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Both the summary judgment and the discovery provisions of the Federal Rules of Civil Procedure were designed to foster efficient pre-trial resolution of disputes. Discovery was designed to facilitate settlements by uncovering all the facts relevant to a dispute before trial;[1] summary judgment was designed to dispose of cases presenting no factual issue before trial.[2] Yet despite their common goal, these two procedures may occasionally be at cross-purposes. Rule 56 of the Federal Rules of Civil Procedure provides that, upon motion of either party, a court may grant summary judgment if there are no factual issues to be tried.[3] But rule 56 fails to prescribe clearly whether the trial court in ruling on the motion may rely on the affidavits and other supporting material brought to its attention by the parties, or whether it must search through routinely filed discovery material. If rule 56 imposes a duty to search the discovery file, the efficiency of summary judgment may be impaired by the thoroughness of discovery.

This Note examines the history and ambiguous language of rule 56 to determine whether courts have a duty to examine the discovery file before granting a summary judgment. Section I discusses courts' differing interpretations of the rule. Section II shows that the Supreme Court Advisory Committee which drafted the rule contemplated that courts would examine routinely filed discovery materials[4]

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1. *See* text at note 50 *infra*.

2. *See* text at notes 44-45 *infra*.

3. (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

FED R. CIV. P. 56(a), (b) & (c).

4. Rules 26 to 37 of the Federal Rules of Civil Procedure create a discovery process to narrow and clarify the basic issues between the parties and to ascertain the facts relative to those issues. *See* Hickman v. Taylor, 329 U.S. 495, 500-01 (1947). The devices for discovery include depositions, interrogatories, requests for admission, requests for production of things,

when considering a motion for summary judgment. Section III concludes, however, that the expansion of pre-trial discovery since the enactment of the federal rules renders such a trial court duty inconsistent with the drafters' intent that the rules "be construed to secure the just, speedy, and inexpensive determination of every action."[5]

I.

Summary judgment is an expeditious means to dispose of cases in which there is no genuine factual dispute.[6] To avoid the unnecessary expense and delay of a trial, either party may move for judgment as a matter of law by presenting affidavits or other evidence showing that there are no material factual issues to be tried.[7] Although any doubt regarding the existence of an issue of fact will be resolved against the movant,[8] his motion for summary judgment will be granted if his opponent can present no evidence to controvert the movant's version of the facts.[9]

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and physical and mental examinations. The matters that may be inquired into through these devices are governed primarily by rule 26, which sets out the permissible scope of discovery. The effectiveness of discovery is ensured by the sanctions of rule 37. For a detailed treatment of discovery procedures, see F. JAMES & G. HAZARD, CIVIL PROCEDURE § 6 (2d ed. 1977); 4-4A MOORE'S FEDERAL PRACTICE ¶¶ 26.00-37.08 (2d ed. 1976 and Supp. 1980); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 2001-2300 (1970 & Supp. 1979) [hereinafter cited as WRIGHT & MILLER].

If filing requirements have not been waived under rule 5(d), transcriptions of depositions, interrogatories and answers to interrogatories, requests for admissions, etc., should all be filed with the court. These various discovery documents constitute the discovery record.

5. FED. R. CIV. P. 1.

6. *See* FED. R. CIV. P. 56(c); FED. R. CIV. P. 56, Advisory Comm. Note; 10 WRIGHT & MILLER, *supra* note 4, at § 2712.

7. Although the pleadings may allege different versions of the facts, on a summary judgment motion the court must weed out unsupported assertions. Thus the court will examine the pleadings to ascertain what issues of fact they present and then consider the affidavits, admissions, answers to interrogatories, and similar material to determine whether any of these issues are genuine. *See* 10 WRIGHT & MILLER, *supra* note 4, at § 2712:

> There has been considerable misunderstanding about the proper role of Rule 56. A motion for summary judgment lies only when there is no genuine issue of material fact; summary judgment is not a substitute for the trial of disputed fact issues. Accordingly, the court cannot try issues of fact on a Rule 56 motion but only is empowered to determine whether there are issues to be tried. . . .
>
> On the other hand, the apparent existence of a factual dispute based on a denial in the answer or an allegation in the complaint does not automatically defeat a Rule 56 motion.

8. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

9. It is well settled that the party moving for summary judgment has the burden of demonstrating that there is no genuine issue of fact and that he is entitled to judgment as matter of law. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). It must be clear what the truth is. *See* Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 467 (1962).

The standard for judging the movant's evidence showing there is no factual issue is the subject of some dispute. Most courts have held the moving party to a stringent standard of evidence and denied summary judgment where there is any doubt as to the nonexistence of a factual dispute. *See* James v. Atchison, T. & S.F.R.R., 464 F.2d 173, 175 (10th Cir. 1972); Chubbs v. City of New York, 324 F. Supp. 1183, 1189 (S.D.N.Y. 1971); Franklin Natl. Bank v. L.B. Meadows & Co., 318 F. Supp. 1339, 1343 (E.D.N.Y. 1970); Dale Hilton, Inc. v. Triangle

In most cases, the party opposing a motion for summary judgment files affidavits and other documents in support of his contention that there exists a triable issue of fact. Often, however, these documents fail to present a triable issue, and occasionally the opposing party fails to respond at all to a motion for summary judgment. In these circumstances, rule 56(c) does not specify whether the court must examine the discovery record before granting summary judgment. Rule 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[10] If evidentiary materials "show" by being present in the record, then a trial court may not grant summary judgment unless it has searched the record to determine if a factual dispute exists. If, however, routine filing does not constitute a showing, a court may grant summary judgment without reviewing the record if the movant adequately demonstrates the absence of triable facts and the opposing party fails to identify evidence that puts the facts in issue.[11]

The circuits disagree as to whether the trial court must examine the discovery file. In *Smith v. Hudson*,[12] the Sixth Circuit held that

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Publications, Inc., 27 F.R.D. 468, 470 (S.D.N.Y. 1961). When the moving party is the party with the trial burden of proof, this standard seems appropriate. The motion is analogous to the party's motion for a directed verdict. In both situations the moving party must present proof of the existence of the element such that no fact-finder could reasonably find against him. *See* Mihalchak v. American Dredging Co., 266 F.2d 875, 877 (3d Cir.), *cert. denied*, 361 U.S. 701 (1959). However, when the party moving for summary judgment does not have the burden of proof at trial, a lesser evidentiary standard may be employed. For a discussion of this standard and a proposed "minimal burden" formulation, see Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745 (1974). Despite the stringent standard of evidence to which the movant is held, it is possible for a movant to meet his burden of demonstrating the absence of a factual dispute even when one in fact exists. *See, e.g.,* notes 12 & 15 *infra*.

This Note does not argue for any change in the moving party's burden of proof. It discusses only the extent of the evidence that courts are required to consider on a motion for summary judgment.

10. FED. R. CIV. P. 56(c).

11. An opposing party may, however, avoid summary judgment by submitting to the court an affidavit stating reasons why he cannot present "facts essential to justify his opposition." FED. R. CIV. P. 56(f).

12. 600 F.2d 60 (6th Cir.), *cert. dismissed under rule 60*, 444 U.S. 986 (1979). In *Smith* four former school bus drivers alleged that they had been discharged in retaliation for successfully suing the school commissioners over a wage dispute. After completion of discovery, defendants filed a motion for summary judgment supported by affidavits of defendant board members, minutes of board meetings, a transcript of the relevant board meeting, the affidavit of defendant transportation supervisor, the pleadings and orders in the state chancery court case which plaintiffs claimed precipitated their discharge, and a transcript of a surreptitiously recorded conversation between one of plaintiff's agents and the defendant transportation supervisor which was obtained from plaintiffs on discovery. These materials indicated that there was no factual dispute regarding the defendants' motive for discontinuing the plaintiffs' employment. The plaintiffs failed to respond to the motion for summary judgment, and the district court granted the motion. On appeal to the Sixth Circuit, plaintiffs identified discovery

rule 56(c) unambiguously[13] directs the trial court to consider the discovery record to determine whether there are issues to be tried, and that it is reversible error for a trial court to grant summary judgment if court review of the record would reveal the existence of a factual dispute.[14] But rule 56(c) is sufficiently ambiguous to have prompted a different interpretation by other courts. The Tenth Circuit has read the rule as permissive rather than mandatory, holding in *Downes v. Beach*[15] that a trial court has discretion to review the record "in an effort to weigh the propriety of granting a summary judgment motion, [but] is not *required* to consider what the parties fail to point out."[16]

The question has rarely been addressed as directly as in the *Smith* and *Downes* cases, however, perhaps because court review of the record ordinarily will be at issue only if counsel has been lax.[17]

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materials on file with the district court that evidenced a factual dispute. The circuit court reversed the grant of summary judgment, holding that the district court could not grant summary judgment "without first examining all the materials properly before it under 56(c)." 600 F.2d at 65. *Smith* also suggests an alternative basis for the decision: that "questions of motive or intent are normally not suited to disposition on summary judgment." 600 F.2d at 66. *Cf.* Pierce v. Ford Motor Co., 190 F.2d 910 (4th Cir.), *cert. denied*, 342 U.S. 887 (1951) (some cases, like negligence actions, peculiarly require jury decision).

13. 600 F.2d at 64 ("On its face, Rule 56(c) is plain").

14. 600 F.2d at 65. The Sixth Circuit reaffirmed the *Smith* interpretation of rule 56(c) in EEOC v. Keco Indus., Inc., 617 F.2d 443 (6th Cir. 1980).

15. 587 F.2d 469 (10th Cir. 1978). In *Downes*, a hospital discharged a group of nurses for activities that culminated in a "sick-out" staged to draw attention to labor problems. The nurses sought to recover for violation of their first amendment rights. After a jury found for the plaintiffs, the district court held that the "sick-out" was not constitutionally protected and entered judgment n.o.v. against all the plaintiffs but Downes. The court ordered a new trial for Downes because it was unclear whether she had been fired because of her participation in the "sick-out" or because of her membership in the group and participation in other protected activities.

The defendant hospital moved for summary judgment, submitting affidavits and records that showed that Downes had been fired for poor attendance, that the case had been reviewed by the Labor Department, and that Downes had received an award in that proceeding. The documents showed that the hospital was at fault but that its conduct did not violate a constitutional right. In answer, Downes reasserted the claims in her pleadings through her own affidavit. The court granted defendant's summary judgment. On appeal, Downes claimed that the record of the previous trial "demonstrated the existence of a factual controversy." 587 F.2d at 471. The Tenth Circuit held, however, that the district court was not compelled to "search beyond the evidence proffered in connection with the [summary judgment] motion." 587 F.2d at 472. Although the issue in *Downes* was review of the record of a previous trial rather than the discovery record, the Tenth Circuit treated the issues as identical in its discussion of precedent. Explaining Bushman Constr. Co. v. Conner, 307 F.2d 888 (10th Cir. 1962), the *Downes* court described filed discovery materials as "beyond the evidence proffered." 587 F.2d at 472.

16. 587 F.2d at 472 (emphasis in original).

17. In *Smith*, the Sixth Circuit observed:

> The record in this case is replete with evidence of instances where plaintiffs' counsel failed to adhere to the applicable rules of either practice or procedure. In addition to filing a motion which is not provided for by the rules, counsel made no initial response whatever to the defendants' motion for summary judgment. We believe that it is likely that this particular appeal could have been avoided, and that this case could have been properly resolved on the merits long ago if plaintiffs' counsel had shown proper concern for matters of practice and procedure.

Other courts' interpretations of rule 56(c) can only be inferred from the manner in which they have handled summary judgment in the normal course of litigation. Early decisions reveal that judges examined the discovery record before passing on a motion for summary judgment, but do not indicate whether the judges felt bound to do so.[18] More recent practice reflects the view that the trial court may limit its consideration to evidence that is specifically presented to the court. Many district courts have adopted rules that require a party opposing summary judgment to submit a short statement of the disputed facts and provide that noncompliance may result in an adverse judgment.[19] These rules implicitly reject the Sixth Circuit's view that the court is obliged to review the record,[20] for they permit

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Smith v. Hudson, 600 F.2d 60, 63 n.1 (6th Cir.), *cert. dismissed under rule 60*, 444 U.S. 986 (1979). *See also* note 60 *infra*.

18. *E.g.*, American Ins. Co. v. Gentile Bros. Co., 109 F.2d 732, 734 (5th Cir. 1940) ("The motion for summary judgment was heard and after . . . *due consideration* of the contents of the depositions, affidavits, and pleadings, the court entered judgment"); Rose v. Connelly, 38 F. Supp. 54, 56 (S.D.N.Y. 1941) ("On these motions for summary judgment and pursuant to Federal Rule 56(c), . . . *I have examined* the depositions of the principals on their examination before trial"); Mutual Life Ins. Co. v. O'Donnell, 29 F. Supp. 1010 (N.D. Ill. 1939) ("No opposing affidavits have been filed. . . . *The matter is submitted for judgment, therefore, on the pleadings, the admissions of record and the depositions on file*"); Culhane v. Jackson Hardware Co., 25 F. Supp. 324 (D. S.D. 1938) ("*A careful consideration of the pleadings and files in the above entitled action* . . . convinces me that under the Federal Rules of Civil Procedure . . . now in force, the plaintiff's motions for summary judgment should be granted") (emphasis added in each quotation).

19. *See, e.g.*, S.D. ALA. R. 8; D. ALASKA R. 5(B)(4); D. ARIZ. R. 11(h); C.D. CAL. R. 3(g)(2); E.D. CAL. R. 116(a); S.D. CAL. R. 220-8(b); D. CONN. R. 9(d); D.D.C. R. 1-9(h); S.D. FLA. R. 10J; N.D. GA. R. 91.7; S.D. GA. R. 6.6; D. HAWAII R. 2(3); D. IDAHO R. 4(e); S.D. ILL. R. 7; S.D. IND. R. 8; E.D. LA. R. 3.10; M.D. LA. R. 5(e); E.D. MO. R. 7; D. NEV. R. 16(f); D.N.J. R. 12(F); D.N.M. R. 9(j)(2); S.D.N.Y. R. 9(g); D. OR. R. 11(d); M.D. PA. R. 301.01(e); D.P.R. R. 8N; D.R.I. R. 12.1; M.D. TENN. R. 8(b)(7); N.D. TEX. R. 5.2(a).

The Second Circuit has approved such a rule. *See* SEC v. Research Automation Corp., 585 F.2d 31, 34 n.6 (2d Cir. 1978). Most of the rules do not sanction noncompliance directly but, for example, provide that failure of the opposing party to respond to a motion for summary judgment will be deemed an admission. *See, e.g.*, S.D.N.Y. R. 9(g):

> Upon any motion for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried.
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> The papers opposing a motion for summary judgment shall include a separate, short and concise statement of material facts as to which it is contended that there exists a genuine issue to be tried.
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> All material facts set forth in the statement required to be served by the moving party will be deemed admitted unless controverted by the statement required to be served by the opposing party.

20. In a recent case, the Sixth Circuit has suggested as much:

> Defendants filed a motion to dismiss the action and for summary judgment. No memorandum contra was filed by plaintiffs, and the district court granted the motion pursuant to its rule 3.5.2, which provides in relevant part that
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> Any memorandum contra shall be filed within twenty (20) days from the date of service of the motion and supporting memorandum, or such other period as the Court may require. Failure to file a memorandum contra may be cause for the Court to grant the motion as filed. . . .
>
> . . . .
>
> During the pendency of this appeal the Court decided in Smith v. Hudson, 600 F.2d

courts to grant summary judgment without such a review.[21] They are consistent with the Tenth Circuit's view that rule 56(c) is permissive rather than mandatory, because they can be interpreted as merely prescribing the manner in which the opposing party must present evidence opposing a summary judgment motion.

The incompatible constructions given rule 56(c) belie the Sixth Circuit's contention that the rule's meaning is clear.[22] Since most courts appear to have adopted the Tenth Circuit's interpretation, one is tempted to write off the Sixth Circuit's view as anomalous. Yet the federal rules are to be interpreted with reference to the accompanying notes and the background of their enactment,[23] and we should look to the construction given them by the drafters[24] before rejecting the Sixth Circuit's view. The next section shows that the drafters intended courts to search the discovery record in passing on a motion for summary judgment.

II.

On June 3, 1935, pursuant to the authority granted under the Rules Enabling Act,[25] the Supreme Court appointed a fourteen member Advisory Committee to draft federal rules of civil procedure.[26] The committee published two preliminary drafts — one in 1936, the other in 1937 — and circulated them to the bench and the bar for criticisms and suggestions.[27] In response to the many com-

60 (6th Cir. 1979) that a district court could not use the failure of plaintiffs to respond to a motion for summary judgment as a reason to grant such a motion without having first examined all of the discovery materials properly before it and determined that there existed no genuine issue of material fact and that judgment for the movant was called for as a matter of law. Although the instant record contains no suggestion by the district court that it had conducted such an examination, and *its judgment might otherwise be suspect since it is based solely on plaintiff's non-compliance with local rule 3.5.2*, nevertheless this Court has considered all of the pleadings and discovery materials in the record and concludes that the action was appropriate for either summary judgment, *Smith v. Hudson*, *supra*, or for dismissal for want of subject matter jurisdiction and for failure to have stated a claim for which relief could be granted.

Lyons v. Mackey, No. 78-3249 (6th Cir. Jan. 17, 1980) (emphasis added).

21. If the Sixth Circuit's interpretation of rule 56(c) is correct, these district court rules would be invalid under rule 83, which provides that district courts may only promulgate procedural rules that are "not inconsistent with" the Federal Rules of Civil Procedure. FED. R. CIV. P. 83. *See generally* 7 MOORE'S FEDERAL PRACTICE ¶ 83.03 (2d ed. 1980).

22. *See* note 13 *supra*.

23. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 159 (1970).

24. *See* Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 444 (1946) (drafters' intention entitled to some weight in construing the Federal Rules).

25. Act of June 19, 1934, ch. 651, §§ 1 & 2, 48 Stat. 1064 (current version at 28 U.S.C. § 2072 (1976)).

26. Appointment of Committee To Draft Unified System of Equity and Law Rules, 295 U.S. 744 (1935). The committee membership included nine practicing attorneys and five prominent law professors. *See* 1A MOORE'S FEDERAL PRACTICE ¶ 0.511 (2d ed. 1980).

27. Following the circulation of the 1936 draft, the Advisory Committee received hundreds of suggestions for improving the rules. These suggestions were collected and organized by rule

ments received on each draft, the committee revised the rules and submitted a final version to the Court in November 1937.[28] After making minor changes, the Court adopted the rules and promulgated them on December 20, 1937.[29] The rules were reported to Congress by the Attorney General on January 3, 1938, and they took effect on September 16, 1938.[30] At three steps in the evolution of the federal rules there are indications that rule 56(c) was intended to require a search of the discovery file: the decision to redraft the language of the summary judgment provisions in the first preliminary draft, the text of the summary judgment provision in the second preliminary draft, and committee member Edson R. Sunderland's comments on what became the current rule 56(c).

The first preliminary draft of the federal rules provided for summary judgment in two separate rules: one for a motion upon the pleadings, depositions, and admissions on file, and another for a motion upon affidavits.[31] The second rule ordered a court to render

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number, and then reduced from their original form to an abstract that reflected the substance of the original suggestions in a more concise form. This and certain other materials cited in this Note may be found in Edson R. Sunderland's personal papers, filed by box number at the Michigan Historical Collections, Bentley Historical Library, University of Michigan. *See* E. Hammond, Abstracts of Local District Court Committee Reports and of Individual and Association Suggestions (unpublished paper in box #27 of Sunderland's papers).

28. *See* ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, FINAL REPORT (Nov. 1937).

29. 302 U.S. 783 (1937).

30. *See generally* 1A MOORE'S FEDERAL PRACTICE ¶¶ 0.501-0.522 (2d ed. 1980).

31. U.S. SUPREME COURT ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND THE SUPREME COURT OF THE DISTRICT OF COLUMBIA (Preliminary Draft, May 1936). Rules 42 and 43 provided:

> Rule 42. Motion for Summary Judgment Upon Pleadings, Depositions and Admissions. Any party may make a motion, upon grounds specified therein, for a judgment in his favor upon the pleadings, depositions and admissions on file in respect to any or all of the matters involved in the action, upon notice to all other parties to be affected thereby. Any adverse party may file affidavits in opposition thereto, and the court may in its discretion permit either party to take and file depositions or to present oral testimony. If the court finds from such pleadings, depositions, affidavits and testimony that there is no substantial issue of fact affecting the right of the moving party to judgment, it shall give judgment accordingly.
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> Rule 43. Motion for Summary Judgment upon Affidavits.
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> (a) *For Claimant*. Any party seeking to recover upon a claim, counterclaim, or crossclaim may, at any time after serving the pleading presenting the claim, move for a summary judgment in his favor thereon. Such judgment shall forthwith be rendered if the motion is supported by affidavits setting forth facts which, on their face, would require a decision in his favor as a matter of law, unless the adverse party shall present opposing affidavits setting forth substantial evidence in denial or avoidance thereof. Judgment in this manner may be rendered in an action for declaratory relief.
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> (b) *For Defending Party*. [A similar provision is made for summary judgment upon affidavits for the defending party.]

It should be noted that under rule 42 the mere filing of the depositions would place that material before the court for consideration on a summary judgment motion.

The May 1936 Preliminary Draft actually had three rules governing summary judgment: rule 42 for judgment upon pleadings, depositions, and admissions; rule 43 for judgment upon affidavits; and rule 44 for defining the issues when the case is not fully adjudicated on the motion for judgment. The first two rules were merged into what became rule 56(c). The third,

summary judgment for a party filing an adequate affidavit unless the opposing party filed an opposing affidavit "in avoidance or denial thereof." This rule permitting summary judgment without review of the record alarmed at least one bar association, and the summary judgment rules were combined in later drafts, arguably in response to that objection.[32]

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rule 44, now appears substantially as rule 56(d). By combining rule 44 with the other rules, summary judgment proceedings could be dealt with under one single rule. Unlike the consolidation of rules 42 and 43, the consolidation of rule 44 appears to have no substantial impact on the procedure for summary judgments provided for in the preliminary drafts.

Under rule 56(d), a court that cannot render a summary judgment upon the whole case issues, if practical, a pre-trial order specifying the facts that are established without controversy and the facts that are controverted in good faith. The order under 56(d) is very similar to the pre-trial order under rule 16; it is a method for salvaging any constructive results from the hearing on the motion for summary judgment. *See* 6 MOORE'S FEDERAL PRACTICE ¶ 56.20[1] (2d ed. 1980). The process of examining the materials before the court under rule 56(d) is no different from the procedure under rule 56(c); they are in fact the same "hearing on the motion." Only the determination that the court is required to make under the two rules is different. Under rule 56(c), the court decides whether a genuine issue of fact exists; under rule 56(d), the court, having determined that an issue of fact does exist, specifies what facts appear without substantial controversy and are thereby deemed established at the trial. Since the court is considering those materials that are already "before it" on the motion for summary judgment, this subdivision of the rule provides no insight into what constitutes proper presentation to the court of materials to be considered on a motion for summary judgment rendered under rule 56(c). Any materials properly before the court for purposes of a determination under rule 56(c) will be properly before the court for a determination under rule 56(d).

32. Edson R. Sunderland may have believed court review of the record was constitutionally compelled. The Federal Bar Association of New York, New Jersey, and Connecticut raised the issue in response to the 1936 Draft:

> The only ground upon which summary judgment in a law action may be constitutionally obtained — on mere motion, where the pleadings in a cause present an issue of fact, is that the issue is in essence, not existent. On any other basis, a party has, in a law action, a constitutional right to trial by jury. These rules, instead of confining the procedure to the presentation of a record upon which to base a claim for the essential non-existence of any issue, in effect, provide for a sort of intermediate trial without jury. Have a redraft of Rules 42, 43 and 44 in *one* new rule.

E. Hammond, *supra* note 27. Sunderland's copy of the suggestion is marked with a circle around the portion advising combination of the three rules into one, and the rules were subsequently combined.

The objection that summary judgment may be constitutionally obtained only where there is no factual issue in existence and that, therefore, a court must consider the entire record in the case is overbroad. Clearly, courts are not expected to undertake their own investigation of the case or questioning of witnesses prior to granting summary judgment. Parties must undertake sufficient discovery or preparation of affidavits in order to bring factual issues to light. *See* text at note 67 *infra*.

The right to a jury trial does not dictate a certain procedural form; it merely insures that a jury trial be available to a party. In *Ex parte* Peterson, 253 U.S. 300 (1920), the Supreme Court held that reading to the jury a transcript of a hearing before an auditor who simplified the issues and expressed his opinion on various material facts did not infringe any constitutional right. The reasoning of the Court in that case sustains the constitutionality of summary judgment granted only on the basis of materials presented to the court:

> The command of the Seventh Amendment that "the right of trial by jury shall be preserved" does not require that old forms of practice and procedure be retained. *Walker v. New Mexico & Southern Pacific R.R. Co.*, 165 U.S. 593, 596. Compare *Twining v. New Jersey*, 211 U.S. 78, 101. It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the admin-

The 1937 draft, which combined the two earlier summary judgment rules, indicated fairly clearly that the court was expected to inspect the materials contained in the discovery record:

> [U]nless the adverse party . . . serves opposing affidavits setting forth facts sufficient to constitute a denial or avoidance, the judgment sought shall be rendered forthwith if (1) the pleadings of the moving party and also (2) the depositions and admissions on file together with the affidavits, if any, attached to or served with the motion show upon their face that, except as to the amount of damages, there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law.[33]

This language suggests that the only method by which the opposing party directly presents information to the court is by serving affidavits. If these affidavits do not show the existence of a factual dispute, then the court must still decide from the moving party's pleadings and affidavits and "the depositions and admissions on file" whether a triable issue exists. Since the opposing party is not obligated to point out favorable discovery material, the court must search the discovery record.

After comments were received on the 1937 draft, committee member Edson R. Sunderland rearranged the phrases of the summary judgment rule to produce the version of 56(c) that was submitted to the Supreme Court.[34] Sunderland's personal papers confirm that the committee expected courts to examine the discovery record when considering a motion for summary judgment. In a paper designed to educate lawyers about the "new" rules as finally promulgated, Sunderland stated: "The adverse party may file such affidavits as he may desire in opposition to [a summary judgment] motion. Upon the hearing, *if it appears from an examination of the files*, that except as to the amount of damages, there is no genuine issue as to

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istration of justice. Indeed such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with.

253 U.S. at 309-10 (footnote omitted). *See generally* 6 MOORE'S FEDERAL PRACTICE ¶ 56.06 (2d ed. 1980).

33. U.S. SUPREME COURT ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, PROPOSED RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES at 38(c) (Preliminary Draft, April 1937) [hereinafter cited as *1937 Draft*].

34. Sunderland was a professor of law at the University of Michigan from 1904 to 1944, and his personal papers are now stored there. *See* note 27 *supra*. Sunderland was supervisor of the drafts on summary judgment in the federal rules. See *1937 Draft*, *supra* note 33, at vii. A copy of the *1937 Draft*, located in box #32 of Sunderland's papers, *see* note 27 *supra*, and identified as his "Marked Copy," shows editing in his handwriting which changes the wording of the proposed rule 38(c) into the final version adopted as rule 56(c). Sunderland's papers also contain various other drafts of the rule edited in Sunderland's handwriting. *See, e.g.*, Advisory Comm. on Rules for Civil Procedure, Tentative Draft III (March 1936). (Sunderland's copy of this unpublished draft is located in box #26 of his personal papers. *See* note 27 *supra*).

any material fact, the judgment shall forthwith be rendered."[35] Although Sunderland did not directly address the question, his remarks suggest that a response to a motion for summary judgment was to be optional, and that court review of the filed materials was prerequisite to a grant of summary judgment. Further support for the Sixth Circuit's view can be gleaned from Sunderland's talks to various lawyers' groups, in which he repeatedly described court review of the record in mandatory terms.[36] On one occasion Sunderland explained: "If there are depositions or admissions on file, these also will be considered and the summary judgment will be rendered or not, depending upon whether the whole record fails or does not fail to disclose an issue of fact."[37]

The rule Sunderland sent to the Supreme Court has remained essentially intact. The Supreme Court adopted amendments to rule 56 in 1946 and 1963,[38] but none reveals an intent at variance with Sunderland's description of the court's obligation to search the discovery record. The 1963 amendment to rule 56 which might at first glance seem to alter that obligation also failed to do so. The 1963 amendment added "answers to interrogatories" (inadvertently omitted by the original drafters) to the list of materials on which summary judgment could be based.[39] It also changed rule 56(e) to expressly require that an opposing party "set forth specific facts" in opposition to a supported summary judgment motion. If the party does not so respond, "summary judgment, if appropriate, shall be entered against him."[40] Through this amendment, the Supreme Court intended to clarify that an opposing party could not rely solely

35. E. Sunderland, The Principles Underlying the New Federal Rules of Civil Procedure 22 (Dec. 1, 1938) (emphasis added) (located in box #33 of Sunderland's papers, *see* note 27 *supra*).

36. *See* Transcript of Speech by E.R. Sunderland, Kansas City Legal Institute (May 25, 1938) (published by the Lawyer's Association of Kansas City, Missouri) (located in box #3 of Sunderland's papers, *see* note 27 *supra*) ("If there are any depositions or admissions on file under the discovery rules, the court *will look* at them as well as the affidavits"); Notes to Address by E.R. Sunderland, Columbus Bar Association (Jan. 15, 1938) (located in box #5 of Sunderland's papers, *see* note 27 *supra*) ("The court *will then inspect* the record, including the pleadings, and all affidavits, depositions or admissions on file") (emphasis added in each quotation).

37. *New Federal Rules of Civil Procedure as Related to Judicial Procedure in Ohio*, 13 U. CIN. L. REV. 1, 49 (1939).

38. Amendments to Rules of Civil Procedure for the United States District Courts, 329 U.S. 839, 862 (1946); Amendments to Rules of Civil Procedure for the United States District Courts, 374 U.S. 861, 888 (1963). *See* FED. R. CIV. P. 56, Advisory Comm. Note (1946 amendment & 1963 amendment).

39. *See* FED. R. CIV. P. 56, Advisory Comm. Note (1963 amendment, subdivision (c)).

40. FED. R. CIV. P. 56(e). This section provides in part:

(e) Form of Affidavits; Further Testimony; Defense Required. . . . The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set

on his pleadings to raise issues of fact, and thus to reverse a line of cases, primarily in the Third Circuit, that had permitted the pleadings to stand in the way of granting an otherwise justified summary judgment.[41] The Court did not intend to change the standards applicable to the summary judgment motion.[42] Therefore rule 56(e) does not, by its terms, relieve a court of its obligation to search the record, since the original drafters contemplated summary judgment would be "appropriate" only if the record failed to reveal a factual dispute.

The history of the drafting of rule 56(c) indicates that the committee envisioned a duty to search the discovery record before granting a summary judgment. Nevertheless, its foresight was obscured because both summary judgment and discovery were innovations.[43] Sunderland characterized summary judgment as a "simple" procedure.[44] He believed that summary judgment motions would be decided primarily on the affidavits of the parties, and that the documents in the discovery file would be regarded merely as supplemental material for the court.[45] Sunderland and the other drafters did not foresee how extensive discovery proceedings would become, and hence they did not realize that requiring the court to read through voluminous discovery materials would distort the "simple" summary judgment procedure they desired.

III.

A requirement that courts search the discovery file for triable facts before granting summary judgment will presumably preserve the right to jury trial of a party whose attorney (perhaps through incompetence) fails to bring a material factual issue in the file to the attention of the court. It is this party that the drafters of rule 56 may

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forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate shall be entered against him.

41. *See* FED. R. CIV. P. 56, Advisory Comm. Note (1963 amendment, subdivision (e)).

42. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-60 (1970). *See* FED. R. CIV. P. 56, Advisory Comm. Note (1963 amendment, subdivision (e)); 6 MOORE'S FEDERAL PRACTICE ¶ 56.22[2] (2d ed. 1980).

43. *See* FED. R. CIV. P. 56, Advisory Comm. Note (summary judgment recently adopted in United States from England); Hickman v. Taylor, 329 U.S. 495, 500 (1947) ("The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure.").

44. *See* E. Sunderland, *supra* note 35, at 22 ("But the new rules go still further in developing the advantages of pre-trial discovery, by providing a definite procedure for rendering a summary judgment when it appears from such discovery that there is no substantial issue of fact to be tried. The method is very simple.").

45. *See New Federal Rules of Civil Procedure as Related to Judicial Procedure in Ohio*, *supra* note 37, at 48-49. Sunderland's notes for a speech before the Toledo Bar Association in December 1938, located in box #19 of his papers, *see* note 27 *supra*, also explain that summary judgment would be rendered upon the affidavits submitted by the parties, and that affidavits would be the "normal" way of presenting evidentiary material. He then explained that *if* there were discovery documents on file, these *also* would be considered.

have had in mind when they assumed courts would search the discovery file.[46] Yet the expansion of discovery has resulted in changed circumstances which render this assumption of the drafters inconsistent with purposes of the summary judgment rule in the federal procedural scheme. The drafters intended summary judgment to be summary: it was to be a "method for promptly disposing of actions"[47] that would promote the "efficient and economical administration of justice."[48] This section therefore argues that rule 56(c) ought to "be construed to secure the just, speedy and inexpensive determination" of actions, as rule 1 directs,[49] rather than to require a search of the discovery file.

Edson R. Sunderland expected that discovery would be a valuable aid in promoting justice and fairness through disclosure of evidentiary data that might prove useful in resolving a dispute.[50] Discovery has not fulfilled Sunderland's expectations. Discovery records are often needlessly large, and they frequently contain a great deal of information not essential to the determination of a given action.[51] Many attorneys have come to use discovery to impose delay and expense on their adversaries, thereby bloating the discovery record.[52] If the trial court bears the onerous burden of sifting through the record to ensure that no factual basis exists for any claim or defense, summary judgment rulings may be considera-

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46. *See* note 32 *supra*.

47. FED. R. CIV. P. 56, Advisory Comm. Note.

48. "This summary remedy carries to its logical conclusion the theory that the pleadings are inadequate to show the existence or the nature of a controversy, and that opportunities for pre-trial inquiry into the evidence behind the pleadings are essential to an efficient and economical administration of justice." E. Sunderland, *supra* note 35, at 22-23. Commentators have also observed that summary judgment is a necessary aspect of a procedural scheme that employs a liberal pleading code. *See, e.g.*, Bauman, *A Rationale of Summary Judgment*, 33 IND. L.J. 467 (1958); Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745 (1974).

49. FED. R. CIV. P. 1.

50. *See* Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737, 739 (1939); Sunderland, *Improving the Administration of Justice*, 167 ANNALS 60, 76 (1933). For comments of other authorities see, *e.g.*, Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure*, 41 MICH. L. REV. 205 (1942); Pike & Willis, *The New Federal Deposition-Discovery Procedure* (pts. 1-2), 38 COLUM. L. REV. 1179, 1436 (1938).

51. In 1980 an amendment to subdivision (d) of rule 5 made filing of discovery materials optional upon motion of the court or the parties. *See* note 58 *infra*. The committee note on the amendment states that the rule was amended both because no use is made of the materials after they are filed and because the "large volume of discovery filings presents serious problems of storage in some districts." FED. R. CIV. P. 5, Advisory Comm. Note (1980 amendment, subdivision (d)). Although empirical evidence on the use of discovery is scarce, the fact that an amendment to the rules was needed to help alleviate the storage problem suggests that the volume of discovery has greatly expanded.

52. *See* Brazil, *The Adversary Character of Civil Discovery*, 31 VAND. L. REV. 1295, 1303 (1978). For a discussion and statistical analysis of the use of discovery in modern procedure, see W. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM (1968).

bly delayed. Given overburdened trial court dockets[53] and the fact that denials of summary judgment are rarely subject to appellate review,[54] trial courts may even deny summary judgment when an opposing party inadequately responds to a well-supported motion if court review of an extensive record is the alternative.[55]

The Sixth Circuit's construction of rule 56 also creates inefficiencies at the appellate level. When faced with an appellant challenging a trial court's inadequate examination of the discovery file before granting summary judgment, the appellate court must either search the entire discovery record itself[56] or require the appellant to bring to the court's attention the matters in the discovery record that create a triable issue. Should the court select the first alternative, it will double the burden the Sixth Circuit's rule imposes on the judiciary. Should it elect the second alternative, the court will require the same presentation that might have been made at the trial level to defeat the motion originally.[57]

Even though recent amendments to the federal rules may make discovery files less bulky than in the past,[58] it seems appropriate to place the burden of identifying material issues of fact on the party opposing summary judgment rather than on the trial court.[59] First,

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53. During 1979 (the latest period for which figures are available) a total of 162,469 civil cases were filed in the district courts, an increase of 12.5 percent over the 144,400 cases filed during 1978. Despite a significant increase in terminations, the pending civil caseload also continued to rise, increasing 6.4 percent from 173,100 in 1978 to 184,104 in 1979. This pending caseload is the largest ever in the district courts. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 5 (1980).

54. Denial of summary judgment is an interlocutory order from which appeal is unavailable until the entry of judgment following the trial on the merits. *See* United States v. Florian, 312 U.S. 656 (1941) (per curiam).

55. *Cf.* Painton & Co. v. Bourns, Inc., 442 F.2d 216 (2d Cir. 1971) (summary judgment inappropriate if the procedure requires as much time as a full-dress trial).

56. This appears to be what the Sixth Circuit did in Lyons v. Mackey, No. 78-3249 (6th Cir. Jan. 17, 1980). *See* note 20 *supra*.

57. This was in fact what occurred in *Smith v. Hudson*. In its appeal from the district court's grant of summary judgment, appellant specified the material that disclosed a material issue of fact to the appellate court. Brief for Appellant at 7, Smith v. Hudson, 600 F.2d 60 (6th Cir.), *cert. dismissed under rule 60*, 444 U.S. 986 (1979). The Sixth Circuit recognized this difficulty, commenting in a footnote: "[Plaintiff's] counsel made no initial response whatever to the defendant's motion for summary judgment. We believe it is likely that this case could have been properly resolved long ago on the merits if plaintiff's counsel had shown proper concern for matters of practice and procedure." 600 F.2d at 63 n.1.

58. FED. R. CIV. P. 5(d). Before the 1980 amendment rule 5(d) provided that "[a]ll papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter." The amendment allows the court "on motion of a party or on its own initiative [to] order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding."

59. Moreover, the choice between the Sixth Circuit and Tenth Circuit rules is not one of placing the burden on the court *or* on the opposing party. Even if the trial court were required to search the discovery record, the opponent's attorney would be foolish not to point out discovery materials that show an issue of fact. Thus under the Sixth Circuit's rule the trial court,

the party opposing summary judgment is much better equipped than the trial court to winnow from the discovery file the issue of fact that would defeat an adequately supported motion. The opposing party is better equipped to search the discovery file because of his involvement in compiling it. Counsel for the opposing party is present when the depositions are taken, has an opportunity to review the text of the depositions, and frames or answers the interrogatories and requests for admissions that go into the discovery file.[60] Even when the file is relatively small, summary judgment would be more efficient if the opposing party — who is familiar with the file — searched the record rather than a trial court which comes to it cold.

Second, requiring an opposing party to identify evidence to rebut a well-supported summary judgment motion is consistent with the balance between fairness and efficiency struck elsewhere in the federal procedural scheme. Federal procedural rules require parties to prepare diligently for trial,[61] and failure to comply with procedural requirements often carries sanctions. Parties must obey provisions that dictate both acceptable form and proper timing for motions.[62] Failure to respond promptly to a request for admissions results in admission by default of the matter requested.[63] Failure to appear at a pre-trial conference may be grounds for dismissal of the action.[64] Similarly, once a plaintiff presents a prima facie case at trial, the defendant must either attack the credibility of the plaintiff's evidence or introduce new evidence sufficient to raise an issue that requires a jury decision, or lose on a directed verdict.[65] Even if the defendant has strong evidence supporting his position, failure to respond adequately through presentation of this evidence results in an adverse judgment. Finally, the summary judgment motion itself imposes a

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the opponent's attorney, and possibly the circuit court, *see* text at note 56 *supra*, will each search the same haystack for the same needles.

60. *See* EEOC v. Keco Indus., Inc., 617 F.2d 443, 446 (6th Cir. 1980). While requiring the trial court to search the discovery record prior to granting summary judgment, the court observed:

> We find inexcusable the failure of the EEOC to draw to the attention of the District Court or this Court the sworn evidence in the record on which it intended to rely. . . . The record in this case is voluminous and confusing. Overburdened District Judges should be able to rely on counsel who are familiar with depositions, documents, and affidavits in the file to locate the relevant information.

617 F.2d at 446.

61. *See, e.g.*, FED. R. CIV. P. 16; Hickman v. Taylor, 329 U.S. 495, 501 (1947); Kaufman, *Judicial Control over Discovery*, 28 F.R.D. 111, 125 (1960).

62. *See* FED. R. CIV. P. 12(h), 15(a). For example, failure to timely assert lack of jurisdiction results in waiver of the defense. *See, e.g.*, Konigsberg v. Shute, 435 F.2d 551 (3d Cir. 1970).

63. *See* FED. R. CIV. P. 36(a). Unless objected to within 30 days, the matter requested is deemed admitted.

64. *See, e.g.*, Link v. Wabash R.R. Co., 370 U.S. 626 (1962) (upholding district court dismissal of action, with prejudice, for failure of counsel to appear at pre-trial conference).

65. *See, e.g.*, Dyer v. MacDougal, 201 F.2d 265 (2d Cir. 1952).

burden on the opposing party to undertake adequate discovery or produce affidavits that reveal a triable issue of fact. Although a party may avoid summary judgment by setting forth reasons why he cannot produce facts sufficient to raise a material issue,[66] mere failure to undertake discovery without satisfactory explanation will not delay granting of an otherwise appropriate summary judgment motion.[67]

In summary, the responsibility of an adverse party to present evidence in opposition to a well-supported summary judgment motion is no more burdensome than many other federal procedural requirements. Requiring the opposing party to present materials directly to the court would not alter the underlying standard of "appropriateness" of summary judgment,[68] but would simply shift the burden of searching the discovery file to the party in the best position to show the existence of a factual dispute.

CONCLUSION

Neither the wording of rule 56 nor the proper role of summary judgment in the federal procedural scheme requires a court to consider materials not specifically offered in opposition to a motion for summary judgment. The Tenth Circuit's rule permitting but not requiring trial courts to consider unpresented depositions, answers to interrogatories, and admissions in the discovery file relieves the courts of a considerable burden, and assigns the duty to identify material facts to the party best able to discharge it. In the interests of judicial economy and the speedy resolution of disputes, the Sixth Circuit's interpretation of rule 56(c) — which requires trial courts to search routinely filed discovery materials before granting summary judgment — should be rejected. Although the drafters of rule 56 expected that courts would review the discovery record, summary judgment could not operate today as the drafters envisioned if the court were to bear that burden.

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66. *See* FED. R. CIV. P. 56(f).

67. *See* First Natl. Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 298 (1968).

68. The movant would still have to show that he is entitled to summary judgment by discharging the burden of showing that there is no genuine issue of fact. *See* note 9 *supra*.