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OF THE
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To: **Honorable Lee H. Rosenthal, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Honorable Mark R. Kravitz, Chair**
Advisory Committee on Federal Rules of Civil Procedure

Date: **December 9, 2008**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts on November 17 and 18, 2008. Draft Minutes of the meeting are attached.

Proposed amendments of Civil Rules 26 and 56 were published for comment in August 2008. The first of three scheduled hearings on these proposals was held through the morning on November 17, before the Committee meeting began. The remaining hearings are scheduled for January 14, 2009, following the Standing Committee meeting in San Antonio, and for February 2 in San Francisco. The Advisory Committee will meet after the close of the February hearing to discuss the fruits of the hearings and the written comments that have been received by that time.

No action items are presented in this report.

Several discussion items are presented to provide information about tasks the Advisory Committee is considering for near- or intermediate-term action after the Rule 26 and 56 projects are wrapped up.

Discussion Items

RULE 26 PROPOSAL: EXPERT TRIAL WITNESSES

Early written comments and testimony at the November hearing continue to show widespread support for the Rule 26 proposals published last August. The proposals cover both trial expert witnesses who are required to prepare a disclosure report under Rule 26(a)(2)(B) and those who are

not required to prepare a 26(a)(2)(B) report. For one not required to prepare a report, the party who may use the witness at trial must disclose the subject matter of the expert testimony and a summary of the expected facts and opinions. Drafts of the disclosure are protected by the work-product rule. For an expert that is required to prepare a 26(a)(2)(B) report, work-product protection is extended both to drafts of the report and also to communications between the party's attorney and the witness. Work-product protection, however, does not apply to the extent that the communications relate to the expert's compensation, identify facts or data that the attorney provided and that the expert considered in forming the opinions to be expressed, or identify assumptions the attorney provided and that the expert relied upon in forming the opinions to be expressed.

The support so far expressed for these proposals rests on experience with the actual results of the widespread present practice allowing full discovery of draft reports and of attorney-expert communications. Support is offered by attorneys who typically represent plaintiffs and by those who typically represent defendants. Experienced attorneys often stipulate out of such discovery. When discovery is sought it yields little or nothing of value, but adds cost and delay. Perhaps worse, the prospect of discovery leads to behavior by attorneys and expert witnesses that accounts for the lack of useful discovery but also impedes the most effective use of the expert trial witness. And well-endowed parties often retain two sets of experts, including "consulting" experts who will not testify at trial and are shielded from discovery; other parties who cannot afford this indulgence may suffer significant disadvantages.

There are signs of discontent with these proposals among at least some procedure scholars, who believe that the rules should not seem to accept the evolution of expert witness testimony into modes that they see as advocacy, not testimony. They believe that full discovery into the attorney-expert relationship is necessary to the truth-finding function, particularly when it helps to show that a particular expert is serving as nothing more than a conduit for what is actually the lawyer's argument, not the expert's own considered judgment. This concern was actively explored in the deliberations that led up to the published proposal and will continue to be reviewed in considering what recommendation to make at the end of the hearing and comment process.

The next-to-last paragraph of the Rule 26 Committee Note continues to stir controversy. The Note recognizes that extending work-product production to draft reports and disclosures, and to some attorney-expert communications, "focus[es] only on discovery." But it states an expectation "that the same limitations will ordinarily be honored at trial." This observation reflects an abiding concern that allowing free inquiry at trial will defeat the purposes sought by protecting against discovery. Drafts will not be prepared (or will be erased), communications will be guarded, dual teams of experts will be retained when otherwise trial-witness experts would suffice, valuable deposition time will be wasted in generally vain discovery efforts, and so on. This is not an attempt to create a Rule of Evidence by a Civil Rule Committee Note; it is an invitation to courts to exercise their ordinary authority in ruling on evidence questions that are not addressed by an explicit rule. But some observers view it as an indirect attempt to create a Rule of Evidence; a few even carry this view to the point of asking whether this is an attempt to create a privilege that, if adopted in an Enabling Act Rule, could become effective only if approved by Act of Congress. This paragraph will remain the subject of lively debate as the process continues.

RULE 56 PROPOSAL: SUMMARY JUDGMENT

The Rule 56 proposal is an effort to create a clear, uniform, and efficient procedure for submitting a summary-judgment motion under the same standards and allocation of moving burdens as are established by current law. It will be important to assess comments and testimony by asking whether particular positions are shaped by dissatisfaction with current standards and burdens. Some observers seem to believe that summary judgment is given too readily. Others seem to believe that

it is not given often enough. Working through this potential source of misunderstanding may prove difficult on occasion.

Two major topics have come to the fore in early comments and testimony: the Style Project translation of "shall" grant summary judgment to "should," carried forward in the 2008 proposal, and the point-counterpoint procedure adapted from experience under the local rules of some 20 districts.

The argument that the Style Project erred in translating "shall" to "should" grant summary judgment is regularly framed in two parts. First is the assertion that everyone had assumed that there is a right to summary judgment "when there is no genuine issue as any material fact and * * * the movant is *entitled* to judgment as a matter of law." Recognizing that there is no discretion to grant summary judgment when there is a genuine issue of material fact, the argument is that there has been and should be no discretion to deny summary judgment when there is no genuine issue. On this view "must" is the only accurate translation. Second, it is urged that federal judges too often fail to grant summary judgment, inflicting on parties the need to choose between settlement or the costs and risks of trial. This view may be supported not only by anecdotes of summary judgment wrongly denied but also, at times, by figures in the FJC study showing that courts frequently fail to rule either way on summary-judgment motions.

The arguments against the point-counterpoint procedure in proposed Rule 56(c) take two quite different forms. One line of argument is that the disaggregating effect of looking at historic facts in isolation, one-by-one, blinds the court to the need to consider the inferences that may be drawn from the mass of fact entire. This effect is given the unflattering description of "slice-'n-dice," and decried because it deprives the nonmovant of the opportunity to tell the story of the dispute as an integrated narrative.

A different argument against the point-counterpoint procedure is that in practice it elicits motions that are far longer than the more sensibly framed motions made in districts that do not follow this procedure. This story is told by judges of courts that have adopted the practice only to abandon it, and by judges who have extensive experience both in a district that has the practice and in a district that does not have it. The same story has been told throughout the process of developing proposed Rule 56(c) by practicing lawyers who complain that statements of material facts may number in the hundreds, commonly including many that cannot have any effect on decision of the motion. These voices of experience are daunting, and will prove more daunting if further comments and testimony do not provide an offset. But what remains missing is an explanation of the ways in which lawyers who would frame sensible motions are transported into hypertrophy by a reminder that the motion must, after all, identify the facts that cannot be genuinely disputed and point to materials in the record that defeat any genuine dispute.

Of course the comments and testimony will provide reason to consider other aspects of the Rule 56 proposal in addition to these central issues. One example is provided by a continuing chorus of support for adding an attorney-fee sanction for making an unreasonable motion or an unreasonable response or reply. All of these issues will be studied further. But the choice between "should" and "must," and the basic point-counterpoint procedure, are likely to remain among the central issues.

The testimony and comments during the relatively early part of the publication period also raise a broader question that will lie at the center of ongoing deliberations. The Rule 56 project was launched to establish a uniform national procedure. The revisions would express in rule text practices that have evolved without finding expression in the rule, and would — where practices have substantially diverged — make uniform what seem to be the best practices among the districts. During the miniconferences convened to help the Advisory Committee, many lawyers expressed a

strong preference for uniform procedures. This support continues in the testimony and comments, albeit with different views of what the uniform procedure should be. But an impressive number of district judges have argued in favor of local autonomy, particularly with respect to the point-counterpoint procedure. To them it is not enough that the point-counterpoint procedure can be discarded on a case-by-case basis; bad experiences with it in at least some cases persuade them that it should not be made uniform for the large number of ordinary cases in which many courts have found it useful.

This confrontation of national uniformity with local autonomy is familiar in the Enabling Act process. One prominent example is the fate of the Civil Rule 26(a)(1) initial disclosure provisions adopted in 1993. The 1993 rule allowed districts to opt out by local rule. Many districts opted out in whole or in part. The rule was amended in 2000 to establish national uniformity, but at the price of substantially diluting the required disclosures. Allowing courts to opt out of the point-counterpoint provisions of proposed Rule 56(a) by local rule would substantially reduce the dissatisfaction expressed by the district judges who have commented. But it would perpetuate disuniformity in a central part of summary-judgment practice.

It is too early in the publication period to attempt a final resolution. But it may not be too early to ask the Standing Committee's guidance in helping the Advisory Committee to weigh the importance of local autonomy against the values of uniformity under rule text that clearly describes much actual practice. One part of the dilemma may be peculiar to the point-counterpoint procedure that lies at the heart of the debate. The Advisory Committee recognizes that this procedure could be counterproductive in some cases, as indeed it seems to have been. The proposed rule explicitly allows the court to order a different procedure on a case-by-case basis. The Committee Note highlights this authority. Power to depart in a particular case is important, and perhaps essential. But the power could be exercised by routinely entering, in every case, an order prescribing a different procedure. The order would give the parties clear notice of what they must do, eliminating the risk of misunderstanding. But if many judges took to this approach, uniformity would be defeated. Advisory Committee consideration of these questions after the publication period closes will be advanced by some discussion with the Standing Committee now.

AGENDA REVIEW

The Committee reviewed a number of public suggestions that have accumulated on the agenda. Several of them were removed because there did not seem to be sufficient reason to take them up for study in the near- or intermediate-term future. Some of the removed items did not seem to have merit. Others may have had merit, but presented questions that seem likely to be worked out in practice or to involve issues too particular to be addressed at the cost of further expanding and perhaps complicating the national rules.

Some of the items removed from the agenda relate in one way or another to the need to integrate developing CM/ECF practices with rule text. These issues do not seem to have matured to a point that would support clearly defined and well-supported responses in the rules. But they may well mature to a point that justifies comprehensive review in a few years. When the time comes, review is likely to involve joint work that involves at least most of the Advisory Committees, and may involve other Judicial Conference committees as well.

Other agenda items are to be carried forward without plans for immediate action but with the thought that they may deserve active consideration within the foreseeable future. These include matters that are likely to involve other advisory committees, such as the means of serving papers outside Civil Rules 4 (summons and complaint), 4.1 (other process), and 45 (subpoenas) — how far should party consent be required for service by electronic means, third-party commercial carrier, or

the like? Should the extra three days to act allowed by Rule 6(d) after many modes of service be retained? Another example in this category may be questions about Civil Rule 7.1 corporate disclosure statements; the Committee on Codes of Conduct is interested in further consideration of these disclosures.

The Civil Rule 68 offer-of-judgment provisions have a tenacious hold on the agenda. Thorough revisions were attempted in the 1980s and again in the 1990s, only to fall through. Unsolicited suggestions continue to arrive, including a recent plea by the Second Circuit that the rule provide better guidance on how to compare a rejected offer with the eventual judgment when the case involves nonmonetary relief. Well-informed proponents can be found for a variety of changes, covering the range from abrogation to complex rules that provide for attorney-fee sanctions for rejecting offers by any party. The underlying questions are complex. Efforts to make even modest changes could easily become unraveled as one change seems to mandate consideration of some related matter. Even if a genuinely modest proposal should come to seem worthwhile, it could easily stir vehement protests of the sort provoked by the 1980s proposals. There is a strong case to be made for leaving Rule 68 to rest in relative obscurity. It is used with some frequency by defendants in cases brought under fee-shifting statutes to cut off post-offer fees if the prevailing plaintiff fails to win a judgment better than the offer. It is very seldom used in other cases. But the topic continues to stir interest in some quarters. The Committee is likely to take a close look at possible responses within the next year or two.

Still other agenda items will be taken up promptly, at least to determine whether rules changes should be proposed. The Maritime Law Association has suggested that the final sentence of Supplemental Rule E(4)(f) has been superseded; if this suggestion proves out, abrogation will be in order. The proposal to delete "discharge in bankruptcy" from the Rule 8(c) list of affirmative defenses, published in 2007, was held back from adoption last year in hopes of resolving a disagreement between the Department of Justice and several participants in the Bankruptcy Rules process. This topic remains on the active agenda to be resolved as promptly as possible.

The subpoena provisions of Civil Rule 45 have prompted a number of suggestions. After discussing several of them, the Discovery Subcommittee was asked to make a recommendation whether the Committee should develop specific proposals for revision. Among the questions are whether to expand the modes of service — Civil Rule 45(b)(1) prescribes service by "delivering a copy to the named person." (Criminal Rule 17(d) is similar.) The issues posed by possible alternative means of service are likely to be shaped by practical judgment more than high theory. Another question involves the territorial reach of a trial subpoena addressed to a party. The answer appears plain on the face of Rule 45 — the subpoena can reach only to the limits defined by Rule 45(b)(2). But some courts have drawn a negative inference that nationwide service is possible from Rule 45(c)(3)(A)(ii), reasoning that by addressing service to command a nonparty witness to attend a trial, Rule 45(c)(3)(A)(ii) impliedly allows service on a party anywhere in the country. The cost-protection provisions in Rule 43(c)(3)(B)(iii) may be put to similar use. This interpretation seems surprising on the face of the rule text. But changes in the ease and cost of travel may justify substantial change. Indeed it may be appropriate to begin by examining the territorial limits established by Rule 45(b)(2), including the dependence on state law for statewide service. Yet another question arises from divided decisions on the question whether a court enforcing discovery against a nonparty in ancillary proceedings can refer a dispute to the court where the main action is pending. There may be compelling reasons to prefer disposition by that court, but the rules do not provide any clear opportunity to do so. Beyond these specific questions, it was observed that Rule 45 is long, complicated, frequently troubling to practitioners, and perhaps not as well integrated with the discovery rules as should be. Serious work on Rule 45 may lie in the relatively near future.

The Appellate Rules Committee met just days before the Civil Rules Committee met. Professor Struve provided a very helpful summary of the discussions of several topics that may come to intersect with the Civil Rules. It is likely that collaborative work will occur on several fronts. The Civil Rule 58 requirement that judgment be entered on a separate document continues to generate problems after the recent amendments. In large part the problems arise from failure to remember to enter judgment on a separate document, but there may be other problems that deserve further study. The circuits take varied approaches to the opportunity to "manufacture" a final judgment by dismissing claims or parties in ways designed to revive the matters that defeated finality if the appeal leads to reversal; here too the inquiry may move in directions that require consideration of the Civil Rules as well as the Appellate Rules. The Appellate Rules Committee is considering the possibility of drafting legislation to address the "mandatory and jurisdictional" character of statutory appeal deadlines; development of a statute may involve nonstatutory provisions on appeal time, such as the provisions that, by virtue of Appellate Rule 4(a)(4), suspend appeal time for as long as needed to dispose of motions under various Civil Rules. The Civil Rules Committee looks forward to working with the Appellate Rules Committee as these projects develop further.

The Appellate Rules Committee also decided to terminate consideration of a revision of Appellate Rule 7 that would address providing for statutory attorney fees in an appeal cost bond exacted from an objector who appeals approval of a class-action settlement. Discussion of this issue in the Civil Rules Committee focused on the difficulty of distinguishing between "good" objectors and other objectors who seek only strategic advantage. It was suggested that thought should be given to evaluating the rule that a class member who is not named as a class representative is a "party" who can appeal denial of objections without becoming a party by intervening. Requiring a motion to intervene would enable the district court to evaluate the good faith of the appeal. Preliminary research will be undertaken to help guide the decision whether to pursue this question further.

REPORT ON SUBCOMMITTEES

A draft report to the Executive Committee of the Judicial Conference on the Civil Rules Committee's use of subcommittees was discussed, and further comments were invited. Useful comments were made after the meeting concluded, and were incorporated in the final Report.

OTHER MATTERS

The Committee also considered a report on progress in the first part of the second stage of the Federal Judicial Center's study of the impact of the Class Action Fairness Act on federal courts and on federal class-action practice. Judge Kravitz reported on his testimony to Congress on a proposed Sunshine in Litigation Act of 2008. Professor Gensler presented a helpful report summarizing issues with respect to privilege logs that have divided the courts. The Committee concluded that some of the privilege log issues should be considered by the Discovery Subcommittee as it reviews Civil Rule 45 subpoena practice, and that the questions would otherwise remain on the agenda for possible future consideration.

FUTURE WORK: NOTICE PLEADING AND DISCOVERY

Seventy years ago the FEDERAL RULES OF CIVIL PROCEDURE created a new system that packaged notice pleading, discovery that began well beyond anything that had gone before and moved beyond anyone's wildest imaginings, and summary judgment. The system has worked well for many years and for many types of litigation. But it has come under strain, and increasing strain. The focus of concern since the last great forward surge of discovery in the 1970 amendments has been on ways to protect against overuse, misuse, and abuse of discovery. It would be difficult to find anyone to champion the proposition that real success has crowned the constant efforts of the last

three decades and more to establish some happy balance. But it is not difficult to find those who believe that the problems, accelerated by the advent of ediscovery, are rapidly spiraling out of control.

If direct efforts to contain discovery have not yet met complete success, indirect efforts may be attempted. One theme that emerged clearly from the Supreme Court's decision in the *Twombly* case is the prospect that access to discovery might usefully be limited by raising the initial pleading threshold. The opinion is too artful to say directly that the time has come to reconsider the combination of notice pleading with sweeping discovery; lower courts are left to work on the pleading problem in ways that may reduce the opportunities for discovery run out of control. That process has only begun.

It would be premature to undertake a head-on project to reconsider the combination of notice pleading with wide-open discovery. Further experience in developing the *Twombly* decision will be important to determining whether there is much to be done about pleading standards, and what — if anything — it might be. Further experience with discovery as it moves increasingly into a world of electronically stored information that displaces paper documents will, if anything, be even more important. Discovery of electronically stored information may evolve in ways that force dramatic revision of the discovery rules. Paradoxically, it is still too early to reject the hope that electronic retrieval methods will outstrip the growth of electronic storage, making it possible to identify, at low cost, exactly the important information, to screen it for privilege and other protections, and to produce it in forms that facilitate further pretrial and trial efforts. New rules should not be written now.

The view that it is too early to begin rewriting the 1938 package does not justify inaction. Instead, it is important to establish the foundations to support thoughtful action if action comes to seem necessary. The Civil Rules Committee has determined to hold a conference in the first half of 2010 to begin exploring contemporary pleading, discovery, and related topics. Much will be gained by gathering the views and experiences of lawyers, judges, and academics. It will be vitally important to supplement these resources with disinterested and expert empirical research. The Federal Judicial Center has provided invaluable help in supporting past revisions of the discovery rules, and must be counted on to help once again. It will not be possible to do everything that might be wished within the present timeframe. But it will be possible to design work that is both immediately useful and a springboard for ongoing and future work. The research will be invaluable even if the conclusion is that there is no need to consider reform again before 2020. A baseline of information will be the only way to measure progress or regress over time.

The help and support of the Standing Committee will be essential to planning and implementing the short-term work on notice pleading and discovery. If further work seems indicated by the fruits of the initial work, further guidance will be equally important.

TAB

COPY OF PROPOSED AMENDMENTS TO RULE 26
SET OUT IN
REQUEST FOR COMMENT PAMPHLET

Executive Summary of Research Regarding Rules Enabling Act Issue and Proposed Amendments to Civil Rule 26

Some comments to the proposed amendments to Federal Rule of Civil Procedure 26 suggest that they may pose a Rules Enabling Act problem. One comment suggests that the proposed amendments' extension of work-product protection to drafts of expert reports and to certain attorney-expert communications may violate 28 U.S.C. § 2074(b), which provides that rules "creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." The Committee requested research on section 2074(b) and case law on whether work product has been considered a "privilege." The legislative history and the case law do not support the proposition that there is a Rules Enabling Act problem with the proposed amendments.

Comments suggesting that there may be Enabling Act issues with the proposed amendments have argued that the discovery protections in the Rule would need to apply at trial to achieve their objective and that precluding inquiry at trial is what privilege rules are designed to do. The proposed amendments, however, only establish work-product protection for draft reports and certain attorney-expert communications in discovery. The proposed Committee Note expresses an expectation that the discovery protections afforded by the Rule will ordinarily be honored at trial, but this language is far from necessary and the Rule itself only imposes a limit on discovery and leaves the question of whether the protections will be extended to trial for common law development. If case law does develop to protect such communications and drafts at trial, that development will not contravene the Enabling Act procedure, but will be developed by "common law as . . . interpreted by the courts of the United States in the light of reason and experience," as authorized by Federal Rule of Evidence 501.

The case law does not support the proposition that work-product protection is a "privilege." Importantly, while work-product protection may be referred to as a "privilege" in certain contexts, courts have repeatedly found that it is not a "privilege" in the context of Federal Rule of Evidence 501. The fact that work-product protection has not been considered a "privilege" under Rule 501 is persuasive support for the proposition that courts are unlikely to find that work-product protection is a privilege under section 2074(b) because, like section 2074(b), Rule 501 was expressly enacted and drafted by Congress (as opposed to passed through the Enabling Act's congressional veto procedure for passage of rules other than privilege rules), because Rule 501 was enacted and considered together with the privilege restriction in former section 2076 (where the provision in current section 2074(b) formerly resided), and because Rule 501 also deals with limits that Congress imposed with respect to the role of federal courts in privilege issues. Indeed, the work-product doctrine was separated from privilege at its inception in *Hickman v. Taylor*, 329 U.S. 495 (1947), in which the Supreme Court emphasized that the work-product doctrine was not a matter of attorney-client privilege.

The legislative history of the restriction on privilege rulemaking in section 2074(b) also strongly suggests that Congress did not have work-product protection in mind when it limited the Supreme Court's rulemaking power with respect to privileges. The provision was introduced when

Congress was considering whether to adopt the Rules of Evidence proposed by the Advisory Committee. The legislative debates on the proposed Rules of Evidence reveal congressional concern with the Advisory Committee's involvement in creating, modifying, or abrogating "traditional" privileges, which Congress viewed as matters of substantive law that should be expressly resolved by the legislative branch. The history repeatedly refers to traditional privileges, such as attorney-client, doctor-patient, newspapermen, and husband-wife, and expresses concern with the Court's rulemaking power being used to modify or abrogate any of these privileges, as well as with that power being used for the creation of privileges for matters such as governmental secrets. Congress ultimately rejected the proposed privilege rules and instead adopted only Rule 501, which left privilege law to be developed through common law. At the same time that Congress adopted the Rules of Evidence (including Rule 501), Congress also adopted the limitation in the Enabling Act that prevented the Supreme Court from changing privilege rules without express congressional consent. The legislative history does not indicate that Congress had work product in mind when it enacted the privilege restriction in the Enabling Act. Instead, Congress seemed concerned with the Court's ability to use its rulemaking power to modify privilege law because it viewed privileges as involving policy decisions to protect certain confidential relationships, and as affecting the behavior of all citizens, not just litigants.

The very limited case law discussing section 2074(b) provides little useful guidance in interpreting the meaning of the term "privilege" in that statute. While there are a few cases that cite the provision as an aside, there are no reported cases involving a challenge to a national federal rule of procedure under that statute. Although the meaning of "privilege" within the statute has not been directly addressed, the legislative history of the statute and the case law discussing whether work-product is a privilege show that a rule that establishes or modifies work-product protection only in discovery does not modify a "privilege" within the meaning of section 2074(b). It is unlikely that the proposed amendments to Rule 26 could be successfully challenged under the Rules Enabling Act.

MEMORANDUM

DATE: December 16, 2008

TO: Professor Richard Marcus

FROM: Andrea Kuperman

CC: Judge Lee H. Rosenthal

SUBJECT: Rules Enabling Act Issue Raised by Comments to Proposed Amendments to Rule 26

This memorandum addresses comments to proposed amendments to Federal Rule of Civil Procedure 26 that suggest that there could be a Rules Enabling Act problem with the proposed amendments. The relevant portion of the proposed amendments applies the work-product protection found in Rule 26(b)(3)(A) and (B) to limit discovery of draft expert statements or reports, and, with three exceptions, of communications between expert witnesses and counsel regardless of form.[1] A group of professors has submitted a comment on this portion of the proposed amendments that argues that providing such protection for draft expert reports and attorney-expert communications could violate section 2074(b) of the Rules Enabling Act, which provides that rules "creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." *See* Letter from John Leubsdorf et al., Professor, Rutgers University (Newark), to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure (Nov. 30, 2008) (on file with the Administrative Office of the U.S. Courts) (available at http://www.uscourts.gov/rules/2008_Civil_Rules_Comments_Chart.htm (follow 08-CV-070 hyperlink) [hereinafter Professor Letter]. The Professor Letter asserts:

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[1] The exceptions include attorney-expert communications regarding compensation, identifying facts or data considered by the expert in forming the opinions, and identifying assumptions relied on by the expert in forming the opinions.

> The amendment is plainly meant, not just to forbid exploration of most lawyer-expert discussions at the discovery stage, but to prevent their use as evidence at trial. Unless it bars inquiry at trial, it will not accomplish its desired goals. There would be little point in barring pretrial discovery of draft reports and the like if parties were free to ask about them at trial. But placing materials beyond the scope of inquiry both in discovery and at trial is precisely what privilege rules do. Moreover, the grounds for the amendment are exactly the same as those relied on to support most privileges: the asserted value of a class of private communications, and the fear that they will be discouraged if outsiders can inquire into them.

Id. at 3. In an effort to determine the meaning of the term "privilege" in the context of section 2074(b), and to determine whether section 2074(b) may apply to the proposed amendments in the manner suggested in the Professor Letter, we discussed looking into the following categories of research: (1) the legislative history of section 2074(b); (2) case law discussing whether work product is a "privilege"; and (3) case law applying or interpreting section 2074(b). Overall, the legislative history does not establish any intent to encompass work product or similar exclusionary rules within section 2074(b); the case law reveals that while work product is sometimes referred to as a "privilege" in some contexts, the doctrine is not a true "privilege"; and no cases have ever challenged a national federal civil rule under section 2074(b).

I. Legislative History

The provision requiring congressional approval of rules creating, abolishing, or modifying a privilege was introduced in the early 1970s when Congress considered the Rules of Evidence proposed by the Advisory Committee. Congress ultimately adopted the Evidence Rules in 1974, after modifying the proposed rules. One of the major congressional modifications involved rejecting the proposed rules on privileges and instead adopting only a congressionally-drafted Rule 501, which left privilege law to be "governed by the principles of the common law as they may be interpreted

by the courts of the United States in the light of reason and experience." In connection with the adoption of the Rules of Evidence, the provision regarding privilege rules that eventually was embodied in section 2074(b) was proposed by a member of the House of Representatives.

The legislative history of section 2074(b) and the accompanying discussion of the proposed rules of evidence show that Congress was concerned with the fact that privileges could be matters of substantive policy that would be better left in the hands of the legislature under separation-of-powers principles. The commentary accompanying section 2074(b) explains that Congress was concerned with the Court's ability to modify privilege law because of its substantive nature:

> This [section 2074(b)] is an outgrowth of the attempt the rules' drafters once made to overturn some key privileges, including the husband-wife privilege emanating from state law. Trifling with privileged communications was one of the main reasons (there were of course others) for Congress's rejection of the drafters' proposed Federal Rules of Evidence and for Congress's drafting and passage of its own version. That confrontation occurred in the early 1970s. The bad taste it left with Congress has endured. Subdivision (b) of § 2074 is a memento of the occasion.

David D. Siegel, Commentary on 1988 Revision to Section 2074, in 28 U.S.C.A. § 2074.[2]

When the Advisory Committee submitted the proposed Rules of Evidence to Congress for consideration, Congress enacted legislation to prevent the Rules of Evidence from becoming effective until Congress affirmatively approved of them, *see* Pub. L. No. 93-12, 87 Stat. 9 (March 30, 1973), focusing in large part on its perception that the Rules of Evidence involved substantive policy matters that should not become effective without substantial consideration by Congress. *See* 119 CONG. REC. 7647 (Mar. 14, 1973) (comments of Rep. Hutchinson) ("[T]here is an honest

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[2] The provision now in section 2074(b) was added as part of section 2076 in 1975. *See* Pub. L. No. 93-595, 88 Stat. 1926 (1975) (codified at 28 U.S.C. § 2076). The provision was moved to section 2074(b) in 1988. *See* Pub. L. No. 100-702, 102 Stat. 4642 (1988).

question as to whether the enabling acts which refer to the rules of practice and procedure were intended to cover the rules of evidence."); *id.* (comments of Rep. Dennis) ("[T]here is a very serious question whether those [privileges in proposed Article V] may, in fact, be matters of substantive law, rather than procedure, and, if so, whether they should not be governed by the laws of the States where the court sits under the normal doctrine of Erie versus Tompkins."); *id.* at 7648 (comments of Rep. Holtzman) ("The proposed rules of evidence do not deal with abstruse legal technicalities. They seek to resolve social issues over which there is now vast national debate: executive secrecy, the newsmen's privilege, and individual privacy."); *id.* (comments of Rep. Holtzman) ("[I]t may be that article III of the Constitution prohibits the Supreme Court from promulgating certain substantive rules of evidence, except in the context of a particular case or controversy."); *id.* (comments of Rep. Holtzman) ("Moreover, to the extent that these rules deal with substantive rights as opposed to housekeeping court procedures[,] the drafters may have overstepped the bounds of congressional authority delegated in the Enabling Act."); *id.* (comments of Rep. Holtzman) ("It is Congress—not the Supreme Court or the Justice Department—which has the prime responsibility for establishing national policy with regard to executive secrecy, newspaperman's privilege and personal privacy."); 119 CONG. REC. 7648 (memo by Rep. Holtzman) ("The Rules abridge many important existing substantive rights of federal court litigants, thus violating principles of federalism."); *id.* (memo by Rep. Holtzman) ("The Rules' treatment of privileges was perhaps singled out for criticism by so many witnesses because laws of privilege assure *all* citizens, not just those in court, of the confidentiality of important relationships; abolition of those laws will affect the relationships of *all* citizens, and the ability of those doctors, newsmen, accountants, etc. to serve the public well."); *id.* at 7650 (comments of Rep. Moorhead) ("It would appear that not only are many of the proposals of

a dubious quality on their face, but more important, are in fact substantive law and not merely procedural rules.").

The House debates regarding delaying enactment of the Rules of Evidence reveal that Congress was specifically concerned with "traditional" privileges, which were considered matters of substance. *See* 119 CONG. REC. 7644 (Mar. 14, 1973) (comments of Representative Hungate) ("To zero in on an area of ready controversy, I recommend Article V to the Members which deals with all of the privileges: husband and wife; doctor and patient; where they have newsman privilege, there would be no such privilege; secrets of State; and official information. I have not covered it all, and that is a shorthand version of that section."); *id.* at 7647 (comments of Rep. Dennis) ("There is not only the husband and wife privilege, but the physician and patient privilege, the privilege with respect to Government secrets, and the privilege, if any, with respect to police informers, and so on."); *id.* (comments of Rep. Dennis) ("Under these rules as provided there is no newsman's privilege, and the rules also state that the privileges as listed, which do not include the newsman's privilege[,] are the only privileges."); *id.* at 7648 (memo by Rep. Holtzman) (noting that the proposed Rules of Evidence "would eliminate the traditional doctor-patient privilege, narrow substantially the long-standing husband-wife privilege, and make inapplicable state statutes or common law protecting newsmen's sources and the confidentiality of the accountants' and social workers' relationships with their clients"); *id.* at 7649 (memo by Rep. Holtzman) ("To the inadequate procedures may be laid in part the apparent bias of Article V in favor of governmental secrecy and against individual privacy, much of the poor drafting and Notes, and the effect of the privileges sections to protect lawyers and corporate clients—those most involved in the drafting—but not doctors, accountants, social workers and journalists."). Thus, the Court's ability

to regulate matters of privilege through rulemaking emerged as a congressional concern when the Evidence Rules were proposed.

The same concerns that motivated Congress to delay enactment of the Rules of Evidence until thorough congressional review was completed, likely led to the addition to the Enabling Act that would preclude the Court from modifying privilege under the traditional Enabling Act regime that allowed rules to become effective unless Congress acted to prevent them under the timeline set forth in the statute. For example, during later debates on the bill that would have enacted the proposed Evidence Rules, Representative Holtzman pointed out: "Many of the rules of evidence, however, involve major policy questions, especially rules of privilege—such as husband and wife, lawyer and client, or newspapermen's privilege. By creating privileges, we express a desire to promote a social objective: for example, promoting free press, encouraging clients to be candid with their lawyers, and so forth." 120 CONG. REC. 1416 (Jan. 30, 1974) (comments of Rep. Holtzman); *see also id.* at 1409 (comments of Rep. Holtzman) ("The committee felt that those [privileges, including husband-wife, physician-patient, governmental secrets, and newsmen] were rather matters of substantive law than they were simply rules of evidence; that they did not really belong in a rules of evidence bill; and further, that we [the Committee members] were so divided on that subject ourselves, let alone what the House would be, that we would never get a bill if we got bogged down in that subject matter which really ought to be taken up separately in separate legislation."). Representative Holtzman then stated that she "intend[ed] to propose an amendment that will prevent any proposed rule, which seeks to change the law of privileges, from going into effect unless Congress acts affirmatively to approve it." *Id.* She further explained: "In matters as important as privileges—husband-wife, lawyer-client, newspaperman—Congress should always act explicitly and

affirmatively. Legislation by inaction is not a practice which this body can adhere to and command the respect of the American people. Finally, I do not think the present state of the enabling act is either constitutional or consonant with our concept of congressional prerogatives." *Id.* Later in the debates, Representative Holtzman argued:

> Evidentiary privileges are not legal technicalities. Rather, they involve decisions over some of the most critical issues facing us. For example, should there b[e] a privilege for Presidential or Executive communications and, if so, how broad should it be? Should there be a newspaperman's privilege and, if so, what kind? Should there be a doctor-patient, accountant-client privilege? Should we narrow or expand the confidentiality of husband-wife communications?

Id. at 1420.

Representative Holtzman proposed an amendment to the legislation adopting Evidence Rules that would limit the Court's ability to adopt rules of privilege without affirmative congressional action, arguing that "[u]nless [the] amendment is adopted, we will be giving the Supreme Court the basic power to legislate such decisions." 120 CONG. REC. 1420. Representative Holtzman believed such a limitation was necessary in the case of privilege rules for several reasons:

> First, evidentiary privileges have evolved in the past on a case-by-case basis. In H.R. 5463, we depart from that tradition and permit the Supreme Court to legislate by promulgating rules, instead of formulating such decisions in the judicial crucible of cases in controversy. This procedure may also be an unconstitutional delegation of powers.
>
> Second, if a law is to be written in the area of privileges, then Congress, not the Supreme Court, is the institution best capable of weighing the social and political implications and making the legislative decision.
>
> Finally—and perhaps most important—it is inconsistent with our notion of congressional prerogatives to permit laws on evidentiary privileges to go into effect as a result of congressional inaction rather than by affirmative steps. We cannot hope to maintain public

> confidence in the Congress if we continually abdicate our powers to other branches of Government.

Id. at 1420–21. In arguing in favor of her proposed amendment, Representative Holtzman later stated:

> Evidentiary privileges cover the areas of attorney-client, husband-wife, newspapermen, accountant-client, doctor-patient, and so forth. Evidentiary privileges are not simple legal technicalities, they involve extraordinarily important social objectives. They are truly legislative in nature. Nonetheless, under the enabling act of this bill, the Supreme Court is given the power to legislate with respect to evidentiary privileges and the only role that Congress can play is that of exercising a veto.
>
> I think that the importance of privileges requires Congress to act affirmatively and not to delegate power to the Supreme Court to legislate in this area. To give you one example, I think it would be incredible if that after months and months of controversy and argument, we in Congress enacted a newspaperman's privilege and then the Supreme Court passed a rule modifying that law—which it could do under this enabling act; or modifying the husband-wife privileges as they stand now.

120 CONG. REC. 2391 (Feb. 6, 1974) (comments of Rep. Holtzman). Representative Holtzman argued that "there will be an article III constitutional problem with respect to allowing the Supreme Court to legislate in the area of privilege." *Id.* at 2392. She reiterated her view that the usual rulemaking process should not apply to privileges in the House Report:

> The dangers in this procedure [where a proposed rule becomes effective unless Congress rejects it] are particularly apparent with respect to evidentiary privileges: husband-wife, lawyer-client, doctor-patient privilege. Decisions regarding privileges necessarily entail policy considerations because, unlike most evidentiary rules, *privileges protect interpersonal relationships outside of the courtroom.* Clearly, by creating a newspapermen's privilege or defining the limits of confidential communications, we are expressing a desire to promote a social objective, e.g., promoting a free press, encouraging clients to be candid with their lawyers, etc.

> Rules creating, abolishing, or limiting privileges are legislative. Nonetheless, under the committee bill we would be allowing the Supreme Court to legislate in the area of privilege subject only to a congressional veto. This procedure is unwise since rules concerning privilege, if enacted, should be done through an affirmative vote by Congress.
>
> The process is, I submit, unconstitutional as well. The Supreme Court is not given the power under Article III of the Constitution to legislate rules on substantive matters. It can pass such judgments only in the context of a particular case or controversy. Yet, H.R. 5453 allows the Court to promulgate a rule in a substantive policy area without the benefit of an adversary proceeding. We cannot (and should not) delegate such rule-making power to the Supreme Court.

H.R. REP. NO. 93-650 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 7075, 7097–98 (separate views of Hon. Elizabeth Holtzman) (emphasis added).

Although the House eventually passed the amendment requiring affirmative congressional action for privilege law to be modified through the Court's rulemaking power, the Senate did not believe that such a restriction was necessary:

> The committee considered the possibility of requiring congressional approval of any rule of evidence submitted to it by the Court. We determined, however, that while requiring affirmative congressional action was appropriate to this first effort at codifying the Rules of Evidence, it was not needed with respect to subsequent amendments which would likely be of more modest dimension. Indeed, the committee believed that to require affirmative congressional action with respect to amendments might well result in some worthwhile amendments not being approved because of other pressing demands on the Congress. The committee thus concluded that the system of allowing Court-proposed amendments to the Rules of Evidence to take effect automatically unless disapproved by either House strikes a sound balance between the proper role of Congress in the amendatory process and the dictates of convenience and legislative priorities.
>
> For the same reasons, the committee has deleted an amendment made on the floor of the House providing that no amendment creating,

> abolishing or modifying a privilege could take effect until approved by act of Congress. The basis for the House action was the belief that rules of privilege constitute matters of substance that require affirmative congressional approval. While matters of privilege are, in a sense substantive, and also involve particularly sensitive issues, the committee does not believe that privileges necessarily require different treatment from other rules, provided there are adequate safeguards so that the Congress retains sufficient review power to review effectively proposed changes in this area, as well as in others.

S. REP. NO. 93-1277 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7051, 7070. Ultimately the Senate receded from its opposition to the change to the Enabling Act that would require affirmative congressional action to pass rules on privilege. *See* H.R. REP. NO. 93-1597 (1974) (Conf. Rep.), *as reprinted in* 1974 U.S.C.C.A.N. 7098, 7107 ("The Conference adopts . . . the House provision requiring that an amendment creating, abolishing or modifying a rule of privilege cannot become effective until approved by Act of Congress."); *id.* at 7111 (statement of House committee chairman) ("Rules of privilege keep out of litigation relevant and material information. They do so because of a substantive policy judgment that certain values – such as preserving confidential relationships – outweigh the detrimental effect that excluding the information has on the judicial truthfinding process. In short, *rules of privilege reflect a substantive policy choice between competing values*, and this policy choice is legislative in nature. The legislative character of the policy choice is particularly clear with governmental privilege, there is a need for affirmative congressional action in formulating them.") (emphasis added).

The overall theme in the legislative history regarding the enactment of section 2074(b) seems focused on the fact that privilege was considered a matter of substantive policy that ought to be addressed by the legislature on a global scale, or by courts in the context of particular cases. Congress seemed particularly concerned with the prospect that the "traditional" evidentiary

privileges would be modified or abolished by the Court or that privileges that could promote government secrecy would be created by the Court. The legislative history repeatedly refers to the newspapermen's privilege, the doctor-patient privilege, the state secrets privilege, and other traditional privileges. I did not see any reference in the legislative history to work-product protection or any other similar exclusionary rules. It may be reasonable to assume that the work-product doctrine, which had been around for some time when the debates on the Rules of Evidence were taking place and which had recently become a part of the Rules of Civil Procedure, would have been mentioned in the debates regarding rules of privilege if it was intended to come within the scope of the limits on rulemaking with respect to "privileges." One possible inference from the lack of any discussion regarding work product is that it was not the type of thing Congress had in mind when it intended to prohibit the Court from making privilege rules without express congressional approval. Unlike the privileges that Congress was concerned about, the work-product doctrine does not address particular policy considerations, such as the desire to protect particular confidential relationships. In addition, because work-product affects behavior only in connection with litigation, it does not raise the concern mentioned in the legislative history that privileges affect the relationships and rights of all citizens, not just those involved in litigation. Instead, the work-product doctrine is aimed at providing a tool for courts and litigants to effectively prepare for trial without undue intrusion by adversaries. In contrast, the "privileges" that Congress seemed concerned about involved the policy decision to promote particular behaviors of members of society, even outside the context of litigation, such as the relationships between doctors and patients or between newspapermen and their sources. Work product arguably falls more within the scope of "procedural" rules aimed at making litigation fair, convenient, and efficient, rather than the

substantive side of "privilege" rules aimed at protecting particular confidential relationships.

II. Case Law Discussing Whether Work Product Is a "Privilege"

I looked at cases involving claims of work product in a variety of contexts to determine whether work product has been considered a "privilege," and whether that determination depends on the context. It does not appear that work product was intended to be a "privilege," at least in the context of the traditional meaning of that word. Some courts have referred to a "work product privilege," although it is not clear that the use of the word "privilege" has any substantive meaning in this sense or that the use of the term "work product privilege" means that work product is a "privilege," as that term is used in section 2074(b). *See, e.g.*, *Dep't of the Interior v. Klamath Water Users Protective Assoc.*, 532 U.S. 1, 8 (2001) ("[T]hose [civil discovery] privileges [incorporated into Exemption 5 of the Freedom of Information Act] include the privilege for attorney work-product and what is sometimes called the 'deliberative process' privilege."); *Fed. Trade Comm'n v. Grolier*, 462 U.S. 19, 23–25 (1983) (analyzing Exemption 5 of the Freedom of Information Act as being consistent with evidentiary privileges, and referring to "work product privilege," but also noting that it is a qualified privilege and also referring to work product as an "immunity"); *Alleyne v. N.Y. State Ed. Dep't*, 248 F.R.D. 383, 387 (N.D.N.Y. Feb. 6, 2008) (noting that "[t]he court has previously traced the history of the *work-product privilege* from its classic discussion in *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947), through its modification by the 1970 and 1993 amendments to Rule 26 of the Federal Rules of Civil Procedure," and explaining that "[t]he *privilege precludes disclosure* of an attorney's core work-product, including his mental impressions, opinions, and legal theories concerning litigation," but that "[i]nsofar as non-core work-product is concerned, *the privilege is qualified* and does not protect everything a lawyer does") (emphasis added) (citations

omitted); *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2007 WL 2900537, at *1 (S.D. Cal. Sept. 28, 2007) ("Because federal common law mandates that *work product is a privilege* that belongs to the attorney, the Court finds that if the attorneys choose to waive the attorney work product privilege in their declarations, doing so does not violate the attorneys' ethical duties and professional responsibilities . . . .") (emphasis added); *Green v. Sauder Mouldings, Inc.*, 223 F.R.D 304, 307 (E.D. Va. 2004) ("The work-product doctrine created by the Supreme Court in *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947), and codified in Rule 26(b)(3), *is a qualified privilege.*") (emphasis added) (citing *United States v. Nobles*, 422 U.S. 225, 237 (1975)); *id.* ("Waiver of the [work-product] privilege occurs when materials that are otherwise protected work-product are disclosed to someone with interests adverse to the party asserting the privilege.") (citation omitted).

However, many courts have also expressly stated that work product is not a privilege. *See, e.g., Broessel v. Triad Guar. Ins. Corp.*, 238 F.R.D. 215, 218 n.1 (W.D. Ky. 2006) ("The protection afforded work-product is not a privilege as the term is used in the Rules of Civil Procedure or the Law of Evidence.") (citing *Hickman*, 329 U.S. at 509–510 & n.9); *Fru-Con Constr. Corp. v. Sacramento Mun. Utility Dist.*, No. S-05-0583 LKK GGH, 2006 WL 2050999, at *2 (E.D. Cal. July 20, 2006) ("Work product is not a 'privilege,' but rather is a court created immunity from disclosure. As such, the applicability of the work product doctrine is governed by federal law in diversity cases.");[3] *Ronald C. Fish, A Law Corp. v. Watkins*, No. CIV030067PHXSMM, 2006 WL 422302, at *5 (D. Ariz. Feb. 17, 2006) ("The doctrine of work product is not a privilege; rather it is 'a

[3] Despite stating that work product is not a "privilege," the court later references the "work product privilege." *See Fru-Con Constr.*, 2006 WL 2050999, at * 6 n.4 ("If documents are created for routine business purposes, by non-attorneys, they do not fall within the purview of the work product privilege.").

qualified immunity protecting from discovery documents and tangible things prepared by a party or his representative in anticipation of litigation.' The primary difference between the attorney-client privilege and the work product doctrine is that the work product immunity may be overcome by a showing of need for the materials in question, whereas the attorney-client privilege may not.") (internal citation omitted); *In re Combustion, Inc.*, 161 F.R.D. 54, 55 (W.D. La. 1995) (affirming magistrate judge's holding that applied federal law in a federal question case with pendent state law claims because "the work product doctrine is not a privilege, but is a creation of federal jurisprudence which is independent of privilege law"); *Republican Party of N.C. v. Martin*, 136 F.R.D. 421, 424 n.3 (E.D.N.C. 1991) ("The work product doctrine (or 'rule') is also sometimes referred to as the work product privilege. This terminology is not, technically speaking, correct, in that the defense of work product is not a privilege from discovery, but is only a *qualified immunity* from the same . . . .") (citations omitted);[4] *Foley v. Juron Assocs.*, No. 82-0519, 1986 WL 5557, at *4 (E.D. Pa. May 13, 1986) ("As was stated in *Augenti v. Cappellini*, this 'work product rule' is often spoken of as creating a 'privilege' when, in reality, it is more accurate to say that it gives a '[q]ualified immunity from discovery.' For indeed it must give way when the exigencies of the case are such that the statements involved were made at such a time and under such circumstances that they become 'unique catalysts in the search for the truth.'") (quoting *Augenti v. Cappellini*, 84 F.R.D. 73, 80 (M.D. Pa. 1979)); *cf. Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575, 579 (D.N.J. 1994) (noting that "[t]he Supreme Court in [*Nobles*] permitted the exclusion of trial preparation materials

[4] The court explained the differences between work product and attorney-client privilege: "The work product doctrine is separate from, and broader than, the attorney-client privilege. Unlike the privilege, the doctrine is not designed to protect client confidences; rather, it seeks to shelter 'the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case.'" *Republican Party of N.C.*, 136 F.R.D. at 429 (citing *Nobles*, 422 U.S. at 238).

when offered in a criminal trial," and that "[o]ne commentator has since concluded that the work product rule, which was originally considered to be an immunity, has been turned into a 'privilege' subject to Rule 501," but also noting that there are authorities to the contrary) (citing 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 5423 (1980); *Airheart v. Chicago & N.W. Transp. Co.*, 128 F.R.D. 669, 670–71 (D.S.D. 1989); *Pete Rinaldi's Fast Foods, Inc. v. Great Am. Ins. Cos.*, 123 F.R.D. 198, 201 (M.D.N.C. 1988));[5] *TJN, Inc. v. Superior Container Corp.* (*In re TJN, Inc.*), No. 94-73386-W, 96-8108, 1997 WL 33343976, at *5 (Bankr. D.S.C. Jan. 22, 1997) (stating that "[t]he application of the *work-product privilege* was created and is governed by Rule 26(b)(3) of the Federal Rules of Civil Procedure," but noting that "'the purpose of the work-product rule 'is not to protect the evidence from disclosure to the outside world, but rather to protect it only from the knowledge of opposing counsel and his client, thereby preventing its use against the lawyer gathering the materials'") (emphasis added) (quoting 8 CHARLES A. WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 2024). Some commentators have also argued in favor of distinguishing between privileges and work product. As one commentator has put it:

> [T]he work-product protection is just that: a protection. It has not yet been fully elevated to the status of a privilege. The protection's primary function is not to protect the interests of any particular individual, plaintiff, defendant, *or* counsel. Rather, it is designed to benefit the adversary system itself and to produce an atmosphere in which counsel for both sides can fully prepare and present their clients' best case without the stifling self-editing that would be necessary if an attorney's work product were subject to unchecked discovery. Challenges to an invocation of work-product protection are best viewed with an understanding that the work-product doctrine

[5] The court did not decide whether "work product" was a privilege that would require the application of state law because it found "no substantial difference between federal and state law on this question." *Cordy*, 156 F.R.D. at 579.

> protects the adversary system. When that system ceases to reap those benefits, the protection is vitiated despite what may best serve individual interests.

Sherman L. Cohn, *The Work-Product Doctrine: Protection, Not Privilege*, 71 GEO. L.J. 917, 943 (1983); *see also* Gregory P. Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 105 (1996) ("Sometimes attorney work-product is casually said to be a Rule 26(b)(1) 'privilege,' but it is more precise to consider it unprivileged matter the discovery of which is governed by Rule 26(b)(3)."") (internal citation omitted).

One context that may shed some light on whether work product has been considered a "privilege" is Federal Rule of Civil Procedure 30(c)(2). Under that rule, "[a] person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)." FED. R. CIV. P. 30(c)(2). Work product has uniformly been recognized as a valid basis for instructing a deponent not to answer under Rule 30, meaning that work product must be a "privilege" in that context. *See Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266–67 (10th Cir. 1995) (finding no abuse of discretion in the district court's sanctions in response to counsel's blanket instruction not to answer a particular line of questioning on the basis of work product because the witness was instructed "not to answer questions which clearly did not call for work product material");[6] *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, No. C-06-01665 PJH (JCS), 2007 WL 1514876, at *2 (N.D. Cal. May 21, 2007) ("During depositions, counsel shall not instruct witnesses not to answer, except on the grounds of

[6] The court did not disapprove of instructing a witness not to answer a deposition question on the basis of work product, just of the blanket instruction that clearly prevented the witness from answering questions that did not call for work product.

attorney/client privilege, work product privilege, the Fifth Amendment of the United States Constitution, beyond the scope of a 30(b)(6) topic for which the witness is designated, or any other applicable privilege that prevents the witness from testifying.");[7] *Biocore Med. Techs., Inc. v. Khosrowshahi*, 181 F.R.D. 660, 670 n.3 (D. Kan. 1998) ("A party can instruct a witness at deposition not to answer a question when necessary to protect the party's work-product privilege.") (citing FED. R. CIV. P. 30(d)(1)),[8] *modified on reconsideration on other grounds*, No. Civ. A. 98-2031-KHV, No. Civ. A. 98-2175-KHV, 1998 WL 919126 (D. Kan. Nov. 6, 1998), and *affirmed sub nom. Butler v. Biocare Med. Techs., Inc.*, 348 F.3d 1163 (10th Cir. 2003); *cf. Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B*, 230 F.R.D. 398, 421 (D. Md. 2005) (district court's discovery guidelines provided that "'[i]t is presumptively improper to instruct a witness not to answer a question during the taking of a deposition unless under the circumstances permitted by FED. R. CIV. P. 30(d)(1),'" and that "'the person asserting the privilege shall identify during the deposition the nature of the privilege (including work product) that is being claimed' as required by FED. R. CIV. P. 26(b)(5)");[9] *Klein v. King*, 132 F.R.D. 525, 531 (N.D. Cal. 1990) (ordering that "[d]uring depositions, counsel may instruct a witness not to answer only on grounds of privilege or work product . . . ," implicitly recognizing that work product is separate from "privilege" but still within the scope of Rule 30's list of permissible reasons to instruct a witness not to answer). The Advisory

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[7] The court was setting forth guidelines for conducting depositions in the case, and was not considering a challenge to an instruction not to answer on the basis of work product.

[8] The court did not consider a challenge to an instruction not to answer on the basis of work product. Instead, the remark about the propriety of such an instruction was a side note to the court's consideration of whether an attorney had violated a local rule by hiring a witness and representing her at her deposition.

[9] The court did not consider a challenge to the propriety of instructing a witness not to answer on the basis of work product in general, but rather whether an instruction not to answer deposition questions on the basis of attorney-client privilege and work product was proper under the circumstances.

Committee's Note from the 1993 amendments to Rule 30 confirm that work product was intended to be included among the permissible reasons for instructing a deponent not to answer. *See* FED. R. CIV. P. 30 Advisory Committee's Note (1993 Amendments) ("The second sentence of new paragraph [(d)](1) prohibits such directions [to a deponent not to answer a question] except in the three circumstances indicated: to claim a privilege or protection against disclosure (e.g., as work product) . . . ."). I did not come across any cases in which a party challenged opposing counsel's ability to instruct a witness not to answer on the basis of work product as a general proposition, as opposed to arguing that the instruction was improper under the circumstances presented. It appears to be generally accepted that work product is a valid basis for instructing a witness not to answer a deposition question under Rule 30, implying that the term "privilege" in that Rule encompasses work product.

Another context for evaluating the meaning of the term "privilege" is Federal Rule of Evidence 501, which provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501. The term "privilege" in this context has almost universally been interpreted to exclude work product. *See, e.g.*, *Baker v. Gen. Motors Corp.*, 209 F.3d 1051, 1059 (8th Cir. 2000) (Heaney, J., dissenting) ("The parties agree that work product doctrine is not a substantive privilege

under Federal Rule of Evidence 501, and therefore is governed by federal law."); *Randleman v. Fidelity Nat'l Title Ins. Co.*, No. 3:06CV7049, 2008 WL 4683297, at *2 (N.D. Ohio Oct. 21, 2008) ("Although questions of evidentiary privilege arising in the context of a state law claim are governed by state law, FED. R. EVID. 501, the work product doctrine, FED. R. CIV. P. 26(b)(3), is not an evidentiary privilege. Consequently, the scope of the work product doctrine is 'unquestionably a matter of federal procedural law even in a diversity action.'")[10] (quoting *Scotts Co. v. Liberty Mut. Ins. Co.*, No. 2:06-CV-899, 2007 WL 1500899, at *3 (S.D. Ohio May 18, 2007)); *Dow Chem. Co. v. Reinhard*, No. 07-12012-BC, 2008 WL 2245007, at *4 (E.D. Mich. May 30, 2008) ("Attorney-client privilege, however, differs from work product privilege. This latter privilege is codified at Federal Rule of Civil Procedure 26(b)(3). As such, Federal Rule of Evidence 501 requires that the federal law of privilege, rather than state law privilege, governs for work product privilege.") (internal citations omitted); *Peacock v. Merrill*, No. CA 05-0377-BH-C, 2008 WL 762103, at *2 (S.D. Ala. Mar. 19, 2008) (finding that federal law was applicable to the work-product issues in the case, and noting that "'[b]ecause the work product doctrine is not considered a substantive privilege, FED. R. EVID. 501 does not require that state law be applied'")[11] (quoting *Shipes v. BIC Corp.*, 154

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[10] The court explained that "[t]he work product doctrine protects the adversarial process and is designed to prevent a potential adversary from gaining an unfair advantage. It reflects a strong public policy 'against invading the privacy of an attorney's course of preparation.'" *Randleman*, 2008 WL 4683297, at *2.

[11] The court quoted another case explaining that work product is not a privilege under Rule 501:

> "While Rule 501, FED. R. EVID.[,] provides that Florida law of *privilege* governs in a federal diversity suit, the work product doctrine is a limitation on discovery in federal cases and federal law provides the primary decisional framework . . . . 'Unlike the attorney client privilege, the work product privilege is governed, even in diversity cases, by a uniform federal standard embodied in FED. R. CIV. P. 26(b)(3) . . . .'"

Peacock, 2008 WL 762103, at *2 (quoting *Milinazzo v. State Farm Ins. Co.*, No. 07-21892-CIV, 2007 WL 4350865, at *6, *8 (S.D. Fla. Dec. 11, 2007)).

F.R.D. 301, 305 n.2 (M.D. Ga. 1994)); *Continental Cas. Co. v. Under Armour, Inc.*, 537 F. Supp. 2d 761, 769 (D. Md. 2008) ("Because the work product doctrine is not a privilege, but rather a qualified immunity from discovery, FED. R. EVID. 501 is inapplicable, and Maryland law does not govern this waiver issue. Rather, federal law does, even though jurisdiction in this case is bottomed on diversity of citizenship.") (footnote omitted) (collecting cases); *Milinazzo v. State Farm Ins. Co.*, 247 F.R.D. 691, 700 (S.D. Fla. 2007) (distinguishing limited case law that had applied state law for work-product issues as involving unique facts, and noting that it had "found no case that generally holds state law governs the work product doctrine in federal court . . ."); [12] *Hunter's Ridge Golf Co. v. Georgia-Pacific Corp.*, 233 F.R.D. 678, 681 n.1 (M.D. Fla. 2006) ("Georgia-Pacific is correct that FED. R. EVID. 501 provides that Florida law of privilege governs in a federal diversity [lawsuit], however, as the work product doctrine is a limitation on discovery, federal law governs.") (citation omitted); *Melhelm v. Meijer, Inc.*, 206 F.R.D. 609, 614–15 (S.D. Ohio Feb. 26, 2002) (holding Rule 501 inapplicable because "[t]he work-product rule is not a privilege but a qualified immunity protecting from discovery documents and tangible things prepared by a party or his representative

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[12] The court explained why federal law governs the work product doctrine:

> "In diversity cases, the federal courts, with uniformity, albeit not with self-evident logical consistency, have concluded that issues of attorney-client privilege are substantive and thus controlled by the forum state's law, while *issues of work-product doctrine are procedural* and thus controlled by federal law. The reason for this bizarre distinction is that Rule 501 of the Federal Rules of Evidence requires that the privilege law of the forum state be applied, but is silent as to what law applies to issues of work-product doctrine, which are governed by Federal Rule of Evidence, codifying a Supreme Court case which created the concept of work-product protection."

Milinazzo, 247 F.R.D. at 700 (emphasis added) (quoting EDNA S. EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 1131–32 (5th ed. 2006)); *see also* EPSTEIN, *supra*, at 804 ("Because work-product protections are predicated on Federal Rule of Civil Procedure 26(b)(3), federal law applies even in diversity cases, even though the law of the state in which the forum sits is applied to attorney-client privilege issues.").

in anticipation of litigation);[13] *Clark v. Buffalo Wire Works Co.*, 190 F.R.D. 93, 95 n.3 (W.D.N.Y. 1999) (disapproving of a party's reliance on state law regarding work product because the case was based on a federal question and because "'the work product doctrine is a device providing qualified immunity from discovery rather than a traditional substantive privilege, [and] [therefore,] Rule 501 of the Federal Rules of Evidence does not require that state law be applied [even in the context of a diversity action]'") (quoting *Fine v. Facet Aerospace Prods. Co.*, 133 F.R.D. 439, 444–45 (S.D.N.Y. 1990)); *In re Combustion, Inc.*, 161 F.R.D. 51, 52 (W.D. La. 1995) ("The rationale underlying the conclusion reached by these courts [that federal law governs the application of the work-product doctrine] is that the work product doctrine is not a substantive privilege within the meaning of Rule 501; instead it is a device providing qualified immunity from discovery"), *aff'd*, 161 F.R.D. 54 (W.D. La. Apr. 18, 1995); *A.O. Smith Corp. v. Lewis, Overbeck & Furman*, No. 90 C 5160, 1991 WL 192200, at *1 (N.D. Ill. Sept. 23, 1991) ("But work product is *not* a 'privilege' within the scope of the portion of that evidentiary rule that calls for reference to state law—it is rather a federal doctrine that stems from *Hickman v. Taylor*, 329 U.S. 495 (1947)[,] and that has now

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[13] The court explained the difference between the attorney-client privilege and the work-product doctrine:

> The work product doctrine covers a much broader swath of material than the attorney-client privilege; it is not directed toward protecting attorney-client communications, for the attorney-client privilege serves that purpose on its own. The work product doctrine is instead concerned with giving an attorney a sense of confidence that he or she will not be required to reveal his or her theory of the case prior to trial. Indeed, Rule 26(b)(3) of the Federal Rules of Civil Procedure provides that generally, documents and tangible items prepared by one party in anticipation of trial may only be obtained by another party upon a showing by the other party that it has a "substantial need" for the materials to prepare its own case and that it would be "unable without undue hardship to obtain the substantial equivalent of the materials by other means."

Melhelm, 206 F.R.D. at 614–15.

been codified in FED. R. CIV. P. 26(b)(3).") (citations omitted);[14] *Pete Rinaldi's Fast Foods, Inc. v. Great Am. Ins. Cos.*, 123 F.R.D. 198, 201 (M.D.N.C. 1988) ("Work product is not a privilege within the meaning of Rule 501 which protects the sanctity of confidential communications. Rather, it is a tool of judicial administration, borne out of concerns over fairness and convenience and designed to safeguard the adversarial system, but not having an intrinsic value in itself outside the litigation arena.") (citations omitted);[15] *Railroad Salvage of Conn., Inc. v. Japan Freight Consolidators (U.S.A.) Inc.*, 97 F.R.D. 37, 41 (E.D.N.Y. 1983) (holding that a work-product claim was governed solely by FED. R. CIV. P. 26(b)(3), rather than by New York state law providing absolute immunity for attorney work product, relying on a previous case that had held that Rule 501 did not require application—in a federal case grounded in diversity jurisdiction—of a different section of the same New York law providing qualified immunity for material prepared for litigation) (citing *Merrin Jewelry Co. v. St. Paul Fire & Marine Ins. Co.*, 49 F.R.D. 54, 56 (S.D.N.Y. 1970));[16] *Niagara*

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[14] The court noted, however, that "[i]t is of course true that the *application* of the work-product doctrine may cause documents to be 'privileged' from disclosure (the locution employed for example, in *United States v. Nobles*, 422 U.S. 225, 239 (1975)), but that is a wholly different matter." *A.O. Smith*, 1991 WL 192200, at *1. The court's reference to *Nobles* may indicate that whether an exemption from disclosure qualifies as a "privilege" is determined by whether the exclusion extends beyond discovery and into trial.

[15] The court concluded that federal courts apply federal law, even in diversity, when considering questions involving work product because "[d]ecisions concerning work product are not governed by Federal [Rule] of Evidence 501 which mandates the application of state law with respect to determination of testimonial or evidentiary privileges in diversity cases." *Pete Rinaldi's Fast Foods*, 123 F.R.D. at 201.

[16] The New York statute at issue provided separately for complete immunity from disclosure for privileged matter (CPLR § 3101(b)) and attorney work product (CPLR § 3101(c)). The New York statute also provided a qualified immunity for material prepared for litigation (CPLR § 3101(d)). The *Railroad Salvage of Connecticut* court noted that "the CPLR itself distinguishes between a true evidentiary privilege (subdivision (b)) and attorney work product (subdivision (c)). If the latter were a privilege, there would obviously be no reason for subdivision (c)." *Railroad Salvage of Conn.*, 97 F.R.D. at 40. The court further explained: "Properly analyzed, it seems clear CPLR 3101(b) refers to the traditional evidentiary privileges (attorney-client, doctor-patient, etc.), while subdivisions (c) and (d) deal with matter as to which there is no evidentiary privilege, but which is nevertheless immune from pretrial discovery." *Id.* The court then determined that "Rule 501 does not apply to attorney work product under CPLR 3101(c), any more than it does to material prepared for litigation under CPLR 3101(d)." *Id.* Thus, the court determined that under Rule 501, work product was not a "privilege."

Mohawk Power Corp. v. Megan-Racine Assocs., Inc., (*In re Megan-Racine Assocs., Inc.*), 189 B.R. 562, 573 n.9 (Bankr. N.D.N.Y. 1995) ("Although there is conflicting authority, the Court does not consider the 'work-product doctrine' a privilege under the federal standards and as such relies on FED. R. CIV. P. 26(b)(3).");[17] *but see Walker Group, Inc. v. First Layer Comms., Inc.*, No. Civ.A04CV02112PSFMJW, Civ. A.03CV01973PSFMJW, 2006 WL 278552, at *7 (D. Colo. Feb. 3, 2006) ("Applying state law to determine whether the attorney-client or attorney work product privilege has been waived (*see* F.R.E. 501), neither North Carolina nor Colorado law appears to recognize either privilege in these circumstances."). In the context of Rule 501, "privilege" has repeatedly been held to exclude work product. Rule 501 may be particularly relevant in shedding light on what was meant by "privilege" in the context of section 2074(b) because Congress passed Rule 501 at the same time that it amended the Enabling Act to preclude the Court from creating, abolishing, or modifying a privilege. To the extent that courts have interpreted Congress's reference in Rule 501 to "privilege" as excluding work product, it seems likely that courts would interpret the term "privilege" in section 2074(b) as excluding work product as well.

In analyzing whether work product is a "privilege" within the scope of Rule 501, some commentators have provided a framework that could be useful for analyzing whether work product is a "privilege" within the scope of section 2074(b). In the FEDERAL PRACTICE AND PROCEDURE treatise, Professors Wright and Graham point out that one "way to decipher the meaning of 'privilege' in Rule 501 is to look at the rules in the Advisory Committee's version of Article V, since these are the rules that Congress rejected in favor of Rule 501." 23 CHARLES A. WRIGHT &

[17] Despite stating that work product is not a "privilege" under Rule 501, the court later called the doctrine a "privilege," stating that "the [work product] privilege only protects information 'against opposing parties, rather than against all others outside a particular confidential relationship.'" *Megan-Racine Assocs.*, 189 B.R. at 574 (citation omitted).

KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5423 (1980). Under this theory, determining what constitutes a "privilege" would be resolved by looking to the specific rules in proposed Article V as well as to rejected Rule 501, which provided a negative definition of "privilege." *Id.* Under Rejected Rule 501, a rule was "one of privilege if it involved a claim or a right to: (1) Refuse to be a witness; or (2) Refuse to disclose any matter; or (3) Refuse to produce any object or writing; or (4) Prevent another from being a witness or disclosing any matter or producing any object or writing." *Id.* Professors Wright & Graham propose that if this method does not resolve the meaning of "privilege," courts are likely to use the method most often used by scholars. *Id.* They point out that Professor McCormick defined a rule of "privilege" as follows: "First, the rule was devised to foster some social policy other than the policy of accurate ascertainment of truth. Second, rules of privilege may properly be asserted by a person who is not a party to the action." *Id.* With respect to work-product, Professors Wright and Graham state:

> [T]he so-called "work product rule" was originally considered to be an immunity from discovery in civil cases rather than a true privilege. In this aspect, the doctrine falls within Civil Rule 26(b)(3). However, recently the Supreme Court [in *Nobles*] has applied the doctrine to exclude trial preparation materials when offered in a criminal trial, a decision which has gone some way toward turning the immunity into a privilege. As such, the "work product" doctrine is within Rule 501.

Id. (footnotes omitted).

Another potential analogy for understanding the meaning of "privilege" in section 2074(b) may be how that same term has been interpreted in the context of Federal Rule of Evidence 1101(c), which provides: "The rule with respect to privileges applies at all stages of all actions, cases, and

proceedings."[18] FED. R. EVID. 1101(c).[19] In one case examining the applicability of work product under Rule 1101(c), the court found that a grand jury witness could resist questioning or a subpoena on the grounds of work product. *See In re Grand Jury Investigation*, 412 F. Supp. 943, 946–47 (E.D. Pa. 1976); *see also In re Grand Jury Subpoena*, 599 F.2d 504, 509 (2d Cir. 1979) ("[E]ven if the work-product rule is not strictly a 'privilege' [under FED. R. EVID. 1101(c)], as applied to interviews with non-party witnesses, the rule has been applied to grand jury proceedings."). The *Grand Jury Investigation* court explained:

> We agree with respondent that work product is a valid ground on which to refuse a grand jury's subpoena or questioning. In *United States v. Nobles*, 422 U.S. 225, 236–40, 95 S. Ct. 2160, 2169, 45 L. Ed. 2d 141, 152–53 (1975), the Supreme Court held that the work product doctrine, first authoritatively enunciated in the context of civil discovery in *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1974), *aff'g* 153 F.2d 212 (3d Cir. 1945) (en banc), also gave rise to a qualified testimonial privilege assertable by a witness in a criminal trial. Under FED. R. EVID. 1101(c), (d)(2), evidentiary privileges also apply in grand jury proceedings. Accordingly, we hold that a grand jury witness may resist questioning or a subpoena on grounds that it calls for the production of work product.

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[18] At least one court has explained that "the 'rule with respect to privileges' referred to in Rule 1101(c) is FED. R. EVID. 501 . . . ." *In re Grand Jury Investigation*, 412. F. Supp. 943, 947 n.3A (E.D. Pa. 1976). However, when the Advisory Committee proposed Rule 1101(c), it may have been referring to all of the rules in proposed Article V of the Evidence Rules, which Congress ultimately chose not to adopt in favor of Rule 501. The preliminary draft of the Rule submitted by the Standing Committee referred to "rules" rather than "rule." *See* Committee on Rules of Practice & Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161, 417 (1969) ("The rules with respect to privileges apply at all stages of all proceedings."); *see also* 31 CHARLES A. WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE & PROCEDURE § 8076 (2000) ("Congress amended "rules" to "rule" for the express purpose of conforming Rule 1101(c) to changes in Article V that reduced the number of privilege rules to one.").

[19] According to the Advisory Committee Note that accompanied the 1972 proposed rule, this rule was necessary because of the limited applicability of the rules other than privilege rules. *See* FED. R. EVID. 1101(c) Advisory Committee's Note (1972 Proposed Rules). Evidence Rule 1101(d) provides that rules other than privilege rules have limited applicability in certain circumstances, including preliminary questions of fact, grand jury proceedings, and miscellaneous proceedings. FED. R. EVID. 1101(d).

In re Grand Jury Investigation, 412 F. Supp. at 946–47 (footnotes omitted).[20] The court explained that work product was essential to proper functioning of the judicial system:

> Justice Murphy, speaking for the majority in *Hickman*, stated that work product was exempt from civil discovery, either absolutely or qualifiedly depending on its nature, 'not because the subject matter is privileged or irrelevant, as those concepts are used in (the Rules of Civil Procedure),' 329 U.S. at 509, 67 S. Ct. 392, 91 L. Ed. at 461, but because:

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[20] While work product has been held to be a "privilege" within the context of Rule 1101(c), other evidentiary rules excluding matters from evidence have not been held to be "privileges" within the context of that Rule. *See* 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 11:4 (3d ed. 2008) (noting that if Federal Rule of Evidence 407, blocking evidence of subsequent remedial measures to prove negligence or culpable conduct, created a privilege, "it would apply during discovery as well as trial," but concluding that "it seems clear that FED. R. EVID. 407 does not create a privilege as the term is used in FED. R. EVID. 1101(c), and evidence of subsequent remedial measures is indeed discoverable") (footnote omitted). The FEDERAL EVIDENCE treatise notes that in addition to Rule 407, "[m]any other provisions similarly create exclusionary principles, but these are not necessarily privileges for purposes of FED. R. EVID. 1101." *Id.* (footnotes omitted). However, according to the treatise, "privileges for purposes of FED. R. EVID. 1101(c) should not mean only those doctrines described by FED. R. EVID. 501, and at least some others should be included." *Id.* The treatise argues that Evidence Rule 410 should be seen as creating a "privilege" that applies in a suppression hearing and motions in limine because "the possibility of using statements against the accused undercut the aim of encouraging plea bargaining, and the fact that FED. R. EVID. 410 is found in Article IV (governing relevance and its limits) should not prevent it from being viewed as a privilege under FED. R. EVID. 1101." *Id.*; *see also* 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FED. EVID. § 11:7, at n.7 (3d ed. 2008) ("Once Congress blocked a change proposed by the Court in the Rules of Evidence (one affecting FED. R. EVID. 410 on withdrawn guilty pleas, nolo pleas, and plea bargaining statements), but the change ultimately took effect and arguably the Court was in that instance amending a privilege rule."); *id.* at § 11:8 (noting that "[t]echnically, the 1975 amendment to FED. R. EVID. 410 did not modify a privilege (it is not in Article V), but that provision operates and looks like a privilege," that "FED. R. EVID. 410 could be read as creating a privilege rule under Fed. R. Evid. 1101(c), which suggests that it should be viewed as a privilege provision under the 1975 statute," and that "[i]f Congress fails to take definitive action on such points, it is hard to imagine other courts disapproving the Court's action in amending FED. R. EVID. 410"). The treatise also argues that "[e]ven if FED. R. EVID. 410 is a privilege under the [Rules Enabling] statute, arguably Congress has approved it in a manner that would satisfy the enabling act," because "[t]he congressional action did not suggest a determination that FED. R. EVID. 410 was a privilege that could only take effect if Congress acted[, b]ut the block-or-delay statute allowed the amendments to take effect, and amounts to at least tacit congressional approval." *Id.* at § 11:8. However, the treatise also recognizes that just because something is considered a "privilege" under Rule 1101(c), that does not necessarily mean it is a privilege in other contexts. *See id.* at § 11:4 ("Other protective doctrines that are not always viewed as creating privileges should probably apply in at least some contexts set out in FED. R. EVID. 1101(d). For instance, the work product doctrine is sometimes viewed as creating a qualified privilege. Under this view, arguably application of the doctrine in contexts like grand jury proceedings is assured by FED. R. EVID. 1101.") (footnotes omitted). Another treatise indicates that the language of Rule 1101(c) and its legislative history support the theory that "quasi-privileges"—rules excluding evidence of settlement negotiations, subsequent remedial measures, liability insurance, etc.—are not privileges under Rule 1101(c), and notes that Rule 1101(c) "implicitly refers to Rule 501," but that it is not clear what constitutes a "privilege" under Rule 501. 31 CHARLES A. WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE & PROCEDURE § 8076 (2000). Another section of the treatise points out that "quasi-privileges" have been treated as rules of relevance, and "for purposes of Rule 501, rules of this sort are not privileges." 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5423 (1980).

> an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties . . . contravenes the public policy underlying the orderly prosecution and defense of legal claims . . . . (T)he general policy against invading the privacy of an attorney's course of preparation is so well recognized and *so essential to an orderly working of our system of legal procedure* that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through subpoena or court order.

In re Grand Jury Investigation, 412 F. Supp. at 946 n.3 (emphasis added) (quoting *Hickman*, 319 U.S. at 510, 512). The *Grand Jury Investigation* court stated that "[i]n holding that the work product doctrine gives rise to a qualified evidentiary privilege, the *Nobles* majority did not overrule *Hickman*'s position that work product is not itself a privilege when asserted in civil discovery." *Id.* (citing FED. R. CIV. P. 26(b)(3)). The *Grand Jury Investigation* court's analysis of *Hickman* and *Nobles* implies that work product is an immunity (and not a privilege) when asserted in discovery, but that it transforms into an evidentiary privilege when used to preclude testimony at trial. Under this analysis, the proposed amendments to Rule 26 do not create or modify a privilege because the Rule's text only refers to protecting draft reports and attorney-expert communications from discovery. Although the committee note expresses an expectation that the protection will be respected at trial as well, the Rule does not itself command that result, and whether the cases will provide protection at trial will not be certain until the Rule is enacted and case law develops regarding protecting such drafts and communications at trial. If the case law does develop to protect such communications and drafts at trial, that development will not contravene the Enabling Act procedure, but will be developed by "common law as . . . interpreted by the courts of the United

States in the light of reason and experience," as Congress contemplated with its enactment of Rule 501. *See In re Grand Jury Investigation*, 412 F. Supp. at 947 n.3A ("We believe that *Nobles* is an 'interpret(ation)' of 'the principles of the common law' within the meaning of Rule 501, insofar as that opinion articulated a privilege analysis of work product in the criminal context."). Although the Professor Letter argues that the amendment will not accomplish its goals unless inquiry into drafts and communications is barred at trial as well, that does not mean that the amendments bar inquiry at trial. To the extent that barring inquiry at trial is the test of whether an exclusion from discovery is a "privilege," the proposed Rule leaves for common law development whether its protections will apply at trial. While it is probably true that the Rule will not completely eliminate the undesirable behavior if its protections are not extended to trial, that does not necessarily mean that the Rule itself extends the protections to trial. The Advisory Committee determined that providing an exclusion from discovery for drafts and attorney-expert communications would be a substantial step towards eliminating the artificial behaviors prevalent under the current regime.

One other context that may provide a potential analogy for the determination of whether work product is a "privilege" under section 2074(b) involves the Indian Mineral Development Act (IMDA). In *Jicarilla Apache Nation v. United States*, 60 Fed. Cl. 611 (2004), the court analyzed the meaning of the term "privilege" in the context of the IMDA. The IMDA, which "'governs the Secretary's approval of agreements for the development of certain Indian mineral resources through exploration and like activities,'" *id.* at 612 (quoting *United States v. Navajo Nation*, 537 U.S. 488, 509 (2003)), requires the Department of the Interior to keep certain information regarding the terms and conditions of mineral agreements as "*privileged proprietary information* of the affected Indian or Indian tribe," *id.* (quoting 25 U.S.C. § 2103(c) (2000) (emphasis added by *Jicarilla* court)). The

defendant in *Jicarilla* argued that the phrase "privileged proprietary information" meant that such information was exempt from discovery. *Id.* The court rejected the defendant's assertion, finding that "the IMDA was not intended to create an evidentiary privilege that would remove the information protected thereby from the reach of discovery." *Id.* The court looked at the common usage of the term "privileged," and found that "something is 'privileged' if it '[e]njoy[s] a privilege,' and a 'privilege' is merely a 'special advantage, immunity, permission, right or benefit granted to or enjoyed by an individual class or caste.'" *Id.* (quoting THE AMERICAN HERITAGE DICTIONARY OF ENGLISH LANGUAGE 1396 (4th ed. 2000)). The court concluded that "while the use of the term 'privilege' suggests that Congress intended the IMDA information to benefit from some special rule or protection, it neither specifically defines that rule or protection nor, especially, indicates that the protection extends to preventing disclosure by way of discovery." *Jicarilla*, 60 Fed. Cl. at 612 (citation omitted). The court also found that "the language of section 2103(c) plainly lacks the clear direction that the Supreme Court has required, and the Congress, in other contexts, has supplied, to create an exception to discovery." *Id.* at 613. The court found that the legislative history revealed that the provision was included in the statute to exempt such information from disclosure requirements under the Freedom of Information Act. *Id.* (citations omitted). The court later implied that work product is a "privilege," stating that it was "bothered by defendant's apparent belief that the discovery privilege allegedly embodied by section 2103(c) is absolute, rather than qualified," and comparing "other well-established privileges" that "may be overcome on a showing of strong need." *Id.* at 614 n.3 (citing *Hickman*, 329 U.S. at 510–12, as involving the "work product privilege"). The *Jicarilla* decision at least shows that the term "privilege" has different meanings in different statutory contexts. In the IMDA, "privileged" did not mean exempt from discovery or from disclosure at trial,

but simply meant exempt from disclosure under FOIA.

In sum, the case law is not clear as to whether work product is a "privilege." Although some cases have referred to the protection as a "privilege," it is not clear that those cases do so with any substantive meaning. Work product has also been considered a "privilege" within the scope of Federal Rule of Civil Procedure 30(c) and within the scope of Federal Rule of Evidence 1101(c). But work product generally has not been considered a "privilege" within the scope of Rule 501, an analogy that may be particularly relevant in terms of determining the meaning of "privilege" under section 2074(b) because both Rule 501 and the amendment to the Enabling Act regarding rules of privilege were enacted as part of Congress's consideration of the proposed Rules of Evidence, making it more likely that the term was used consistently between the Rule and the Act. In addition, Congress drafted Rule 501 rather than passing the privilege rules proposed by the Advisory Committee, whereas Civil Rule 30 and Evidence Rule 1101(c) were drafted by the Advisory Committee.

III. Cases Citing Section 2074(b)

I have also reviewed case law citing section 2074(b) (and the similar language previously found in section 2076). None of the cases citing the relevant portions of the statute in either its prior or current form specifically address a challenge to a federal civil rule asserting a violation of the Enabling Act procedure that requires congressional approval of privilege rules. Since the provision was embodied in section 2074(b) in 1988, it has only been cited four times, and only one of those cases involved a challenge to a rule. In *Baylson v. Disciplinary Board of the Supreme Court of Pennsylvania*, 764 F. Supp. 328 (E.D. Pa. 1991), *aff'd*, 975 F.2d 102 (3d Cir. 1992), the court considered a challenge to a Pennsylvania state disciplinary rule. Pennsylvania Disciplinary Rule 3.10

provided that a prosecutor could not subpoena an attorney to appear before a grand jury or other tribunal investigating criminal activity if the prosecutor sought to compel the attorney to provide evidence concerning a client of the attorney, unless the prosecutor obtained prior judicial approval. *Baylson*, 764 F. Supp. at 331. Before the state court enacted Rule 3.10, the federal district courts in Pennsylvania had adopted the Pennsylvania Disciplinary Rules through their own local rules. *See id.* at 331. After Rule 3.10 was enacted, the federal district courts amended their local rules to opt out of that particular disciplinary rule. *Id.* at 331–32. The plaintiffs brought the lawsuit to prevent the state Disciplinary Board from enforcing Rule 3.10 against them and other federal prosecutors who were members of the Pennsylvania state bar. *Id.* at 332. The district court concluded that the amendments to the local rules that excluded Rule 3.10 from the disciplinary rules adopted by the local federal rules were invalid because of insufficient public notice. *See id.* at 335–36. The court then found that because the amendments exempting Rule 3.10 from the local rules were invalid, Rule 3.10 would ordinarily apply in the federal district courts. *Id.* at 336. However, the court concluded that the local rules implicitly rejected absorption of Rule 3.10 and that Rule 3.10 was not compatible with the Federal Rules of Criminal Procedure or federal grand-jury practice. *Id.* at 336–37. In finding that the district courts could not have adopted Rule 3.10, the court noted that "if the district courts have adopted Rule 3.10, then they have conferred on attorneys not only a protection that exceeds the bounds of recognized privileges, but also one that constitutes an almost impregnable immunity from ever testifying or producing documentary evidence regarding their clients." *Baylson*, 764 F. Supp. at 344. The court found that "Rule 3.10 . . . converts the confidentiality rule [to safeguard client secrets] into a legal mandate, that is, a privilege, because it requires the court to withhold altogether approval of a subpoena directed to an attorney if the information sought

'relate[s] to representation of [the attorney's] client,' unless the client consents after consultation or unless one of four exceptions is applicable." *Id.* The court concluded: "Apart from simply prohibiting the issuance or service of subpoenas directed to attorneys under all circumstances, it would be difficult indeed to invest another linguistic formulation that so grossly distorts current notions of evidentiary privilege and is so profoundly inimical to the traditional configuration of grand jury authority." *Id.* at 345. The court also found that Rule 3.10 could not be adopted by local rule because "[e]ven if one could harmonize the 'new and expanded' attorney-client privilege created by Rule 3.10 with the scope of the grand jury's powers, it is a modification that most assuredly cannot be engineered by local rule," noting that while "[r]easonable minds may disagree about the exact contours of district court rulemaking authority, . . . there is no question that the lower federal courts cannot alter or enhance privileges in that manner." *Id.* (internal citation omitted). The court explained: "Even Federal Rules touching upon those matters are not valid without Congress's blessing. As 28 U.S.C. § 2074(b) clearly prescribes, 'Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.'" *Id.* (citations omitted). The court held:

> Rule [3.10] cannot be fairly understood to have been integrated into the local rules of the district courts. It distorts evidentiary privileges, disrupts existing subpoena practice, and compromises the authority and function of the modern grand jury. In consequence, Rule 3.10 is without vitality in the district courts of Pennsylvania, and the state may not sanction prosecutors who fail to adhere to it when they are working in those fora.

Id. at 349. The Third Circuit affirmed, but did "not find it necessary to rest [its] decision on any of the broad grounds announced by the district court," and thought "it suffice[d] to hold that Rule 3.10 is invalid because its adoption as federal law falls outside the local rule-making authority of the

federal district courts [because it is inconsistent with FED. R. CRIM. P. 17 and goes beyond "matters of detail" permissibly regulated by local rules under FED. R. CRIM. P. 57], and its enforcement as state law violates the Supremacy Clause of the United States Constitution [because it is incompatible with FED. R. CRIM. P. 17]." *Baylson v. Disciplinary Bd. of the Supreme Court of Pa.*, 975 F.2d 102, 106–07 (3d Cir. 1992).

The district court in *Baylson* found that federal local rules could not adopt Rule 3.10 because it was inconsistent with a federal criminal rule and federal grand jury practice, and noted that it would also go beyond even what the national federal rules were permitted to do without express congressional approval because it expanded a privilege. While *Baylson* did not expressly consider a challenge to a federal rule of procedure, it at least provides an example of a rule that, if proposed as a Federal Rule of Civil Procedure, would expand a privilege and require congressional action to be effective. While it is relatively clear that creating an additional shield for attorney-client communications would be a modification of a privilege, it does not necessarily follow that modification of work-product protection in proposed Rule 26 for drafts and attorney-expert communications is also a modification of a privilege.

The other cases citing section 2074(b) do not address challenges to particular rules. For example, in *In re Grand Jury*, 103 F.3d 1140, 1155–56 (3d Cir. 1997), the court refused to adopt a parent-child privilege for many reasons, one of which was that the court felt that section 2074(b) showed that Congress was the better body to create new privileges. The court stated: "Although we have the authority to recognize a new privilege, we believe the recognition of such a privilege, if one is to be recognized, should be left to Congress." *Id.* at 1147. The court found that "[t]he legislature, not the judiciary, is institutionally better equipped to perform the balancing of the competing policy

issues required in deciding whether the recognition of a parent-child privilege is in the best interests of society," and that "Congress, through its legislative mechanisms, is also better suited for the task of defining the scope of any prospective privilege." *Id.* at 1154. In another case—*Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 258 n.5 (D. Md. 2008)—the court only mentioned section 2074(b) in a footnote in which it discussed the amendments to the Rules of Civil Procedure relating to electronically stored information, and noted that those rules could not have created a privilege. The *Victor Stanley* court analyzed waiver of any attorney-client privilege or work-product protection that had attached to electronically stored information that had been voluntarily produced. The court noted that the Civil Rules Advisory Committee had acknowledged the challenges presented by privilege review of electronically stored information, but the court explained that "[n]otwithstanding this recognition [by the Advisory Committee], however, the recently adopted rules of civil procedure relating to ESI do not effect any change in the substantive law of privilege waiver . . . because the Rules Enabling Act precludes creation or abrogation of any privilege by ordinary rule making." *Victor Stanley*, 250 F.R.D. at 258 n.5 (citing 28 U.S.C. § 2074(b)). Finally, in *Rhoads Industries, Inc. v. Building Materials Corp. of America*, --- F.R.D. ---, No. 07-4756, 2008 WL 4916026, at *1 n.1 (E.D. Pa. Nov. 14, 2008), the court analyzed claims of privilege waiver and cited to section 2074(b) as the authority for the enactment of Evidence Rule 502. These additional cases citing section 2074(b) did not involve an analysis of the meaning of "privilege" in that statute or a challenge to a rule under the Enabling Act procedure.

Several cases discuss the limitation on rules involving privileges set forth in section 2076, prior to that restriction being moved to section 2074(b). In *United States v. Klubock*, 832 F.2d 664 (1st Cir. 1987) (en banc) (per curiam), the court faced a challenge similar to that addressed by the

court in *Baylson*. In *Klubock*, federal prosecutors brought a declaratory judgment action to prevent enforcement of a Massachusetts ethical rule that prohibited prosecutors from subpoenaing an attorney to give evidence to the grand jury about the attorney's client without prior judicial approval. The federal district court in Massachusetts thereafter adopted that Massachusetts ethical rule as a local rule of the district court. The original panel opinion found that the district's local rule was valid, holding that the rule did not violate the Supremacy Clause because of an alleged conflict with the Federal Rules of Criminal Procedure and federal substantive law, and that the local rule did not exceed the district court's rule-making powers. *See United States v. Klubock*, 832 F.2d 649, 651–53, 656 (1st Cir. 1987). On rehearing en banc, the court vacated the panel's previous opinion, and the district court's opinion upholding the local rule was affirmed by an equally divided court. *See Klubock*, 832 F.2d 664, 667–68 (1st Cir. 1987). In dissent, Chief Judge Campbell argued that "the rule is most akin to an expanded rule of attorney-client privilege, placing a new and significant limitation upon a grand jury's power to seek information from certain attorneys." *Id.* at 669 (Campbell, J., dissenting en banc). Judge Campbell asserted that "it [was] difficult to imagine how [disciplinary rule] PF 15 [could] operate meaningfully except as a substantive modification of the existing rules both of grand jury power and attorney-client privilege." *Id.* at 670 (footnote omitted). Judge Campbell noted: "To the extent that PF 15 effects substantive change in the law of the attorney-client privilege, it is arguably beyond even the Supreme Court's rule-making power." *Id.* at 670 n.5 (citing FED. R. EVID. 501; 28 U.S.C. § 2076 (1982) ("providing a 'fast track' method for congressional ratification of Supreme Court amendments to the Federal Rules of Evidence, save '[a]ny such amendment creating, abolishing, or modifying a privilege,' which can only be adopted by a full-blown act of Congress")). Judge Campbell concluded that the local rule "clearly involve[d]

the creation of new substantive privilege law of very significant consequence," and that it was "not the sort of matter of detail a single district court is empowered to legislate under its local rule-making authority." *Id.* at 671. Like *Baylson*, the dissent in *Klubock* recognized a limitation on local rulemaking, noting that if the Federal Rules cannot modify a privilege without express congressional approval, then the local rules cannot do so either. However, also like *Baylson*, the dissent in *Klubock* does not resolve whether the proposed amendments to Rule 26 violate section 2074(b) because the rule at issue in *Klubock* related to the attorney-client privilege, while the proposed amendments to Rule 26 do not address a clearly defined privilege.

In *State v. Knee*, 616 P.2d 263 (Idaho 1980), the court analyzed the validity of a state court rule that allowed a defendant to be impeached by use of a prior felony conviction. The defendant challenged the rule as being an evidentiary rule that modified the substantive right to a fair and impartial jury, in violation of an Idaho statute providing that court rules "shall neither abridge, enlarge nor modify the substantive rights of any litigant." *Id.* at 264. The majority found the rule valid, noting that "[r]ules of evidence have been generally regarded as procedural in nature . . . ." *Id.* (citations omitted). The majority did not address any analogy to the limitation on adoption of privilege rules in 28 U.S.C. § 2076, but the dissent pointed to that provision and noted that in the legislative debates, it had been argued that privilege rules are substantive.[21]

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[21] The dissent argued that the rule at issue was more substantive than procedural in nature:

> A rule which allows your adversary to keep one of your witnesses off the stand can only be a rule of substantive law. A rule which prescribes only the time and manner of raising the objection to your witness testifying is procedural. A rule which allows your adversary to destroy the credibility of your best witness is a rule of substantive law. A rule which would state when and how it may be done is procedural. Although in some instances the distinctions might be blurred, any rule which keeps a witness off the stand, or allows his testimony to be collaterally discredited, for felony conviction, affects his substantive rights—no matter what the procedure which brings about that result.

The other cases discussing the limitation on privilege rules in former section 2076 do not address specific challenges to rules, but instead cite the provision as a side note. For example, in *Trammel v. United States*, 445 U.S. 40, 53 (1980), the Court modified the rule stated in *Hawkins v. United States*, 358 U.S. 74 (1958), barring the testimony of one spouse against the other unless both spouses consent, to give the witness-spouse alone the privilege to refuse to testify against his or her spouse. The Court rejected the petitioner's reliance on section 2076 for the proposition that the Court lacked power to reconsider *Hawkins* because "[t]hat provision limits this Court's *statutory* rulemaking authority by providing that rules 'creating, abolishing, or modifying a privilege shall have no force or effect unless . . . approved by act of Congress.'" *Trammel*, 445 U.S. at 47 n.8. The Court explained: "It [the privilege rules limitation in section 2076] was enacted principally to insure that state rules of privilege would apply in diversity jurisdiction cases unless Congress authorized otherwise. In Rule 501 Congress makes clear that § 2076 was not intended to prevent the federal courts from developing *testimonial privilege law* in federal criminal cases on a case-by-case basis 'in light of reason and experience'; indeed Congress encouraged such development." *Id.* (emphasis added). As another example, in *Gubiensio-Ortiz v. Kanahele*, 857 F.2d 1245 (9th Cir. 1988),

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Knee, 616 P.2d at 269 (Bistline, J., dissenting). The dissent argued that the U.S. Supreme Court had never recognized an "inherent" right to promulgate rules of evidence, and that the Federal Rules of Evidence were adopted by Congress. *Id.* The dissent also noted that the portion of the bill to adopt the Federal Rules of Evidence originally would have modified 28 U.S.C. § 2076 to allow the Supreme Court to change the rules subject only to congressional veto, but Representative Holtzman had criticized that provision by arguing that rules of privilege are substantive and that the proposed process would have been unconstitutional. *Id.* at 269 n.3. The dissent concluded that the court had the power to adopt only rules of procedure, and explained: "Procedure determines the manner in which a case moves through the courts. Rules which structure the order of appearance of parties, designate times for filing and dictate the manner in which arguments and motions are to be presented are procedural rules and clearly within the power of this Court to adopt." *Id.* at 270 (citations omitted). The dissent's reference to section 2076's limitation on rules involving privilege does not clarify the meaning of "privilege" in that statute, but the dissent does provide some points of reference that might be used for distinguishing between rules of substance and rules of procedure. Under the dissent's analysis, work-product protection could arguably be characterized as falling into either category because it does more than simply regulate the manner in which matters are presented to the court, but does not strictly keep a witness of the stand.

vacated, *United States v. Chavez-Sanchez*, 488 U.S. 1036 (1989), the Ninth Circuit analyzed the constitutionality of the Sentencing Reform Act of 1984, which created the United States Sentencing Commission and authorized the Commission to promulgate sentencing guidelines. The Ninth Circuit found it problematic that federal judges were appointed to serve on the Commission because their service was an unconstitutional delegation of power to the judiciary. *Id.* at 1254–60. The court recognized that federal judges have very limited authority over matters that are not "cases or controversies," and cited the authority to promulgate rules of procedure as an example. *See id.* at 1252–53. The court pointed to the adoption of the Federal Rules of Evidence as an example of the distinction between rules of procedure and substance. *Id.* at 1253. The court noted that "[u]nlike other rules of evidence, rules of privilege 'are not designed or intended to facilitate the fact-finding process or to safeguard its integrity,' but rather are intended to further public policies and protect primary conduct extrinsic to the judicial process." *Id.* (citing KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 72, at 171 (3d ed. 1984)). The court pointed out that during congressional debates on the Rules of Evidence, it was argued that rules of privilege affect the rights of individual citizens and that such rules are substantive. *Id.* (citations and footnotes omitted). The court then noted that after Congress deleted the Court's proposed privilege rules and substituted Rule 501, it "permanently constrain[ed] judicial authority in this area" by adding the limitation on privilege rules in section 2076. *Gubiensio-Ortiz*, 857 F.2d at 1253. The court noted that the provision in section 2076 was added in the House by an amendment proposed by Representative Holtzman, "who argued that because rules of privilege 'involve extraordinarily important social objectives' and 'are truly legislative in nature,' 120 CONG. REC. 2391 (1974), judicial promulgation of such rules was unconstitutional: 'The Supreme Court is not given the power under Article III of the Constitution

to legislate rules on substantive matters. It can pass such judgments only in the context of a particular case or controversy.'" *Id.* at 1253–54 (citing H.R. Rep. No. 650, 93rd Cong., 1st Sess. (1973), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7075, 7098). The court found the sentencing guidelines unconstitutional, but that decision was vacated by the Supreme Court in light of *Mistretta v. United States*, 488 U.S. 361 (1989), which had held that the sentencing guidelines were constitutional.

In sum, none of the cases discussing the limitation on modification of privilege rules addresses a direct challenge to a federal rule of procedure. A tangential issue involves whether the 1993 amendments to Rule 26, which included allowing for broad discovery of expert materials and requiring parties to expressly claim privilege or work product or potentially face waiver of the privilege or protection, constituted abrogation or modification of a privilege. According to one of the submitted comments, the argument in the Professor Letter that the amendments violate the Enabling Act "proves too much" because "[i]f returning the state of discovery to essentially where it was prior to the enactment of the 1993 amendment to Rule 26 [violates the Enabling Act], then the academics' argument actually proves that the current rule (which is the 1993 amendment to Rule 26) violated the Rules Enabling Act . . . ." Letter from Gregory P. Joseph, Gregory P. Joseph Law Offices LLC, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Nov. 15, 2008) (*available at* http://www.uscourts.gov/rules/2008_Civil_Rules_Comments_Chart.htm (follow 08-CV-055 hyperlink)). If the changes made in 1993 had provoked criticism that they violated the Enabling Act, discussion or resolution of such criticism might be useful in determining whether the current

proposed change might constitute a violation.[22] However, it does not appear that anyone has litigated whether the 1993 amendments contravened the Enabling Act procedure. *See* Gregory P. Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 106 (1996) ("If core work-product is an 'evidentiary privilege,' and if mandating the waiver of this 'evidentiary privilege' constitutes 'abolishing or modifying' it, § 2074(b) has to that extent been contravened and Rule 26(a)(2)(B) is to that extent invalid. Because § 2074(b) has not been construed, the meaning of these operative phrases is not settled."); *see also* 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FED. EVID. § 11:7 (3d ed. 2008) ("The Court has never proposed a Rules change dealing with privileges, although a privilege waiver provision [FED. R. EVID. 502] was under consideration in a committee of the Judicial Conference in 2007.") (footnote omitted).

IV. Conclusion

Overall, the legislative history and the case law do not support the theory that the proposed amendments to Rule 26 violate the Enabling Act procedure. The legislative history does not indicate that Congress was thinking of work product or any similar protection when it enacted the restriction on the court's power to modify privilege rules. The case law analyzing whether work product is a

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[22] If the 1993 amendments did constitute a violation of the Enabling Act, it is unclear what that would mean for the present amendments. On the one hand, it could be argued that the Enabling Act procedure would not be contravened by returning discovery to its pre-1993 state because the amendments would undo the alleged violation that occurred through the 1993 amendments. On the other hand, it could be argued that if the 1993 amendments violated the Enabling Act, then any further changes to the "privilege" in Rule 26 would also violate the Act, even if those changes were simply returning the "privilege" to its state before the first "violation." As Mr. Joseph notes, any potential Enabling Act issue with the 1993 amendments "was never the subject of a reported decision (it does not appear that it was every litigated)." Gregory P. Joseph, Proposed Expert Witness Rule Amendments, at 6 (2008) (available at http://www.uscourts.gov/rules/2008_Civil_Rules_Comments_Chart.htm (follow 08-CV-055 hyperlink)). Mr. Joseph notes several possibilities: "Perhaps work product protection is not 'an evidentiary privilege.' Perhaps the Rules are simply reverting to the pre-1993 legal landscape. Perhaps it is simply a deferral to the common law. Perhaps this provision, too, will never be litigated." *Id.*

"privilege" varies depending on context, but most cases do not consider it a "privilege" under Federal Rule of Evidence 501, a fact that weighs heavily in favor of finding that work product is not a "privilege" under section 2074(b) because, like section 2074(b), Rule 501 was expressly enacted and drafted by Congress (as opposed to passed through the Enabling Act's congressional veto procedure for passage of rules other than privilege rules), because Rule 501 was enacted and considered together with the privilege restriction in former section 2076, and because Rule 501 also deals with limits that Congress imposed with respect to the role of federal courts in privilege issues. The case law interpreting former section 2076 and section 2074(b) is not conclusive on the meaning of "privilege" in the statute because it does not appear that anyone has ever litigated whether a rule has been enacted in violation of these provisions, but the fact that no one has ever litigated the validity of the 1993 amendments to Rule 26 makes it less likely that the current proposed changes to that Rule, which essentially undo the 1993 amendments, will be interpreted to create an Enabling Act problem. *See* 5 FED. EVID. § 11:7 ("If the Court promulgates a rule that takes effect when Congress fails to intervene, it is at least doubtful that either the Supreme Court or another court will find the Rule invalid because it is a privilege that Congress did not endorse by statute."). To the extent the case law indicates that a "privilege" is a complete exclusion from disclosure and/or that it is a protection that extends to trial, the proposed amendments do not modify a privilege because they only create qualified exclusion from discovery. To the extent that the case law and legislative history indicate that a "privilege" encompasses a policy decision to protect certain confidential relationships, and that a "privilege" is a rule that affects the behavior of all citizens (not just those in litigation), the proposed amendments do not modify a privilege because they only impose a limitation on discovery intended to reduce costs imposed on parties in litigation and to allow litigants

to more effectively prepare for trial.

TAB

COPY OF PROPOSED AMENDMENTS TO RULE 56
SET OUT IN
REQUEST FOR COMMENT PAMPHLET

MEMORANDUM

DATE: February 19, 2008

TO: Judge Mark Kravitz

FROM: Andrea Thomson

CC: Judge Lee H. Rosenthal
Judge Michael Baylson
Professor Edward Cooper

SUBJECT: Discretion to Deny Summary Judgment

This memorandum addresses research regarding FED. R. CIV. P. 56 and whether there is a circuit split regarding discretion to deny a motion for summary judgment when the movant meets the requisite standard in Rule 56.

A law review article from 2002 evaluated some of the case law on this issue. *See* Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91 (2002). In the article, the authors state that "the notion of judicial discretion to deny an otherwise appropriate summary judgment motion has been evidenced in judicial opinion since the earliest decisions regarding summary judgment under the Federal Rules." *Id.* at 96. The article notes that federal courts are split over whether judges are required to grant summary judgment if it is technically appropriate. *Id.* at 104. According to the article, "[t]he majority of federal courts have held that judges have discretion to deny a motion for summary judgment, even if the parties' submissions would justify granting the motion. The First, Fourth, Fifth, Eighth, and Federal Circuits have each adopted this view. Moreover, various district courts in these and other circuits also have accepted this position." *Id.*

I. *Anderson v. Liberty Lobby, Inc.*

The confusion about the discretion to deny summary judgment may stem from a key Supreme Court case regarding summary judgment, in which the Court used conflicting language to describe the discretion given to trial court judges in considering motions for summary judgment. *See generally Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In parts of the majority's opinion, the Court implied that there is little or no discretion to deny a motion for summary judgment if the movant has met his burden. For example, the Court stated that "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248 (citing 10A C. WRIGHT, A. MILLER, & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2725, pp. 93–95 (1983)). This language implies that a district court may not deny a properly supported summary judgment motion unless the court finds a material factual dispute. The Court also noted that "Rule 56(e)'s provision that a party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253 (1968)) (additional internal quotation marks omitted). Further, the Court found that after the opponent to a motion for summary judgment sets forth facts showing that there is a genuine issue for trial, "the trial judge shall then grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law." *Id.* at 250. The Court analogized to a motion for directed verdict in the criminal context, noting with approval that it has been held that upon a motion for directed verdict of acquittal, if the judge "'concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or to

state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted.'" *Id.* at 253 (quoting *Curley v. United States*, 160 F.2d 229, 232–33 (D.C. Cir. 1947)). All of this language taken together seems to imply that a district court does not have discretion to deny a motion for summary judgment if the requisite standard is met—the judge must grant the motion upon the proper showing by the movant.[1]

However, the *Anderson* Court later suggested just the opposite: "Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial." *Id.* at 255 (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948)). Indeed, *Anderson* has been cited both for the proposition that district courts have discretion to deny summary judgment, *see, e.g.*, *United States v. Certain Real Estate and Personal Prop. Belonging to Hayes*, 943 F.2d 1292, 1297 (11th Cir. 1991), as well as for the proposition that they do not, *see Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994) (per curiam), *aff'd on other grounds*, 515 U.S. 304 (1995). Thus, there is language in some cases showing potential disagreement as to whether there is discretion to deny a well-supported motion for summary judgment. The arguably conflicting language regarding discretion to deny summary judgment is discussed in more detail below. Overall, it may be that the circuits are generally in agreement that

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[1] The language implying a lack of discretion to deny a motion for summary judgment is consistent with statements made by the Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), decided the same day as *Anderson*. *See* Friedenthal et al., 31 HOFSTRA L. REV. at 101–02. In *Celotex*, the Court stated: "'[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Id.* at 102 (quoting *Celotex*, 477 U.S. at 322). In Friedenthal's article, the authors note that after *Celotex*, "[t]he Court's apparent position limiting judicial discretion would thus seem crystal clear were it not for another case in the trilogy, *Anderson v. Liberty Lobby Inc.*, decided on the same day as *Celotex*, that included language completely contrary to that quoted above." *Id.*

a court should grant a summary judgment motion if the movant has met his burden, but that there are some rare instances in which it would be appropriate for the court to deny even a well-supported motion.

II. Cases Recognizing Discretion to Deny Motions for Summary Judgment

A. Circuit Court Opinions

Most of the circuits examining this issue have concluded that there is discretion to deny summary judgment.[2] *See, e.g.*, *NMT Med., Inc. v. Cardia, Inc.*, No. 2006-1645, 2007 WL 1655232, at *6 (Fed. Cir. June 6, 2007) (unpublished) ("This court defers to the district court's denial of summary judgment.") (citing *SunTiger, Inc. v. Sci. Research Funding Group*, 189 F.3d 1327, 1333 (Fed. Cir. 1999)); *Lind v. United Parcel Serv., Inc.*, 254 F.3d 1281, 1285–86 (11th Cir. 2001) (holding that denial of a motion for summary judgment is not reviewable after a trial on the merits, and noting that the Supreme Court has held that "'even in the absence of a factual dispute, a district court has the power to 'deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.'"') (quoting *Black v. J.I. Case Co.*, 22 F.3d 568, 572 (5th Cir. 1994) (quoting *Anderson*, 447 U.S. at 255), and citing *United States v. Certain Real and Personal Prop. Belonging to Hayes*, 943 F.2d 1292 (11th Cir. 1991)); *Kunin v. Feofanov*, 69 F.3d 59, 62 (5th Cir. 1995) (per curiam) (affirming the district court's opinion, which stated: "even if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that 'a better course would be to proceed to a full trial.'") (quoting *Anderson*, 477 U.S. at

[2] Many of the circuits have issued opinions that state in their boilerplate language regarding the legal standards for analyzing summary judgment motions that the motion must be granted upon the proper showing. However, in cases where the discretion issue truly arises and is substantively evaluated, such as where a circuit court is reviewing a district court's denial of a summary judgment motion, most circuits have leaned towards finding that there is discretion to deny.

255–56); *United States v. Certain Real and Personal Prop. Belonging to Hayes*, 943 F.2d 1292, 1297 (11th Cir. 1991) ("A trial court is permitted, in its discretion, to deny even a well-supported motion for summary judgment, if it believes the case would benefit from a full hearing. Trial courts may 'deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.' A trial court's discretion to *deny* summary judgment is reviewed only for an abuse of discretion.") (internal citations omitted); *Veillon v. Exploration Servs., Inc.*, 876 F.2d 1197, 1200 (5th Cir. 1989) (finding no error in refusal to grant a motion for summary judgment because "[a] district judge has discretion to deny a Rule 56 motion even if the movant otherwise successfully carries its burden of proof if the judge has doubt as to the wisdom of terminating the case before a full trial.") (citing *Marcus v. St. Paul Fire and Marine Ins. Co.*, 651 F.2d 379, 382 (5th Cir. 1981); C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2728 (1983)); *Franklin v. Lockhart*, 769 F.2d 509, 510 (8th Cir. 1985) ("This Court has previously noted that even if the district court 'is convinced that the moving party is entitled to [summary] judgment the exercise of sound discretion may dictate that the motion should be *denied*, and the case fully developed.'") (quoting *McLain v. Meier*, 612 F.2d 349, 356 (8th Cir. 1979)); *Forest Hills Early Learning Ctr., Inc. v. Lukhard*, 728 F.2d 230, 245 (4th Cir. 1984) ("Even where summary judgment is appropriate on the record so far made in a case, a court may properly decline, for a variety of reasons, to grant it. We think this is such a case . . . .") (citing 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2728 (1983)); *Marcus v. St. Paul Fire and Marine Ins. Co.*, 651 F.2d 379, 382 (5th Cir. 1981) ("Even if St. Paul were entitled to summary judgment, the sound exercise of judicial discretion dictates that the motion should be denied to give the parties an opportunity to fully develop the case. This is particularly true in light of the posture

of the entire litigation. A district court can perform this 'negative discretionary function' and deny a Rule 56 motion that may be justifiable under the rule, if policy considerations counsel caution.") (citing *McLain v. Meier*, 612 F.2d 349, 356 (8th Cir. 1979), *after remand*, 637 F.2d 1159 (8th Cir. 1980)); *McLain v. Meier*, 612 F.2d 349, 356 (8th Cir. 1979) ("The court has no discretion to Grant a motion for summary judgment, but even if the court is convinced that the moving party is entitled to such a judgment the exercise of sound judicial discretion may dictate that the motion should be Denied, and the case fully developed.").

In addition, several circuit courts have explained that an order denying a motion for summary judgment is reviewed only for abuse of discretion, implying approval of the proposition that a district court has discretion to deny a motion for summary judgment. *See SunTiger, Inc. v. Sci. Research Funding Group*, 189 F.3d 1327, 1333 (Fed. Cir. 1999); *Romstadt v. Allstate Ins. Co.*, 59 F.3d 608, 615 (6th Cir. 1995) ("This court reviews a district court's decision to *deny* a motion for summary judgment for an abuse of discretion.") (citing *Southward v. S. Cent. Ready Mix Supply Corp.*, 7 F.3d 487, 492 (6th Cir. 1993); *Pinney Dock & Trans. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1472 (6th Cir. 1988)). In *SunTiger*, the court rejected the argument that the district court had erred by denying summary judgment of patent invalidity, explaining:

> When a district court *grants* summary judgment, we review without deference to the trial court whether there are disputed material facts, and we review independently whether the prevailing party is entitled to judgment as a matter of law. By contrast, when a district court *denies* summary judgment, we review that decision with considerable deference to the court.

SunTiger, 189 F.3d at 1333 (internal citations omitted) (emphasis in original). The court continued:

> "The trial court has the right to exercise its discretion to deny a motion for summary judgment, even if it determines that a party is entitled to it if in the court's opinion, the case would benefit from a

> full hearing. The court can perform this 'negative discretionary function' and deny summary judgment if policy considerations so warrant; absent a finding of abuse, the court's discretion will not be disturbed."

Id. (quoting 12 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE § 56.41[3][d] (3d ed. 1999)). The court also held that "[t]o disturb the decision by the trial court, we would have to find that the facts were so clear that the denial of summary judgment was an unquestioned abuse of discretion." *Id.* at 1334. Judge Lourie dissented in *SunTiger*, noting that "[t]he rule of deference [to the trial court's denial of summary judgment] is a good one, soundly based. However, the rule is not absolute." *Id.* at 1337 (Lourie, J., dissenting). Judge Lourie thought the patent at issue should have been held invalid in light of the fact that validity is a question of law for the court and that the facts were clear that denial of summary judgment was an abuse of discretion. *Id.* at 1337–38.

Thus, at least the Fourth, Fifth, Sixth, Eighth, Eleventh, and Federal Circuits have recognized the discretion to deny a motion for summary judgment by expressing approval of discretionary denials or by expressing that denials should be reviewed only for an abuse of discretion. The First Circuit has also commented that "in some relatively rare instances in which Rule 56 motions might technically be granted, the district courts occasionally exercise a negative discretion in order to permit a potentially deserving case to be more fully developed." *Buenrostro v. Collazo*, 973 F.2d 39, 42 n.2 (1st Cir. 1992). The *Buenrostro* court held that generally "[d]istrict court orders granting or denying brevis disposition are subject to plenary review," but reserved its opinion on whether the use of negative discretion could work in qualified immunity cases, and on what the proper standard of review might be. *Id.* at 42, 42 n.2.

B. District Court Opinions

District courts have also explained that they have discretion to deny motions for summary judgment even if the standard in Rule 56 is met. For example, in *Martin Ice Cream Co. v. Chipwich, Inc.*, 554 F. Supp. 933 (S.D.N.Y. 1983), the court stated:

> Were this [claim of price discrimination] the only claim before the Court, we would undoubtedly grant summary judgment. However, in this case, in which the other antitrust claims are to go forward and the discovery required to develop them is virtually the same as that which would be required to develop the price discrimination claim, granting summary judgment at this point would serve no purpose. Such a disposition would save the defendants no costs in time, effort, or money and would deprive the plaintiff of whatever opportunity it may otherwise have to build a foundation under the claim, which has at least been adequately pled. Since the facts are exclusively in the possession of the moving party and discovery has barely begun, it appears desirable for the Court to exercise its discretion and deny the motion with leave to renew when discovery is complete.

Martin Ice Cream, 554 F. Supp. at 944 (citing *Schoenbaum v. Firstbrook*, 405 F.2d 215, 218 (2d Cir. 1968); 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2728, at 557 & n.56 (1973 and Supp. 1982)). Likewise, the Eastern District of Pennsylvania has described the discretion to deny summary judgment motions:

> Despite this seemingly compulsory language [of Fed. R. Civ. P. 56(c)], the Supreme Court has recognized a district court's discretion to deny a summary judgment motion whenever there is "reason to believe that the better course would be to proceed to full trial." This discretion remains "even if the movant otherwise successfully carries its burden of proof if the judge has doubt as to the wisdom of terminating the case before a full trial." Moreover, although the Third Circuit has not ruled on this question, most other Courts of Appeals have refused to review denials of summary judgment, finding that a district court judgment after a full trial on the merits supersedes earlier summary judgment proceedings.

Payne v. Equicredit Corp. of Am., No. CIV.A. 00-6442, 2002 WL 1018969, at *1 (E.D. Pa. May 20, 2002) (internal citations omitted), *aff'd on other grounds*, Nos. 02-2706, 02-2771, 2003 WL 21783757 (3d Cir. Aug. 4, 2003) (per curiam) (unpublished); *see also Lyons v. Bilco Co.*, No. 3:01CV1106(RNC), 2003 WL 22682333, at *1 (D. Conn. Sept. 30, 2003) ("Judicial discretion to deny summary judgment in favor of a full trial has been approved by most courts of appeals.") (citing Friedenthal et al., *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFTRA L. REV. at 104; Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day In Court and Jury Trial Commitments?*, 78 N.Y.U.L. REV. 982 (2003)).

Other district courts in various circuits have described their discretion to deny summary judgment in certain circumstances. *See, e.g., Lister v. Prison Health Servs., Inc.*, No. 8:04-cv-2663-T-26MAP, 2007 WL 624284, at *2 (M.D. Fla. Feb. 23, 2007) (denying summary judgment because of lack of clarity regarding material factual disputes, and noting that the court was exercising "its discretion to deny summary judgment, *even assuming the absence of a factual dispute . . . .*") (emphasis added); *Taylor v. Truman Med. Ctr.*, No. 03-00001-CV-W-HFS, 2006 WL 2796389, at *3 (W.D. Mo. Sept. 25, 2006) (denying a motion for summary judgment with respect to a claim for which the court "would not be comfortable in ringing down the curtain . . .," and for which the court found the exercise of its "negative discretion" to deny summary judgment when the record is inconclusive to be appropriate) (citing *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979)); *Propps v. 9008 Group, Inc.*, No. 03-71166, 2006 WL 2124242, at *1 (E.D. Mich. July 27, 2006) (holding that in light of the voluminous record and the complexity of the proposed facts, the effort necessary to determine whether genuine issues of fact existed was "not a productive use of [the

court's] time," that even if the movants had carried their burden, the court doubted the wisdom of terminating the case prior to trial, and that a court has discretion to deny a motion for summary judgment); *Lyons*, 2003 WL 22682333, at *1 ("Because summary judgment has this effect [of cutting off a party's right to present his case to the jury], trial courts must act with caution in granting it and may deny it in the exercise of their discretion when 'there is reason to believe that the better course would be to proceed to a full trial.'")[3] (quoting *Anderson*, 477 U.S. at 255); *United States v. T.J. Manalo, Inc.*, 240 F. Supp. 2d 1255, 1261 (Ct. Int'l Trade 2002) (declining to grant summary judgment despite the fact that there was no dispute as to any material fact because it was not clear that the Government was entitled to judgment as a matter of law and because "even where a movant has met its burden, a court retains the discretion to deny summary judgment notwithstanding the seemingly mandatory language of Rule 56(c) . . . . Rule 56 is thus 'far less mandatory' than the language of the rule would indicate."[4]; *New York v. Moulds Holding Corp.*, 196 F. Supp. 2d 210, 219 (N.D.N.Y. 2002) (denying summary judgment on certain claims because of the poor factual record and the necessity of difficult scientific evidence on the CERCLA claim, and noting that the exercise of discretion to deny was appropriate) (citing *Anderson*, 477 U.S. at 255–56); *Butler v. CMC Miss., Inc.*, No. CIV.A. 1:96CV349-D-D, 1998 WL 173233, at *7 (N.D. Miss. March 18, 1998) (denying summary judgment because a fact issue existed, but noting that the court "has the discretion to deny motions for summary judgment and allow parties to proceed to trial and more fully develop the

[3] The court also noted that in *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256–57 (1948), the Supreme Court had "recognized that summary judgment may not be the most appropriate way to resolve complex matters, even if the motion for summary judgment technically satisfies the requirements of Rule 56." Lyons, 2003 WL 22682333, at *1 n.1.

[4] The court also noted that "'[t]here is long-established doctrine holding that a court may deny summary judgment if it believes further pretrial activity or trial adjudication will sharpen the facts and law at issue and lead to a more accurate or just decision, or where further development of the facts may enhance the court's legal analysis.'" *T.J. Manalo, Inc.*, 240 F. Supp. 2d at 1261 (quoting 11 MOORE'S FEDERAL PRACTICE § 56.32[6]).

record for the trier of fact") (citing *Kunin v. Feofanov*, 69 F.3d 59, 61 (5th Cir. 1995); *Black v. J.I. Case Co.*, 22 F.3d 568, 572 (5th Cir. 1994); *Veillon v. Exploration Servs., Inc.*, 876 F.2d 1197, 1200 (5th Cir. 1989)); *Morris v. VCW, Inc.*, No. 95-0737-CV-W-3-6, 1996 WL 429014, at *1 (W.D. Mo. July 24, 1996) (denying summary judgment because of "necessarily limited consideration and the need for a quick ruling," noting that "[c]aution is the rule of judicial practice in . . . cases [seeking summary judgment late in the case]" and that "there is a 'negative discretion' to deny summary judgment even when 'technically' justifiable, when the ends of justice appear to favor full development of the facts at trial, in order that a fact-finder may acquire a sound 'feel' for the issues.") (citing *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979); *McLain v. Meier*, 612 F.2d 349, 356 (8th Cir. 1979)); *Caine v. Duke Commc'ns Int'l*, No. CV-95-0792 JMI (MCX), 1995 WL 608523 (C.D. Cal. Oct. 3, 1995) (granting a motion for summary judgment, but stating in boilerplate language that "[t]here is no absolute right to a summary judgment in any case. The court has discretion to deny summary judgment wherever it determines that justice and fairness require a trial on the merits.") (citing *Anderson*, 477 U.S. at 249–55); *McDarren v. Marvel Entm't Group, Inc.*, No. 94 CV. 0910 (LMM), 1995 WL 214482, at *5 (S.D.N.Y. April 11, 1995) (denying a motion for summary judgment on a breach of contract claim on the basis that an interpretation of the "best efforts" contract clause in light of circumstances had to be made by the fact finder, but also noting that "[w]here an issue is closely intertwined with an issue to be tried, a court has discretion to deny summary judgment even if the issue is 'ripe' for summary judgment.") (citing *Citibank v. Real Coffee Trade Co.*, 566 F. Supp. 1158, 1165 (S.D.N.Y. 1983); *Berman v. Royal Knitting Mills, Inc.*, 86 F.R.D. 124, 126 (S.D.N.Y. 1980)); *Wilson v. Studebaker-Worthington, Inc.*, 699 F. Supp. 711, 718–19 (S.D. Ind. 1987) (denying summary judgment and stating, "It has been repeatedly held that

despite all that may be shown, the Court always has the power to deny summary judgment if, in its sound judgment, it believes for any reason that the fair and just course is to proceed to trial rather than to resolve the case on a motion. Thus, an appraisal of the legal issues may lead the Court to exercise its discretion and deny summary judgment motions in order to obtain the fuller factual foundation afforded by a plenary trial.")[5] (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948); *Flores v. Kelley*, 61 F.R.D. 442 (D. Ind. 1973); *Western Chain Co. v. Am. Mut. Liab. Ins. Co.*, 527 F.2d 986 (7th Cir. 1975)).

III. Cases Limiting Discretion to Deny Motions for Summary Judgment

A. Circuit Court Opinions

Despite the existence of the circuit opinions clearly stating that there is discretion to deny a motion for summary judgment, other circuit opinions have consistently repeated language that implies that there is little or no discretion to deny. *See, e.g.*, *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) ("A motion for summary judgment *must be granted* when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'") (quoting FED. R. CIV. P. 56(c)) (emphasis added); *Rease v. Harvey*, No. 06-15030, 2007 WL 1841080, at *1 (11th Cir. June 28, 2007) (unpublished) (same); *Chicago Title Ins. Corp. v. Magnuson*, 487 F.3d 985, 994 (6th Cir. 2007) (same); *Guilbert v.*

[5] The *Wilson* court's description of discretion to deny is seemingly at odds with a later Seventh Circuit opinion in *Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994) (per curiam), where the Seventh Circuit held that "[s]ummary judgment is not a discretionary remedy." While the *Wilson* case has not been expressly overturned, the subsequent decision in *Jones* may call *Wilson*'s language regarding discretion to deny summary judgment motions into question. However, it is also possible that the holding in *Jones* was not as broad as it may seem. The appellate court in *Jones* reviewed the denial of the summary judgment motion on an interlocutory appeal regarding the defense of qualified immunity. The Seventh Circuit commented that immunity claims ought to be resolved as early in the case as possible, *id.*, and it may be that the reason for the court's statement regarding lack of discretion was that the appeal related to a defense that needed to be immediately resolved.

Gardner, 480 F.3d 140, 145 (2d Cir. 2007) (same); *Loggins v. Nortel Networks, Inc.*, No. 06-10361, 2006 WL 3153471, at *1 (5th Cir. Nov. 2, 2006) (unpublished) (same); *Mambo v. Vehar*, No. 05-2356, 2006 WL 1720211, at *1 (10th Cir. June 23, 2006) (unpublished) ("The familiar standard *requires that summary judgment be granted . . .*" if the Rule 56(c) standard is met.) (emphasis added); *Warner-Lambert Co. v. Teva Pharms. USA, Inc.*, 418 F.3d 1326, 1335 (Fed. Cir. 2005) ("Summary judgment *must be granted . . .*" if the Rule 56(c) standard is met) (emphasis added); *Watson v. Eastman Kodak Co.*, 235 F.3d 851, 854 (3d Cir. 2000) ("[S]ummary judgment *is to be entered* if the evidence is such that a reasonable fact finder could find only for the moving party.")[6] (citing *Anderson*, 477 U.S. at 248; *Doherty v. Teamsters Pension Trust Fund*, 16 F.3d 1386, 1389 (3d Cir. 1994)) (emphasis added); *Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994) (per curiam) ("Summary judgment *is not a discretionary remedy.* If the plaintiff lacks enough evidence, *summary judgment must be granted.*") (citing *Anderson*, 477 U.S. at 249–51; *Celotex*, 477 U.S. 317) (emphasis added), *aff'd on other grounds*, 515 U.S. 304 (1995); *Real Estate Fin. v. Resolution Trust Corp.*, 950 F.2d 1540, 1543 (11th Cir. 1992) (per curiam) ("A district court must grant summary judgment if the moving party shows that there is no genuine dispute regarding any material fact and it is entitled to judgment as a matter of law.") (citing *Celotex*, 477 U.S. at 322).

In sum, at least the Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and Federal Circuits have issued opinions that contain language seeming to mandate the entry of summary judgment if the movant shows that he is entitled to judgment. However, most of the cases containing this language have the language in the boilerplate section reciting the legal standard for review of

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[6] The court also noted that "[a] party's failure to make a showing that is 'sufficient to establish the existence of an element essential to that party's case, and on which that party will bear th burden of proof at trial' *mandates the entry of summary judgment.*" *Watson*, 235 F.3d at 857–58 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)) (emphasis added).

summary judgment orders. Very few of the cases with this language appear to actually apply the standard to an order denying summary judgment.[7] Of the cases cited in the previous paragraph, for example, only one of them definitively applied the rule that motions must be granted if the Rule 56(c) standard is met. *See Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994) (per curiam) (finding that the district court was mistaken in determining that "because the excessive force claim had to be tried, and because the plaintiff might come up with more evidence before trial, the false arrest claim should also be tried"), *aff'd on other grounds*, 515 U.S. 304 (1995). The remainder of the cases cited in the previous paragraph involved review of a grant of summary judgment, and thus the courts did not have occasion to apply the standard used for review of a denial of summary judgment, despite discussion of that standard in the "legal standards" portion of the opinions.

B. District Court Opinions

Various district court cases also contain statements that summary judgment is mandatory if the movant has shown entitlement to summary judgment. *See, e.g.*, *Starns v. Health Prof'ls, Ltd.*, No. 04-1143, 2008 WL 268590, at *1 (C.D. Ill. Jan. 29, 2008) ("'Summary [judgment] is not a discretionary remedy. If the plaintiff lacks enough evidence, summary [judgment] must be granted.'") (quoting *Jones*, 26 F.3d at 728)[8]; *Levine v. Children's Museum of Indianapolis, Inc.*, No. IP00-0715-C-H/G, 2002 WL 1800254, at *1 (S.D. Ind. July 1, 2002) (granting summary judgment

[7] Finding appellate cases actually disapproving of a discretionary denial has proven to be difficult, perhaps because denials of summary judgment are rarely appealable. Most of the appellate cases substantively reviewing a denial of summary judgment have concluded that discretion to deny exists.

[8] A Westlaw search reveals that the *Jones* case has been cited in other cases 113 times for the proposition that summary judgment is not a discretionary remedy. All of these citations have been by district courts within the Seventh Circuit. I have surveyed a selection of these cases, and they appear to generally use this language as boilerplate language in the legal standards section of the opinion. Within the sampling of cases I reviewed, I did not see any cases where the district court expressed a desire to deny the motion but felt compelled to grant it in view of a standard that granting summary judgment is mandatory if the movant has shown entitlement.

where the plaintiff had failed to come forward with sufficient evidence, and stating in the section describing the legal standards that "[s]ummary judgment is not discretionary; if a party shows it is entitled to summary judgment, judgment must be granted.") (citing *Jones*, 26 F.3d at 728), *aff'd*, No. 02-3013, 2003 WL 1545156 (7th Cir. March 24, 2003) (unpublished); *In re Lawrence W. Inlow Accident Litig.*, No. IP 99-0830-C H/K, 2002 WL 970403, at *3 (S.D. Ind. April 16, 2002) ("Summary judgment is not a discretionary remedy. If a party shows it is entitled to summary judgment, the court must grant it.") (citing *Tangwall v. Stuckey*, 135 F.3d 510, 514 (7th Cir. 1998)), *aff'd sub nom. First Nat'l Bank & Trust Corp. v. Am. Eurocopter Corp.*, 378 F.3d 682 (7th Cir. 2004); *Gates v. L.R. Green Co.*, No. IP 00-1239-C H/G, 2002 WL 826394, at *1 (S.D. Ind. Mar. 20, 2002) ("Summary judgment is not a discretionary procedure, though. When the moving party has shown it is entitled to summary judgment, the court must grant it. To do otherwise would be to condemn the parties, witnesses, and jurors to spend time, money, and energy on a trial that could have only one just result."); *Acceptance Assoc. of Am., Inc. v. Various Underwriters of Lloyds of London*, CIV. A. No. 88-6816, 1989 WL 25146, at *2 (E.D. Pa. Mar. 16, 1989) (granting summary judgment after finding no genuine issue of material fact and citing 18A COUCH ON INS. 2d § 77:16 (Rev'd ed. 1983) for the proposition that "when undisputed documents show that the insurer is entitled to summary judgment, the court must grant the motion regardless of other facts in the record that may be in dispute."), *aff'd*, 884 F.2d 1382 (3d Cir. 1989); *Martinez v. Ribicoff*, 200 F. Supp. 191, 192 (D.P.R. 1961) ("It, therefore, follows that there is no genuine issue as to any material fact and that defendant's motion for summary judgment must be granted, defendant being entitled to judgment as a matter of law.").

Most of the district court cases I reviewed that state that summary judgment must be entered if the movant is entitled state this standard in the "legal standards" section of the opinion, and it is not clear if the court ultimately granted the summary judgment because it had no choice if the movant met its burden or because the court felt no need to exercise discretion to deny the motion under the facts of the case.[9] The *Acceptance Assoc. of Am.* and *Martinez* cases use the mandatory language within the analysis portion of the opinions, as opposed to in a separate section describing legal standards, but even in those cases, it is not clear whether the court felt compelled to grant summary judgment simply because it was mandatory if the movant met its burden or if the court granted the summary judgment because it viewed granting as the best option after the movant had met its burden.

C. Letter Asserting Lack of Discretion to Deny Summary Judgment

A January 10, 2008 letter from Lawyers for Civil Justice and the U.S. Chamber Institute for Legal Reform ("the Letter") insists that the current standard is that summary judgment is mandatory when a litigant has met the burden of demonstrating the absence of a genuine issue of material fact. However, most of the cases cited in the Letter for this proposition do not actually evaluate the denial of a motion for summary judgment, making any boilerplate language that summary judgment is required less persuasive than the Letter indicates. The Seventh Circuit *Jones* case cited in the letter may be an anomaly with its strict language stating that "[s]ummary judgment is not a discretionary remedy. If the plaintiff lacks enough evidence, summary judgment must be granted." *Jones*, 26 F.3d

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[9] A search in Westlaw for cases stating that summary judgment is mandatory or must be granted if the standard is met turns up many cases. However, a review of a sampling of these cases reveals that few of them actually apply the proposition that summary judgment is mandatory if the standard is met, and merely contain language to that effect in the "legal standards" portion of the opinion. Finding district court cases granting summary judgment based on an alleged lack of discretion to deny once the standard is met has proven difficult, possibly because courts may not express a desire to deny the motion at the same time the court is granting the motion.

at 728. Notably, the *Jones* court emphasized that the issue on summary judgment involved a defense of immunity, stating that "[i]mmunity claims should be resolved as early in the case as possible—and by the court rather than the jury." *Id.* (citing *Elder v. Holloway*, 510 U.S. 510, ___, 114 S. Ct. 1019, 1023 (1994); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Elliot v. Thomas*, 937 F.2d 338, 344–45 (7th Cir. 1991)). In *Jones*, the defendants filed an interlocutory appeal asserting a defense of qualified immunity. *Id.* at 727. The district court had denied the defendants' summary judgment motion both with respect to the plaintiff's false arrest claim and with respect to the plaintiff's excessive force claim. With respect to the excessive force claim, the Seventh Circuit held that it had no appellate jurisdiction because the district court had found that an issue of fact existed as to whether the defendants beat the plaintiff while he was in custody, an issue that had to be "resolved in the district court before it could be reviewed on appeal." *See id.* at 727–28. With respect to the false arrest claim, the district court had held that "because the excessive force claim had to be tried, and because the plaintiff might come up with more evidence before trial, the false arrest claim also should be tried." *Id.* at 728. The Seventh Circuit rejected that conclusion, finding that summary judgment should have been granted in favor of the defendants with respect to the false arrest claim because there was no genuine issue of fact and summary judgment is not a discretionary remedy. *Id.*

One could argue that *Jones* creates a circuit split as to whether there is discretion to deny summary judgment. However, despite its broad language disapproving of discretion to deny, the *Jones* court may have been particularly focused on the importance of resolving immunity claims early in the litigation.[10] A persuasive argument can be made that the need to resolve immunity issues

[10] The Seventh Circuit has repeated the language regarding the mandatory nature of granting summary judgment if the movant meets his burden. *See Anderson v. P.A. Radocy & Sons, Inc.*, 67 F.3d 619, 621 (7th Cir. 1995) ("Summary

played a strong role in the court's opinion, particularly given the absence of discussion distinguishing cases from other circuits that had recognized the existence of discretion to deny fully-supported summary judgment motions.

Other than the *Jones* case, the cases cited in the Letter do not substantively evaluate the discretion to deny summary judgment motions, despite having language stating that summary judgment is mandatory. For example, the Letter cites *Watson v. Eastman Kodak Co.*, 235 F.3d 851, 857–58 (3d Cir. 2000), for the proposition that "[a] party's failure to make a showing that is 'sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of trial' mandates the entry of summary judgment." However, in *Watson*, the court affirmed a grant of summary judgment where the non-movant failed to make the required evidentiary showing. Because the Third Circuit affirmed a grant of summary judgment on the basis that the requisite showing was not made and because the case did not involve review of a denial of summary judgment (or of a grant of summary judgment where the court felt compelled to grant the motion despite wanting to deny it), the language stating that summary judgment is mandatory does not carry as much weight as suggested by the Letter.

Similarly, the Letter cites *Real Estate Fin. v. Resolution Trust Corp.*, 950 F.2d 1540, 1543 (11th Cir. 1992) (per curiam), for the proposition that "[a] district court must grant summary judgment if the moving party shows that there is no genuine dispute regarding any material fact and it is entitled to judgment as a matter of law." However, the cited language appears in the section of the opinion entitled "The Standards Governing Summary Judgment," and is not applied to the merits

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judgment is not a remedy to be exercised at the court's option; it must be granted when there is no genuine dispute over a material fact.") (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). However, in *Anderson*, the Seventh Circuit reviewed a grant of summary judgment rather than a denial.

because the case involved review of a grant of summary judgment, rather than a denial. The court affirmed part of the grant of summary judgment, but found that the non-movant had presented sufficient evidence to avoid summary judgment on one of the claims. Thus, the court had no reason to address whether there would have been discretion to deny summary judgment if there had not been sufficient evidence. The language regarding the mandatory nature of granting summary judgment is further weakened by the fact that a subsequent Eleventh Circuit decision involving an attempted appeal of a denial of summary judgment recognized discretion to deny summary judgment motions. *See Lind v. United Parcel Serv., Inc.*, 254 F.3d 1281, 1285 (11th Cir. 2001).

The Letter argues that the version of Rule 56 effective prior to the Style Amendments, containing the statement that "the judgment sought shall be rendered . . .," has language commanding mandatory action. However, the cases simply have not always interpreted the language that way. *See, e.g.*, *Payne v. Equicredit Corp. of Am.*, No. CIV.A. 00-6442, 2002 WL 1018969, at *1 (E.D. Pa. May 20, 2002) ("Despite this seemingly compulsory language [of Fed. R. Civ. P. 56(c)], the Supreme Court has recognized a district court's discretion to deny a summary judgment motion whenever there is 'reason to believe that the better course would be to proceed to full trial.'"), *aff'd on other grounds*, Nos. 02-2706, 02-2771, 2003 WL 21783757 (3d Cir. Aug. 4, 2003) (per curiam) (unpublished); *see also* EXCERPT FROM THE REPORT OF THE JUDICIAL CONFERENCE, COMMITTEE ON RULES OF PRACTICE & PROCEDURE at 10, http://www.uscourts.gov/rules/supct1106/Excerpt_JC_Report_CV_0906.pdf (stating that the restyled rules "minimize the use of inherently ambiguous words," such as "shall," which "can mean 'must,' 'may,' or 'should,' depending on context"); FED. R. CIV. P. 56 advisory committee's note (2007 Amendment) (stating that "shall" is changed to

"should" in light of case law establishing that "there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact").

The assertion in the Letter that discretion to deny summary judgment would "run[] headlong into the concern expressed in *Anderson v. Creighton*, 483 U.S. 635, 643 (1987)[,] that conscientious public officials would lose the 'assurance of protection that [] is the object' of summary judgment," is misplaced. The quotation is taken slightly out of context because it omits the remainder of the sentence, which reveals that the quoted language was used in the case to describe the purpose of the doctrine of qualified immunity.[11] Nonetheless, it follows that requiring summary judgment regarding qualified immunity defenses would also further the assurance of protection that qualified immunity is intended to provide. However, even if courts may have less discretion to deny summary judgment in certain contexts, such as qualified immunity, *see Jones*, 26 F.3d at 728, it does not necessarily follow that it is mandatory in all circumstances where the Rule 56 standard is met.

IV. Conclusion

Most of the case law substantively evaluating whether there is discretion to deny a motion for summary judgment has determined that discretion to deny summary judgment exists when the movant has made the proper showing. The discretionary power of a court to deny a properly-supported motion for summary judgment has been summarized as follows:

> Although the court's discretion plays no role in the granting of summary judgment, since the granting of summary judgment under FRCP 56 must be proper or the action is subject to reversal on appeal, the court may deny summary judgment as a matter of discretion even where the criteria for granting judgment are technically satisfied. Denial of summary judgment is appropriate where the court has

[11] The full sentence actually reads: "An immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide." *Anderson*, 483 U.S. at 643.

> doubts about the wisdom of terminating the case before a full trial or believes that the case should be fully developed before decision. For example, denial of summary judgment may be appropriate where the court has received inadequate guidance from the parties, where further inquiry into the facts is deemed desirable by the court to clarify the application of the law, where the motion is tainted with procedural unfairness, where a case involves complex issues of fact or law, or a question of first impression, or where summary judgment would be on such a limited basis or on such limited facts that it would be likely to be inconclusive of the underlying issues. In a case involving multiple claims, the court may exercise its discretion to deny summary judgment where it finds it better as a matter of judicial administration to dispose of all the claims and counterclaims at trial rather than to attempt piecemeal disposition, or where part of the action may be ripe for summary judgment but is intertwined with another claim that must be tried.

27A FED. PROC., LAW. ED. § 62:683 (2007).

Although there is plenty of case law with boilerplate language stating that a court must grant summary judgment if the Rule 56 standard is met, most of those cases at the appellate level do not involve review of a denial of a motion for summary judgment. Likewise, a review of a selection of some of those at the district court level reveals that most do not express that a motion is granted simply because of mandatory language in the rule when the court believes that the motion should be denied for administrative or other reasons. The one case the research uncovered that substantively involved review of a denial of summary judgment and that disapproved of that denial arguably may be limited in its application because it involved a request for summary judgment on qualified immunity grounds. While the court's language was broad, it also emphasized that immunity claims ought to be resolved early in the case, perhaps giving a stronger reason to remove discretion to deny a motion in that case than in the case of other summary judgment motions.