"PLEASE READ THE DIRECTIONS"

STATE AND FEDERAL SUMMARY JUDGMENT PRACTICE: 2001

(This document addresses summary judgment practice in the State and Federal Courts of the State of Maine. It is adapted from materials presented at a Maine State Bar Association Continuing Legal Education program, January 26, 2001. The materials were prepared by Donald G. Alexander, Associate Justice, Maine Supreme Judicial Court, with the assistance of Robert C. Hatch, Law Clerk to Justice Alexander, and Arlyn Weeks, Law Clerk to Magistrate Judge David M. Cohen.)

This document has been updated to recognize amendments to Rules 7(b) and 7(c) of the Local Rules of the United States District Court for the District of Maine effective March 1, 2001.

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I. INTRODUCTION

Summary judgment practice before state and federal courts in Maine is subject to nearly identical rules and has been so for more than a decade. In 1990, the Maine Rules of Civil Procedure were amended to adopt provisions similar to the then effective local federal rules governing summary judgment practice. The local federal rules were rewritten into Local Rule 56 in 1999. Changes in the Maine Rules of Civil Procedure, adding Rule 56(h), effective January 1, 2001, again make federal and state summary judgment practice nearly identical.[1]

Rules 7 and 56 of the Maine Rules of Civil Procedure, the Federal Rules of Civil Procedure, and the Local Rules of the United States District Court for the District of Maine are rather simple and explicit as to what is

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1. Today, there are only minor, process differences between state and federal summary judgment practice:

A. Motion Form: The federal local rules suggest that the motion and supporting memoranda be combined in one document. *See* D. Me. Local Rule 7(a). However, except for the simplest motions, the practice is for the motion and the memorandum to be separate. In state practice, the motion and supporting memorandum are usually filed as separate documents. A separate motion promotes a very concise statement of the relief requested in the motion document.

B. Opportunity for Hearing: In federal practice, motions, even dispositive motions, may be resolved without hearing, except where a hearing is ordered by the judge. In state practice, a hearing is usually afforded on a contested motion for summary judgment. In both courts, quality briefing is important because the time for hearing, where a hearing is afforded, may be very short, and the hearing may focus on issues of concern to the judge, not points neglected by counsel in the briefing process.

C. Ruling Against Moving Party: The last sentence of M.R. Civ. P. 56(c) explicitly notes that in state practice a ruling on a motion for summary judgment may be against the moving party. *See Beaucage v. City of Rockland*, 2000 ME 184, ¶ 5, 760 A.2d 1054, 1056; *Keyes Fibre Co. v. Lamarre*, 617 A.2d 213, 214 (Me. 1992). Such may also occur in federal practice, but usually after some notice by the court if summary judgment in its favor has not been requested by the nonmoving party in its briefing. *See Berkovitz v. Home Box Office, Inc.*, 89 F.3d 24, 29 (1st Cir. 1996). In both courts, this is done sparingly.

required to prepare, file, support, and oppose a motion for summary judgment. Despite this clarity, continuing uncertainty exists when applying these rules to summary judgment practice in specific case situations.

These materials are designed to identify specific problem areas, outline the rules and relevant law governing that area, and provide suggestions for improved practice. There are five areas of concern that arise most frequently in summary judgment practice:

First, and most frequently occurring, is the failure to adequately prepare a statement of material facts supporting or opposing a motion for summary judgment in a way that is sufficiently specific and tied to specific record references to material of evidentiary value;

Second is the premature filing of summary judgment motions before facts are fully developed, and the related problem of confusing summary judgment practice with motion to dismiss practice pursuant to Rule 12(b)(6);[2]

Third is overbroad motions for summary judgment that, *inter alia*, seek summary judgment on claims as to which there are apparent disputes of material fact;[3]

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2. In this paper, where a rule number is cited without further citation, it refers to identically numbered provisions of the Maine Rules of Civil Procedure and the Federal Rules of Civil Procedure which have identical or substantially similar wording.

3. In preparation for this program, one experienced litigator stated:

> The single, most frequent cause of problems in summary judgment practice is the failure of moving parties to recognize that summary judgment is a rifle shot, not a shotgun, approach to disposing of issues. We frequently see motions attempting to eliminate a complex case in its entirety, while the opponent purposely responds with a broad brush filing intended to suggest that there are issues of fact. It is the failure to focus sharply on the legal issues that causes

Fourth is inadequate attention to opportunities for partial summary judgment, both to resolve discrete questions of law and to identify facts which can be established without dispute, thereby avoiding the necessity of proof at trial; and

Fifth is the failure to recognize that the points advocated in supporting or opposing summary judgment in the trial court largely control the positions that can be taken on any appeal of a summary judgment ruling.

The above primarily focuses on attorney practices. Judicial practices regarding summary judgment are also worth comment. One experienced litigator has noted:

> (a) Judges often get the advocates they cultivate. If the judges do not require strict adherence to the rules, there will be no strict adherence to the rules.
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> (b) Now that single justice management is becoming the norm in the state court, judges have the opportunity to shape the practice by rejecting filings that do not comply with the rules. No longer will judges have to accept substandard filings to avoid passing the problem to the next judge on the circuit.
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> (c) Each new procedure requires a short but forgiving period of adjustment in which judges perform a pedagogical role. Consequently, rather than entering summary judgments for lack of strict adherence to the new rules, perhaps state judges could reject pleadings and give the parties a short time to properly prepare them and resubmit.
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> (d) Poor summary judgment practice is inadvertently encouraged by judges who, understandably, throw up their hands, roll up their sleeves and delve into the record in order to decide the case, perhaps on facts and even issues the parties have not recognized, much less briefed. Not only does this expose the trial court to making a mistake or drawing motions for reconsideration, but it creates in the Bar an attitude that it

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many unusable statements of fact.

makes little difference what is briefed and supported because the court will do its own record review and make its own decision. This occurs, by the way, not only in the trial court, but also at the appellate level.[4]

The materials that follow are divided into two parts:

1. Discussion of issues in summary judgment practice; and

2. Suggestions for drafting effective pleadings for -- and against -- summary judgment.

4. This represents the views of an experienced litigator, communicated by letter of December 14, 2000.

II. SUMMARY JUDGMENT PRACTICE ISSUES

1. Reading the Rules

Read state, federal, and local rules 7 and 56; intimate familiarity with them is essential.[5] Understanding those rules is aided by review of the United States Supreme Court decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Useful recent precedent for Maine, the First Circuit, and the District of Maine includes *Corey v. Norman, Hanson & DeTroy*, 1999 ME 196, ¶ 8, 742 A.2d 933, 938; *Pratt v. Ottum*, 2000 ME 203, ¶ 15 n.8, 761 A.2d 313, 318; *Burns v. State Police Ass'n of Massachusetts*, 230 F.3d 8 (1st Cir. 2000); *Cantor v. O'dea*, No. 00-128-P-C, 2000 WL 1730883 (D. Me. Nov. 21, 2000); *Barstow v. Kennebec County Jail*, 115 F. Supp.2d 3 (D. Me. 2000).

2. Premature Summary Judgment Motions

A premature summary judgment motion presents some risks to the moving party and some potential for wasteful delay and repetitive litigation for the court. Rule 56(f) indicates that a party opposing summary judgment must be allowed adequate opportunity to conduct discovery or otherwise develop evidence in opposition to the summary judgment motion. Where such a reasonable opportunity to develop materials has not been provided, the motion should be denied or hearing on the motion continued. *See* Rule 56(f); *Celotex Corp.*, 477 U.S. at 326; *Webb v. Haas*, 665 A.2d 1005, 1012

5. M.R. Civ. P. 56 has been amended, effective January 1, 2001, to add new subdivision 56(h) addressing statements of material facts in a manner identical to local rule 56. Statements of material facts were previously addressed in M.R. Civ. P. 7(d) which was based on the previous local rule 19(b). D. Me. Local Rules 7(b) and 7(c) have been amended, effective March 1, 2001, to make the deadlines for opposing motions similar to the state 21–day deadline for filing opposition to motions.

(Me. 1995); *Moore v. City of Lewiston*, 596 A.2d 612, 615 (Me. 1991); *C-B Kenworth, Inc. v. Gen. Motors Corp.*, 118 F.R.D. 14 (D. Me. 1987). Thus, it is not possible to "blindside" someone with a premature motion for summary judgment. Where more time for development of evidence is needed, the nonmoving party must file some opposition and a request for more time, properly supported by affidavit, within 21 days.

When a party has not had a reasonable opportunity to undertake discovery, either denial of the motion for summary judgment or a continuance for discovery is a likely result. Thus, Rule 56(f) provides:

> **(f) When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Practitioner's Note: A request for more time stated only in a motion or memorandum in opposition to a motion for summary judgment is insufficient. Rule 56(f) requires that the reasons supporting a request for more time must "appear from the affidavits of a party opposing the motion." Thus, a request for more time must be supported by an affidavit.

The above discussion does not mean that a motion for summary judgment should not be filed early in the proceedings if, in reality, there is no significant dispute as to the material facts. Such often happens, particularly where a plaintiff is the moving party, as in a debt collection case, or where the facts have been significantly examined before suit was filed. However, attempting and failing an early resolution of the case through a

motion to dismiss or a premature motion for summary judgment risks a ruling on legal issues which can become the "law of the case." *See United Air Lines, Inc. v. Hewins Travel Consultants, Inc.*, 622 A.2d 1163, 1167 (Me. 1993); *Shove v. E.J. Prescott, Inc.*, No. 93-31-B-H, 1994 WL 247769 (D. Me. May 4, 1994).

The law of the case doctrine may make prospects more difficult for a later motion for summary judgment presented after further development of the facts. Where "law of the case" concerns may arise, it will be important to identify new developments in the case, or in the law, before inviting the court to revisit an issue on which it may have already ruled. *See*, *e.g.*, *Lester v. Powers*, 596 A.2d 65, 67-68 (Me. 1991) (where a new appellate opinion resulted in the trial court considering and granting summary judgment after summary judgment had been denied earlier in the case).

3. Specific Time Limits in Rules or Orders

Pursuant to Rule 56(a), a plaintiff cannot file a motion for summary judgment until 20 days after commencement of the action. The rules contain no other explicit time limit for filing motions for summary judgment. In the Federal District Court, a scheduling order is issued shortly after the answer or a motion to dismiss is filed. The scheduling order sets a deadline for the filing of dispositive motions. A motion for leave to file a late motion for summary judgment must be filed if a party seeks to file such a motion after the deadline for any reason. *See Heghmann v. Fermanian*, No. 99-336-P-H, 2000 WL 898457 (D. Me. June 16, 2000).

In the Maine Superior Court, a scheduling order issued pursuant to M.R. Civ. P. 16(a) may place an outside limit on filing dispositive motions. Where such an outside limit is imposed by a scheduling order, better practice suggests filing a motion for leave to file a late motion for summary judgment if new grounds develop late in the case justifying the motion. *See Carter v. Bangor Hydro-Electric Co.*, 598 A.2d 739, 740-41 (Me. 1991); *Rancourt v. Waterville Osteopathic Hosp.*, 526 A.2d 1385, 1387-88 (Me. 1987).

4. Standards for Summary Judgment Consideration

The standards for decision on motions for summary judgment are addressed in many cases, including *Champagne v. Mid-Maine Med. Ctr.*, 1998 ME 87, ¶¶ 5 & 9, 711 A.2d 842, 844-45. There, the Law Court stated:

> ¶ 5 In reviewing a summary judgment, we examine the evidence in the light most favorable to the nonprevailing party to determine whether the record supports the conclusion that there is no genuine issue of material fact and that the prevailing party is entitled to a judgment as a matter of law. *See Petillo v. City of Portland*, 657 A.2d 325, 326 (Me. 1995). In testing the propriety of a summary judgment, we accept as true the uncontroverted facts properly appearing in the record. *See Gerber v. Peters*, 584 A.2d 605, 607 (Me. 1990) (citing Field, McKusick & Wroth, *Maine Civil Practice* § 56.4 at 357 (2d ed. Supp. 1981).
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> ¶ 9 Where a plaintiff will have the burden of proof on an essential issue at trial, and it is clear that the defendant would be entitled to a judgment as a matter of law at trial if the plaintiff presented nothing more than was before the court at the hearing on the motion for a summary judgment, the court may properly grant a defendant's motion for a summary judgment.

> *See Town of Lisbon v. Thayer Corp.*, 675 A.2d 514, 517 (Me. 1996); *Gerber*, 584 A.2d at 607; *see also* M.R. Civ. P. 50(a). To avoid a judgment as a matter of law for a defendant, a plaintiff must establish a *prima facie* case for each element of her cause of action. *See Fleming v. Gardner*, 658 A.2d 1074, 1076 (Me. 1995). A judgment as a matter of law in a defendant's favor is proper when any jury verdict for the plaintiff would be based on conjecture or speculation. *See id.*; *Barnes v. Zappia*, 658 A.2d 1086, 1089 (Me. 1995).

In this analysis, the court does not look for any dispute of fact, but a "genuine" issue of "material" fact. *See* Rule 56(c). "Material" means a contested fact that has the potential to change the outcome of the case under the governing law if the dispute is resolved favorably to the nonmoving party. *See Steinke v. Sungard Fin. Sys., Inc.*, 121 F.3d 763, 768 (1st Cir. 1997); *Burdzel v. Sobus*, 2000 ME 84, ¶ 6, 750 A.2d 573, 575. "Genuine" means that the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party. *See Kenny v. Dep't of Human Servs.*, 1999 ME 158, ¶ 3, 740 A.2d 560, 562; *Prescott v. State Tax Assessor*, 1998 ME 150, ¶ 5, 721 A.2d 169, 171-72 (issue is "genuine" when facts require a choice between the parties' differing versions of the truth); *Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 253 (1st Cir. 1996).

The standards for summary judgment in favor of a party with the burden of proof are necessarily somewhat different, as it is frequently within the factfinder's prerogative to disbelieve affirmative evidence. *See Walter v. Wal-Mart Stores, Inc.*, 2000 ME 63, ¶¶ 9-31, 748 A.2d 961, 966-72 (affirming trial court entry of judgment for plaintiff on liability in a jury trial);

Houlton Band of Maliseet Indians v. Town of Houlton, 111 F. Supp.2d 51 (D. Me. 2000).

5. Record of Evidence in Opposition

Motions for summary judgment, even those made by the party with the burden of proof, must be opposed by more than denials and the listing of affirmative defenses. "Rule 56(e) imposes upon [the opponent of the motion] the obligation to come forward with affidavits or other materials setting forth by competent proof specific facts that would be admissible in evidence to show . . . that a genuine issue of fact exists." *Bangor & Aroostook R. R. Co. v. Daigle*, 607 A.2d 533, 535-36 (Me. 1992); *see also Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Thus, evidentiary material presented in support of and in opposition to motions for summary judgment must be such as should qualify for admission at trial, but for the device used to present the material in the summary judgment stage, *e.g.*, affidavit, deposition, properly authenticated statement of a party opponent, etc. *See infra* at pp. 16-17 (discussion relating to Rule 56(e)). Statements that are hearsay of the offeror of the statement, or evidence without a proper foundation, do not qualify for consideration under Rule 56(e).

A party opposing a motion for summary judgment where the motion relies on that party's prior sworn statement will not be permitted to create an issue of material fact to defeat summary judgment by submitting an affidavit disputing the party's own prior sworn testimony. *See Zip Lube, Inc. v. Coastal Savs. Bank*, 1998 ME 81, ¶ 10, 709 A.2d 733, 735. This ruling

restricts the practice of attempting to use affidavits to change prior deposition or other sworn testimony where the original sworn statement forms a basis for a motion for summary judgment. Federal practice imposes the same restriction. *See Torres v. E.I. DuPont de Nemours & Co.*, 219 F.3d 13, 21 (1st Cir. 2000).

6. The Statement of Material Facts

A proper statement of material facts is essential to all summary judgment practice. The state and local rules governing statements of material fact, M.R. Civ. P. 56(h) and D. Me. Local R. 56(a)-(e), are nearly identical. In essence, they state:

1. A statement of material facts must be filed with each parties' written materials supporting or opposing a motion for summary judgment;

2. The statement of material facts must be separate from any other documents filed in support of, or in opposition to, the summary judgment motion;

3. Each statement of material facts must be short and concise. The parties must set forth the statements in numbered paragraphs. In both state and federal practice, each separate statement of material fact should address only one discrete fact or issue;

4. Each statement requires an appropriate reference to the record where "facts as would be admissible in evidence" may be found. Rule 56(e). Rule 56(e) principally speaks of affidavits to be filed in support of, or in opposition to, motions for summary judgment. However, the factual basis to support or oppose a motion for summary judgment can be provided by (i)

any under oath statement including affidavits, interrogatory responses, depositions, and hearing transcripts; or (ii) any other document that would have evidentiary significance in a trial, such as a stipulation, a response to requests for admissions, or an authentic but unsworn statement by a party opponent.

5. Facts in the statement required to be served by the moving party, if they are supported by the appropriate record references, "will be deemed to be admitted unless properly controverted by the statement required to be served by the opposing party;"

6. Opposing statements of fact must "admit, deny or qualify" facts by reference to each numbered paragraph of the other party's statement, AND, a denial or qualification must be supported by a record citation;

7. Record references must be to specific page and paragraph numbers; and

8. The court has no independent duty to search or consider any part of the record not referenced in the parties' statements of facts. *See Dumont v. Fleet Bank of Maine*, 2000 ME 197, ¶ 13, 760 A.2d 1049, 1053-54; *Pew v. Scopino*, 161 F.R.D. 1, 1 (D. Me. 1995).

Despite the explicit language of the rules regarding statements of material facts, there are continual problems with:

— Statements of material fact that are too general and attempt to cover several or many facts and conclusions in broad statements, rather than individually targeted facts. (*E.g.*, "The defendant had a long standing relationship with plaintiff's decedent which gave rise to a fiduciary

obligation to act in the decedent's best interest and protect and preserve the property for the benefit of the decedent and the decedent's heirs.").

— The problem of broad statements is compounded by frequent lack of the requisite record citations, or citations to the record that are too broad. (*E.g.* "See plaintiff's affidavit;" or "Jane Doe's deposition, pages 9-25."). Citations complying with the rules would be "Plaintiff's Affidavit, paragraph 16," or "Jane Doe deposition, page 47, lines 10-14." Citations to the record are essential if a statement of material facts is to have binding effect. *See Biette v. Scott Dugas Trucking and Excavating, Inc.*, 676 A.2d 490, 494 (Me. 1996). "Although [defendant] filed a statement of material facts it did not provide record references as required by [the Rule]. Accordingly, the contents of [defendant's] statement are unsupported speculation that does not generate a genuine issue of material fact." *Id. See also id.* at 496.

— The cited materials, when found, do not constitute proof of specific facts that would be admissible in evidence as required by Rule 56(e). (*E.g.*, A citation is given to paragraph 20 of plaintiff's affidavit; paragraph 20, in turn, states only that "plaintiff adopts the facts and conclusions stated in my attorney's brief in opposition to summary judgment"). Such a statement would be inadmissible, if offered by the plaintiff at trial, and is insufficient to meet the summary judgment admissibility standard of Rule 56(e). *See Pratt v. Ottum*, 2000 ME 203, ¶ 15 n.8, 761 A.2d 313, 318; *Greenell Corp. v. Penobscot Air Servs. Ltd.*, No. 99-31-P-C, 1999 WL 33117116 (D. Me. Aug. 19, 1999).

Similarly, unsupported denials of facts asserted by the moving party, or mere references to portions of the complaint, fail to satisfy the admissibility standard of Rule 56(e). Citation to inadmissible statements occurs too frequently in summary judgment practice and may be reflective of the confusion between practice under Rule 12(b)(6) and Rule 56. Generally, the "admissibility" issue can be resolved by asking one question: "Would the referenced statement or evidence be admissible at trial through the individual offering the statement in the summary judgment proceeding?"

— Failure to recognize that uncontested or improperly contested statements of material fact are deemed admitted. *See Pratt v. Ottum*, 2000 ME 203, ¶ 15 n.8, 761 A.2d 313, 318; *Guiggey v. Bombardier*, 615 A.2d 1169, 1171 (Me. 1992); *O'Donnell v. Earle W. Noyes & Sons*, 98 F. Supp.2d 60, 61 n.1 (D. Me. 2000); *Okot v. Conicelli*, No. 99-254-P-C, 2000 WL 760994, at *1 n.1 (D. Me. Feb. 17, 2000). Failing to counter or improperly countering a statement of material facts will cause the fact to be deemed admitted for all further proceedings both before the trial court and on appeal.

Although occasionally counsel may have had success in failing to properly support or controvert facts in the trial court and then obtaining a reversal on appeal by using citations to the record that were not provided to the trial court, such is less likely to happen with the recent Rules revisions. In appellate practice, counsel should anticipate being held more rigorously to the statements of material facts originally presented to the trial court. *See Corey*, 1999 ME 196, ¶ 8, 742 A.2d at 938. Thus, in the recently

adopted Maine Rules of Appellate Procedure, the Maine Supreme Judicial Court requires that, on appeals from rulings on summary judgment, the supporting and opposing statements of material facts must be included in the appendix on appeal. *See* M.R. App. P. 8(h)(1).

— Lack of understanding of the burden shifting feature of statements of material fact practice. Once the moving party on a motion for summary judgment has presented materials in a statement of material facts indicating that no genuine issue of material fact exists, the burden shifts to the nonmoving party to point to specific facts demonstrating that a disputed fact for trial does exist. *See Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995); *Champagne v. Mid-Maine Med. Ctr.*, 1998 ME 87, ¶ 9, 711 A.2d 842, 845. This obligation of the nonmoving party to come forward with appropriate evidence of a disputed fact through a proper statement of material facts is particularly important where the nonmoving party has the burden of proof on the claim or issue in dispute. *See Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996); *Champagne*, 1998 ME 87, ¶ 9, 711 A.2d at 845.

— Anticipated greater use of statements of material facts to focus legal and factual issues, even where summary judgment is not entered. It is anticipated that the recent expansion of single judge assignments will result in greater reliance on the statement of material facts to centralize legal and factual issues. With the expansion of the practice under Rule 56(d) to address partial summary judgment or identify facts not in dispute and

remove those facts from contests at trial, statements of material facts become critical. Judges may use those statements by comparing them and establishing facts removed from dispute for the remainder of the litigation, even if the underlying motion for summary judgment is denied. Accordingly, such statements should be prepared carefully.

7. Do Not Confuse 12(b)(6) with 56

A motion to dismiss under Rule 12(b)(6) asserts that a complaint fails "to state a claim upon which relief can be granted." Such a motion presumes the facts as alleged in the complaint and reasonable inferences that can be drawn from those facts, construed most favorably to the plaintiff. *Heber v. Lucerne-in-Maine Village Corp.*, 2000 ME 137, ¶ 7, 755 A.2d 1064, 1066. The motion asserts that the allegations in the complaint are insufficient to entitle plaintiff to relief as a matter of law. In pure motion to dismiss practice, a plaintiff can prevail solely by legal argument pointing to the pleadings as raising some factual issue that entitles plaintiff to relief and denying in argument any facts asserted by the moving party that are not indicated in the complaint. *Id.*

The practice for opposing a motion to dismiss -- denying the moving party's assertions and pointing to the pleadings as establishing sufficient facts -- is dramatically different from the practice required to support or oppose summary judgment. The two must not be confused. Even in litigation of a motion to dismiss, if "matters outside the pleadings are presented to and not excluded by the court," Rule 12(c) requires that: "The motion shall be treated as one for summary judgment." Then, full

summary judgment process must be afforded to the parties: "All parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." *See* Rule 12(c). *See also Beaucage v. City of Rockland*, 2000 ME 184, ¶ 5, 760 A.2d 1054, 1056.

Of course, not all matters outside the pleadings change a 12(b)(6) motion to a Rule 56 motion. Exhibits to a complaint, court files which can be considered by judicial notice,[6] and, in limited cases, other facts and documents as to which there is no controversy as to authenticity, may be considered in the context of a 12(b)(6) motion.

In practice, courts should be cautious when considering materials outside the pleadings to allow the parties, particularly the party opposing the motion, to have sufficient opportunity to prepare and present materials, including an opposing statement of material facts, before finally ruling on the motion. For purposes of this paper, however, the key issue to remember in comparing Rule 12(b)(6) practice with Rule 56 practice is that pure 12(b)(6) practice allows both the moving and the opposing party to address the issues by argument and citation to the pleadings, without more. Summary judgment practice requires much more, as evidentiary support for

6. *See* F.R. Evid. 201, M.R. Evid. 201.

the parties' positions must be demonstrated, not just argument based on the pleadings.[7]

8. Motions to Amend

While motions to amend pursuant to Rule 15(a) are generally viewed positively, absent bad faith, delay, or undue prejudice, such motions may be viewed more cautiously when made late in a summary judgment proceeding. *See Holden v. Weinschenk*, 1998 ME 185, ¶ 6, 715 A.2d 915, 917. In state practice, where a motion to amend is pending, or is filed as a defensive response to a motion for summary judgment, the court should explicitly rule on the motion to amend prior to ruling on the pending motion for summary judgment. *See Dunelawn Owners' Ass'n. v. Gendreau*, 2000 ME 94, ¶ 6 n.6, 750 A.2d 591, 593.

In federal practice, a motion to amend will often not be considered at all if it is filed after the deadline set in the scheduling order for the filing of dispositive motions, especially if a trial date is near. If a motion to amend is timely and pending before the motion for summary judgment is filed, it will of course be considered first. However, if the motion to amend is timely but filed as a defensive response to a motion for summary judgment, the two will often be considered together. Thus, the issue becomes whether summary judgment is appropriate even if the motion to amend were granted. *See*

7. To understand generally the differences between Rule 12(b)(6) practice and Rule 56 practice, *compare Webb v. Haas*, 665 A.2d 1005 (Me. 1995) (motion to dismiss) *with Webb v. Haas*, 1999 ME 74, 728 A.2d 1261 *and Corey, Norman, Hanson & DeTroy*, 1999 ME 196, 742 A.2d 933 (summary judgment).

generally United States v. Roberts, 978 F.2d 17, 21-23 (1st Cir. 1992); *Barrett v. Bergen*, No. 99-239-P-C, 2000 WL 761789 (D. Me. Feb. 14, 2000).

9. Partial Summary Judgment

Rule 56(d) specifies that when the court does not grant final summary judgment, it may enter partial summary judgment or, alternatively, an order specifying those issues which, based on the presentations, are no longer in dispute. In past state practice, judges after denying a motion for summary judgment would rarely go on to specify facts no longer in dispute and then remove those facts from the contest for the remainder of the case. No partial ruling is final until the judgment is final. *See* Rule 54(b)(1). One judge understandably does not want to preclude another judge of a concurrent court, accountable for a trial and its result, from considering such issues. However, the practice may be changing with single judge assignment for all federal cases and all Superior Court civil cases in Androscoggin, Cumberland, Kennebec, Penobscot, and York counties. Once a judge knows that he or she is going to be presiding over a particular case, that judge may be more willing to use the partial summary judgment option to focus facts and rule on preliminary points, even if final judgment cannot be entered on a summary judgment motion.

10. Cross-Motions

The court may deny summary judgment even if each party has filed a cross-motion for summary judgment. Each party may argue that there are no disputes as to the facts as that party sees them. However, the question is not whether each party says there are no disputes as to material facts, the

question for the court is whether it recognizes any disputes as to material facts.

As an alternative to cross-motions for summary judgment, some parties present the court a stipulated record for decision. This assures a final judgment by allowing the trial court to draw inferences from the record to reach a final result, rather than just deny the motion if it finds a fact to be disputed. *See Enerquin Air, Inc. v. State Tax Assessor*, 670 A.2d 926, 927 (Me. 1996) ("The parties agreed that it was not the facts but the interpretation of those facts that was in dispute."); *Boston Five Cents Savs. Bank v. Secretary of the Dep't of Housing and Urban Dev.*, 768 F.2d 5, 11-12 (1st Cir. 1985) (promoting the use of stipulated facts, which permits a judge to draw inferences as factfinder and to produce a final judgment, rather than cross-motions, which limit a trial judge's ability to decide significant issues).

11. Sanctions

An attorney or an unrepresented party who pursues or opposes a motion without a reasonable basis for their position risks sanctions pursuant to Rule 11, Rule 56(g), and M.R. Civ. P. 7(b)(6). For summary judgment practice, these sanctions provisions increase the risk to those who allege fact disputes without specific citation to evidentiary materials in the record which demonstrate genuine disputes. *See Biette v. Scott Dugas Trucking & Excavating, Inc.*, 676 A.2d 490, 498 (Me. 1996). The sanctions provisions also emphasize that motions should not be filed where there is no real prospect of success.

12. Form of Order or Judgment

In state practice, an order or judgment, to be in proper form and to make it final and appealable or enforceable, must resolve all pending claims by all parties and specify the relief granted. *See Town of Freeport v. Ocean Farms of Maine, Inc.*, 600 A.2d 402, 403 (Me. 1991). An order that only states "motion granted" without specifying the relief granted is insufficient to confer summary judgment. *3W Partners v. Bridges*, 651 A.2d 387, 389 (Me. 1994). In the interest of judicial economy, however, the Law Court may overlook the problem on appeal. *Id.*

13. Appeal: Erroneous Reason, Correct Result

If it appears that an original grant of summary judgment was for an erroneous reason, summary judgment may be affirmed if the appellate court determines there is another valid reason for the judgment. *See Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 7 (1st Cir. 1990); *Bakal v. Weare*, 583 A.2d 1028, 1030 (Me. 1990).

14. Partial Judgment: Enforcement or Appeal

Where partial summary judgment is granted, there are some practice cautions to be attentive to:

(a) A judgment, to be final and appealable, or enforceable, must resolve all pending claims by all parties and specify the relief granted. *Town of Freeport v. Ocean Farms of Maine, Inc.*, 600 A.2d 402, 403 (Me. 1991).

(b) A partial summary judgment may be made appealable and enforceable only with an order, with specific findings under Rule 54(b), directing entry of judgment as to fewer than all claims. *See Carter v. State*

of Rhode Island, 68 F.3d 9, 11 n.4 (1st Cir. 1995); *Key Bank of Maine v. Park Entrance Motel*, 640 A.2d 211, 212-13. (Me. 1994).

(c) Absent an order making a partial judgment a final judgment, an order that decides one or more claims, but not all claims, "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Rule 54(b)(1). Unless counsel is cautious, a partial summary judgment won today may be lost tomorrow. In state practice, this "it ain't over till its over" feature has limited incentives that counsel or the court may have to put any great effort into preliminary determinations before final judgment, unless the case is assigned to a single judge.

15. Appeal of Denial

Denial of a motion for summary judgment may be appealed in certain limited circumstances involving issues such as immunity or jurisdiction. *See Acevedo-Garcia v. Vera-Monroig*, 204 F.3d 1, 6 (1st Cir. 2000); *Pratt v. Ottum*, 2000 ME 203, ¶ 15, 761 A.2d 313, 318; *Paschal v. City of Bangor*, 2000 ME 50, ¶ 1 n.1, 747 A.2d 1194, 1195; *Struck v. Hackett*, 668 A.2d 411, 416 (Me. 1995).

16. Judgmental and Equitable Issues

The prospects for summary judgment decline as the issues become less objective and more judgmental. However, summary judgment is possible on judgmental facts where the judgmental issues are covered by specific statute or precedent, *see Milliken v. City of Lewiston*, 580 A.2d 151, 152 (Me. 1990), or where any reasonable factfinder would be compelled to

reach the same result based on the available evidentiary materials. *See Allen v. Adage, Inc.*, 967 F.2d 695, 701-02 (1st Cir. 1992).

Summary judgment, although characterized as entitlement to judgment as a matter of law, may be granted in actions involving equitable relief or defenses. Summary judgment may be granted in such actions when (1) there is no genuine issue of material fact affecting either the equitable claims or the equities to be considered in deciding to take action; and (2) the opponent of the motion has been afforded sufficient opportunity to present affidavits or other sworn evidence and legal arguments. *Town of Falmouth v. Long*, 578 A.2d 1168, 1171 (Me. 1990); *Inhabitants of Town of Boothbay Harbor v. Russell*, 410 A.2d 554, 557-58 (Me. 1980).

17. Duty of Care Questions

On negligence-duty of care questions, summary judgment can be considered, particularly if the issue is characterized as "duty of care" rather than negligence. Duty of care issues are questions of law, while breach of duty issues are generally questions of fact. *Cf. McPherson v. McPherson*, 1998 ME 141, ¶ 8, 712 A.2d 1043, 1045; *Hughes v. Beta Upsilon Bldg. Ass'n.*, 619 A.2d 525, 527 (Me. 1993); *Perron v. Peterson*, 593 A.2d 1057, 1058 (Me. 1991); *Carter v. Bangor Hydro-Electric Co.*, 598 A.2d 739, 741 (Me. 1991); *Milliken v. City of Lewiston*, 580 A.2d at 152. *See also Merchant v. Mansir*, 572 A.2d 493, 494 (Me. 1990) (affirming a grant of a judgment N.O.V. on a negligence-duty of care issue).[8]

8. Because this is an issue of state law, the federal courts also would rely on the cases cited.

III. PLEADINGS

A well prepared motion for summary judgment will usually involve filing at least four documents: (1) a motion; (2) a memorandum in support of the motion (in federal practice, the motion and the memorandum may be combined); (3) a statement of material facts; and (4) usually, affidavits. In state courts, the moving party must also file a draft order which specifically states the relief to be granted by the motion. *See* M.R. Civ. P. 7(b)(3)(2).

1. The Motion For Summary Judgment

A motion for summary judgment should include:

-- a short concise statement of the ground for relief, with citation of Rule 56;

-- citation of the counts or issues to which the motion is directed;

-- a brief statement of the relief requested; and

-- for state court cases, a notice that opposition must be filed within 21 days and that failure to file opposition will be deemed a waiver. *See* M.R. Civ. P. 7(b)(1). Failure to include a notice that the motion must be opposed within 21 days may prevent granting the motion *ex parte* if no timely opposition is filed. *Id.*

For federal practice, the local rule requires filing opposition to motions within 21 days. *See* D. Me. Local R. 7(b). However, the local rule includes no specific obligation to notify the nonmoving party of the time in which a response is required and the consequences of an untimely response.

2. A Memorandum in Support of the Motion

Sometimes the motion and the memorandum are combined. The Maine rules allow this, and the local rule, D. Me. Local R. 7(a), appears to require it, although in practice the motion is often separate from the memorandum. For state cases, combining the two should be avoided except in the simplest cases.

A good memorandum in support of a motion for summary judgment will include:

A. A clear, early identification of the issues and/or counts on which summary judgment is sought.

B. A statement of the procedural history of the case:

-- when the case was filed;

-- the claims presented;

-- disposition of any prior motions which have addressed the merits, such as a motion to dismiss or a motion for attachment; and

-- indication of any other pending motions, including discovery motions.

A statement of the procedural history is not included in many memos. It should be. It can be very helpful to the judge in understanding the case. Rulings on prior motions related to the merits are important to "law of the case" questions and determination of the extent to which issues in the summary judgment motion may already have been addressed. Citation of pending motions is important (a) to determine what else the court needs to address, if anything, and (b) to determine if the case is ripe for decision or if

there is, for example, outstanding discovery that needs to be completed before the motion can be decided.

C. A statement of the facts relevant to the issues to be decided:

This can be in more or less detail than the statement of material facts as necessary to support your argument. However, it cannot replace or supplement the statement of material facts. The fact statement is more understandable if it is separate from the legal argument.

D. Legal Argument:

Here, precision is key. Remember you are trying to convince the court of one simple point, that there are or are not disputes as to material facts. Discuss any critical statutes or ordinances. Pick a few of the most relevant precedents. Argue from them. Avoid electronic research generated string cites. Do not spend a lot of time discussing general standards for grant or denial of summary judgment.

Your chances of success rise as you make the case appear simple, they fall as you make it look more complex. Lengthy memos that appear designed to impress clients with thoroughness of your work only support concerns that the case is complex.

Attach copies of materials that are important to your argument that may not be readily accessible to the court.

3. <u>The Statement of Material Facts</u>

Each particular fact claimed to be in issue, or not in issue, must be set forth in separately numbered paragraphs. Further, the record of evidentiary materials submitted in support of, or in opposition to, the motion for

summary judgment must be cited regarding each fact, so that the court may easily reference the record to aid in determination as to whether dispute, or lack of dispute, exists.

Positive or affirmative statements of fact are most effective. (*E.g.*, "plaintiff Able stated that he did not see defendant Jones in the area of the assault at the time plaintiff Able was assaulted" (Able deposition transcript, page 36, lines 8-14)).

Parties opposing motions for summary judgment cannot succeed with generalized statements asserting disputes as to material facts based on general review of the record. (*E.g.*, "A review of the depositions of plaintiff Able and the other two witnesses to the assault demonstrate that there is uncertainty as to whether defendant Jones was at the scene of the assault at the time it occurred."). Instead, there must be specific citation to the points in the record that establish disputes as to material facts. (*E.g.*, "Witness Small saw defendant Jones on the corner where plaintiff was assaulted immediately before and immediately after the assault" (Small deposition transcript, page 18, lines 5-9)).