one attorney's mosaic I think we should remember is another attorney's house of cards, if you will, and the --

JUDGE KRAVITZ: We don't want to mix metaphors.

MR. PACKER: No. I'm juxtaposing them.

But the -- I thought at least point-counterpoint does allow the attorney bringing the motion for summary judgment to focus the court on the genuine issues of material facts so that the attorney trying to paint the mosaic, if you will, perhaps can run around the central facts, but they can't hide from them, and that, I think, is something of value.

Thank you.

JUDGE KRAVITZ: Thank you very much, Mr. Packer.

Mr. Downs?

MR. DOWNS: Thank you, Judge Kravitz, members of the panel. I will be brief. I'm scheduled to talk on both 26 and 56.

I have listened to people and have nothing to say about 26 that has not already been said. And on 56 I'm going to try and limit myself to certain points

that were not fleshed out in my rather brief written estimate.

I represent insurance companies predominantly in coverage disputes, class actions and things like that. So I'm a defense lawyer.

I want to talk about the "should" versus "must" issue. I understand that it was not the intent in the drafting process to change "should" to "shall" and then effect a substantive change in the law.

Unfortunately, I think, as other witnesses have testified, there is certainly a danger that the perceptions of those who are not parties to the discussions and those who are perhaps not sitting members of the federal judiciary at the time the rule came out or for strong business reasons didn't read with great care the material being distributed to them are going to in the future interpret it the other way.

Simply the fact that the bench is going to hear arguments that, well, now you can do something that you couldn't do before because, quote, "the rules have changed" is a genuine fear. And I think we have to go back and look what happens with the distinction between the two.

If a court is going to deny summary judgment and it wants to deny summary judgment, there was a

discussion, well, there's good cause on the record. Well, I'm assuming under those circumstances given the way the rule is written that good cause is not that there is a material fact that's in dispute because if there was, you wouldn't need good cause to deny the motion. The motion ought to be denied anyway.

Similarly, that good cause is not going to be the moving party is not entitled to the relief they are seeking as a matter of law because, once again, if they can't beat that element, they don't get summary judgment.

So I'm left sort of wondering what is that other good cause that makes a court after it's applied the rules saying the inferences run in favor of the opposing party is look at the material facts and determine that the material facts are indeed undisputed, that the opposing party has had a full and fair opportunity to present a record to the court, and then nonetheless the motion is going to be denied for some subjective reason that within the sound discretion of the district judge makes sense to that judge.

I'm concerned that lessens respect for the judiciary in some circumstances because when I go back to my client and say, "Well, why did we lose?"

It's easy for me to say you lost because the

judge does not agree with X and Y of the law. It's easy to say you lost because the court denied a motion of fact or they found that I had not met my burden as a moving party.

But if I go back and say, "I met my burden as a moving party, the court agrees. There's undisputed facts, the court agrees. The court agrees I'm entitled to judgment as a matter of law, but he's not going to give it to me," that is not going to promote respect of the judiciary.

JUDGE WEDOFF: I wonder if there's another scenario that you're not taking into consideration in this debate between "should" and "must," and that is the situation where the judge does not reach the question at all, but the judge prefers to have a trial because the judge believes that that will be a more efficient economic use of the time in arguments to the court than going through the entire briefing and decision of the summary judgment motion and then potentially having a trial.

MR. DOWNS: I just won a dinner bet on that very issue with one of my co-defense counsel on a case where there was parallel state and federal litigation and was told that the federal judge was not going to decide the motion for summary judgment prior to the

state court trial date. I then got an order out setting the hearing for a week after the state court trial had started.

I think that is a genuine legitimate issue, but that is because there is not in the federal system, nor should there be, a time limit on when the court makes a decision. There are judges who may rule from the bench and rule quickly on some motions. Those same judges may have matters under submission for months, if not years, under other circumstances. I know there are judges at least in this district in the Northern District of California where I began my practice who are known -- they are good judges, but they are known for keeping matters in the court files under submission for anywhere from six months to a year and a half.

I had a case I tried recently in the District of Nevada where the summary judgment motion was under consideration for approximately 14 months. I won. So I'm not that upset about the end result. But I think it's -- I think the concern is if you're going to have an amorphous method of ruling on the motion and saying, "well, yes, you've met this element, you've met this element, you've met this element, but you still lose."

There's a danger that the decision to not rule can come up with many perfectly valid reasons that have

nothing to do with the merits of the case, which is probably too squirrely an issue for you as a group to deal with in the Federal Rules. I don't see how you would write a rule that would actually ever address that short of putting federal judges under the same kind of time gun, for example, that the state court judges are here in California where if they have something under submission for 90 days, they don't get paid, which is a rule that does not promote fair adjudication in many instances.

JUDGE KRAVITZ: I think Congress is thinking about that.

MR. DOWNS: As long as they don't go beyond thinking. There's some constitutional issues in it, too.

JUDGE KRAVITZ: Right.

MR. DOWNS: I want to talk a little bit more about my practice. I started my practice here in San Francisco. I've had a lot of federal practice in my career, but I became a member of the Nevada bar about six and a half years ago. I practice rather extensively there now. And the rule in Nevada, both in state and federal courts, is not to use the separate statement of point-counterpoint.

And I've also practiced fairly extensively in

districts throughout this state. Uniformity is very important and uniformity is not only important district to district on matters that are not purely local such as how the papers are formatted, but on the standards of how things are done. Because when you do practice in multiple districts, even though you commit rules to memory and refresh them every time, there is a great disparity in how things are done in different districts and you also have disparities inside the district.

One of the things that happened in this district is there are at least two, there may be more than two -- I didn't check every judge's standing orders on the court's website. There are two judges in this district who when they utilize or who require the state procedure, when they utilize it, they require a single undisputed statement. And the standing order of one of those judges is the parties cannot agree a fact is undisputed if it is disputed.

That rule, while well intentioned, does not work well in practice because no matter how in good faith an attorney is an advocate for the client is, sometimes there are things that either because the client's insistence despite the rules of evidence they cannot stipulate to or because one of the parties is just patently unreasonable and they want to bring up

the evidence on summary judgment just by being unreasonable.

I think it is worth mentioning in comments that if you're going to require separate statements that the idea that the parties must be forced to stipulate to that which they cannot agree or they would not be before you in the first place is counterproductive.

JUDGE BAYLSON: I think we agree, I mean, to some extent that the rule does not require joint statements or anything like that. We've heard a lot of comments about that and we specifically abstained from requiring anybody's joint statement.

But I appreciate the comments about uniformity, but the proposal itself allows a judge to -- to opt out of the point-counterpoint in a particular case, and as you've heard when you were here this morning, there's been a lot of opposition to the point-counterpoint and we've been hearing that.

So uniformity may be difficult to achieve on this point, but what would be your views on, first of all, requiring the briefs to have pinpoint citations? You don't have a problem with that?

MR. DOWNS: I have no problem. I do that in my Nevada practice.

JUDGE BAYLSON: What would be your view of a rule that made the point-counterpoint an opt-in for a judge or a district clerk that had a model opt-in procedure or a set opt-in procedure that, I mean, I presume could be varied but would be a national standard for those judges who wanted to do so?

MR. DOWNS: I think it might create more chaos than it cured simply because one of the things -- I started practicing about a month before they changed the law in California for point-counterpoint 25 years ago. So every motion I've ever written in California has been under that system and we've learned over the last 25 years how to write them. You know, somebody else commented good lawyers don't write long statements. Long statements if you're a moving party are an invitation to having your motion denied.

But I think on the uniformity issue is concerned about brief lines, too. There's at least one judge in the Central District of California whose standing order is that the moving party's brief will be no longer than 20 pages long. In the Central District all quotations in the brief must be double spaced. They cannot be single spaced as they are in the Northern District of California.

That same judge has a five-page limit on the

line briefs. I have never found out whether that counts the caption or you count the caption page. So I always start at the top of the page of page 1. And, by the way, in that district, all briefs must be on 14 point Times New Roman type.

JUDGE KRAVITZ: A two and a half page.

MR. DOWNS: Well, considering the games people played many years ago with fonts, unfortunately, that type of rule was necessary to keep lawyers and their secretaries from playing games at 4:30 in the afternoon, but if you're going to have a rule that requires it be spelled out, there also has to be a rule that parties have adequate opportunity to do it.

And while I recognize that the shorter the brief, the better the brief both for the benefit of advocacy and the court's perspective having to read them, that doesn't change the fact that if you are going to have to lay out the facts with pinpoint cites you need to have room to do it.

And I think the important thing about point-counterpoint, which is really nothing more than a formatting issue. In the State Bar of California, whether you use a grid or you use them serially, it doesn't really matter. This is a disciplinary tool. It's the first thing I write when I'm writing a summary

judgment motion because if I can't write that and get my material elements discovered and prove they are undisputed, I'm never going to file that motion.

If I get a motion against me, and I have had plaintiffs move against me successfully, the first thing I'm going to look at and go, oh, no, there is a fact there, then I'm in deep trouble. And if I'm in deep trouble in all those facts, I'm going to be picking up the telephone and try to resolve that case before it ever comes to decision.

There's a tremendous intellectual structure and discipline in doing it and I think there's a benefit for the courts, and the benefit is not because you're going to get another 30 pages of paper that you have to plow through in a limited amount of time because highlighted right there, if you have intellectually honest counsel, is exactly the facts that the party contends are in dispute. And you don't have to wade through the tortured syntax that all of us employ on occasion in our briefs because we're tired.

We're not as good of writers as we should be in discussing facts to figure out that this particular fact is really the key fact on which this motion turns, and that then, you know, what evidence is going through that's been highlighted instead of reading the thousand

pages of documentation that's been submitted by some party from the deposition excerpts, exhibits, affidavits, you can find what you need to do and get on with life.

Judge Rosenthal?

JUDGE ROSENTHAL: Have you found that your practice where the description focuses on the insurance coverage disputes might perhaps be particularly well suited for the kind of point-counterpoint exchange where there really aren't very many disputed facts and often you're looking at contract interpretation issues or looking at state insurance codes or statutes?

MR. DOWNS: I think that it's better suited than some. I started my career at Davenport and in that side I primarily represented the plaintiffs and I used summary judgment motions as an offensive tactic because if I could get the defendant backed into a corner I can get the case resolved without going to trial.

JUDGE ROSENTHAL: Were these FELA cases?

MR. DOWNS: No. Mostly property damage cases.

And, you know, you can do it either way. Yes, insurance coverage cases probably tend to be more summary judgment intensive than some types of cases,

but I practiced employment law and I work with employment lawyers today. That's obviously a big issue with employment issues as well.

My last -- my last point really is about the inferences, which is simply that that's why we write briefs. You argue the inferences in your briefs. You say here are the facts, here are the inferences that can reasonably be drawn from these briefs. Because of these inferences and that law, I win. And that's no different than what's being done right now. You don't need to argue your inferences in your separate statement. If you do, you are creating a monster.

Thank you.

JUDGE KRAVITZ: Thank you very much.

Mr. Lucey. Welcome, sir.

MR. LUCEY: My colleague just told me to break a leg.

You know, sitting back here since the early morning and now at the beginning of the afternoon I'm reminded of a story about British Parliament at the turn of the century. True story. There was a member of Parliament who was renowned for long-winded speeches and one day he began one of his long-winded speeches, which he always read from a text, head down. He started to read from the text. Morning became late

morning. Late morning became lunch and onward he pressed looking down at his text word for word with passion and vigor.

Afternoon turned into early evening. And one by one the members of Parliament started to leave the room. He was completely unaware of this because he was reading from his text. And finally when the sun had faded and the night was there he finished his text and made his point and he looked up in triumph to find the room empty save one man sitting in the front row. It was Winston Churchill.

Somewhat embarrassed and a little shocked he looked down at Winston Churchill and said, "You, sir, are a gentleman."

And Winston looked up at him and said, "I, sir, am the next speaker."

I've practiced here my whole career as an employment lawyer so I know from that perspective. I am the incoming president of the FDCC, the Federation of Defense and Corporate Counsel and so I speak on their behalf as well. And I'm going to address my comments to Rule 56. To be quite frank, I have nothing meaningful to add on Rule 26 but am prepared to talk at length on that subject anyway.

Two points on Rule 56. I'm going to, with all

due humility, flog the dead should/must horse once more. If the intent was to make a stylistic change, I think the change didn't accomplish the purpose. I think the word "shall" has meaning to lawyers. It has meaning to lay people and in my practice, "shall" has a very specific meaning. Let me give you a perfect example.

Title 7 the Civil Rights Act of 1964. "It shall be an unlawful employment practice, dot, dot, dot, dot, for any employer to discriminate." It takes out the "should." "It should be unlawful to discriminate," and then you would compound the ambiguity with a footnote that said the lawyers should exercise their discretion to discriminate only in very limited circumstances.

It absolutely has meaning to us. "Shall" is "must." "Shall" is "will." And so I've sat and listened as we've tried to get you change the substantive standard. And I get it. We're not here to do that. So what difference does it make? What difference does the word make? I would suggest if you would change the word "shall" to "might," you would have a furor right here in front of you instead of what you see.

And I'm also worried about the law of

unintended consequences. We don't yet fully know what the consequences of changing "shall" and "should" are, but I've had some very real-world consequences not unlike Mr. Herling. In mediation in an employment case the other side refused to get down to where we thought they should be, one of the arguments being that the standard has changed because the first thing everybody looks at in an employment case is is this a summary judgment case or not.

And I've been told now on two occasions that my case while it used to be a good summary judgment case was no longer because now the judge has discretion, even if I win on the facts and even if I win on the law, to deny the motion. So it's having real-world consequences. And I suspect there are other consequences that we don't know about.

And then I'm a little troubled about the cost benefit analysis that has been raised in this discussion. I get it if the judge says, "It's going to take two days to try this case beginning to end and it's going to take eight days to file a motion and have the hearings. So I'm just going to expend less judicial resources and we'll do it that way."

Fine. It would be more appropriate in a bench trial, I would say, but the note in the committee's

report talks about a difference scenario. And in that scenario on page 24 the judge who has found no disputed facts but realizes that the parties are probably going to appeal this thing and there's going to be a big cost of appeal if the judge grants the motion, exercises his or her discretion to deny the motion really in an effort to spare the parties' use of their scarce resources.

Now, if you reformat that not very far, just one step away, the judge who knows that the parties are discussing settlement and knows that if he or she denies the motion for summary judgment, it's going to settle, I think that's an inappropriate response by the judge. I think that settle or motion analysis is more appropriate for the retired judge over at JAMS making the big money, not the trial judge.

So I would caution about the cost benefit analysis insofar as the court is making decisions about how the parties should spend their money. That's -- that's the parties' right. If they want to spend more money on summary judgment than trial, that's their right.

JUDGE WALKER: Mr. Lucey, can I ask did you notice any change in the way that summary judgment motions were handled, disposed of by courts before

December 1, 2007 and after December 1, 2007?

MR. LUCEY: You know, I have to say I have not. It's not come up in court. I have had no judge tell me that they are more confused about the standard now than they were, in all candor.

JUDGE WALKER: Well, it was then that Rule 56 was changed and the language in the rule was changed from the "judgment sought should be rendered," which changed back on December 1, 2007, and, of course, prior to that it was "judgment sought shall be rendered."

So it seems not to have made any difference.

MR. LUCEY: Well, it has in mediation.

JUDGE WALKER: I'm sorry?

MR. LUCEY: It has in mediation. I've had lawyers tell me that it has changed the dynamics of our mediation. I can't say it's affected any judge.

And then I have a bit of, I think, a contrary view on the point-counterpoint. It just seems from sitting in the back there that the general presumption is that the defense attorneys like their point-counterpoint and the plaintiffs attorneys don't like it.

Well, from heavy practice in California before the point-counterpoint, during it, it was not a defense attorney creation. This was put on us by the court.

We didn't like it. It was hard. It was cumbersome, but oddly I miss it. And my particular view is that I'm not particularly enamored with the point-counterpoint separate statement. At the end of the day if we can have a process that's easier for the parties, easier for the judge, fine with me.

At the end of the day all I want to know is if there's an issue of material fact that the judge is saying that I'm going to get to the law because this fact is more than what it is. And as long as we get there, I don't really care of the form of the process. I haven't seen the kind of abuses that we've heard today practiced. It's self-policing, I think. The more facts you create, the more chance you have to be denied on that basis.

And I think any reasonable limit would be fine. There was talk about case cites in the body. That would be fine as long as the parties identify those facts which are material because I think that's what led to the creation of the California standard in the first place. The judge is overwhelmed by 50 pages of fact, not knowing which ones are material and which ones aren't. As long as the material facts are identified both in the papers, in the opposition and in the order, I would be fine.

Thank you very much.

JUDGE KRAVITZ: Thank you, Mr. Lucey.

Mr. Kastner -- excuse me. Ms. Baker? Welcome.

MS. BAKER: Good afternoon. I know you're all getting a little weary on many parts of these. So I will you use a brief illustration first, take it to a couple of my points and then I'd like to talk about on Rule 56 and on 26.

By way of background I am currently the secretary-treasurer for DRI and some of the comments that I may be expressing or some of the ideas that I have have come from talking with many of our members.

As a defense lawyer I also have significant exposure to the impact of litigation on businesses and, not surprisingly, I'm the one whose ear is being pulled or screamed at when a summary judgment motion is denied and I have to explain why the costs of litigation are going to go through the roof.

So let me give you a brief illustration of a federal court case that I had about five or six years ago and then I will use that illustration to talk about a couple of points.

The facts are very simple in this case. A 32-year-old man who was an accountant, husband, father

to two small children died. The parties went through discovery and as discovery progressed it became very clear that there was going to be an issue related to the statute of limitations, was this action brought in a timely manner. And after the discovery reached a point where the defendants thought it was appropriate a motion for summary judgment was filed.

The facts were really not disputed other than perhaps an inference of more in fact. This summary judgment motion was filed on about January 2nd or January 3rd. The summary judgment motion was not heard for a period of time. The parties moved along. They completed their discovery. The parties were at a point where they -- under the court's rules it was necessary to engage in a 39.1 mediation or some other alternative dispute resolution.

The plaintiff's attorney was in an untenable position because he perhaps was the one that missed the statute of limitations and he took the position that he could not give us a settlement demand.

Well, my clients and the other defendants' clients, not surprisingly, said, well, if we don't get a demand, we're not going to make an offer. At that point all the parties sought relief from the federal court not to engage in this process because clearly it

was not going to be meaningful.

We then moved forward to a pretrial conference which was held by telephone and during the conference that judge said to us, "You know, I probably should get around to ruling on that summary judgment motion."

We don't hear anything. So the parties still continue on. Trial briefs are prepared, jury instructions are prepared and we move forward until the Thursday before a Monday trial. And on that Thursday everyone was faxed two orders. One was an order granting summary judgment in which the court used language somewhat saying "shall be granted because there's -- there's no issue of material fact and the law is appropriate."

And the second order issued by this court was sanctioning every party and every lawyer $500 for failing to comply with the 39.1 mediation rule.

Now, the good news when I called my client is I can say we won the summary judgment. The bad news was I had to pony up money because I was sanctioned because of the circumstances that prevailed in the motion.

Now, I don't bring this up to belittle a judge who took some time because I know that all of you are very busy. I bring this up because I think it

illustrates that both parties would have wanted the "shall" or the "must" standard applied. Each of them needed a court to take a difficult stand or perhaps not a difficult stand but a steady stand, make the call and issue the order. Either the statute of limitations had been blown or it hadn't.

This is not a discretionary matter. Both parties in advocating before the court advocated strongly that the court had to do this. It was the obligation of the court. This type of decision had to be issued.

So when I listened today and the reason I want to tell this story is I've heard lots of differences between whether it should be "must" or "shall" or whether that impacts plaintiff more or it impacts the defendants more. I think the reality is all parties want certainty within the application of the summary judgment rules. The parties are looking for the court to tell us certain things. "There is a material issue of fact. Motion denied." "There is not a material issue of fact. Maybe the law doesn't support your contention." It might be denied. Or it might be granted because the moving party has done other things.

But what I think people, both plaintiff and

defendant, insurance companies, businesses or individuals fear the most is when there is a sliding scale, when no explanation is given other than "I think this is a case the jury should hear."

Very recently I filed a motion for summary judgment. The plaintiffs did not dispute the facts. The plaintiffs -- we were seeking to have a non-party determined to be a cause of an injury in a tort claim. The plaintiffs agreed in their statement of fact that the non-parties were a cause of injury to the plaintiff. We did not seek any segregation or, you know, allocation of damages.

When we argued the motion the court denied it flat out and said, "Well, the plaintiff's attorney thinks this would be a good one for the jury to hear. So that's what I'm going to do."

Now, the challenge in having a standard that doesn't have more stability to it or a more uniform application is simply that both parties on either side of the fence face a really difficult situation of having any confidence that a standard will be applied uniformly to facts that are similar or to what legal analyses that are similar.

Let me talk briefly about employment cases. I do some employment work. I do some other personal

injury type of work. I've heard some comments today indicating that a discretionary standard should perhaps be in existence or the court should be allowed greater latitude to deny motions for summary judgment in the employment arena. And I'd like to take on a couple of the reasons that that has been brought up and why I think that's not a reasonable --

JUDGE BAYLSON: Excuse me. Forgive me, but I'm not sure that's -- I know that's what some speakers have said, but if you read the proposal of the committee, you know, we're not advocating discretion in our rule. We're -- we've done a lot of research on this and we know starting with the Supreme Court in the Liberty Lobby case that a lot of courts, including appellate courts, have said that judges have discretion to deny summary judgment. And we're just dealing with that fact. That's in the case law.

MS. BAKER: Thank you, Your Honor. I certainly appreciate that. I'm also aware of case law where it's commented that the discretion doesn't exist.

JUDGE KRAVITZ: So does that suggest, then, that what we really ought to do is not choose "must" and not choose "should" and just let the case law develop wherever it takes us?

MS. BAKER: No, I don't agree with that at

all. I mean, I think uniformity is important. I would go back -- I would go with "shall." "Shall" is my preference.

JUDGE KRAVITZ: But what do we say to the courts who have said there is discretion when we say, sorry, you're wrong, there is no discretion in the rule because that's what you want us to do at the same time as we're saying this is a procedural rule, this is not intended to change the substance?

MS. BAKER: And I appreciate this isn't intended to change something. What I'm trying to speak to you is from the appearance of litigants who come before your court. I understand the challenge it places in front of you if you look at two cases that say you have discretion and you look at two or three other cases that say, no, you don't have discretion.

I think the problem that you invite with the rule that has "should" instead of "shall" or "must" is that you throw open a much greater door for many more appeals because someone exercised discretion.

JUDGE BAYLSON: If the proposal said the court may grant summary judgment, then surely you would be correct. We would be making it a wide open discretionary standard, which is -- I don't think is the law either.

And, you know, we're looking for the right verb, but, I mean, I interrupted you a bit. I don't think it's correct to say that we're trying to change the standard. We're trying -- we specifically don't want to change the standard. We're looking for the right verb that conveys what the case law has held.

MS. BAKER: And I appreciate your comments, and my choice of words may not have been as eloquent as yours in choosing to change a standard, but I think in having a standard that appears to the outsider, to the litigant as having discretion is unsettling to those that come before the court, come before the court on a regular basis with a same or similar set of facts or the same or similar reason or argument, and one judge to another may interpret "shall" or "should" in a different manner.

JUDGE COLLOTON: Well, do you think that substituting "must" for "should" would change the law from when the rule said "shall"? Do you think "must" is more restrictive than "shall" or do you view them as equivalent?

MS. BAKER: I think in the scheme of things I think "must" is a little stronger. I think "must" and "shall" are much closer than "shall" and "should." So I think that would be --

JUDGE COLLOTON: Well, I take it to the extent the Supreme Court recognized some discretion in the Kennedy case or in the Anderson case under "shall," that that law can continue to prevail under "must" or do you think that it would be modified by "must"?

MS. BAKER: Ask me that one more time. I'm sorry. I have a post-lunch slump here and I didn't quite follow you.

JUDGE COLLOTON: Judge Baylson points out that there is a -- or you pointed out that there are conflicts in the lower courts about whether there is discretion and part of that is because I think the courts view some of the Supreme Court decisions that are ambiguous on the point.

Do you agree with that?

MS. BAKER: I do agree with that.

JUDGE COLLOTON: And so the Supreme Court presumably at some point would have to resolve whether the rule and the law allows for discretion to grant summary judgment even when there's no genuine issue of fact.

And my question is if that was an open issue under "shall be rendered," do you think we can change it to "the court must grant" and leave it an open issue?

MS. BAKER: I think you can go to "must," right. And if you mean by leave it open issue, you mean by discretionary --

JUDGE COLLOTON: Leave whether the discretion exists as an open issue.

MS. BAKER: I think discretion of some kind is always going to be there. What I hate to see is a term that allows, as has already been discussed here, lawyers to come in and say, you know, the court has discretion to do that, not setting a judicial standard or a conduct that judges are going to apply across uniform facts or areas of law.

JUDGE KRAVITZ: Just to follow up on Judge Colloton's point. So you believe that if the rule said "must" rather than "should" or "shall," the Supreme Court could nonetheless say, oh, that rule is completely discretionary and you don't have to grant summary judgment even if the facts are undisputed and the law is on your side. Or does that sort of put a thumb on the scale more towards the court saying no, it said "must"? That means you have to grant summary judgment. There is no discretion.

MS. BAKER: I think it's more of a thumb on the scale. I don't think that -- I don't think discretion will ever be completely written out of this

rule. I don't think that there's a word that will be selected that will ever take that out.

JUDGE COLLOTON: Yeah. You might say that -- to follow up on Judge Kravitz, you might say that "shall" was already a thumb on the scale.

MS. BAKER: I think defendants perceive that.

JUDGE COLLOTON: Or it may be saying there are some sorts of cases where there's discretion and I'm just trying to think through whether "must" could retain whatever residual discretion they were recognizing.

JUDGE BAYLSON: Do you have any views of the phrase I threw out this morning to the proposal as saying "must, comma, unless for good cause stated on the record grant summary judgment"?

MS. BAKER: You know, when I heard that this morning, while I certainly appreciated the word suggestion of it, my fear is that we'd be creating a whole bunch more reason to appeal things. What is more good cause? We'd have to have another footnote that defined that for the case law, then have to define that, which would require a written record for that. How would I as a lawyer know what to tell you that would then be good enough cause for you to do that?

So my basic impression of that is that it

could work, but it would just take a whole lot of appellate cases and decisions for helping all of us understand what that means.

Finally, I'll just make one further comment. And I appreciate your inquiries on 56. I just want to talk briefly about Rule 26. I'm obviously supportive of the changes. One of the -- Judge Kravitz, you asked us to offer some information about what those changes might make in our practice or how they might make a difference, and one of the things I just wanted to bring up, which I suspect you've heard before, is simply the use of duplicative witnesses.

There is the retained consulting expert that never sees the light of day in court, but a lot of money and time is spent with that individual to help you plan your strategy, to essentially get your ducks in a row so that you can then go to the other expert.

We think it would be greatly beneficial to all persons for the protection to exist so that candid communications could be explained, strategy could be advocated, and that people could move forward so a jury would be able to hear what the experts have to say.

Along with that, I think that just from personal experience there is an awful lot of time wasted on reports, preliminary reports, draft reports.

"Why don't you put the comment in?" "This paragraph has five sentences. Before you had four sentences." Personally I think that's a large waste of time and I would be relieved to see that go away if we had the changes.

Thank you, Your Honor.

JUDGE KRAVITZ: Thank you very much.

Mr. Greenbaum and Mr. Kieve.

MR. KIEVE: "Kieve."

JUDGE KRAVITZ: "Kieve." I'm sorry.

MR. KIEVE: You're not the first, Your Honor.

MR. GREENBAUM: Good afternoon.

JUDGE KRAVITZ: You're going to lead off.

MR. GREENBAUM: I'm going to lead off.

I am going to be wearing different hats. So with the panel's permission, I may be flipping hats during my remarks, but I would like to start. I'm here to testify about Rule 56 and Mr. Kieve will be giving remarks about Rule 26. But as a preliminary matter, as the office of the ABA Section of Litigation, I wanted to extend my gratitude on behalf of the ABA for the decision of this committee to undertake this wonderful study on Rule 26 two years ago as a result of the recommendation by our federal practice task force and later a resolution of the ABA.

I want to further thank you for your two years of hard work on this subject and the excellent results that you've achieved. We think it's a wonderful product and it should be adopted. And Mr. Kieve will testify in more detail as to why we believe that.

Two, as to Rule 56, I'm here to testify to the views set forth in a letter of January 29 from a number of individual who happen to be officers and members of the council and the federal practice task force at the Section of Litigation. However, there's no ABA policy on these subjects. So we express these views in our individual capacity and I must make that disclaimer.

That said, I think I'm somewhat known to the committee. I am a lawyer who practices in Newark, New Jersey. My practice is class action defense, but in business cases I can be on the plaintiff's side as much as the defendant's side.

The members who have also signed on to this letter cross the broad spectrum of the litigation practice. There are four small firms represented. In fact, there's one single practitioner that I'm aware of. There are large firms. There are plaintiff's lawyers. There are defense lawyers. And I think our objective is truly to express our views as to what we think is right for the profession and for the practice

of law and it does cover a broad cross-section.

First, I'd like to start with our views on uniformity in the national rule, the importance of a national rule. Because we really do not have one now summary judgment is governed by a patchwork of local rules. I believe it is broken at present. The variations in rules are traps for the unwary who don't know the local practice. They foster confusion and non-compliance.

How do you know, for example, what the consequence is of not properly responding to a fact? Is the district going to -- you've got to line up your facts, you don't line up your facts? And that's why you have so much trouble with people not complying with the standards because they vary from district to district.

With something as important as summary judgment we believe there should be a uniform practice. That's important for lawyers, that's important to clients. And a uniform rule will ensure less confusion as to procedures and will lead to better compliance and will lead to better motions and better responses, and we believe it will lead to more consistent and better results.

In our view, no change, continuing our current

practice, or optional procedure should not be a choice because it will just continue the patchwork of confusion that we now have.

Now, with that said, I'd like to address the point-counterpoint. We would strongly support a rule requiring point-counterpoint provided it made clear that we're all talking about limited and targeted fact statements, those that identify only the material facts critical to sustaining and defeating the claim.

Our experience with the existing practice is mixed and varied. When I say "existing," many of our members practice in many districts where we have variations of the point-counterpoint. And we've seen them to be used to overburden the other side. We have seen situations where they've been make-work and a waste of time.

And at one of our miniconferences, one lawyer got up and said, "Well, you know how this is really done? You write your brief and when everything is done you give it to the youngest associate and you say do the facts statement and they then go ahead and put a number next to every sentence in the fact section, which if you're a good practitioner you already have print sized in it, and then you have your statement of undisputed facts. And that's why the judges this

morning said, gee, I think I'm reading the same thing twice. And that had the ring of truth to me. And I would say that's how they were done and that's how I've done them.

Until I went to my mini conference and this committee opened up my eyes. I looked at this now with a fresh appreciation and I recently had an experience where I had a nationwide consumer class action. I moved for summary judgment and I said let me focus on just the key facts. I came up with ten. It was two and a half pages. My adversary said, "You know what? Number 10. That's the one I dispute and I have an expert that says we need a trial on it."

And I said, "No. That's really an issue of construction, which is one for the court."

The trial judge agreed, granted summary judgment, and the Third Circuit affirmed, but the beauty of the practice was it crystallized the issues and it took this very complex case which would have cost great dollars in discovery, setting up a trial and crystallized it to really the essence of the case. And I think, if properly used, this can be a great tool that just advances on the focus and structure, as I said before, about how to come up with a great result.

Now, the problem with the proposal as it now

exists is we're still getting these comments that we're going to get overwhelmed with the burden.

Well, that's not what the rule says. It says only those key facts. And I know this committee has struggled with that direction. How do you get out the message it's not 300? And, yes, it's not a great chance of success if you come up with the 300. But we can't account for bad lawyering. We're still going to get the 300.

Well, what do we do? When we're dealing with an overlay and history where we have the current practice, where we have these 300 statements, and no matter what words we pick and you pick, it just doesn't get the message across, as is evident by the testimony. You have judges saying we're going to be overwhelmed. You have plaintiffs lawyers and academics saying it's going to be used as an instrument of abuse.

Our answer to that is limit it, put a numerical limit, say, 20 facts per cause of action.

JUDGE KRAVITZ: Can I test that for a second? Because, you know, on one level it sounds very good, but the reality is we're all getting all these motions for summary judgment in all these cases.

I don't know much -- I mean, I know some about

your case because I've had 16 conferences. Maybe you've had some discovery issues, but I don't know the ins and outs of the case. And ordinarily, truth be told, I wait until a case is fully briefed before I start digging into the briefs and the statements because maybe a miracle will happen and the case will settle before that and I don't want to waste my time.

So how -- how am I to decide that you should get five more facts? In other words, the limit is 25 and you feel you need 30 and you write me this thing in a motion, I presume, motion for five additional facts. And your opponent objects and says you're being abusive and you don't need those facts really and they are not material.

I'm going to have to do all that before I look at the brief being on the summary judgment?

MR. GREENBAUM: No. I don't -- I think that's going to work itself out. It's what happens now every day with page limits. We have page limits. It gets the message across. You've got 40 pages. Sometimes you need 45. You call your adversary.

"Five pages?"

"Sure."

You call the judge and write a letter and they say okay. It's not a big deal. But it gets the

message across that this is limited. Just take the key off.

JUDGE KRAVITZ: So you're basically thinking that by and large with limited exception the lawyers are going to agree to give each other some extra facts as a courtesy and so the judge is never -- it's going to be a consented-to motion and -- but there will be some presumably that won't be consented to.

MR. GREENBAUM: Well, it's like what we have now. We have ten depositions per case. When I heard that I thought it was terrible. A big case, how can I limit it to ten depositions? But you know what? You work it out. You sit down with the magistrate judge. You figure out who do I think I'm going to need. If you need an extra one or two, you go back. It seems to work.

25 interrogatories. Most people come to understand interrogatories have become a waste of time in large measure and 25 is enough. It seems to work.

JUDGE ROSENTHAL: How much different would this be than the proposed -- than what we heard described earlier today is used in some of the districts of requiring a statement of facts as part of the brief and putting -- and having the page limit serve the same governing function that you just

described would be presented by having a limit on the number of facts you could assert?

The other advantage that you could argue might exist when that kind of a rule would be the absence of the repetition between the statement of facts and the reappearance of the same facts in the brief itself.

I operate in a district that has neither approach. So my question to you is whether as a functional matter there would be an improvement in what you've described as opposed to what we've heard is used in Indiana and a few other places.

MR. GREENBAUM: Let me address that in several ways. Number one, you could put a page limit on the separate statement of undisputed facts, which would serve a similar purpose. The problem there is I fear that you will not be getting the word across that this is something different than what's in the brief, and what you may find is the fact statement in the brief just moved over.

What I think we need is a wakeup call that gets the message out this is not business as usual. We just need the key facts and I think by saying 10 facts or 20 facts per cause of action gets that message across.

JUDGE KRAVITZ: I'm sorry. Judge Walker, you

were going to follow up on that. And I know you -- which hat you're wearing, but if -- if the proposal was as it currently is without a numerical limit on point and counterpoint, would the Section of Litigation of the people who signed that letter support this proposal?

MR. GREENBAUM: Well, we're concerned about the abuse and we think if the language could otherwise be improved to get the word out that we're talking about only limited focused facts, which I think you've been trying to do, we would support it if it got that message out, but we don't think it's done it at all by these comments.

JUDGE KRAVITZ: Okay.

JUDGE WALKER: Mr. Greenbaum, can I suggest that there is a qualitative difference between page limitations or even limitations on the number of depositions in that there are qualitative factors that you can include on a page. There's a lot of qualitative information that's included in the deposition.

When you're talking about issues, a limitation will hamstring what may be necessary in order to convey the mosaic, to use a term that's been used here today, in presenting the issues.

Let me support that with an analogy. In fact cases there are a number of judges who will put a limitation, a numerical limitation on the number of claims that can be construed, 5, 10, 15, 20 and so forth. Our experience in those cases has often been where you impose that kind of a limitation, and notwithstanding the good efforts of the lawyers, when you get to try the case you suddenly discover that one of the claim terms that nobody has addressed is the claim term on which the case turns.

So limiting construction of claim terms is really an artificial constraint that does materially change the character of the case that's presented to the judge at the claim construction phase and we would not have the same problem with an artificial limitation on the number of issues to be considered at summary judgment.

MR. GREENBAUM: I don't think so because we are still strong advocates of the discretion of the district judge to tailor the fact requirements for a specific case, not the standing order, not "I don't like this, I'm never going to do it," but we are big believers in the discretion of the trial judges to say in this case I have a 30 limit or a 10 limit or none at all. Or you know what? There is another issue here

that no one talked about. We're going to amend and allow it in. Obviously, the trial judge always has that discretion and we don't advocate taking that away.

But in terms of this mosaic, and this is why in further answer to Judge Rosenthal, I think you need two separate documents. The brief is what we put in that mosaic. That's my art form. That's where I'm going to argue my facts. That's where I'm going to mold my facts. I don't want to use that brief to have to respond to the movant's summary judgment. I'm going to respond to it in my way. I'm going to leave my facts to create my mosaic, but that's where I do my argument. That's where I argue my inferences.

The separate facts are the things people should agree upon. Either they are in dispute or they are not and these are the five or six things. They're not going to take them and argue them in my mosaic as I'm building it.

JUDGE BAYLSON: How would your group feel about the subparagraph that says simply the court may limit the number of statements or similar language to that?

MR. GREENBAUM: My worry is that going to be enough to get -- we need something to shake people up

because there are too many people that practice in these districts that have these statements now.

JUDGE BAYLSON: As you recall from the miniconferences which you attended, there were some complaints about overly voluminous statements, but a lot of lawyers said that doesn't happen very much. And in most cases lawyers are reasonable and the statements are manageable.

So in a case where, you know, it's a complex issue or something, either the judge could dispense with one form of the program altogether or could with input from the parties come up with a number and before you came up and filed 300 statements the judge could strike it and say you've got to limit it to 25.

MR. GREENBAUM: Well, you know, I think a note can go a long way if it said we don't see why more than 10 or 20 would be needed for any cause of action, maybe less. We think judges very well should consider limiting them and make sure there's no -- you've got to do something to get the message --

JUDGE BAYLSON: You think if that was put in the note --

MR. GREENBAUM: I think that would help create the message. Because right now all we say is if you put in 300, you're probably not going to win, but I

don't think that's gone far enough.

Now, let me also just comment on the idea of the national rule as an opt-in. I think that would be a terrible idea. It would be worse than what we have now because at least I know in my district what at least is required there. If I have to explain to a client that to practice on something as important as summary judgment will depend on whose name comes up on a wheel, that's kind of hard to explain to a client, that if you got this judge versus this judge now all of a sudden the whole practice is different.

JUDGE KRAVITZ: But that actually is how it is in many districts. I mean, I come from a district that uniformly every judge we have a local rule, and it's point-counterpoint or much like this, but there are districts where there's no local rule and each judge has their own standing order.

MR. GREENBAUM: You know, I think the work of this committee over the years has been to try to have a uniform practice. And it's one thing to have 93 different rules, but I would hate to see a situation where we have 600 or a thousand.

Let me -- unless there are more questions on that --

JUDGE BAYLSON: Let me just ask you a question

because you have a lot of background on this. Now it's -- you know, the field is wide open. A judge in most districts can do whatever they want unless there's a binding order.

But if you had an opt-in with a national model, not that the judge couldn't vary it, but at least you would have a -- a standard that a judge who wanted to use point-counterpoint could just easily adopt without customizing it. You don't see any advantage in that?

MR. GREENBAUM: I think it would be worse than what we have now. Because right now at least within the realm of the District of New Jersey I know what I'm going to get and what I have to do. When I go across the river to New York it's maybe a slight variation. If I take the train 100 miles south to Philadelphia, it's another, but at least now in my own district I know what I'm going to get. But to have the wheel determine that on a judge-by-judge basis, this then creates havoc and a lot more confusion than what we have now.

Let me address "should" versus "must." Like many who testified before me today, I think "must" conveys the same meaning as "shall," and I agree with the choice of this committee not to change the

standard. And I think if you go to "should," you're really doing that and the end result is going to be people are saying, you know what? Maybe you really don't have to do this even if you've met the standard.

Now, I came of age like some members on the committee at a time before the trilogy and I'm aware of a district judge who said to his clerk after his first reversal on summary judgment, "You know what? I'm not doing this anymore. It's not going to help the litigants because in two years the case is going to come back to me, the circuit is not going to really uphold it, and I'm not going to grant any more summary judgments. So from now on define the factual disputes or we're going to deny the motion."

This was not a judge who's looking to save work. He was making his judgment societally as to what was better for the ultimate disposition of the case or cases in general.

And he didn't grant summary judgments. That was before -- and he was a very well-respected judge. That was before the Celotex trilogy. It's no longer a disfavored device. And I think if we go back to "should" and put in this notion that there's discretion here, I think it's going to become a disfavored device again and it's going to be an excuse for those, as the

prior witness testified, not as competent as those before me now who are looking for an easy way out and just saying, "You know what? It's just simple. Let's just let it got to trial. Why do I need to get involved in this?"

And I think if we put in a comment "except as otherwise -- for reasons stated on the record," we're really going to be opening up a Pandora's box. I know there are cases that seem to suggest there's some discretion. And my sense is that, number one, appeals of the model of summary judgment are almost non-existent. So they are a little skewed. Number two, some of them turn on the discretion of the trial judge in general. And I think if there is a dispute among circuits, the Supreme Court will ultimately have to address that and I don't think this committee should weigh in on the scale.

And from my perspective "shall" and "must" are really the same meaning. To me it always meant when you shall do something. And I think Judge Rosenthal's example two years ago was the best one when it said that shalt not kill. I mean, that's -- everyone understands what that means. It doesn't mean maybe you shouldn't kill, but you can in certain circumstances. It says you shouldn't do it.

JUDGE KRAVITZ: Self-defense.

JUDGE BAYLSON: She was really talking about the original, not referring to a lawyer.

MR. GREENBAUM: Again, I think we shouldn't be trying to change the standard. I think "should" does, and if it hasn't taken effect until now, and I think the style change has snuck in as a style change. If this committee decides to keep the initiative, you're going to start seeing the argument, ah, they changed it now. There's a lot more discretion. Maybe you shouldn't. Bottom line is the judge thinks the case should go to trial. I haven't found a judge that hasn't been upon the fact that he's going to find a fact issue on the issue that's really troubling him or her.

Third, I just want to make a minor point on 56(c)(4). The rule as currently drafted allows the judge to go beyond the record to deny -- to grant the motion if -- only if it gives notice. We think the rule should be more balanced and it should say to grant or deny. If you go beyond the record if you want to give notice as far as it should be, whichever way it should go, to grant or deny.

And the last point is more of a technical one as to how you go about saying that a fact is disputed

because it's really an evidential point. You put it -- there was something in the note and we recommended putting it in the rule and I don't want to have to go into that. That's in our notes.

MR. GIRARD: Judge Kravitz?

JUDGE KRAVITZ: Yes?

MR. GIRARD: Can I ask a question?

JUDGE KRAVITZ: Yes.

MR. GIRARD: I'm not sure I really understood your response to Judge Rosenthal's question about the notion of requiring that the statement of facts that are in dispute be included within the brief. Because it seems to me like that is the best way to motivate the moving party to really think about what facts need to be looked at by the court, and I'd like to hear you respond.

How would that be a disservice if that were the rule? How would movants be prevented? It seems like it would address a lot of concerns that the committee has heard about the proliferation of abusive statements of facts that put undue burdens on responding parties and it seems to me like unless there's some -- some way to discipline the movants to really think about the facts, that that's going to continue. And using something like artificial numbers

of acceptable facts seems like a bad way to do it. It seems like the best way to motivate the movants is to make them think about what they need to do in order to win the motion.

MR. GREENBAUM: Let me -- I'm glad you addressed that because maybe it will help me understand my confusion as to what the proposal is. I see this in two different ways.

One is you put your numbered facts in your fact statement and that becomes in lieu of creating the mosaic. That, I think, is a terrible idea because I want to write my brief the way I think is most effective in putting my chain of facts together chronologically in the best way that I think is going to lead to the result on that.

That's the art of the aggregate, to lay those facts out the way I want to lay them out. If I have to do this artificial list of facts, I don't want to do that in my brief. I want to do that as a separate issue because it's really a separate point.

On the other hand, if you're just saying don't have fact statements and just write your fact statement, that's kind of what we have now without the point-counterpoint and I think we will have lost a valuable tool in being able to crystallize the key

issues in a case that will help district judges and practitioners.

Moreover, I think it's more of a problem for the respondent. If I were required to write my fact statement only as these -- in response to these ten or twelve things in this artificial way and then respond to my additional ones, I couldn't tell my story. I couldn't create my mosaic. As a respondent to a motion I want to tell my story and, if I don't happen to directly contradict one of their facts and maybe I do it in my fact statement, I'll take that risk, but I want to focus the court on what I think is most important.

Maybe my position is, well, maybe I agree with those, maybe I don't, but those aren't important because here is the real critical issue and, as a matter of law, this is all the court should be focusing on. So I think that's more of a burden for the respondent than even the movant.

So I think it's melding two concepts and I think they really -- and that's been part of our problem now in the practice as it currently exists. There isn't enough thinking about how these statements are different, and that's why you get this duplicative listing of all your facts.

MR. GIRARD: What if there are both elements in the brief? What if there was what you refer to as a statement of facts, which is a narrative, which includes some facts that are not disputed, which includes some facts that are immaterial for background purposes, and then following that, but, again, limiting the brief to have this number of facts on the number of material facts. There was actually a section that would say here are the ten material facts not in dispute and they were numbered and there would be a requirement for the other side to respond to them. But it would still be within whatever the overall page limit is in the brief. You'd get both your mosaic and your numbered set. You'd have some duplication but not complete duplication.

MR. GREENBAUM: That would work. Only then I would say give me back my pages. I want my full 40 pages for the old brief. That's the only fear of that. I mean, I think it would discipline and it would -- I think it's the same equivalent as the separate fact statement, but maybe it would help reinforce the idea that that second section is different from the first fact section.

JUDGE KRAVITZ: Thank you.

MR. GREENBAUM: Thank you.

JUDGE KRAVITZ: Welcome.

MR. KIEVE: Thank you very much. It's a pleasure to be here.

My name is Loren Kieve. I am the sole partner in a firm called Kieve Law Offices which I started last April. Before that I was with the Quinn Emanuel law firm for six years. Before that I had the privilege of being one of John Koeltl's partners in New York and Washington at Debevoise & Plimpton.

I am, in fact, wearing an official hat today, the Litigation Section of the American Bar Association on behalf of the American Bar Association, and I'd like to briefly address Rule 26 and the expert discovery.

They go back really to 1999. They have the origin in something called the ABA civil practice, the civil discovery standards which I wrote, and they then developed into a set of protocols that lawyers, if you take a look at civil discovery section 21, which says when you're dealing with actual purposes counsel should stipulate as to how you're going to deal with them, and that evolved into something that Judge Rosenthal may know and I know as the assessment protocols.

Whenever Steve Sussman gets a case he immediately sends out a list of ten or so proposals to his opposing counsel, and he says let's start out and

do it right. And chief among those is to essentially have the protocol begin with expert witnesses that is before this committee that originated with the ABA's 2006 proposal to deal with expert witnesses, which I also am very pleased to say I had a hand in writing.

That is by way of background. I've been in practice for some time in New York and having been reminded of this a year ago by Judge Kaplan, there is something called New York Supreme Court Rule 1 which says that you have to put everything you're going to say into a brief and when you get in front of the court the court will ask you, "Is it in the brief?" And you say, "Yes, Your Honor," at which point he will say, "Well, why are you talking about it?"

The point here is that we have given you everything we've given you. I'm basically here to support the rule as proposed, to laud this committee as Jeff did for great work and suggest that if you have any questions of me that you have in front of you a letter dated January 16, 2009 from Bob Rothman which I wrote.

JUDGE KRAVITZ: Well, I think the only thing that I would like to hear, maybe Professor Marcus, too, is whether you take a position on this idea that has been given to us that we should somehow extend the work

product privilege or work product protection, excuse me, for retained experts to employee non-retained experts.

MR. KIEVE: What we've suggested is, and to use the language that I put in here, and I'm quoting from Professor Arthur Miller, the two most important words in the English language at least from a legal standpoint is "it depends." And it depends on the relationship that that particular witness has to the controversy at hand. If you have somebody who is more akin to a retained expert witness, then it makes no sense to treat that person in an analogous fashion. If somebody is more akin to simply a fact witness, then you don't make that communication off bounds to the other side.

JUDGE KRAVITZ: And that may be hard to rate and rule on.

JUDGE ROSENTHAL: It depends.

JUDGE KRAVITZ: A rule that seeks clarity.

PROFESSOR MARCUS: As you address that, I have a different question but going to what you were just talking about.

If when -- when it depends enough that the protection should apply, would you say also that a full report should be required instead of the limited

attorney disclosure that is what we propose with regard to those witnesses we're talking about?

MR. KIEVE: I think the answer to that would be yes.

PROFESSOR MARCUS: So we would need to deal with when the full report requirement applies and when it doesn't apply under an "it depends" approach?

MR. KIEVE: Typically you have a treating physician. I would not have a treating physician be required to give a full report. If you have an in-house engineer who is essentially serving as a substitute for an outside retained expert, I think it would be appropriate to call for a report.

PROFESSOR MARCUS: Do you think it would be possible for counsel to arrange that that inside engineer be really specially retained for purposes of the litigation thereby coming under the proposal we've already written and put out for comment?

MR. KIEVE: That's probably -- again, this is not part of ABA policy.

PROFESSOR MARCUS: Right.

MR. KIEVE: Changing hats, that's probably a pretty good idea by saying that if you have somebody who is testifying on a particular discrete subject that would ordinarily be in the scope of outside retained

expertise, then I think you could say, yes, that person should prepare a report because that's what you're shooting at.

PROFESSOR MARCUS: And that person might be specially retained within the meaning of the current rule?

MR. KIEVE: Yes.

PROFESSOR MARCUS: Okay. I would like to ask you a question just to be clear on something in the letter of January 16 that you wrote.

There is discussion on pages 5 and 6 of the three exceptions in the proposal now to the limitation on discovery regarding communications. There are three unlimited types of topics.

And my question to you, and if it would be easier for you to respond later than now, that would be fine, is whether this is saying there should be some change or saying what you've done looks about right.

MR. KIEVE: I would like to respond in writing.

PROFESSOR MARCUS: Okay. That's fine.

JUDGE KRAVITZ: Just make sure you keep February 17 seared into your head because that's the end of our comment period.

MR. KIEVE: We'll have something very

shortly.

JUDGE KRAVITZ: Good.

MR. KIEVE: And, again, I would like just to thank the committee for all of your work.

JUDGE KRAVITZ: Well, thank you, and we particularly thank the ABA and you and Jeff in particular for starting us down this road with your resolution and getting us thinking along these lines.

Thank you.

MR. KIEVE: It's a pleasure.

JUDGE KRAVITZ: Mr. Zimmer?

MR. ZIMMER: Good afternoon. I'm Fritz Zimmer. Thank you, Your Honors and other distinguished members of the committee, for having me.

Accustomed as I am to going either last or near that for a last name that starts with a Z, I will be very, very brief out of sympathy for those who remain to follow.

JUDGE KRAVITZ: Just think of that last person.

MR. ZIMMER: Like all of you having sat here since this morning, I truly am going to confine my comments because many of them have already been received. In fact, I'm going to speak only about Rule 56. I'll rest upon my letter for brief comments

on 26, and even on 56 I just want to concentrate on a couple of things.

Let me start by getting -- telling you I'm a partner at King & Spalding here in San Francisco. I'm a member of the IADC board of directors, also an active member of DRI, and, of course, appearing here to speak on my own behalf.

With respect to Rule 56 and the whole debate about "must," "shall" and "should" that we need to step back for just a moment -- I didn't hear very many accounts today to this effect but maybe a couple -- and view how the public perceives that standard. When I advise clients representing defendant corporations for the most part as I do about whether to bring a motion or not, I immediately tell them how expensive that process is. And yet they often are looking for relief earlier in the case than seeing it through all the way to trial.

If they are able to meet the difficult burden of proof that they have to cross, if you will, to prove that there are no genuine issues of material fact, I certainly would urge you to have the rule read that that certainty and consistency is something that they are entitled to and that it should be over at that point.

Now, I'm familiar with the trilogy, of course, like all of you, but I think there's an important benchmark to reading the rule and seeing what it says, and that, as a couple of commentators have expressed previously, Mr. Dunne, for example, in effect we're really dealing with the lowest common denominator. I have the utmost confidence in Judge Walker from here in my home district and Judge Wilken who spoke earlier and how thorough and intellectual their assessment is of summary judgment and others.

However, I practice nationally as well and I don't see that everywhere. And I don't mean to single out any particular jurisdiction, but we need uniformity to the extent that it can be achieved.

I'm told and have read, although I don't have data here in front of me -- I'm sure it's been submitted to you -- that 49 out of the 50 states in state codes dealing with summary judgment actually use the word "shall." I would urge you to consider that in terms of uniformity. "Must," of course, would be preferable from a defense standpoint, but I see the nuance in between those terms. I think "should," excuse me, is decidedly more voluntary and much closer to "may."

The only other point I wanted to make about

the point-counterpoint debate is that, as many other speakers today have indicated, I've also practiced here in California for all my 26 years of practice. It's not something that the defense bar asked for. We had learned to deal with it. Frankly, I come out about the same as I believe it was Mr. Dunne and a couple of others have said. If it's not important to the judges, I don't really have an axe to grind about that particular matter myself either.

I do find it instructive and that it limits the number of issues that you then talk about in a motion and, like many others, I can speak volumes to having a witness, hopefully not in my own cases but in those of my colleagues and others that I've heard argue before I then took the podium, that sometimes the weight alone of a motion results in its denial. So I have not seen people file extraordinarily long statements or -- of separate and supposedly undisputed facts with any success.

I think once again that that process is designed to streamline the issues, but once again comments that I've heard today persuade me that if judges are not satisfied with it, well, then perhaps an opt-in or even an opt-out procedure would be appropriate.

JUDGE KRAVITZ: Thank you.

MR. ZIMMER: Thank you.

JUDGE KRAVITZ: Mr. Kennedy?

Welcome.

MR. KENNEDY: Thank you, Your Honor. Thank you all for sticking around this late for us.

My name is Raoul Kennedy. I practice with the San Francisco office of Skadden Arps. I've been doing civil litigation both in California state court and federal courts for the last 41 years and have spent a large portion of that time, at least in the more recent years, battling against Elizabeth Cabraser and Sharon Arkin, and aside from gravity and a couple of fundamental laws of physics, there isn't much that Elizabeth and Sharon and I all agree on.

The fact that we are all feeling the same way about point-counterpoint I hope in and of itself might carry some significance with the committee, and I will restrict my comments just to the point-counterpoint issue.

And I think the reason that we, along with Fritz Zimmer, people from the defense and plaintiffs side, are in agreement on that issue is we've had 25 years of experience. And I don't think it has any substantive effect in terms of trying to improve

getting to the right result.

I can't think of a single summary judgment motion that I have won or lost that I thought the fact that there is the separate statement either aided me or hindered me. I've never heard a California state judge say, you know, if we didn't have that statement of undisputed facts, this could have been a very different motion or I wouldn't have been able to grant it or I'll grant you more of it.

So I think both the plaintiffs bar and the defense bar have found this doesn't carry substantive benefit, but it carries an incredible amount of baggage and expense. When the rules first came into effect, we had a case called United Community Church that said, "We now have," and I'm quoting directly, "a gold standard." The judge looks at the statement, the response to it and there is everything in a self-contained basis -- the gold standard.

Six years later in a case called Cabrera applying the gold standard and looking only to what was in the statement of undisputed facts, the court found itself is a quandary that a law firm was going to skate in a legal malpractice case because the plaintiff had discussed continued representation and told of the statute in her memorandum but hadn't said a word about

it in the statement of facts, and, therefore, under the gold standard the discussion in the memo didn't exist.

So like Tom Lehrer's old line about a Christian Scientist with appendicitis when the pain and faith are sort of colliding, an exception got created for, well, the court has a duty to look at all the evidence in the record. That was a 2 to 1 decision. So now we have two rules, the gold standard from one court and the exception from another.

Six years later in this same court in the 2 to 1 decision was able to band together with two other members of his court and say, "What we need" -- I love this phrase -- "is a rule based on a baser metal than gold. So we are rejecting both the gold standard and you-must-search-the-record standard for the quasi or crypto gold standard."

So in California you can now choose -- and the Supreme Court hasn't addressed the issue -- three different appellate opinions in terms of what does or doesn't have to be included in the separate statement. Now, this is California and other people can do it better, but I'm just pointing out some of the problems that we've run into.

I heard today that good lawyers around here don't have to worry about lengthy statements of fact

or, like somebody said, I throw the associate out if she comes in with more than twelve. Well, I've spent most of the last year down in federal court in Riverside where the Central District has the same rule trying a case you may have seen -- there was a lot of publicity about it -- Mattel versus MGA over who invented the Bratz doll. There was a lot of money involved, but it was really one issue. Did this guy think up the doll's idea while he was on Mattel's payroll or did he do it on his own?

Mattel filed a summary judgment motion with 130 undisputed facts represented by Quinn Emanuel who I think most people here would say is something better than stumblebum lawyers. The inventor, Carter Bryant, filed a motion for summary judgment, 60 undisputed facts through John Keker, and MGA represented by my office, Skadden, a motion for summary judgment with 80 undisputed facts. So something like 270 undisputed facts from people who at least pride themselves on being pretty good lawyers.

Now, you say when you hear the proposal, well, just cut it down. Well, how do you go about telling Quinn Emanuel or John Keker you really only have 15 or 20 or 25 facts there and I predict, if you do, the revised version is going to look very much the same

substantively except facts 1 through 6 are now going to be fact number 1. And you can then do a whole new round of law and motion about who's cheating on combining more than one fact into a single number.

In addition, in California we've run into problems with whether something is or isn't in statement of facts or even judges think they are too long. Some judges permit writing amendments. They say go back and do it over again until you get it right where other people it's one strike and you're out.

So what I'm saying is at least in terms of uniformity in California we have something that's pretty close to an embarrassment with three differing Court of Appeal opinions and then a local option as to whether judges are or are not going to permit amendment. As I say, this is without placing rote limitations on what happened.

JUDGE KOELTL: Mr. Kennedy.

MR. KENNEDY: Yes.

JUDGE KOELTL: Were all the motions for summary judgment denied in that case?

MR. KENNEDY: Virtually all of them were taken under submission and we went and had our 14-week trial for phase 1. Phase 2 is scheduled and most of the summary judgments are still awaiting outcome and

determination of the issues in other phases.

JUDGE KOELTL: State court?

MR. KENNEDY: Federal court.

JUDGE KOELTL: It's not -- the implication of what you said is that the motions should have been decided before you went to trial. How could they have been reasonably presented to a judge to make them reasonably subject to disposition?

You say the lawyers were all good. The claimed undisputed facts were in the hundreds and all of these good lawyers are saying these are really undisputed, but I take it that they were all not undisputed. They were contested.

MR. KENNEDY: Your Honor, let me add, first, I didn't mean to suggest this all could have been resolved earlier. It is a phased case. It's also still ongoing. So I don't want to come out of here that I'm somehow criticizing the judge in an ongoing case. It was not my intent to do that. I was focusing in on the issue of are good lawyers keeping these down to ten or twelve issues.

What I'm suggesting is all three of the law firms in that case had been trained in the California system where we are still worried about the gold standard looking over our shoulder.

Secondly, to answer your question, it seems to me this is a tool that just ignores the realities and limitations of lawyers. If you ask most lawyers to stipulate that the sun rises in the east, they will say, "Every morning?" There's a certain hesitancy that comes in in trying to get either limitation. We're in the California system -- I'm sorry.

JUDGE KOELTL: What would you do then to make a motion for summary judgment in a complex case like that presented to the court in a reasonable fashion that can be decided?

MR. KENNEDY: If I may?

JUDGE KOELTL: Sure.

MR. KENNEDY: If I'm required to use this undisputed statement of facts and I've got the gold standard over my shoulder, I put in 80 facts, as we did for MGA in the case I just talked about, and I'm not going to take a chance on losing the motion.

Yes, ma'am?

JUDGE ROSENTHAL: Just to follow up on Judge Koeltl's question, would those motions you think had been presented in an either less cumbersome manner or clearer manner if the local rule had not been so structured?

MR. KENNEDY: Well, absolutely. If the case

had been pending in the Northern District, it would have been an entirely different story.

JUDGE ROSENTHAL: Shorter motions?

MR. KENNEDY: Much shorter. And people wouldn't have needed 130 record cites because of those 130 issues. Probably 110 of them weren't essential. The problem is is the person wearing the robe gets to decide what's essential, not the lawyer.

So I'll express the thought there is caution on the part of the lawyer. Secondly, lawyers just don't a very good job of conceding, and not only do we get the 140 or 130 questions to start with, but the other side doesn't come back disputed, undisputed, undisputed. You'll get disputed. And I'm sure some of you in your districts have seen it, there's eight pages of disputed evidence, including deposition transcript page 42 through 76, Exhibit 76 --

JUDGE KOELTL: Just to follow up, why -- I'm sorry.

MR. KENNEDY: I just don't want anybody to leave thinking --

JUDGE KRAVITZ: Judge Koeltl?

JUDGE KOELTL: Why would you think that it's necessary to include facts which you don't think are essential in a statement of undisputed fact, but you

would feel comfortable leaving them out in a brief which is going to be your only moving paper to explain why you are entitled to summary judgment?

MR. KENNEDY: Because in the Northern District, if something -- taking the legal malpractice case where something wasn't in the papers about the tolling agreement, I feel very comfortable if it's in the record that the court is going to let us augment or segment, whereas these undisputed facts -- as I say, I've taken on this gold standard and that's it and there's a lack of flexibility.

So if there's any question, lawyers become far more cautious, at least in California in state court than they are in the federal courts where you don't have that requirement.

JUDGE BAYLSON: There doesn't seem to be any question that back in your MGA case the point-counterpoint procedure is not appropriate for that case. It's just not going to work and it seems like it was a waste of time from day 1 for anybody to do it. I don't know whether anybody asked the judge to exempt them, but certainly it sounds like most judges would have if approached.

But what -- I mean, I don't know if you handle what I would call a garden variety employment

termination case or a garden variety insurance coverage case where a point-counterpoint statement for many of us would -- those judges in some districts with local rules find it very helpful to get to the point.

You know, what does the company say about why the person was terminated? What does the plaintiff say are the facts shown is pretext with support from the record, which normally can be, you know, three, four pages of material? And just because it doesn't work in the MGA case why not allow it for the cases where it does work?

MR. KENNEDY: For this reason and I do a lot of what you might say are routine kinds of cases, but as contrasted with just having briefs and record cites with a separate statement, one, you're always a little bit more cautious, but most important, the responses that come back on key issues are going to be evasive. So then the moving party then -- or at least we think they are evasive.

Then we file a reply. So we have a three-column document to try to trace across and it's almost the equivalent of a request for admissions in interrogatories. Lawyers aren't going to belly up and candidly say what's involved.

So it seems to me for the court it would just

be an exercise in futility that you've got an imprecise issue with an imprecise response with an imprecise rejoinder. It's like doing discovery. That's why there's magistrate judges. Why judges want to inflict this on themselves, I don't know.

As opposed to -- you know, I heard constructive suggestion requiring the non-moving party to submit a proposed form of order with their opposition that lays out specifically what do you contend are the disputed facts along with the evidentiary cites where you get there. So moving party has moved, plaintiff comes back, not just words, but a proposed form of order, and then requiring the defendant with its reply papers to file a response to that proposed form of order request.

In terms of funneling and getting down to bedrock, I submit that would be -- we haven't tried it. I don't know if we would have three Court of Appeals opinions in California with different interpretations of it, but I suggest trying that before going this route.

Your Honor, another question?

JUDGE HAGY: Chris Hagy. My concern is in your last example you're saying that if a party's putting in pinpoint citations and required to say where

in the record you found this, the job would be easier on the judges. It sounds like what you're saying what you don't like about the gold rule in California is you can't trust the judge to search the record and find the fact that's going to save your case. What we're looking for is you tell us, you pinpoint that cite and tell us where it says that that's now in dispute and the other side then pinpoints it and shows where it isn't disputed.

If you say, well, inventor X said Y and they say, well, inventor X said Z, we have a genuine dispute. It's easy.

MR. KENNEDY: The option then, though, is we want to really cordon out what the genuine dispute is, do it via a proposed form of order. Then the party who's resisting the motion could say this is what this case is really about and here's the evidence I've really got. They censor the list or shorten it down for you.

JUDGE HAGY: You file that along with the briefs so you'd have a motion and a proposed order and brief and no statement of fact?

MR. KENNEDY: Correct. By the time you get through with all these fixes, why not just stay with the existing system? We always talk about the separate

statement. It always comes, well, it's got this problem, it's got this problem. If we get rid of this, we can do this. If we get rid of that, we can do this.

In California after 25 years it just is not doing anything to help the dispute resolution system, and the amount of money and time that gets spent on it is really sinful.

JUDGE KRAVITZ: Chief Justice Shepard?

JUSTICE SHEPARD: My question is a lot like my seatmate's. I pose it to you a different way.

Is the -- in the regime in which there is no separate statement of facts or in which you rise or fall on the basis of a brief that contains allegations about what the undisputed facts are with citations on the record and argument on why you're entitled to judgment on that basis, is the reason why that, in your opinion, produces more directness and less evasion largely because there is a page limit?

That is to say, the worry that you expressed about the dynamics of the separate statement is that everyone is fearful about leaving anything out, worried about what the judge might think of the undisputed facts. All of those worries occur when you write a brief that's got a limit of X pages, but you're simply

accustomed to having to make hard choices on those days, and so will the responding party.

Is it this -- is it the imposed discipline of being forced to describe it in 8,000 words or 25 pages or whatever the rule is that causes people to do a better job than they are doing -- than they do when they are left to their own devices about how many facts to list?

MR. KENNEDY: I think that's part of it. I think give lawyers, you know, unlimited pages and they all want to exceed them, which is what's happening. I don't think there's any doubt about that, but I also think the separate statement is just going to find a way lawyers as advocates think in asking them to reach closure and stick to things.

We're very good at writing point-counterpoint briefs against one another, but the statement of undisputed facts presupposes a certain amount of collegiality and joint participation, and so now you don't get back. You're asking lawyers to do something most of us are genetically incapable of doing and giving us unlimited numbers of pages in which to do it. I think it's the combination of those two.

JUSTICE SHEPARD: But when we tell you there are 25 pages, you present the same problem, the same

angst, don't you? You -- "I really believe there are 83 facts that entitle me to judgment and you've forced me to abandon 70 of those because you're only going to let me write about a certain number of them in my brief with a statement aside." It seems to me that the real dynamic is do we force you to describe it in X pages or do we simply allow an unlimited number which gets exceeded? That's a great way of thinking about it.

MR. KENNEDY: And, Your Honor, I think the focus here ought to be we have an existing system. How would this alternative improve -- I mean, there's nothing inherently sinful about undisputed statements of fact and I'm sure in a lot of cases they added something. And there are some judges who are more comfortable. In fact, our California state court judges are told in judges school they should start by reading the separate statements of fact before they even go to the briefs.

The question is is whatever quantum of additional justice, correctness or whatever worth the price in terms of human hours and dollars that are going to be involved. And I think that's why Elizabeth and I being on opposite sides can both agree it's a cost benefit analysis. It doesn't help. It's a distraction.

JUDGE KRAVITZ: Judge Walker.

JUDGE WALKER: If there's nothing inherently sinful, Mr. Kennedy, in a point-counterpoint theme, why wouldn't it be reasonable for a committee to conclude that it should provide a uniform point-counterpoint system as an option or an opt-in and include that option in the express language and rule?

MR. KENNEDY: Two things. One has already been discussed this morning. I guess the risk that that would then become the automatic default.

Secondly, I think California experience says this is not a practice that should be encouraged. If there's a judge out there that wants to handle her summary judgments on a point-counterpoint, I suppose he or she can. Unless we can find two-thirds of the Senate that's upset about it, they will get the right to do it.

So the option is there, but I'm suggesting there's nothing in the history of this vehicle that suggests that you should be encouraged or endorsed or sponsored in any way. It brings so little in terms of positive ability and so much in terms of distraction. It seems to me anybody who thinks they've got a really good summary judgment motion, either the moving or the opposing party, finds this to be a distraction that's

just going to cost me more money and take longer to get to the same result.

JUDGE KRAVITZ: Any questions? I'm sorry.

MR. HIRT: Is there any movement afoot at the California rules level to push back -- or the Northern District of California to push back on their point-counterpoint?

MR. KENNEDY: Not that I'm aware of.

As long as you brought that up, I think everyone talks about California procedures. One ought to keep in mind we are a state with a Democratic legislature, and however noble any of these ideas may have been in their origin, the reason they got voted in was the trial lawyers through their representatives said this is something that will limit the ability of courts to grant summary judgments or discourage people filing them. That's the history of California.

This particular idea seems to have boomeranged and it turns out it's doing as much economic harm to plaintiffs as otherwise, but the only way in the last 30 years anybody has changed the summary judgment standards in California was with the approval of the plaintiffs bar, and I've been at lawyers meetings with legislators who were friends of my opponents who I've heard giggle and say we can't abolish summary

judgment, but with the latest amendment we can certainly make it more difficult to get.

And this is sabotaging, which I find kind of ironic that you as overworked judges would want to do anything that might undercut or hobble the availability of the summary judgment device.

JUDGE BAYLSON: Well, you know, some of us, including myself, we think it makes it easier and that's been a prime motive for our moving as far as we have. And a lot of judges feel that. There are a significant number who disagree.

JUDGE KRAVITZ: So maybe the way to think about point-counterpoint is that it's part of a stimulus package.

Thank you.

MR. KENNEDY: Thank you very much for hearing me out. I appreciate it.

JUDGE KRAVITZ: Last, but certainly not least. Mr. Pearlman, you've been very patient.

MR. PEARLMAN: I thank you very much. I guess this puts me in the position of Winston Churchill to use Mr. Lucey's parable. At least I have the hairline for it, however.

My name is Peter Pearlman and I have the honor this afternoon to represent the Association of the

Federal Bar of New Jersey. It's the primary association of lawyers in that district who practice before the federal courts.

The lawyers who are members of that association as well practice substantially in the state courts as well. So we bring you a view not only from those people who litigate in the federal court and deal with the federal system but also who litigate in the state court of New Jersey whose rules are patterned after and are substantially identical to the Federal Rules of Civil Procedure.

I will tell you the position which we have taken, our board has taken in connection with the letter which has been presented to you and which I'm going to talk about a bit today, was taken unanimously by the board of the Federal Bar Association. And I will also tell you that it is unique for the entire board of trustees, composed as it is of plaintiffs lawyers, defendants lawyers, lawyers of large firm, lawyers of small firms, to do anything unanimously.

JUDGE KRAVITZ: So you don't have any academics, huh?

MR. PEARLMAN: We do -- no. We -- well, part-time academics, I suppose, or proposed academics or academics in their own minds, but none who did it

strictly for a living in any event.

We have confronted the issues that arose as a result of the 1993 amendments to Rule 26 in both state and federal court. And in 2001 one of our most -- most able trial judges, the late Charles Walsh, in a decision in the matter of Adler versus Shelton gave a very comprehensive and I suggest well-reasoned analysis of some of the problems that were created and some of the difficulties that the rule proposed.

With surprising speed our state court rules committee approved a rule change which was also with surprising speed approved by the Supreme Court of the State of New Jersey which resolved the problem and eliminated inquiry into communications regarding the collaborative process, other than with respect to facts and data, and eliminating the necessity of providing draft reports.

I am here to tell you that it works. It works well. It has been very widely and very favorably accepted by the bench and bar of the State of New Jersey. It causes the focus to fall where it ought to fall. It causes the focus to fall on the substance of the expert's opinion, on its correctness, on its scientific basis, on its reasoning, on its basis in fact and in theory. It reduces the satellite

collateral litigation that provides simply largely a sideshow.

That collateral litigation distracts from the central issue, sometimes inadvertently, frequently advertent. You heard earlier today from someone -- one of the people who testified, and I wholeheartedly concur, that it is the people who really don't have a very strong position on the merits of whatever it is that the expert is testifying to, the economics or the science, who wish to delve into why the comma was removed, who wish to spend hours and hours examining and cross-examining, deposing on side issues, because that's the only thing they can talk about. They really can't talk about the merits.

That, of course, does nothing to aid in the search for truth. It certainly does nothing to aid in the proper disposition of the expert him or herself.

It also exacerbates a lack of professionalism to permit the sideshow to go on because the attorney then becomes the focus of the litigation. Why did you say this? What did you do? The impression is created, whether intentionally or not, that the attorney has done something wrong by suggesting a theory to the expert, by questioning whether the expert's position is appropriate here or whether this paragraph should

really say what this paragraph says. And even if that is not the intent, it certainly is what comes across and it doesn't do any good for the profession.

Whatever benefit there may be in permitting extensive cross-examination of what I suggest is largely irrelevance is overcome by the problems.

Conversely, the free exchange of ideas between the attorney and the expert benefits the process. It causes the process to move along. It causes the attorney -- enables, I should say, the attorney to understand better what it is that the expert means and to understand better the science of the economics involved. It permits the expert to understand better from the lawyer the process of the litigation and what is really expected or required of the experts.

I really cannot say any better than what Judge Walsh said in Adler versus Shelton, the benefits of doing what we have done in New Jersey. And with the panel's permission I'd like to take about 30 seconds just to read a couple of sentences from Adler versus Shelton.

JUDGE KRAVITZ: Sure.

MR. PEARLMAN: "Litigation is expensive. Attorneys by focusing an expert's attention on the significant issues in the case unquestionably can

improve the expert's learning curve and lessen litigation cost.

"It is common knowledge that attorneys regularly work with their retained experts in preparing expert reports. It is good practice as well. Too much scrutiny on the collaborative process serves only to demonize the natural communicative process between an attorney and his or her retained experts.

"The central inquiry on cross-examination of an expert witness is not a question of it -- is not a question of it and to what extent the expert was influenced by counsel. Rather, it is this: What is the basis for the expert's opinion? Cross-examination on the adequacy and reliability of the stated basis of the expert's opinion can be conducted effectively absent a line of questioning on counsel's role in assisting the expert."

I could not say it better. It works in New Jersey. We wholeheartedly recommend the amendment to Rule 26 as proposed.

JUDGE KRAVITZ: Mr. Marcus.

PROFESSOR MARCUS: Just to follow up on one thing you said. I note that your rule applies to communications with any expert retained or specially employed. Some who have commented to us urge that the

protection we propose for experts of this sort be extended to other people not required to provide the reports and not specially retained.

I wonder if the limitation on your New Jersey rule has caused any problems that you're aware of.

MR. PEARLMAN: No. The New Jersey rule limitation provides that any expert who's going to testify provide a report. We provide a report from an expert who's going to testify.

This -- this creates a problem sometimes with treating physicians because treating physicians aren't real big at preparing reports. They consider it a bit of a nuisance, but it ultimately gets done because the physicians who testify generally are -- are somewhat familiar with the process, the litigation process.

Orthopedic surgeons, for instance, who, although they hate filling out reports and although they revile against the concept, understand that they need to because it's simply part of what they have to do in order to treat people that are injured in traumatic -- traumatic accidents. So they do it. It creates a bit of nuisance. It creates sometimes an inconvenience. It has not created any sort of an insurmountable problem, however, I would say.

I thank you --

JUDGE KRAVITZ: I thank you.

MR. PEARLMAN: -- very much for the attention.

JUDGE KRAVITZ: Thank you very much for traveling from New Jersey. I am reminded of that sign along the trainway of "what Trenton makes, the world takes" and maybe we can say the same about New Jersey's rule on experts.

MR. PEARLMAN: Well, I commend it to you. It works for us and I'm confident it will work for the federal bar as well.

JUDGE KRAVITZ: Thank you.

That brings our hearing process to a close. We've now finished our last hearing and our last witness. There is still time for written comments. The comment period ends on February 17, 2009.

We are now going to have a committee discussion, but -- and we're repairing, I gather, to this room next to us, but we are a sunshine committee. So anybody who wants to listen is welcome to do so.

I want to not only again thank the Ninth Circuit but also thank the AO staff indicated, John Rabiej and Jeff Barr and James Ishida, most especially for the great facilities and arranging all this, the food and the breakfast and everything else. So I thank you.

We're going to take a ten-minute break and then we're going to start our discussion.

(Whereupon, the proceedings concluded at 3:28 p.m.)

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CERTIFICATE OF REPORTER

I, PETER TORREANO, a Certified Shorthand Reporter in and for the State of California, certify that the foregoing is a full, true and correct transcript of the Civil Rules Hearing on Evidence on Proposed Amendment to Rules 26 and 56 held on February 2, 2009, reported to the best of my ability and transcribed under my direction.

_____, 2009
Date

_____
PETER TORREANO, CSR 7623