

## COMMENTS

### ***ADMISSIBILITY TOLERANCE: LIMITED LATITUDE FOR SUMMARY JUDGMENT MATERIAL UNDER RULE 56<sup>1</sup>***

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1. At the time of this Comment's publication, Rule 56, as amended, is set to take effect on Dec. 1, 2010 pursuant to the Rules Enabling Act. *See* 28 U.S.C. §§ 2072-2074 (2006). When citing and discussing Rule 56, this Comment refers primarily to the version of Rule 56 set to take effect on Dec. 1, 2010. Because at the time of this Comment's publication this version of Rule 56 is not officially in effect, references to Rule 56 include a parenthetical stating that it takes effect Dec. 1, 2010. When the need to refer to prior versions of Rule 56 is necessary, a parenthetical will be included in the citation, stating which version of Rule 56 is being cited. For example, see FED. R. CIV. P. 56 (c) (effective Dec. 1, 2009). Also, because Rule 56 has been so significantly restructured in the amendment, full versions of Rule 56, effective Dec. 1, 2010, and effective Dec. 1, 2009, are available for comparison in Appendix A and Appendix B, respectively. For more information on the amendment of Rule 56, see Federal Judiciary Rulemaking, <http://www.uscourts.gov/rules/>.

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## INTRODUCTION

When a litigant moves for summary judgment in federal court,<sup>2</sup> the opposition's posture transforms drastically. In an instant, the litigant opposing the motion—often the plaintiff—has thrust on it the burden of organizing its case, identifying crucial evidence, and demonstrating to the court that a trial is necessary.<sup>3</sup> Figuratively, it is much like the moment when a poker player gets called and must show his or her hand. Until the motion is filed, a litigant can bluff: obfuscating weaknesses and overstating strengths in its case to reach settlement. But once the litigant's opponent makes a motion for summary judgment, the cards come out and must be shown.<sup>4</sup> Of course, the simile breaks down at the showing of hands that occurs in a poker game. Unlike a poker game, summary judgment

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2. See generally FED. R. CIV. P. 56. Summary judgment is adjudication on the merits of a case without the necessity of a trial and can be granted upon motion by a party to a case, where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a) (effective Dec. 1, 2010).

3. FED. R. CIV. P. 56(c)(1)(A)-(B) (effective Dec. 1, 2010). "A party asserting that a fact . . . is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record . . . or showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Id.*; see also D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOKLYN L. REV. 35, 41-42 (1988) (highlighting the heavy burden placed on a summary judgment opponent).

4. FED. R. CIV. P. 56(c)(1)(A)-(B) (effective Dec. 1, 2010).

proceedings require litigants to show only part of their hands.<sup>5</sup> And, it only has the potential to be the end of the hand. If a litigant has been bluffing, summary judgment will be entered against that litigant. But if the litigant has been playing a strong hand, both parties keep playing and head to trial.<sup>6</sup> Awkwardly, the litigants stand one foot ready for finality and the other ready to forge ahead.

This threshold stage before trial makes the procedure difficult to apply precisely and has led to incongruities in its relationship to trial.<sup>7</sup> A particular result of this ambivalent transition phase is confusion about what standard of admissibility, if any, summary judgment materials must meet. A version of Rule 56—which drastically re-writes the rule and is set to take effect December 2010 unless Congress intercedes in accordance with the Rules Enabling Act<sup>8</sup>—attempts to clarify this confusion.<sup>9</sup>

Unlike its predecessor versions of Rule 56, it explicitly provides a standard of admissibility. Section (c)(5) is entitled: “Objection That a Fact is Not Supported by Admissible Evidence.” It states: “A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.”<sup>10</sup> As discussed further herein, this rule section and other additions to the rule would clarify the question of summary judgment admissibility enormously. At the very least, it establishes the existence of a standard of admissibility for summary judgment materials. Nevertheless, this standard is far from a crystal clear

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5. Summary judgment opponents need not reveal their entire strategy at trial. They need only provide the court sufficient support on each material element of their case to establish a genuine dispute. For a further exposition of basic summary judgment procedure, see JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 467-68 (4th ed. Thomson West 2005) (1985).

6. If the opposing party cannot show a genuine dispute to a material fact, “the court shall grant summary judgment. FED. R. CIV. P. 56(a) (effective Dec. 1, 2010). Conversely, if the opposing party can establish a genuine dispute to a material fact, summary judgment must be denied. See FED. R. CIV. P. 56(c)(1)(A)-(B) (effective Dec. 1, 2010).

7. See Melissa L. Nelken, *One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 HASTINGS L.J. 53, 60 (1988) (describing summary judgment law as generally containing obscurities); see also generally Risinger, *supra* note 3 (recognizing that summary judgment’s forward looking perspective in relationship to trial makes it a difficult procedure to apply). Furthermore, it has been amply recognized that equating trial standards of proof with summary judgment standards of proof can create anomalies in procedure’s application. See generally Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court’s Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988).

8. 28 U.S.C. §§ 2072-2074 (2006).

9. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, SEPTEMBER 2009 REPORT app. C at C34-C52 (2009) [hereinafter REPORT OF COMMITTEE ON RULES OF PRACTICE AND PROCEDURE], available at [http://www.uscourts.gov/rules/Reports/Combined\\_ST\\_Report\\_Sept\\_2009.pdf](http://www.uscourts.gov/rules/Reports/Combined_ST_Report_Sept_2009.pdf).

10. FED. R. CIV. P. 56(c)(5) (effective Dec. 1, 2010).

rule.

For one, the full scope of its meaning and effect remains unclear because the language itself is uncertain. Does “admissible in evidence” refer to rules of trial evidence? And what is intended by the word “form”? Given a strict meaning, it could mean that litigants must put summary judgment materials in a “form” that meets trial admissibility standards at the moment summary judgment is decided. Conversely, a more relaxed reading would allow a court to consider the material if it was capable of later being put in an admissible “form” at trial. The dispute over how expansively to read “form” would not be new,<sup>11</sup> nor would the language that creates the standard. The language is identical to the phrase that applies to affidavits, is very similar to language from past committee notes, and in turn raises some of the same problems that admissibility always presented summary judgment.<sup>12</sup> Furthermore, the version of the rule arguably purports to retain the status quo of existing summary judgment jurisprudence; therefore, the divided case law on the subject continues to be good law.<sup>13</sup> Be it under a revised section or earlier versions of Rule 56, the extent that a summary judgment material must meet trial admissibility standards, if at all, is unclear.

For example, what is the admissibility of a document in the record containing facts relevant to a critical issue? At the summary judgment stage—with no witness to lay a foundation for it—the document is unauthenticated hearsay when scrutinized under trial evidentiary standards.<sup>14</sup> Even if it is attached to a sworn affidavit or deposition, which is what most courts require for it to be considered at summary judgment,<sup>15</sup> it

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11. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (stating that a nonmoving party need not put a summary judgment material in “a form that would be admissible at trial”); EDWARD J. BRUNET & MARTIN H. REDISH, *SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE* 225-26 (3d ed. Thomson West 2006) (1994) (discussing what the Court meant by “form”).

12. See FED. R. CIV. P. 56 advisory committee’s notes, available at <http://www.law.cornell.edu/rules/frcp/ACRule56.htm> (last visited Apr. 6, 2010). In notes to the 1987 amendments, the committee states that the court shall consider materials:

[T]o the extent such evidence would be admissible if the deponent, person answering the interrogatory, or affiant were testifying at trial and, with respect to an affidavit, if it affirmatively shows that the affiant would be competent to testify to the matters stated therein; and (2) documentary evidence to the extent such evidence would, if authenticated and shown to be an accurate copy of original documents, be admissible at trial in the light of other evidence.

*Id.*

13. See FED. R. CIV. P. 56 advisory committee’s notes (effective Dec. 1, 2010); see also REPORT OF COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 9, app. C at C44.

14. See FED. R. EVID. 801-802, 901; *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 49-50 (1st Cir. 1990).

15. See 10A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* § 2722 (3d ed. 1998).

still technically fails a trial admissibility standard because affidavits and depositions are generally considered hearsay at trial.<sup>16</sup>

This example illustrates the extraordinary theoretical difficulty in applying trial evidentiary rules congruently with summary judgment evidence because an absolute trial standard would theoretically exclude virtually all summary judgment materials, at least absent a hearing with live testimony.<sup>17</sup> Given that these hearings are rare, summary judgment necessarily requires that litigants offer proof from a passive record instead of through active testimony as it is at trial. This limitation illustrates that while these two different types and phases of evidentiary presentation—summary judgment and trial—overlap, they are in fact distinct evidentiary exercises in purpose and in method.<sup>18</sup> The distinction makes it impossible for rules of summary judgment evidence to always mirror the rules of trial evidence perfectly.<sup>19</sup>

Of course, the history of summary judgment reveals a long-standing resolution to this problem. As most litigants realize and the example above suggests, courts at summary judgment routinely consider perfected affidavits, depositions, and the documents properly attached to and referred to within either of them.<sup>20</sup> This practice suggests that generally the rules of evidence apply at summary judgment, and affidavits and depositions are merely exceptions to admissibility constraints that are authorized by the

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16. An affidavit is an out-of-court statement offered to prove the truth of the matter asserted. *See* FED. R. EVID. 801-802; *see also* Eisenstadt v. Centel Corp., 113 F.3d 738, 742 (7th Cir. 1997) (“[A]ffidavits and depositions . . . (especially affidavits) are not generally admissible at trial.”).

17. Live testimony at summary judgment is permissible under narrow circumstances stated in the rules of procedure. *See* FED. R. CIV. P. 43(c).

18. Risinger, *supra* note 3, at 38. At trial, proof is aimed at persuasion, credibility, and reliability. At summary judgment, proof is merely offered to demonstrate that there is even a need to persuade at all, that is, that a genuine factual dispute exists that needs resolution. Limitations on the presentation of evidence at summary judgment also distinguish it from the trial evidentiary pursuit. Although summary judgment procedures approximate those applied at trial, it is largely a paper case whereas trials consist mostly of live testimony. *See* BRUNET & REDISH, *supra* note 11, at 206-07; FRIEDENTHAL ET AL., *supra* note 5, at 465-66.

19. *See* Nelken, *supra* note 7, at 72-73 (making distinction between at trial admissibility and summary judgment admissibility, which Professor Nelken terms “procedural admissibility”); Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years after Celotex*, 63 WASH. & LEE L. REV. 81, 121 (2006) (distinguishing between “trial-quality evidence” and the kind required at summary judgment). *Cf.* Stempel, *supra* note 7, at 146 (explaining that the directed verdict standard is not congruent with the summary judgment standard).

20. *See, e.g.,* Eisenstadt v. Centel Corp., 113 F.3d 738, 742 (7th Cir. 1997) (stating that affidavits “are admissible in summary judgment proceedings to establish the truth of what is attested or deposed”); Faulkner v. Fed’n of Preschool & Cmty. Educ. Ctrs., Inc., 564 F.2d 327, 328 (9th Cir. 1977) (considering affidavit). For further authorities on this point, see 10A WRIGHT, MILLER & KANE, *supra* note 15, § 2722.

rule and functionally necessary.<sup>21</sup> But this normative reality and its permissibility within Rule 56 says little about the actual standard of admissibility at summary judgment as a whole. Simply because a practice is accepted under Rule 56 does not make it the threshold standard. Thus, the theoretical question about admissibility persists apart from practical experience.

The quandary is one that courts<sup>22</sup> and commentators<sup>23</sup> have struggled to agree on in the years following the landmark U.S. Supreme Court case *Celotex Corp. v. Catrett*,<sup>24</sup> which clarified the moving party's summary judgment burden and appeared to formulate a summary judgment admissibility test in dicta.<sup>25</sup> It also is an issue that often receives a

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21. See FED. R. EVID. 802, advisory committee's notes (noting exceptional status of hearsay affidavits in summary judgment proceedings); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (noting that affidavits, admissions, answers to interrogatories, and depositions are materials that one "normally expect[s]" a litigant to make a showing to oppose summary judgment); John Kennedy, *Federal Summary Judgment: Reconciling Celotex v. Catrett with Adickes v. Kress and the Evidentiary Problems Under Rule 56*, 6 REV. LITIG. 227, 239 (1987) (arguing that depositions, affidavits, and interrogatory responses define the exception to admissible form that the *Celotex* majority articulated). But see James Joseph Duane, *The Four Greatest Myths about Summary Judgment*, 52 WASH. & LEE L. REV. 1523, 1548 (1996) (explaining that affidavits are not an exception to the rules of evidence).

22. Compare *Sallis v. Univ. of Minn.*, 408 F.3d 470, 474 (8th Cir. 2005) (purporting to apply trial admissibility standards), and *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 49-50 (1st Cir. 1990) (applying trial admissibility standards to summary judgment and stating that "a mere promise to produce admissible evidence at trial does not suffice to thwart the summary judgment ax"), and *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987) ("It is well settled that unauthenticated documents cannot be considered on a motion for summary judgment"), with *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1389 (2d Cir. 1992) (applying language that permits defective summary judgment materials), and *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 37-38 (D.C. Cir. 1987) (admitting unauthenticated hearsay letter), and *Offshore Aviation v. Transcon. Lines, Inc.*, 831 F.2d 1013, 1015 (11th Cir. 1987) (permitting inadmissible hearsay when it puts material facts into question).

23. See Duane, *supra* note 21, at 1548-49 (1996) (noting the "torrent of academic and judicial debate" surrounding the issue); Nelken, *supra* note 7, at 73-77 (criticizing the *Celotex* decision for its consequences on admissibility); Bradley Scott Shannon, *Responding to Summary Judgment*, 91 MARQ. L. REV. 815, 834 (2008) (arguing for a strict evidentiary admissibility standard for summary judgment); Steinman, *supra* note 19, at 121 (arguing that no evidentiary admissibility standard exists at summary judgment).

24. See generally *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

25. *Id.* at 325. The *Celotex* Court announced that a moving party could meet its burden by pointing to specific parts of the record that show a nonmoving party cannot meet its burden. *Id.* It also ostensibly, along with its counterpart cases in the *Celotex* trilogy, tied summary judgment standards of proof directly to those present during trial. See *id.* at 323-24 (holding that the defendant-movant need not put forth affirmative evidence to meet its moving burden for summary judgment); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 255 (1986) (raising nonmovant's burden to be consistent with at-trial burdens of proof); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) (holding that the same standard that applies to directed verdict also applies at summary judgment and permitting a court to weigh inferences).

mechanical treatment, backed by scant explanation from the federal courts. Returning to the example above of an unattached document, courts have ended up at various points of an admissibility spectrum. On one side, courts purport to apply trial evidentiary rules and exclude the document as unauthenticated hearsay because it is not attached to an affidavit or deposition.<sup>26</sup> In contrast, other courts claim that trial evidentiary rules do not govern and consider the document's content at summary judgment.<sup>27</sup> In either case, however, the rationale for each court's result is rarely clear.

In turn, this Comment's goal is both prescriptive and explanatory. It aims to ascertain the threshold degree that summary judgment materials must comply with trial admissibility standards and offers a synthesis that explains how federal courts reach diverging outcomes on the summary judgment admissibility issue. In doing so, the paper first draws some significant, but rational and supported conclusions about summary judgment. For one, it accepts the *Celotex* trilogy's effect on summary judgment and does not quarrel with the Court's application of each party's burdens or how it tied them to trial burdens of proof. Instead, it attempts to describe a workable approach to admissibility within the current state of summary judgment law.<sup>28</sup>

This approach necessarily requires analogizing summary judgment's procedural components to trial's procedural components. Consequently, this Comment concludes that trial evidentiary rules apply to some extent at summary judgment. This assumption is not much of a stretch.<sup>29</sup> The interdependence of the Federal Rules of Evidence and Rules of Procedure is well established; furthermore, Rule 56 explicitly incorporates trial evidentiary principles into summary judgment in its restrictions on

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26. See, e.g., *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 49-50 (1st Cir. 1990); *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987).

27. See, e.g., *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1389 (2d Cir. 1992); *Offshore Aviation v. Transcon Lines, Inc.*, 831 F.2d 1013, 1015 (11th Cir. 1987).

28. Much of the summary judgment scholarship over the last two decades plus focused on whether the Court properly decided the *Celotex* trilogy of cases and whether courts properly applied it. In particular, there has been much criticism of the way that *Celotex* allocates party burdens at summary judgment and the way that *Liberty Lobby* tied trial burdens of proof to summary judgment. See cases and sources cited *supra* notes 22-23. Although these critiques are highly persuasive, this Comment, for the most part, does not question the validity of the *Celotex* trilogy's rules in assessing the admissibility question. Admittedly, there are components of the *Celotex* decision that if decided differently, would result in a different view of summary judgment admissibility. But this Comment accepts *Celotex* as part of Rule 56, at least insofar as the decision's rule is clear, and proceeds from there.

29. In fact the notes to the Federal Rules of Evidence appear to make this assumption as it relates to summary judgment and other pretrial motions. See FED. R. EVID. 802 advisory committee's notes (assuming that affidavit is an exception to hearsay rule); see also *Duane*, *supra* note 21, at 1531.

affidavits and depositions.<sup>30</sup> Given this relationship, it is fairly untenable to say that *none* of the trial evidentiary principles are imposed—at any degree—on summary judgment materials. Furthermore, tying summary judgment burdens of proof to trial burdens as the *Celotex* trilogy did<sup>31</sup> implies that trial evidentiary principles would correlatively apply at summary judgment. To the extent that Rule 56 fails to fully provide a standard of admissibility, it at least suggests that the lens of trial admissibility provides the platform on which to posture an admissibility question.<sup>32</sup> In other words, there is not some alien set of admissibility rules that should apply to summary judgment materials. Whatever they are, their genesis is in the Federal Rules of Evidence.<sup>33</sup>

From these acknowledgements, a further analogy is necessary. Courts must organize assessments of summary judgment evidence into distinct inquiries of admissibility and weight as it is at trial. Similar to when a court performs its Rule 104(a) function at trial, the court under Rule 56 first ascertains the prospective, trial admissibility of a summary judgment material in the record.<sup>34</sup> After it “admits” the material for summary judgment purposes, it then determines whether the material’s content sufficiently establishes a genuine dispute to a material fact.<sup>35</sup> This two-step view is a significant organizational concept that may be distinct from practice, where a judge would likely bind the questions of admissibility and

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30. See BRUNET & REDISH, *supra* note 11, at 220-21. The Rule 56 Rules Advisory Committee notes also make repeated reference to admissibility and evidentiary standards found at trial. For example, the Advisory Committee notes state that the court’s obligation to “consider only matters potentially admissible at trial [sic] applies not just to affidavits, but also to other evidentiary materials submitted in support of or opposition to summary adjudication.” FED. R. CIV. P. 56 advisory committee’s notes.

31. See *generally* *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (raising nonmovant’s burden to be consistent with at-trial burdens of proof); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding that the defendant-movant need not put forth affirmative evidence to meet its moving burden for summary judgment); *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (holding that the same standard that applies to directed verdict also applies at summary judgment and permitting a court to weigh inferences).

32. See FED. R. CIV. P. 56(c)(4) (effective Dec. 1, 2010) (A supporting affidavit must “set out facts that would be admissible into evidence.”).

33. Even one of the staunchest critics of a summary judgment standard of admissibility uses evidentiary principles to describe the qualifications of a particular summary material. Steinman, *supra* note 19, at 130-31.

34. In its 104(a) function, the court can consider the evidence that is inadmissible. See FED. R. EVID. 104(a). Similarly, at the summary judgment stage, the court first considers summary judgment material that is in an inadmissible form to gauge its overall future trial admissibility. Duane, *supra* note 21, at 1536 (describing summary judgment as “prospective looking” toward trial).

35. Professor Risinger describes such a two-step method: “First, [the court] must make a prediction about what the record will look like at trial, and second, it must appropriately apply the sufficiency standard.” Risinger, *supra* note 3, at 38.

sufficiency into a single review of a material's ability to establish a genuine dispute. But generally, segregating the two questions better facilitates the analogy to trial admissibility standards and enhances the understanding of the admissibility problem because it isolates the admissibility issue from the substantive content that must demonstrate a genuine dispute. This division also fits within the form and content distinction that the *Celotex* Court makes.<sup>36</sup> When a court assesses admissibility at summary judgment, it is evaluating the degree of its reliability and its form.<sup>37</sup> When a court assesses whether it demonstrates a dispute, it scrutinizes content.

Upon these premises, established further herein, this Comment theorizes that courts may apply the rules of evidence flexibly to allow limited latitude for admissibility defects in summary judgment materials that fail to comply with trial evidentiary standards. The Comment characterizes this theory as *admissibility tolerance*. Generally, this tolerance is a measure of a summary judgment material's reliability, which it demonstrates through its adherence to Rule 56 formalities; its authenticity; and the likelihood that admissible evidence at trial can cure the material's admissibility defect as the *Celotex* Court arguably notes in dicta.<sup>38</sup> For example, a court tolerates the hearsay defect in an affidavit at summary judgment because perfected affidavits contain sworn testimony and can be converted easily into admissible evidence by calling the affiant as a witness at trial.<sup>39</sup> In contrast, a court is less tolerant of an unauthenticated document not attached to an affidavit or deposition because it deviates from Rule 56 formalities; nevertheless, a court could consider it if convinced of its reliability and that its content would ultimately be converted into an admissible form at trial.<sup>40</sup>

Because this analytical framework requires a difficult preliminary prediction (whether a litigant will convert evidence in inadmissible form at summary judgment into admissible at trial),<sup>41</sup> reasonable minds may and have differed in some circumstances.<sup>42</sup> Consequently, when considering the

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36. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

37. See FED. R. CIV. P. 56 (c)(2) (effective Dec. 1, 2010); *Celotex*, 477 U.S. at 324.

38. See *Celotex*, 477 U.S. at 325; *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 37-38 (D.C. Cir. 1987).

39. See, e.g., *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742-43 (7th Cir. 1997); Nelken, *supra* note 7, at 72-73.

40. See, e.g., *Catrett*, 826 F.2d at 37-38.

41. BRUNET & REDISH, *supra* note 11, at 229-32 (noting the high difficulty in making the prediction); see also Duane, *supra* note 21, at 1536.

42. Compare *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 49-50 (1st Cir. 1990) (excluding unattached document), with *Catrett*, 826 F.2d at 37-38 (D.C. Cir. 1987) (admitting unattached document).

admissibility of a summary judgment material, a court necessarily exercises its evidentiary discretion growing from Rule 61 of the Federal Rules of Civil Procedure and Rule 103 of the Federal Rules of Evidence.<sup>43</sup> The Comment further describes several factors that determine how a court uses its evidentiary discretion at summary judgment. Factors include the extent a summary judgment material suffers from an admissibility defect, the probative value of the material, the ease with which a litigant could place the defective material in a more traditional summary judgment form, the usefulness of further discovery, and burdens of unnecessary delay.

In sum, *admissibility tolerance* applies trial rules of evidence but adjusts them to the limitations of summary judgment. Further, it accounts for how courts may theoretically consider materials such as affidavits, depositions, and documents at summary judgment, even though trial evidentiary rules would exclude them. In other words, it encapsulates the practical and theoretical necessity to tolerate admissibility defects in summary judgment materials such as affidavits and other record-based materials that Rule 56 specifically endorses or contemplates. If courts could not consider such material and instead had to apply trial admissibility standards absolutely to summary judgment evidence, the procedure would have ceased long ago to function as an efficient screen for invalid claims and would have devolved into protracted hearings involving witness testimony. The evolution of Rule 56 has shown otherwise. Consistent with the 1986 trilogy of U.S. Supreme Court summary judgment cases and Rule 56,<sup>44</sup> *admissibility tolerance* will permit efficient, fair, and accurate

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43. FED. R. CIV. P. 61; FED. R. EVID. 103. As explained *infra* section III and IV, this discretion necessarily operates unique at summary judgment from how it works at trial. The discretion is in whether to permit a litigant to deviate from the rules of evidence as well as Rule 56 formalities—sworn, competent testimony on specific facts that is based on personal knowledge. See FED. R. CIV. P. 56(c)(4) (effective Dec. 1, 2010); FED. R. CIV. P. 56(e)(1) (effective Dec. 1, 2009). If a party lacks admissible evidence at summary judgment, but later produces admissible evidence at trial, the “error in admitting” the evidence at summary judgment does not “affect any party’s substantial rights” because the proponent inevitably produced the evidence appropriately when it mattered. FED. R. CIV. P. 61; see also FED. R. CIV. P. 103(a) (“Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[.]”). True, this ruling rests on an unpredictable contingency of a litigant actually producing admissible evidence, but that is precisely why discretion is necessary. If summary judgment is granted, an error in excluding a summary judgment material that the litigant would have replaced with admissible evidence may have “constitutional dimension.” See Risinger, *supra* note 3, at 41.

44. See generally *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (raising nonmovant’s burden to be consistent with at-trial burdens of proof apply); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding that the defendant-movant need not put forth affirmative evidence to meet its moving burden for summary judgment); *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (holding that the same standard that applies to directed verdict also applies at summary judgment and permitting a court to weigh inferences); see also F. R. CIV. P. 56.

summary judgment determinations that focus on the merits of a claim rather than technicalities.

Section I of this Comment provides necessary historical background on the evolution of federal summary judgment under Rule 56. Section II describes added provisions on the Rule and places them in the context of the summary judgment admissibility question. Section III sews together a patchwork of court approaches to the admissibility question and articulates a practical scope of summary judgment admissibility. Section IV defines a lower court's evidentiary discretion at summary judgment. Finally, the Comment concludes briefly with reasons why Congress should adopt the language in the proposed amendment.

## **I. THE EVOLUTION OF FEDERAL SUMMARY JUDGMENT AND THE ADMISSIBILITY PROBLEM**

While Rule 56 underwent several amendments, the standard governing summary judgment has remained unchanged since the inception of the Federal Rules of Civil Procedure.<sup>45</sup> Nevertheless, summary judgment's application is far more aggressive than probably initially envisioned.<sup>46</sup> The result: increased and effective use of tactics that challenge summary judgment material's admissibility to gain summary judgment against an opponent. The tactics have developed a confusing area of summary judgment law. With admissibility as its context, this section summarizes the evolution of the procedure beginning with summary judgment's original history and purpose in the federal rules and ending with a discussion of *Celotex* and summary judgment procedure's modern application.

### **A. HISTORY AND PURPOSE OF SUMMARY JUDGMENT: NOT A REPLACEMENT FOR THE TRIAL**

Summary judgment's historical function was to eliminate sham claims without the necessity of a full trial.<sup>47</sup> In drafting the Federal Rules of Civil Procedure, which took effect in 1938, former Second Circuit Court Judge, Charles E. Clark, insisted on providing for summary judgment in the federal

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45. Steinman, *supra* note 19, at 89.

46. See *MacDonald v. DuMaurier*, 144 F.2d 696, 701-02 (2d Cir. 1944) (Clark, J., dissenting) (describing summary judgment as a merit-based adjudication that subordinates the pleadings and foregoes a formal trial); see also Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1021 (2003) (noting that Judge Charles E. Clark envisioned a prominent role for summary judgment in civil litigation but not to the extent of expanded summary judgment practices emerging in modern courts such as a judge's assessment of the worth of either litigant's evidence).

47. 10A WRIGHT, MILLER & KANE, *supra* note 15, § 2711.

rules to protect the liberal pleading rules from abusive litigants.<sup>48</sup> He saw the motion as a way to deter harassment and pressure to settle.<sup>49</sup> To accomplish this goal, Rule 56 authorizes disposal of actions in which there is no genuine issue to any material fact and where the only questions that remain are questions of law.<sup>50</sup>

While the procedure originally served as a filter for unfounded claims and “spurious defenses,”<sup>51</sup> its original drafters, including Judge Clark, did not likely anticipate its expanded use in the last 20 years.<sup>52</sup> The Supreme Court’s attitude initially toward summary judgment was one of caution.<sup>53</sup> Until 1986, the Court seemed to vacillate on the appropriate use of the procedure.<sup>54</sup> But whatever its proper use should be, the procedure’s aim certainly was not to serve as a trial substitute.<sup>55</sup> And because grant of summary judgment has preclusive effect,<sup>56</sup> the drafters likely did not mean to force litigants through a gauntlet of potential technical pitfalls that a trial presents, such as the strict use of evidentiary rules, to justify a grant of summary judgment.<sup>57</sup>

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48. Brooke D. Coleman, *The Celotex Initial Burden Standard and the Opportunity to “Revivify” Rule 56*, 32 S. ILL. U. L. J. 295, 299 (2008) (citing CHARLES CLARK, *PROCEDURE: THE HANDMAID OF JUSTICE: ESSAYS OF CHARLES CLARK*, 145-46 (Charles Allan Wright & Harry M. Reasoner eds. 1965)).

49. *MacDonald v. DuMaurier*, 144 F.2d 696, 703 (2d Cir. 1944) (Clark, J., dissenting); *see also* Miller, *supra* note 46, at 1021.

50. 10A WRIGHT, MILLER & KANE, *supra* note 15, § 2711.

51. *Id.*

52. *See* Miller, *supra* note 46, at 1021.

53. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-58 (1970) (holding that summary judgment is improper when defendant fails to first demonstrate through affirmative evidence the nonexistence of a genuine issue of material fact); *First Nat’l Bank v. Cities Serv. Co.*, 391 U.S. 253, 299 (1968) (endorsing use of summary judgment in antitrust suit); *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 474 (1962) (stating that summary judgment should be used sparingly in complex litigation).

54. *First Nat’l Bank v. Cities Serv. Co.*, 391 U.S. 253, 299 (1968); *see also* Miller, *supra* note 46, at 1024.

55. 10A WRIGHT, MILLER & KANE, *supra* note 15, § 2712.

56. JAMES WILLIAM MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 56.11(b) (3d ed. 2010).

57. *Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir. 1940).

Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists. . . . It is quite clear that technical rulings have no place in this procedure and particularly that exclusionary rules will not be applied to strike, on grounds of formal defects in the proffer, evidence proffered on tendered issues.

*Id.*; *see also* 10B WRIGHT, MILLER & KANE, *supra* note 15, § 2728.

## B. THE MODERN APPLICATION OF SUMMARY JUDGMENT

Courts and commentators continue to espouse the same view of summary judgment as a mere filtering mechanism today.<sup>58</sup> But any interpretational limit that this view originally placed on the use of Rule 56 is almost entirely abandoned. This is only to say that the historical purpose behind summary judgment has not relegated the procedure's application to hesitancy and caution.<sup>59</sup> Instead, courts apply summary judgment more aggressively than other filtering motions like motion to dismiss. In practice, the procedure supplanted the trial as the central stage of litigation and became the centerpiece of case resolution in federal courts.<sup>60</sup>

The source for the growing use of summary judgments is the *Celotex* trilogy of cases that the Supreme Court handed down in 1986.<sup>61</sup> After the *Celotex* trilogy, summary judgment became the dominant legal mechanism in the resolution of disputes. The three cases are a "celebration of summary judgment"<sup>62</sup> and sent a message that summary judgment should be liberally granted.<sup>63</sup> Whether this zealous push for summary judgment was ill-advised is a forgotten question in practice. The precedential value of the *Celotex* trilogy is close to unquestionable; the three cases are cited more often than any other cases in the federal courts.<sup>64</sup> Realistically, summary judgment likely will retain its dominant role in the near and distant future.<sup>65</sup>

With its expanded role engulfing much of the trial's importance, it is unsurprising that summary judgment resembles a trial in the resources devoted to it and myriad of technical formalities that it involves.<sup>66</sup> One

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58. 10A WRIGHT, MILLER & KANE, *supra* note 15, § 2712.

59. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.") (quoting FED. R. CIV. P. 1 (internal quotations marks omitted)).

60. Risinger, *supra* note 3, at 41-42. For a thorough discussion of the differences between Rule 56 and other pretrial motions, see 10A WRIGHT, MILLER & KANE, *supra* note 15, § 2713.

61. *See generally Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

62. Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO L.J. 1065, 1114-15 (1986).

63. Risinger, *supra* note 3, at 41-42.; *see also* Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been A Material Change in Standards*, 63 NOTRE DAME L. REV. 770, 770 (1988).

64. Steinman, *supra* note 19, at 86-87.

65. The committee notes to the proposed amendment also state that they do not intend to alter the *Celotex* precedent. *See* REPORT OF COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 9, app. C. at C44.

66. *See* BRUNET & REDISH, *supra* note 11, at 1-4, 206-07.

example is admissibility, which is often raised to gain summary judgment where a litigant failed to adhere to Rule 56 formalities in the presentation of the litigant's summary judgment material. While no precise data exists on how often admissibility is raised to show the absence of a genuine issue as to material fact, it is clearly a frequent enough tactic to warrant discussion in many popular federal practice guides.<sup>67</sup> With its affirmation of the no evidence theory, the *Celotex* Court ushered in the practice of attacking admissibility of summary judgment evidence. The following presents a summary of the *Celotex* case facts, the Court's articulation of summary judgment burdens, and the majority's discussion of an admissibility standard for summary judgment and what meaning proceduralists drew from it.

### I. FACTUAL AND PROCEDURAL BACKGROUND

In *Celotex*, a widow sued fifteen defendants including Celotex Corp., alleging that exposure to asbestos caused her husband's death.<sup>68</sup> During discovery, Celotex requested witnesses that would testify to the decedent's exposure.<sup>69</sup> The plaintiff responded that it would provide the witnesses in supplementary answers.<sup>70</sup> In 1981, Celotex filed a motion for summary judgment.<sup>71</sup> It contended that the plaintiff could not show that any Celotex product "was the proximate cause of the injuries alleged within the jurisdictional limits of [the] [c]ourt."<sup>72</sup> Celotex further argued that the plaintiff could produce no witnesses to testify about the decedent's exposure to Celotex asbestos products.<sup>73</sup>

The plaintiff responded with three documents that she claimed tended to show the decedent's exposure to asbestos by a Celotex company.<sup>74</sup> Those documents included the following: (1) a letter from William O'Keefe of Aetna Casualty and Insurance, the insurer of the decedent's employer, which stated that the decedent's employer acquired an asbestos product from a company later purchased by Celotex; (2) a letter from T.R. Hoff, the assistant secretary of the decedent's employer stating the same; and (3) former deposition testimony from the decedent in a worker's compensation

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67. See, e.g., BRUNET & REDISH, *supra* note 11, at 220-238; WILLIAM DANIEL QUARLES ET AL., SUMMARY ADJUDICATION: DISPOSITIVE MOTIONS AND SUMMARY TRIALS 116-118 (1991); 10A WRIGHT, MILLER & KANE, *supra* note 15, § 2722.

68. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 319 (1986).

69. *Id.* at 320.

70. *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 34 (D.C. Cir. 1987).

71. *Id.* at 34-35.

72. *Celotex*, 477 U.S. at 319-20 (quoting Petitioner's motion below).

73. *Id.* at 320.

74. *Id.*; *Catrett*, 826 F.2d at 35.

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hearing in which he stated his duties included direct contact with asbestos products.<sup>75</sup>

Celotex then argued that the three documents were inadmissible hearsay, and that the court could not consider them in opposition to the summary judgment motion.<sup>76</sup> Without addressing the argument (suggesting tacit consideration of the materials), the district court granted summary judgment because the plaintiff failed to show exposure to asbestos in the D.C. district or elsewhere.<sup>77</sup> The D.C. Circuit Court of Appeals reversed because Celotex failed to meet its initial burden. The court said it felt constrained by the U.S. Supreme Court's decision in *Adickes v. S.H. Kress & Co.*<sup>78</sup>

*Adickes* involved a civil rights claim under § 1983.<sup>79</sup> The suit arose out of a Mississippi restaurant's refusal to serve the plaintiff, who was black, and her subsequent arrest following the incident.<sup>80</sup> The relevant portion of the opinion relates to a conspiracy between the restaurant and the police.<sup>81</sup> The district court dismissed plaintiff's claim on summary judgment.<sup>82</sup> The appeals court affirmed.<sup>83</sup> However, the Supreme Court reversed the lower courts, concluding that the defendant failed to meet its initial burden.<sup>84</sup> The disputed fact was the presence of a police officer in the restaurant, who later arrested the plaintiff.<sup>85</sup> The plaintiff argued that this tended to show conspiracy.<sup>86</sup> As part of its initial showing, defendants put forth evidence suggesting no communication between the restaurant and the police department.<sup>87</sup> However, the *Adickes* Court concluded that the defendant failed to "foreclose" the possibility that a police officer was

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75. *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 183 (D.C. Cir. 1985), *rev'd*, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The 1995 *Catrett* decision was rendered on appeal from the district court's initial grant of summary judgment.

76. *Celotex Corp. v. Catrett*, 477 U.S. 317, 321 (1986).

77. *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 183 (D.C. Cir. 1985), *rev'd*, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

78. *Celotex*, 477 U.S. at 325 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) (discussing how the *Adickes* decision affected the appellate court's decision to affirm summary judgment)). The *Adickes* Court held that summary judgment is improper when the defendant fails to first demonstrate the nonexistence of a genuine issue of material fact. *Adickes*, 398 U.S. at 157.

79. *Adickes*, 398 U.S. at 146 (citing 42 U.S.C. § 1983 (2006)).

80. *Id.*

81. *See id.*

82. *Id.* at 147-48.

83. *Id.* at 148.

84. *Id.* at 148, 153.

85. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153 (1970).

86. *Id.* at 156-57.

87. *Id.* at 153-56.

present at the restaurant.<sup>88</sup> To do so, the defendant would have to show through affirmative evidence that the police officer was absent from the restaurant.<sup>89</sup> Consequently, it required a moving party to reach its burden with affirmative evidence showing that a critical fact of the nonmoving party's case is false.

Celotex was in the same position as the *Adickes* defendants on appeal. Because Celotex had failed to show the absence of exposure through affidavits or evidence, the circuit felt compelled to reverse the district court's decision.<sup>90</sup> The circuit did not reach the issue of whether Catrett's allegedly inadmissible documents could be considered.<sup>91</sup> The lone dissenter of the panel argued that a party moving for summary judgment that does not bear the burden at trial need not always support its motion with affirmative evidence.<sup>92</sup> Instead, it could show that the plaintiff lacked evidence sufficient to create a triable issue.<sup>93</sup> Essentially, this is where the U.S. Supreme Court's majority came down on the case, reversing the circuit court.

## II. RECONFIGURING SUMMARY JUDGMENT BURDENS

In ruling in favor of Celotex, then-Associate Justice William Rehnquist offered a new articulation of the moving party's burden at summary judgment.<sup>94</sup> He wrote that a moving party can satisfy its burden by "identifying portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact."<sup>95</sup> While it strayed from the *Adickes* Court's view of the burdens, it did not overrule that case.<sup>96</sup>

Consequently, the moving party's summary judgment burden can take two forms.<sup>97</sup> The first is that the moving party through affirmative evidence must show no genuine issue of material fact. To accomplish this, the

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88. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

89. *Id.* at 157-58.

90. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (discussing how the *Adickes* decision affected the appellate court's decision to affirm summary judgment). *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 184 (D.C. Cir. 1985), *rev'd*, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

91. *Catrett*, 756 F.2d at 184 n.7.

92. *Id.* at 188 (Bork, J., dissenting).

93. *Id.* at 188-89 (Bork, J., dissenting).

94. *Celotex*, 477 U.S. at 325.

95. *Id.* at 323.

96. *Id.* at 325.

97. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Celotex*, 477 U.S. at 323-24.

moving party must foreclose the possibility that the opposition's evidence can establish a factual dispute.<sup>98</sup> In terms of a defendant's motion, the defendant must show that a condition necessary to the plaintiff's case is factually false.<sup>99</sup> This is the manner in which the defendant in *Adickes* attempted to show the absence of a genuine issue and is a manner that is considerably more burdensome than the burden used in *Celotex*.<sup>100</sup>

The second, often called the "absence of evidence" or no evidence theory for summary judgment, allows a moving party who did not bear the trial burden of proof to discharge its summary judgment burden without affirmative evidence.<sup>101</sup> Instead, a moving party may point to specific portions of the record that one would expect to show a factual dispute but which failed to do so.<sup>102</sup> The burden would then shift to the plaintiff to produce affirmative evidence that a factual dispute existed.<sup>103</sup> The *Celotex* Court concluded that *Celotex* met its burden under this theory because it pointed to portions of the record that failed to show proximate cause.<sup>104</sup> It reversed and remanded the case to the circuit court, which subsequently found that the plaintiff sufficiently opposed summary judgment through its use of the above mentioned letters.<sup>105</sup>

Essentially, the ruling permitted summary judgment movants to carry the burden by arguing that the summary judgment material is not admissible. This argument effectively shows that the opposing party has no evidence on a critical element of its case, which seems simple enough—following *Celotex*, though, how is a court to rule on whether summary judgment material is admissible? The *Celotex* majority offered some guidance that represents the latest Supreme Court statement on how to evaluate admissibility at summary judgment.

### III. ADMISSIBILITY DICTA: THE REDUCIBLE TO EVIDENCE STANDARD

The most pertinent part of the opinion for purposes of this Comment is Justice Rehnquist's description of the reducible-to-evidence standard. Specifically, he wrote that summary judgment materials need not be in "a form that would be admissible at trial" so long as they can be "reduced to

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98. Martin B. Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 750 (1974); Steinman, *supra* note 19, at 123.

99. Louis, *supra* note 98, at 750; Steinman, *supra* note 19, at 123.

100. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

101. Steinman, *supra* note 19, at 123, 125-26 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

102. *Celotex*, 477 U.S. at 321.

103. *Id.*

104. *Id.* at 323.

105. *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 38 (D.C. Cir. 1987).

admissible evidence” at trial.<sup>106</sup> The *Celotex* Court also noted that a party may make a motion for, support, or resist summary judgment “with or without supporting affidavits.”<sup>107</sup> It read subsection (c) and (e) of Rule 56 together to mean that a party could rely on materials listed in 56(c) alone to resist summary judgment, so long as the party does not rely solely on the pleadings.<sup>108</sup> Furthermore, 56(c) lists only the materials “that one would normally expect the nonmoving party to make the showing to which we have referred.”<sup>109</sup> The use of the word normally is often read as creating an exception to the materials listed in 56(c).<sup>110</sup>

The Court, however, failed to decide the case on the question of whether the plaintiff’s documents were admissible at the summary judgment stage. It left this question to the lower court. The issue was whether the Catrett letter could be used to withstand summary judgment “if reduced to admissible evidence.”<sup>111</sup> The circuit court of appeals ruled that the documents, specifically the letter, were admissible and once again denied summary judgment.<sup>112</sup> But because the *Celotex* Court did not decide the issue of the letter’s admissibility, confusion over the issue continued after the case. Much of the uncertainty rests in what the Court meant when it stated that the material need not be in a “form” that is admissible.<sup>113</sup> Primarily, proceduralists dispute whether the Court meant that summary judgment could be resisted with content from material other than an affidavit, depositions, or interrogatory responses—the forms “normally” expected.<sup>114</sup> Thus, uncertainty exists at the intersection of admissibility and a material’s sufficiency to demonstrate a genuine dispute. Regardless of one’s view, the admissibility issue hinges on the kernel of uncertainty that the Court planted in the discretion of lower courts. It was left to them to accept, reject, or modify the Court’s proposed rough model for addressing this uncertainty.

### C. FISSURE—TWO PERSPECTIVES OF THE SUMMARY JUDGMENT ADMISSIBILITY

In the more than two decades after *Celotex*, two general theories

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106. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

107. *Id.* at 323-24 (citing FED. R. CIV. P. 56(a)-(b)).

108. *Id.* at 324.

109. *Id.* (emphasis added).

110. BRUNET & REDISH, *supra* note 11, at 225.

111. *Celotex*, 477 U.S. at 327.

112. *Catrett v. Johns-Manville*, 826 F.2d 33, 37-38, 40 (D.C. Cir. 1987), *cert. denied*, *Celotex Corp. v. Catrett*, 484 U.S. 1066 (1988).

113. *Celotex*, 477 U.S. at 327.

114. See discussion and authorities *infra* Part I.C.

emerged on how admissibility relates to summary judgment and how a court should evaluate admissibility of summary judgment materials. Both can be defined according to their perspective in the litigation process. The first can be termed a *trial admissibility* view. The second can be defined as a *sufficiency* (to establish a genuine dispute) view. They are occasionally blended into other variations, but in broad strokes, they are the two existing approaches to summary judgment admissibility.

### I. TRIAL ADMISSIBILITY

The trial admissibility adherents view the trial rules of evidence as a strict limit on the presentation of summary judgment material.<sup>115</sup> Conceptually, the perspective views summary judgment material as evidence itself instead of a presentation of material that will be later converted into evidence at trial. Evidence is not only a method of proof at trial; it is the method of proof at summary judgment as well.<sup>116</sup> For this reason, summary judgment materials must generally comport with the federal rules of evidence to be “procedurally admi[tte]d” on a summary judgment motion.<sup>117</sup> If they did not, litigants could conceivably withstand

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115. See, e.g., *Orr v. Bank of America*, 285 F.3d 764, 783 (9th Cir. 2002) (excluding inadmissible hearsay); *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 192 (5th Cir. 1991) (stating that the *Celotex* Court did not alter the settled law of requiring documents to be authenticated); *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990) (“Hearsay evidence, inadmissible at trial, cannot be considered on a motion for summary judgment.”); *Canada v. Blain’s Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987) (“It is well settled that unauthenticated documents cannot be considered on a motion for summary judgment.”); see also BRUNET & REDISH, *supra* note 11, at 220 (“It is clear that the evidence submitted by the parties to support or oppose a motion for summary judgment must be admissible under the Federal Rules of Evidence.”); Nelken, *supra* note 7, at 56 (criticizing the *Celotex* Court for suggesting “that the nonmoving party could successfully oppose a motion for summary judgment with evidence that would be inadmissible at trial”); Shannon, *supra* note 23, at 830 (“[T]he adverse party must present materials that are themselves admissible.”). For numerous other authorities supporting this view, see BRUNET & REDISH, *supra* note 11, at 220-21.

116. BRUNET & REDISH, *supra* note 11, at 205, 220. In a chapter entitled “Summary Judgment Evidentiary Material,” professors Brunet and Redish refer to summary judgment materials as “evidence submitted by the parties.” *Id.* at 220.

117. See QUARLES ET AL., *supra* note 67, at 116-18; see also Nelken, *supra* note 7, at 73 (defining the term “procedural admissibility”). To support their view, proponents of a trial admissibility refer to the standard that affidavits must live up to. Affidavits must contain sworn testimony on specific facts that is made based on the personal knowledge of a competent affiant and that would be admissible in evidence. See FED. R. CIV. P. 56(c)(4) (effective Dec. 1, 2010); FED. R. CIV. P. 56(e) (effective Dec. 1, 2007). They extend this standard to all summary judgment materials. Professors Edward J. Brunet and Martin H. Redish argue that it would “seem illogical to single out affidavits that are clearly contemplated for use by Rule 56(e) for testing under the rules of evidence, yet simultaneously not require that items of proof that are not embraced by Rule 56(e) meet the requirements of the rules of evidence.” BRUNET & REDISH, *supra* note 11, at 222; see also Shannon, *supra* note 23, at 831 (arguing it makes little sense to apply evidence rules to affidavits and not other materials).

summary judgment and proceed to trial with inadmissible evidence that would inevitably be excluded, resulting in an unnecessary trial and wasted resources.<sup>118</sup>

There is only a narrow exception to the general extension of trial admissibility rules. The form of the summary judgment material is exempted.<sup>119</sup> The content, however, must be admissible.<sup>120</sup> Practically speaking, the forms exempted are affidavits, depositions, and possibly interrogatory responses.<sup>121</sup> Because Rule 56 authorizes them and arguably demands sworn testimony to be sufficient to demonstrate genuine issue, those materials are the only forms that need not comply perfectly with the rules of evidence to be used to support or withstand a summary judgment motion.<sup>122</sup> For a court to consider documents, letters, and other materials, which when offered alone present hearsay and authentication defects, they must be authenticated within and attached to either an affidavit or deposition.<sup>123</sup> Generally, this theory demands that courts strike, exclude, or declare inadmissible any materials that fail to adhere to the rules of evidence—those materials, which in their present form, would be inadmissible at trial.<sup>124</sup> Consequently, a court cannot admit them to support or oppose a summary judgment motion.<sup>125</sup>

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118. For further discussion on the underlying policy points of this perspective, see Nelken, *supra* note 7, at 72-77.

119. This exception derives from *Celotex*, where Justice Rehnquist stated that summary judgment documents need not be in a form that is admissible at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); BRUNET & REDISH, *supra* note 11, at 224-26; Kennedy, *supra* note 21, at 239.

120. For example, professors Brunet and Redish argue that it is unlikely that the Court “intended any broad exemption from the rule that requires evidence considered on summary judgment to be admissible at trial.” BRUNET & REDISH, *supra* note 11, at 222. The limited exception merely permits materials such as affidavits and interrogatories—technically inadmissible at trial—to be submitted at summary judgment. Kennedy, *supra* note 21, at 239; *see also* Nelken, *supra* note 7, at 72-73 (arguing that Rule 56 mandates that summary judgment material be sworn testimony such as a perfected affidavit or deposition).

121. *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 743 (7th Cir. 1997); Kennedy, *supra* note 21, at 239. Some trial admissibility adherents take this argument a step further. They argue that the *Celotex* Court’s discussion of admissibility is purely dicta and disregard it. *See Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 191-92 (5th Cir. 1991); Shannon, *supra* note 23, at 825.

122. Kennedy, *supra* note 21, at 239; Nelken, *supra* note 7, at 72-73.

123. BRUNET & REDISH, *supra* note 11, at 227 (advising counsel to authenticate documents to ensure their consideration at summary judgment); 10A WRIGHT, MILLER & KANE, *supra* note 15, § 2722 (stating that documents must be attached to affidavits or depositions wherein they are referred to); QUARLES ET AL., *supra* note 67, at 117 (stating that documents must be attached to affidavits or depositions wherein they are referred to).

124. *See, e.g.*, *Orr v. Bank of America*, 285 F.3d 764, 783 (9th Cir. 2002); *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 192 (5th Cir. 1991).

125. QUARLES ET AL., *supra* note 67, at 117-18; Nelken, *supra* note 7, at 72-77.

From a trial admissibility perspective, the Catrett letter from the *Celotex* case would likely be inadmissible and would not be sufficient to establish a genuine dispute.<sup>126</sup> It is inadmissible because it suffers from a hearsay defect and is not authenticated.<sup>127</sup> To properly present the letter at summary judgment according to the trial admissibility rule, a witness must authenticate it in either an affidavit or deposition.<sup>128</sup> The primary, theoretical difficulty with the trial admissibility view is its general extension of trial evidence rules to summary judgment. Strictly speaking, all summary judgment materials, including affidavits and depositions, likely would be inadmissible if offered for the truth of the matter asserted.<sup>129</sup> Furthermore, it creates the potential that a court could grant summary judgment on technicalities, which tends to distort its accuracy on the merits. For example, summary judgment might be granted because a letter was not properly attached to an affidavit or deposition. In the hypothetical, the letter could still be potentially prevailing evidence at trial once introduced by a witness. If it was to be so introduced but for the summary judgment dismissal, the grant of summary judgment would not accurately reflect the presence of an issue and the need for a trial.<sup>130</sup>

## II. SUFFICIENCY (TO ESTABLISH A GENUINE DISPUTE)

The sufficiency view inquires only into whether the presentation of summary judgment material establishes a genuine dispute.<sup>131</sup> There is no other formal limit on the presentation of summary judgment material. As it relates to summary judgment, admissibility is a “forward-looking” inquiry.<sup>132</sup> For example, summary judgment material that is always and

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126. *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 41-42 (D.C. Cir. 1987) (Bork, J., dissenting).

127. *Id.* (Bork, J., dissenting).

128. *Id.* (Bork, J., dissenting). Rule 56, effective Dec. 1, 2009, states that “[i]f a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit.” FED. R. CIV. P. 56(e) (effective Dec. 1, 2009).

129. *See* FED. R. EVID. 601-602, 801-804; *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 743 (7th Cir. 1997); Adam N. Steinman, *An Ounce of Prevention: Solving Some Unforeseen Problems with the Proposed Amendments to Rule 56 and the Federal Summary Judgment Process*, 103 NW. U. L. REV. COLLOQUY 230, 235 (2008) [hereinafter *An Ounce of Prevention*].

130. *See* discussion *supra* Part I.A.

131. *See, e.g.*, *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1389 (2d Cir. 1992) (applying *Celotex* reducibility standard); *Offshore Aviation v. Transcon. Lines, Inc.*, 831 F.2d 1013, 1015 (11th Cir. 1987) (applying *Celotex* reducibility standard); *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 38 (D.C. Cir. 1987) (ruling that letter not attached to an affidavit was sufficient to demonstrate a genuine dispute); *see also* QUARLES ET AL., *supra* note 67, at 117-18 (explaining that some have tried to withstand summary judgment on inadmissible evidence); Steinman, *supra* note 19, at 128-31 (stating that Rule 56 contains only a singular standard for materials to meet: to demonstrate a genuine dispute).

132. Duane, *supra* note 21, at 1541.

inevitably inadmissible at trial is not sufficient to create a genuine dispute.<sup>133</sup> However, a presentation of summary judgment material that a litigant can potentially convert to admissible evidence at trial may be sufficient to create a genuine dispute.<sup>134</sup> This potential is the threshold standard for admissibility. No other formalities are required, with the exception of those required for affidavits.<sup>135</sup> The result is that any presentation of record material, be it through affidavit, deposition, interrogatory response, letter, unattached document, or electronically stored information, could sufficiently demonstrate a genuine dispute so long as it is possible to convert the cited material into admissible evidence at trial.<sup>136</sup>

In the *Celotex* case, the Catrett letter would be sufficient to establish a genuine dispute under this theory. Because the plaintiff showed the intent to call a witness for authentication at trial in an interrogatory response, the letter was susceptible to admissibility later at trial.<sup>137</sup> The combination of the interrogatory response and the letter are potentially admissible at trial. Therefore, the letter's content establishes a genuine dispute.<sup>138</sup> Although not admissible as presented at summary judgment, the record as a whole revealed a way to make the material admissible at trial.<sup>139</sup> In contrast, the deposition transcript from Mr. Catrett's workers' compensation hearing would not be sufficient.<sup>140</sup> Because at trial it would be hearsay without an

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133. See Steinman, *supra* note 19, at 129, 131.

134. Supporters of this view argue that the only requirement that Rule 56 imposes on summary judgment material, with the exception of affidavits, is that it be sufficient to demonstrate a genuine issue. Professor Steinman contends that literally read, Rule 56 only applies trial rules of evidence to affidavits. *Id.* at 128-29 (citing FED. R. CIV. P. 56 (e)(2) (effective Dec. 1, 1987)). He also notes that any material identified in Rule 56 is sufficient to show a genuine dispute. *Id.* at 129, 131.

Moreover, he argues that it makes little sense to impose hearsay evidentiary rules on summary judgment materials because it is not being offered to prove the truth of the matter asserted and need not be at the summary judgment stage. *Id.* at 130. Instead, the rule only requires a party opposing summary judgment to show that a genuine issue exists. *Id.* Thus, it is being offered to show that an issue exists that will later be supported by admissible evidence at trial. *Id.* Professor Steinman also aptly notes that the problem with materials such as pleadings or hearsay reiterations of those pleadings within an affidavit is not their inadmissibility. *Id.* at 128-29. They may be considered, but are not, on their own, sufficient to demonstrate a dispute necessary for trial. *Id.* at 129 (citing FED. R. CIV. P. 56(e)(2)).

135. Steinman, *supra* note 19, at 128 (citing FED. R. CIV. P. 56(e) (effective Dec. 1, 1987)).

136. QUARLES ET AL., *supra* note 67, 117-18; Steinman, *supra* note 19, at 128-31.

137. *Catrett v. Johns-Manville*, 826 F.2d 33, 38 (D.C. Cir. 1987).

138. *Id.*

139. *Id.*; see also Steinman, *supra* note 19, at 131 (explaining that an interrogatory response identifying a witness who would testify at trial sufficiently demonstrates a genuine dispute, even though this particular presentation is not trial quality evidence).

140. *Id.*

exception, it is inadequate to demonstrate an issue necessary for trial.<sup>141</sup>

The primary criticism of this theory is that its forward-looking perspective is far too speculative and unpredictable for practice.<sup>142</sup> Under it, there is risk that a litigant may withstand summary judgment through a document for which authentication may never come at trial simply because it is possible that a hypothetical witness could be called to authenticate it.<sup>143</sup> Consequently, the resources spent on trial would be wasted on what could have been resolved at summary judgment.<sup>144</sup>

Both theories can coexist at summary judgment and generally produce consistent results. For example, under either perspective, an affidavit or deposition will be admitted at summary judgment or suffice to either support or oppose a motion for summary judgment. However, documents and letters have been an area in which both admissible theories have proven inadequate and even produced inconsistency. For example, the *Catrett* court on remand found a letter, coupled with an interrogatory response sufficient to create a genuine issue.<sup>145</sup> Courts are divided on whether this combination of summary judgment material or even a document alone is sufficient to generate a triable issue. Again, the problem is that the *Celotex* Court failed to address definitively how admissibility relates to a material's sufficiency to demonstrate a genuine dispute.<sup>146</sup> However, more than two decades after *Celotex* came down, there is finally something more to consider.

## II. CLOSING THE ADMISSIBILITY GAP AT SUMMARY JUDGMENT

Rule 56, effective December 1, 2010, represents the rule's first wholesale rewriting since the federal rules took effect in 1938.<sup>147</sup> It essentially takes up where the *Celotex* Court left off. The intent of the rules committee was to refine the procedures for managing summary judgment as well as to encapsulate the *Celotex* trilogy's standards in modern rule language.<sup>148</sup> Furthermore, the Committee explicitly stated that it meant not

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141. *Catrett v. Johns-Manville*, 826 F.2d 33, 38 (D.C. Cir. 1987).

142. Shannon, *supra* note 23, at 832-33.

143. *Id.*

144. *Id.*

145. *Catrett*, 826 F.2d at 38.

146. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

147. REPORT OF COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 9, app. C. at C34-C52

148. FED. R. CIV. P. 56 advisory committee's note (effective Dec. 1, 2010); *see also* REPORT OF COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 9, app. C. at C44.

to “affect the continuing development of the decisional law.”<sup>149</sup> However, the re-writing as a whole reflects the contemporary attitude toward summary judgment and therefore clarifies much of the confusion that arose from applying contemporary standards to dated rule language, whose drafters did not likely foresee such a significant role for the procedure. Specifically, it instructs litigants and the court on how to handle admissibility at summary judgment.<sup>150</sup> Although these instructions leave many questions to continuing debate, they provide more direction than past versions of Rule 56.

The following discussion describes the admissibility provisions in Rule 56, effective Dec. 1, 2010, and suggests how the rule affects preexisting theories on summary judgment admissibility.

#### A. ADMISSIBILITY IN RULE 56

The most significant admissibility provision of Rule 56, once it becomes effective December 1, 2010, creates a special objection for summary judgment. Section (c) describes summary judgment procedures, including subsection (2) entitled: “Objection that a Fact Is Not Supported by Admissible Evidence.”<sup>151</sup> It allows “[a] party [to] object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.”<sup>152</sup> The terminology incorporated from trial procedure is not incidental; indeed, the committee intends that the summary judgment objection function “much as an objection at trial, adjusted for the pretrial setting.”<sup>153</sup> It severs itself from trial procedure, however, in an important way. If admissibility is not challenged at the summary judgment stage, the objection is not waived at trial.<sup>154</sup>

The section provides no further information on how a court must rule on the objection. The committee note, however, explains that the “burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated.”<sup>155</sup> Regardless of how

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149. FED. R. CIV. P. 56 advisory committee’s note (effective Dec. 1, 2010); *see also* REPORT OF COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 9, app. C. at C44.

150. *See* FED. R. CIV. P. 56(c)(2) (effective Dec. 1, 2010); *see also* REPORT OF COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 9, app. C. at C44.

151. *See* FED. R. CIV. P. 56(c)(2) (effective Dec. 1, 2010).

152. *Id.*

153. *See* FED. R. CIV. P. 56(c)(2), advisory committee’s note (effective Dec. 1, 2010); *see also* REPORT OF COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 9, app. C. at C47.

154. *See* FED. R. CIV. P. 56(c)(2), advisory committee’s note (effective Dec. 1, 2010); *see also* REPORT OF COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 9, app. C. at C47.

155. *See* FED. R. CIV. P. 56(c)(2), advisory committee note (effective Dec. 1, 2010); *see also* REPORT OF COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 9, app. C. at C47.

this language is interpreted, section (e) makes clear the consequences of a sustained objection. If the proponent of the summary judgment material cannot meet its burden on admissibility (whatever that may be), then the litigant has failed to “properly address another party’s assertion of fact as required by Rule 56(c),” which outlines procedures for supporting factual positions.<sup>156</sup> In such a case, Rule 56(e) states that “a court may: (1) give an opportunity to properly support or address the fact; (2) consider the fact undisputed for purposes of the motion; (3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or (4) issue any other appropriate order.”<sup>157</sup>

This burden shifting framework is consistent with the partial framework that the *Celotex* Court constructed in its endorsement of the “no evidence” theory of a motion for summary judgment, which is reproduced in Rule 56(c)(1)(B) (effective Dec. 1, 2010). Place the facts from *Celotex* under this rule section. *Celotex* properly objected to the admissibility of the plaintiff’s evidence and argued the letter was hearsay.<sup>158</sup> This objection met the movant’s burden under section (c)(1)(B).<sup>159</sup> Catrett then had the burden of showing that the letter was admissible or explaining the form that was anticipated and that the letter established a genuine issue, which it eventually did on remand.<sup>160</sup> The objection is the equivalent of asserting that the plaintiff lacks evidence to support a critical element of its case. Indeed, section (c)(1)(B) equates the objection with the no evidence theory.

The lack of instruction on how to rule on the admissibility question also mirrors *Celotex*’s stopping point on the admissibility question. The rule still does not address specifically how a court should decide admissibility or, more specifically, whether the Catrett letter meets standards for summary judgment materials. Consequently, a lower court may continue to handle admissibility according to how it interprets the *Celotex* Court’s admissibility guidance. However, the presence of the admissibility section alone may alter the way courts and theorists view the admissibility question.

## B. THEORETICAL SHIFTS IN SUMMARY JUDGMENT ADMISSIBILITY

Beyond its instructive effect, the use of the word “object” is highly significant in how summary judgment is conceived within the division of

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156. See FED. R. CIV. P. 56(c)(2), (e) (effective Dec. 1, 2010).

157. FED. R. CIV. P. 56(e) (effective Dec. 1, 2010).

158. *Celotex Corp. v. Catrett*, 477 U.S. 317, 320 (1986).

159. FED. R. CIV. P. 56(c)(1)(B) (effective Dec. 1, 2010).

160. *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 38 (D.C. Cir. 1987).

litigation's various phases. The word unmistakably alludes to trial evidentiary procedure and further blurs the division between summary judgment and trial. In continuing the path laid out in the *Celotex* trilogy, the objection places summary judgment neatly beside trial, and it extracts it almost entirely from the world of post-discovery. Consequently, the compact statement on admissibility deepens the tone of summary judgment to the significance of an "approximate" trial or "mini-trial" before the trial.<sup>161</sup> The leniency found in early stages of litigation such as pleading and discovery fades into the stringent and raised expectations found in the preparation of trial and trial itself. Moreover, the statement makes it more difficult to argue that summary judgment materials need not comply with trial rules of evidence. Beyond the objection, however, another component of section (c)(2) diminishes this argument. It makes clear that all summary judgment materials must meet the same standard that Rule 56 requires from affidavits. The materials must contain information as "would be admissible in evidence."<sup>162</sup> Thus, a general standard of admissibility exists for all summary judgment materials.

This general extension is a blow to the sufficiency theory, which hinged partially on the argument that the rules of evidence only applied to affidavits.<sup>163</sup> However, all is not lost for the theory, which posits that any material recognized in Rule 56 can establish a genuine dispute.<sup>164</sup> Two provisions effectively reaffirm this reading of earlier versions of Rule 56. Section (c)(1)(A) states that a litigant can cite any of the materials in the record, including letters or documents, on their own to support factual positions.<sup>165</sup> Furthermore, nothing in Rule 56 explicitly requires that the materials meet the formalities of affidavits or depositions. Indeed, section (c)(4) appears to release the materials from this requirement because it no longer requires them to be referred to within and attached to an affidavit or deposition.<sup>166</sup> The Committee Notes explain that "[t]he requirement that a sworn or certified copy of a paper referred to in an affidavit or declaration be attached to the affidavit or declaration is omitted as unnecessary given the requirement in (c)(1)(A) that a statement or dispute of fact be supported by materials in the record."<sup>167</sup> In so far as a summary judgment material

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161. BRUNET & REDISH, *supra* note 11, at 206.

162. *See* FED. R. CIV. P. 56(c)(2) (effective Dec. 1, 2010).

163. Steinman, *supra* note 19, at 126.

164. QUARLES ET AL., *supra* note 67, at 117-18; Steinman, *supra* note 19, at 128-31.

165. FED. R. CIV. P. 56 (1)(A) (effective Dec. 1, 2010).

166. FED. R. CIV. P. 56 (c)(4) (effective Dec. 1, 2010).

167. *See* FED. R. CIV. P. 56 (c)(4) advisory committee's note (effective Dec. 1, 2010); *see also* REPORT OF COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 9, app. C. at C47. Precisely what Rule 56 means by "in the record" is unclear. *See* Shannon, *supra* note 23, at 833 n.104. However, Rule 5 explains how to introduce a paper to the court. *See* FED. R. CIV. P.

comports with Rule 56's standard of admissibility, whatever that may be under section (c)(2), the material need only be in the record. In other words, Rule 56 still leaves in doubt whether summary judgment admissibility is coextensive with formalities for affidavits and depositions or whether a material can comply with the rules of summary judgment admissibility without adhering to those formalities.

Rule 56 also is unclear about whether a document alone suffices to demonstrate a genuine dispute. As the *Celotex* Court left this particular question, the answer hinges on one's admissibility perspective. Under rules of trial evidence, a document alone typically cannot demonstrate a genuine dispute because it is inadmissible without authentication and testimony based on personal knowledge. However, if summary judgment admissibility is viewed broadly under the sufficiency theory, it may later become admissible at trial and still considered. Indeed, the committee note supports this broad view in permitting the proponent of a summary judgment material to establish admissibility by explaining "the admissible form that is anticipated," presumably at trial.<sup>168</sup> This tension reassembles the ambiguity that the *Celotex* Court left the legal community with in 1986. In conclusion, the state of law in the area of summary judgment admissibility is unlikely to change and will continue to percolate in the lower federal courts.

### III. A PATCHWORK OF LOWER COURT APPROACHES

Because Rule 56 continues to leave close questions of summary judgment admissibility to lower court discretion, the area of law is essentially in the same position as it was following *Celotex*. Aside from minor theoretical adjustments that added rule language demands, courts may rely on the approaches founded in past precedent. This section discusses some of this precedent to illustrate a new conceptual framework that synthesizes elements of the two perspectives discussed above. Rather than articulate a universal and definitive admissibility rule, the synthesis describes a way to understand how courts arrive at opposing or consistent results on admissibility without lumping them into a particular theoretical camp. Specifically, the synthesis establishes that a litigant need only prepare a summary judgment analogue to admissible trial evidence that a court is willing to tolerate because of its reliability and reasonable reducibility to admissible evidence.

Before proceeding to elements of the admissibility issue, it is

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5(d)(2) entitled "How Filing Is Made."

168. See FED. R. CIV. P. 56(c)(4), advisory committee's note (effective Dec. 1, 2010); see also REPORT OF COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 9, app. C. at C47.

necessary to clarify some boundaries for the discussion. At the summary judgment stage, evidentiary admissibility issues tend to arise in isolated areas of evidence law.<sup>169</sup> Summary judgment materials are generally prone to three potentially relevant deficiencies endemic in a purely paper record: hearsay, authentication, and lack of personal knowledge.<sup>170</sup> Summary judgment proceedings also often implicate expert witness rules; however, this discussion purposefully avoids expert witness problems because the scope of the topic deserves its own article and also, because expert witness admissibility is not handled with any significant variation between trial and summary judgment.<sup>171</sup> Beyond these limitations, the section describes the admissibility issues within summary judgment materials that typically do not meet trial admissibility standards. They include: affidavits and depositions, letters, and unsigned documents. These materials present the most challenging problems for courts.

#### A. AFFIDAVITS AND DEPOSITIONS

Technically, affidavits and depositions are out-of-court statements offered for the truth of the matter asserted and are therefore, generally considered inadmissible hearsay at trial.<sup>172</sup> However, they are almost universally considered for summary judgment in the federal system.<sup>173</sup> This conflict illustrates the theoretical tension between the evidentiary rules and summary judgment procedure and begs the question of how affidavit and deposition testimony comport with the standards of summary judgment admissibility. If the trial rules of evidence generally apply at summary judgment, as Rule 56 suggests,<sup>174</sup> affidavits would seem to be inadmissible in such a proceeding.<sup>175</sup> One way around this problem is to view Rule 56 as

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169. Professors Brunet and Redish suggest that attorneys probably “focus on selective evidentiary rules having strategic potential for utilization within summary judgment rather than raise evidentiary objections to every possible item put forth by their opponents.” BRUNET & REDISH, *supra* note 11, at 224.

170. FED. R. EVID. 601-602, 801, 901.

171. For a full discussion on the admissibility of expert witness materials at summary judgment, see BRUNET & REDISH, *supra* note 11, at 257-62.

172. See FED. R. EVID. 801-802; *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 743 (7th Cir. 1997); FRIEDENTHAL ET AL., *supra* note 5, at 471 n.23. Depositions may often be admitted under a hearsay exception but generally they are still considered hearsay. See, e.g., FED. R. EVID. 804(b)(1).

173. See, e.g., *Eisenstadt*, 113 F.3d at 742 (holding that affidavits fit within admissibility exception identified in the *Celotex* trilogy); *Waldrige v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994) (holding that affidavits fit within admissibility exception identified in the *Celotex* trilogy); see also *An Ounce of Prevention*, *supra* note 129, at 235-36 (citing FED. R. EVID. 801(c)) (defining affidavits as hearsay yet acknowledging that they are routinely used at summary judgment).

174. See discussion *supra* Part II.B.

175. *An Ounce of Prevention*, *supra* note 129, at 235-36.

creating exceptions to the trial admissibility requirement.<sup>176</sup> However, this understanding is unsatisfying from a theoretical standpoint because the exception engulfs the general rule. If Rule 56 creates an exception for the materials it authorizes,<sup>177</sup> there would be no reason to impose trial rules of evidence at all at summary judgment. The rules of summary judgment evidence would be intrinsic to Rule 56 and not drawn from trial standards.

An alternative explanation is that the rules of trial evidence apply, but more leniently than at trial.<sup>178</sup> In the words of the Rule 56 drafting committee, they are “adjusted for the pretrial setting.”<sup>179</sup> Although this understanding seems like an adequate compromise, it is an elliptical one. Even if it is accepted, there continues to be no common understanding on how to adjust them or how leniently to apply them.<sup>180</sup> Rule 56 and *Celotex* stop short of instructing on this issue.<sup>181</sup> However, the way courts treat affidavits and depositions provides some insight because they are the one certainty of admissibility in Rule 56. However the trial rules of evidence are adjusted at summary judgment, affidavits and depositions would be revealing.

Courts consider affidavit and deposition materials highly reliable. This favorable view stems from the safeguards imposed on each of them. Affidavits and declarations are sworn statements.<sup>182</sup> Consequently, they are a fairly “reliable forecast of the evidence that will be presented at trial.”<sup>183</sup> Likewise, deposition transcripts are also sworn testimony with the added reliability of including the opportunity to cross examine.<sup>184</sup> True, there is no guarantee that affiants and deponents will not later reverse their testimony at trial, but this deficiency is true of all testimony, and at least

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176. Nelken, *supra* note 7, at 71-73.

177. *Id.*

178. *See, e.g.,* Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc., 831 F.2d 77, 80-81 (5th Cir. 1987) (holding the papers of a party opposing the motion for summary judgment to a less exacting standard); Jackson v. Mississippi, 644 F.2d 1142 (5th Cir. 1981) (allowing leeway for a technically imperfect affidavit); Barker v. Norman, 651 F.2d 1107, 1128 (5th Cir. 1981) (stating that it may be an abuse of discretion to not allow a non-moving party a meaningful opportunity to remedy defective summary judgment material).

179. FED. R. CIV. P. 56 advisory committee’s notes (effective Dec. 1, 2010); *see also* REPORT OF COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 9, app. C. at C47.

180. Professor Nelken noted that the argument that trial rules of admissibility are applied leniently had not been very popular. *See* Nelken, *supra* note 7, at 71-73.

181. FED. R. CIV. P. 56(c)(2) (effective Dec. 1, 2010); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

182. *See* FED. R. CIV. P. 56(c)(4) (effective Dec. 1, 2010).

183. Nelken, *supra* note 7, at 72-73.

184. *See* FED. R. CIV. P. 28(c). The ability to cross-examine is “an essential safeguard of the accuracy and completeness of testimony.” 1 KENNETH S. BROUN ET AL., *MCCORMICK ON EVIDENCE* 108-09 (6th ed. 2006).

these materials have all the indicia of admissible evidence demanded at trial. When properly taken, affidavit and deposition testimony contains specific fact testimony based on the personal knowledge of a competent witness.<sup>185</sup>

Placed in the *Celotex* reducibility framework,<sup>186</sup> it also is relatively easy to predict whether direct testimony during trial will make the affidavit or deposition admissible.<sup>187</sup> The witness is identified, and the testimony has been sworn.<sup>188</sup> The affiant or deponent need only be called at trial to testify directly to the affidavit's or deposition's contents. Because of this ease, the materials' sufficiency to demonstrate a genuine dispute is unquestionable.<sup>189</sup> They are the "gold-standard" of summary judgment.<sup>190</sup> Their only admissibility problem stems from the fact that their testimony is contained in a passive, paper record. Because of this, their presentation is hearsay when offered for the truth of the matter asserted.<sup>191</sup> But this hearsay is unavoidable since nearly all summary judgment proceedings rely on passive records and not live testimony. Other than this inevitable anomaly, affidavits and depositions substantially comply with the rules of evidence. They comply with Rule 56 formalities and identify a live witness who will reproduce their contents in admissible form at trial. Therefore, depositions and affidavits represent summary judgment analogues to admissible trial evidence that are easily tolerated by a court.

Their universal acceptability under the federal rules suggests that Rule 56 adjusts the rules of evidence to account for the technical defects inherent in the limitations on presenting evidence contained in a passive record. In exchange for reliability, authenticity, and reasonable certainty that trial testimony will cure their admissibility defect, courts tolerate the technical failure of affidavits and depositions to comply with the rules of evidence at summary judgment.<sup>192</sup> Furthermore, the presence of these core components

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185. See FED. R. EVID. 601-602, 701 (requiring competence, personal knowledge, and generally facts not opinion); FED. R. CIV. P. 56(c)(4) (effective Dec. 1, 2010) (requiring competence, personal knowledge, and generally facts not opinion); see also Nelken, *supra* note 7, at 72-73.

186. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

187. See Nelken, *supra* note 7, at 72-73.

188. FED. R. CIV. P. 56(c)(4) (effective Dec. 1, 2010).

189. See e.g., *Celotex*, 477 U.S. at 327 (1986); *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997) (identifying affidavits and depositions as more reliable than documents, letters, and other summary judgment materials).

190. *An Ounce of Prevention*, *supra* note 129, at 236 n.36.

191. See FED. R. EVID. 801.

192. *Eisenstadt*, 113 F.3d at 742 ("Hearsay is inadmissible in summary judgment proceedings to the same extent that it is inadmissible in a trial, except that affidavits and depositions, which, especially affidavits, are not generally admissible at trial, are admissible in summary judgment

of the rules of evidence in perfected affidavits and depositions are what make them admissible for summary judgment purposes, not some special status within Rule 56. Indeed, courts refuse to tolerate the hearsay defect where it is not reliable and predictably reducible to admissible evidence.<sup>193</sup>

For example, an affiant or deponent might testify to a statement made by an out-of-court declarant such as an anonymous salesman who orally promised a warranty to the plaintiff.<sup>194</sup> This scenario is difficult to tolerate. Not only does it present a double hearsay problem,<sup>195</sup> but it also depends on an unidentified witness appearing at trial to testify, which makes the hearsay affidavit's conversion to admissible evidence hypothetical and difficult to gauge. Faced with this scenario, the *Tatum v. Cordis Corp.* court ultimately granted summary judgment because the salesman could not be identified, and the testimony could not be introduced at trial in any other way.<sup>196</sup> It stated that the material was insufficient to demonstrate a genuine dispute over a material fact.<sup>197</sup>

This double-hearsay example makes clear that Rule 56 adjusts the rules of trial evidence narrowly. Not all defective summary judgment material that has a hypothetical remedy at trial is admissible at summary judgment.<sup>198</sup> Instead, the admissibility remedy must be reasonably secure. Certainly, perfected affidavit and deposition testimony—that is, sworn testimony based on personal knowledge of a competent witness—achieves this level of security and substantial compliance with the trial rules of evidence.<sup>199</sup> One could argue that the *Tatum* court rejected the affidavit because it failed Rule 56's requirements for affidavits. But those requirements are not necessarily the threshold level of reliability necessary

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proceedings to establish the truth of what is attested or deposed, provided, of course, that the affiant's or deponent's testimony would be admissible if he were testifying live." (internal citations omitted)); *Winskunas v. Birnbaum*, 23 F.3d 1264, 1267 (7th Cir. 1994) ("[T]he plaintiff is required by FED. R. CIV. P. 56, if he wants to ward off the grant of the motion, to present evidence of *evidentiary quality*—either admissible documents or attested testimony, such as that found in depositions or in affidavits—demonstrating the existence of a genuine issue of material fact.") (emphasis added).

193. See, e.g., *Thomas v. IBM*, 48 F.3d 478, 485 (10th Cir. 1995) ("Hearsay testimony that would be inadmissible at trial may not be included in an affidavit to defeat summary judgment because a third party's description of a witness' supposed testimony is not suitable grist for the summary judgment mill." (citations and internal quotation marks omitted)).

194. *Tatum v. Cordis Corp.*, 758 F. Supp. 457, 463 (M.D. Tenn. 1991).

195. See FED. R. EVID. 805.

196. *Tatum*, 758 F. Supp. at 463.

197. *Id.*

198. Shannon, *supra* note 23, at 830. "[M]ere reducibility to admissible evidence is not the proper standard for assessing the adequacy of the materials presented by the adverse party at summary judgment." *Id.*

199. See FED. R. CIV. P. 56(c)(4) (effective Dec. 1, 2010).

for summary judgment admissibility.

Courts sometimes express tolerance for the kind of double-hearsay defect in *Tatum* with an important distinction. In contrast to the unknown hearsay declarant in *Tatum*, the hearsay declarant in tolerated double-hearsay affidavits is identified and available at trial to remedy the hearsay problem.<sup>200</sup> This tolerance conforms to the dicta in *Celotex* that materials reducible to admissible evidence at trial can create a factual dispute.<sup>201</sup> It also is sufficiently reliable. For one, the specificity of fact and competency requirement remains intact despite the hearsay. Furthermore, the affiant swore to the hearsay declaration. And while the affiant may not have personal knowledge, the affiant has at least identified someone who will have personal knowledge at trial. All of the elements that a perfected affidavit contains are present. The affiant's presentation to the court is just distributed throughout the record in a different manner than the perfected affidavit would present them. Because the presentation is reliable and predictably reducible to admissible evidence, it is admissible for summary judgment purposes.

Here is the point: the double hearsay described above fails to conform to the personal knowledge requirement for affidavits yet is still considered admissible.<sup>202</sup> This suggests that admissibility is not inextricably tied to the formalities that Rule 56 requires. If Rule 56 affidavit formalities provided the standard for admissibility, then courts would exclude all double hearsay affidavits, but this is not always true.<sup>203</sup> Some imperfect affidavit testimony

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200. See, e.g., *Scosche Indus., Inc. v. Visor Gear Inc.*, 121 F.3d 675, 680-81 (Fed. Cir. 1997) (hearsay within deposition not considered, but no speaker identified in deposition); *Reynolds v. Land O'Lakes*, 112 F.3d 358, 364 (8th Cir. 1997) (considering hearsay with identified declarant, but determining that when combined with other evidence, it was insufficient to create an issue for trial); *Carney v. United States Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994) (requiring corroborating facts to support affidavit hearsay); *Petruzzi's IGA Supermarkets v. Darling-Del. Co.*, 998 F.2d 1224, 1235 n.9 (3d Cir. 1993) (considering deposition hearsay when hearsay could be cured by calling identified hearsay declarant at trial); *Tatum v. Cordis Corp.*, 758 F. Supp. 457, 463 (M.D. Tenn. 1991) ("Hearsay evidence may be considered by the Court in response to a motion for summary judgment as long as the out-of-court declarant would be available to present the evidence through direct testimony. But in this case, the out-of-court declarant is unidentified and since Tatum is deceased, he is unable to present the evidence through direct testimony.").

201. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Tatum*, 758 F. Supp. at 463.

202. See FED. R. CIV. P. 56(c)(4) (effective Dec. 1, 2010); FED. R. CIV. P. 56(e)(1) (effective Dec. 1, 2009).

203. *Petruzzi's IGA Supermarkets v. Darling-Delaware Co.*, 998 F.2d 1224, 1235 n.9 (3d Cir. 1993) (considering deposition hearsay when hearsay could be cured by calling identified hearsay declarant at trial); *Tatum v. Cordis Corp.*, 758 F. Supp. 457, 463 (M.D. Tenn. 1991) ("Hearsay evidence may be considered by the Court in response to a motion for summary judgment as long as the out-of-court declarant would be available to present the evidence through direct testimony. But in this case, the out-of-court declarant is unidentified and since Tatum is deceased, he is unable to present the evidence through direct testimony.").

is still considered admissible for summary judgment purposes. “Summary judgment is not . . . an automatic sanction for non-compliance with Rule 56(e).”<sup>204</sup>

In turn, there must be another explanation for why the double hearsay in the *Tatum* affidavit was inadmissible or insufficient other than it failed to adhere to affidavit formalities.<sup>205</sup> Indeed, it was inadmissible, not because the affiant lacked personal knowledge, one of the formalities prescribed in Rule 56 for affidavits;<sup>206</sup> it was inadmissible because it lacked the necessary qualities of admissible evidence sufficient to convince the court of its reliability and reducibility to admissible evidence. Specifically, the proponent of the hearsay affidavit could not produce a witness capable of curing the hearsay at trial.<sup>207</sup> In other words, it was an insufficient summary judgment analogue to admissible evidence.

This reasoning unties admissibility from the formal requirements of affidavits. However, formalities are not without purpose in Rule 56. Instead, they help measure a court’s tolerance of technical, admissibility defects in summary judgment material. Rule 56 affidavit requirements package reliability, authenticity, and reducibility into a single, convenient, and predicable form or summary judgment analogue. Presented with a perfected affidavit, a court’s tolerance of its hearsay status under the rules of evidence is all but mandatory. However, as a litigant deviates from these formalities, the core elements of admissibility become more difficult to gauge and the summary judgment presentation becomes less predictable. The material resembles admissible evidence less. Courts’ *admissibility tolerance* wanes and technical defects, such as in a double hearsay affidavit, become more problematic. However, where the purpose and substance of the formalities is met, such as the case where a hearsay declarant is identified and available to testify, courts can tolerate the technical defect more readily. As will be shown further, this approach can be extended to other materials such as letters and documents that are not attached to affidavits or depositions.

In sum, treatment of affidavits and depositions suggests that the threshold standard of summary judgment admissibility is to present summary judgment material in a manner that substantially conforms to trial rules of evidence so all that is lacking are technical deficiencies and a remedy at trial is reasonably assured. The task is to provide a summary

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204. *Jackson v. Mississippi*, 644 F.2d 1142, 1144 (5th Cir. 1981) (citing FED. R. CIV. P. 56(e)) (considering affidavit that failed to establish competence).

205. *Tatum v. Cordis Corp.*, 758 F. Supp. 457, 463 (M.D. Tenn. 1991).

206. FED. R. CIV. P. 56(c)(4) (effective Dec. 1, 2010).

207. *Tatum*, 758 F. Supp. at 463.

judgment analogue to admissible trial evidence that satisfies the court of its future admissibility at trial. Because of the evidentiary formalities that accompany them, perfected affidavits and depositions are the most convenient and convincing analogue to admissible evidence.<sup>208</sup> They reduce all of the normal evidentiary expectations into a single and convenient form. Rule 56 specifically endorses affidavits;<sup>209</sup> their use is doctrinally established;<sup>210</sup> and for practitioners, they are the preferred method—in addition to depositions—of supporting or opposing summary judgment.<sup>211</sup> Consequently, affidavits and depositions receive the highest degree of *admissibility tolerance* and, in turn, their use is the optimal manner in which to comply with standards of presenting summary judgment material.<sup>212</sup>

But there may be other summary judgment analogues to admissible evidence that satisfy the adjusted rules of trial evidence. Nothing in the rule confines a court's tolerance of technical defects to affidavits and depositions alone.<sup>213</sup> In fact, Rule 56, effective December 1, 2010, makes clear that all materials fall within the same standard of admissibility—a summary judgment material must contain facts that “would be admissible in evidence.”<sup>214</sup> Consequently, it is conceivable that other summary judgment material presentations may also exhibit the core elements of admissible evidence and comply with Rule 56's adjusted and analogized standard of admissibility. In the case of a double-hearsay affidavit or deposition that establishes a material fact, a litigant can accomplish this task by convincing the court that the hearsay declarant will be available at trial. To do this, a litigant must point to other parts of the record that establish the declarant's availability as a witness.<sup>215</sup>

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208. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

209. See FED. R. CIV. P. 56(c)(4) (effective Dec. 1, 2010).

210. *An Ounce of Prevention*, *supra* note 129, at 236 n.36.

211. See FRIEDENTHAL ET AL., *supra* note 5, at 471.

212. See *e.g.*, *Celotex*, 477 U.S. at 327; *Brooks v. Tri-Sys., Inc.*, 425 F.3d 1109, 1111-12 (8th Cir. 2005) (refusing to consider affidavit that lacked personal knowledge); *Markel v. Bd. of Regents of Univ. of Wis.*, 276 F.3d 906, 912 (7th Cir. 2002) (refusal to consider affidavit not sworn); *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997) (identifying affidavits and depositions as more reliable than documents, letters, and other summary judgment materials).

213. Rule 56 permits facts to be supported by any “materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials . . . .” FED. R. CIV. P. 56(c)(1)(A) (effective Dec. 1, 2010).

214. FED. R. CIV. P. 56(c)(2), (4) (effective Dec. 1, 2010).

215. See *Tatum v. Cordis Corp.*, 758 F. Supp. 457, 463 (M.D. Tenn. 1991).

**B. LETTERS**<sup>216</sup>

Unauthenticated, unsworn letters are one of the most common contexts in which the admissibility issue arises. Ideally, the appropriate manner to submit a letter at summary judgment is “authenticated by and attached to an affidavit that meets the requirements of Rule 56(e).”<sup>217</sup> Further, a letter should “be attached to an affidavit and authenticated by its author in the affidavit or a deposition.”<sup>218</sup> But like affidavits and depositions, even this formalized package of summary judgment materials suffers from a trial hearsay problem.<sup>219</sup> Nevertheless, like affidavits, the hearsay is regularly tolerated because of the reliability and ease in converting the content into admissible evidence.<sup>220</sup> This summary judgment presentation is a more than acceptable analogue to admissible trial evidence.<sup>221</sup>

However, courts sometimes recognize that letters on their own may have the indicia of admissible evidence sufficient to permit their content to demonstrate a genuine dispute. This adjustment in the rules of evidence for letters arises often when the failure to authenticate rests on a mere technicality such as attaching a letter to the affidavit of its known author.<sup>222</sup> To avoid making “technical minefields” out of summary judgment proceedings,<sup>223</sup> many courts grant leeway. If a proponent substantially complies with authentication requirements and a realistic remedy at trial is available, courts allow authentication defects to avoid injustice and the inefficiency of further discovery necessary to remedy the defect.<sup>224</sup>

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216. Unattached documents and letters are treated almost identically under authentication rules; however, unattached documents are discussed in a separate section because often they can be distinguished from letters in that they are anonymous and often lack an apparent way to authenticate.

217. 10A WRIGHT, MILLER & KANE, *supra* note 15, § 2722.

218. *Id.*

219. FED. R. EVID. 801-802.

220. *See* 10A WRIGHT, MILLER & KANE, *supra* note 15, § 2722.

221. *See id.*

222. *Canadyne-Ga. Corp. v. Bank of Am.*, 174 F. Supp. 2d 1337, 1343-44 (M.D. Ga. 2001).

223. *Orsi v. Kirkwood*, 999 F.2d 86, 92 (4th Cir. 1993).

224. *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 223 (3d Cir. 2000) (hearsay statements can be considered on a motion for summary judgment only if they are capable of admission at trial); *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742-43 (7th Cir. 1997) (“Some courts have, it is true, allowed letters, articles, and other unattested hearsay documents to be used as evidence in opposition to summary judgment, . . . provided some showing is made (or it is obvious) that they can be replaced by proper evidence at trial.” (internal citations omitted)); *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989) (consideration of unauthenticated documents that could easily be authenticated at trial); *Canadyne-Ga. Corp.*, 174 F. Supp. 2d at 1343-44 (unattached letters identified by deponent and are otherwise admissible at trial); *Mete v. N.Y. State Office of Mental Retardation*, 984 F. Supp 125, 140

For example, in *Canadyne-Georgia Corp. v. Bank of America*,<sup>225</sup> the court considered the admissibility of several letters, which were not attached to affidavits.<sup>226</sup> Instead, the plaintiff merely attached the letters to the motion for summary judgment. To evaluate the letters' admissibility, the court looked to deposition testimony in which the witness identified the letters. Consequently, the witness would be in a position to authenticate them formally at trial.<sup>227</sup> Although unattached and unsworn, the court considered the letters because there was a realistic and obvious manner by which a litigant could authenticate and introduce them at trial.<sup>228</sup> They also were reliable because they contained information sufficiently corroborative of the allegations.<sup>229</sup>

Although formally the *Canadyne* result represents a deviation from the affidavit analogue, it still substantially complied with the rules of evidence. The record contained all of the elements of reliability and reducibility that a letter attached to an affidavit would have. There was a witness who referred to the letter within sworn testimony and was capable of reappearing to testify at trial. Thus, it is an analogue presentation of admissible trial evidence. In turn, the court tolerated the technical hearsay and authentication defects because the substantive evidence within them demonstrated the core characteristics of admissible evidence when placed in the record context as whole.<sup>230</sup>

A less tolerable admissibility problem arises when a proponent fails to obtain an affidavit and submits an unsworn letter, creating hearsay and authentication defects.<sup>231</sup> Where it is not clear how a litigant can authenticate the letter, a court has no way to establish that a witness will have sufficient personal knowledge and competency to establish foundation

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(N.D.N.Y. 1997) ("The court will consider the letters inasmuch as any alleged deficiency as to their admissibility can be easily cured by plaintiffs. . . ."), *vacated* Bd. of Trustees of Univ. of Conn. v. Davis, 528 U.S. 1110 (2000); DiMarco v. Rome Hosp., 899 F. Supp. 91, 94 (N.D.N.Y. 1995) (considering letter whose author would be available for trial). Even still, the presence of an at-trial remedy is not a failsafe for summary judgment admissibility in courts with a strict attitude toward admissibility. See *Brown v. Marriott Int'l, Inc.*, No. 1:04-CV-3255-WSD, 2006 U.S. Dist. LEXIS 56426 (N.D. Ga. June 15, 2006).

225. *Canadyne-Ga. Corp. v. Bank of Am.*, 174 F. Supp. 2d 1337 (M.D. Ga. 2001).

226. *Id.* at 1343-44.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. FED. R. EVID. 801-802, 901; see also *Orsi v. Kirkwood*, 999 F.2d 86, 92 (4th Cir. 1993) (refusing to consider unsigned and unauthored letters that had not been authenticated); *Brown v. Marriott Int'l, Inc.*, No. 1:04-CV-3255-WSD, 2006 U.S. Dist. LEXIS 56426, at \*4-6 (N.D. Ga. June 15, 2006) (striking unauthenticated hearsay letters).

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**Admissibility Tolerance Under Rule 56**

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for the letter at trial.<sup>232</sup> Therefore, reliability and reducibility to admissible evidence is indeterminate. Moreover, the risks are great that tolerance of the defective materials will result in an unnecessary trial, void of any genuine dispute. This fact leads to unauthenticated letters and other documents frequently deemed inadmissible for the purposes of summary judgment.<sup>233</sup>

For example, the court in *Orsi v. Kirkwood* excluded from summary judgment opposition four letters, only three of which were signed.<sup>234</sup> The letters were not attached to affidavits and were “sprung” on the defendants without warning on the hearing date.<sup>235</sup> The only signed letter was dated two weeks prior to the hearing.<sup>236</sup> In their unattached state, the letters would be inadmissible, unauthenticated hearsay at trial; thus the court excluded them.<sup>237</sup> Although not fully articulated in the court’s reasoning, several factors exacerbated the defect and, in turn, diminished the lower court’s tolerance. The lack of signatures on the letters precluded the court from identifying a witness that could authenticate them at trial and foreclosed the chance of authentication through a handwriting comparison.<sup>238</sup> Furthermore, the opposing party had ample time to avoid the severe admissibility defect by obtaining an affidavit.<sup>239</sup> It chastised the plaintiff for failing to attach the letter to an affidavit when it had two weeks to do so before the hearing date and seemed disturbed with the sudden appearance of the letters. Since their presentation was so far from the formalities normally expected from summary judgment material, the *Orsi* court’s refusal to tolerate them seems reasonable.<sup>240</sup>

Reducibility of unattached letters is more uncertain than affidavits, and courts are more skeptical about their admissibility than affidavits or

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232. See, e.g., *Orsi v. Kirkwood*, 999 F.2d 86, 92 (4th Cir. 1993); *Brown v. Marriott Int’l, Inc.*, No. 1:04-CV-3255-WSD, 2006 U.S. Dist. LEXIS 56426, at \*4-6 (N.D. Ga. June 15, 2006).

233. See, e.g., *Washington v. City of Charlotte*, 219 Fed. Appx. 273, 278 (4th Cir. 2007) (excluding an anonymously authored document); *Carmona v. Toledo*, 215 F.3d 124, 131 (1st Cir. 2000) (refusing to consider unsworn, uncertified investigation file); *Orsi*, 999 F.2d at 92 (refusing to consider unsigned and unauthored letters that had not been authenticated); *Brown*, 2006 U.S. Dist. LEXIS 56426, at \*4-6 (striking unauthenticated hearsay letters); *Metro. Enter. Corp. v. United Techs. Int’l Corp.*, No. 3:03cv1685, 2005 U.S. Dist. LEXIS 43473 (D. Conn. Sept. 20, 2005) (excluding letter where proponent could not show how its author could be present at trial to authenticate it).

234. *Orsi*, 999 F.2d at 91.

235. *Id.*

236. *Id.* Partially for this reason, it appears the trial court refused to permit late affidavits. *Id.*

237. *Id.* at 92.

238. *Id.* at 91-92; see also FED. R. EVID. 901(b)(2).

239. *Orsi*, 999 F.2d at 91-92.

240. *Id.* at 92.

depositions. But case law on letters demonstrates factors that help gauge reliability and reducibility. As with affidavits, an identified witness is the preeminent manner to convince a court that a litigant can remedy a letter's defect at trial.<sup>241</sup> Placing the would-be authenticator on a witness list or in an interrogatory response is probably the most convincing way to accomplish this.<sup>242</sup> As *Orsi* shows, the ease with which a litigant could have cured the admissibility defect may affect a court's tolerance of an admissibility defect in a letter.<sup>243</sup>

Additionally, the probative value of the evidence also plays a role in courts' discretion to tolerate a defect.<sup>244</sup> This factor is important to the question of a material's specificity and ability to corroborate allegations. But, occasionally, a material does more than this. At times, a single material can mean all but certain victory at trial. For example, a hearsay letter's probative value occasionally justifies its consideration despite technical admissibility defects.<sup>245</sup> In some cases, letters are more truthful than affidavits because they provide unfiltered information, whereas an attorney can carefully craft an affidavit to strengthen or weaken its influence. For example, the *Catrett* court considered an unattached, unauthenticated letter that it characterized as "damning."<sup>246</sup> The letter contained testimony from the defendant's employee that tended to establish proximate cause.<sup>247</sup> The plaintiff also placed the witness who would establish foundation for the letter or could testify to its contents on the witness list.<sup>248</sup> The *Catrett* court considered the letter at summary judgment,<sup>249</sup> which demonstrates that a defective material's probative value can expand a court's tolerance of technical admissibility defects.<sup>250</sup>

Although courts sometimes apply the rules of evidence leniently to letters, this flexibility by no means ensures that a letter, not authenticated by an affidavit, will meet Rule 56's standard for the presentation of summary

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241. *Canadyne-Ga. Corp. v. Bank of Am.*, 174 F. Supp. 2d 1337, 1343 (M.D. Ga. 2001); *see also Martz v. Union Labor Life Ins. Co.*, 757 F.2d 135, 138 (7th Cir. 1985) ("The facts must be established through one of the vehicles designed to ensure reliability and veracity . . .").

242. *See Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 37 (D.C. Cir. 1987).

243. *Orsi v. Kirkwood*, 999 F.2d 86, 91-92 (4th Cir. 1993).

244. *Id.*

245. *Catrett*, 826 F.2d at 37 (describing letter as a "damning" piece of evidence); *Celestino v. Montauk Club*, No. 97 CV 3943, 2000 U.S. Dist. LEXIS 21845, at \*83-85 (E.D.N.Y. March 12, 2000) (finding letters and documents to be defective in form, but considering them because they contained relevant evidence sufficient to defeat the summary judgment motion).

246. *Catrett*, 826 F.2d at 37.

247. *Id.*

248. *Id.* at 35 n.5.

249. *Id.* at 37.

250. *Id.*

judgment material. Because letters lack sworn testimony, their reliability may be suspect. Therefore, it may be more difficult to convince a court that a letter exhibits sufficient indicia of admissible evidence than affidavits and depositions.<sup>251</sup>

### C. DOCUMENTS

Courts treat documents similarly to letters in that they should be attached to an affidavit for authentication purposes.<sup>252</sup> Courts impose this requirement because generally documents are inadmissible at trial unless introduced through a witness who can lay their foundation.<sup>253</sup> However, as discussed in the previous two subsections, this approach only represents the optimal manner to present documents at summary judgment. Like with letters, it is possible that the record as a whole can emit characteristics of admissible summary judgment evidence and justify tolerating the technical hearsay and authentication defects in presenting them unaccompanied by an affidavit or deposition.<sup>254</sup> In other words, documents are not “per se inadmissible.”<sup>255</sup>

For example, in *Hal Roach Studios v. Richard Feiner*,<sup>256</sup> the

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251. See BRUNET & REDISH, *supra* note 11, at 227.

252. 10A WRIGHT, MILLER & KANE, *supra* note 15, § 2722 (rule of admissibility referring to documents and letters).

253. *Washington v. City of Charlotte*, 219 Fed. Appx. 273, 278 (4th Cir. 2007) (unwilling to consider unauthenticated, authorless document summarizing an interview); *Carmona v. Toledo*, 215 F.3d 124, 131 (1st Cir. P.R. 2000) (approving lower court’s exclusion of improperly attached investigatory file); *First Nat’l Life Ins. Co. v. Cal. Pac. Life Ins. Co.*, 876 F.2d 877, 881 (11th Cir. 1989) (refusing to consider court documents because not self-authenticating under Rule 902(1)); *Canada v. Blain’s Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987) (declining to admit unauthenticated fuel invoices where plaintiff had ample time to get them authenticated); *Kramer v. Gwinnett County*, 306 F. Supp. 2d 1219, 1224 (N.D. Ga. 2004) (refusing to consider unauthenticated photographs, even though witness identified who could authenticate at trial and refusing to consider plaintiff’s unidentified documents authenticated by the defendant in their own motion); *First Nat’l Life Ins. Co. v. Cal. Pac. Life Ins. Co.*, 876 F.2d 877, 881 (11th Cir. 1989) (refusing to consider court documents because not self-authenticating under Rule 902 of the Federal Rules of Evidence).

254. *Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (declining to remand to remedy authentication defect when another witness could authenticate); *Clark v. Clabaugh*, 20 F.3d 1290, 1294 (3d Cir. 1994) (unsworn police report admitted); *Church of Scientology Flag Serv. v. City of Clearwater*, 2 F.3d 1514, 1530 (11th Cir. 1993) (hearsay documents admitted); *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989) (respecting lower court’s discretion to consider unauthenticated document that could be easily authenticated at trial by the custodian of records); *Pennington v. Vistron Corp.*, 876 F.2d 414, 426 (5th Cir. 1989) (unauthenticated newspaper documents admitted); *AMFAC Distrib. Corp. v. Harrelson*, 842 F.2d 304, 305 (11th Cir. 1988) (admitting documents after substantial compliance with Rule 902 self-authentication).

255. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989).

256. See generally *Hal Roach Studios*, 896 F.2d 1542.

proponent of a registration statement, which proved when a license agreement would expire, failed to lay a foundation for the statement through an affidavit or deposition.<sup>257</sup> Nevertheless, the court granted summary judgment in the proponent's favor on the basis of the document.<sup>258</sup> On appeal, the court identified numerous ways in which a litigant could authenticate a document at trial.<sup>259</sup> Although the proponent failed to adhere to the formality of authenticating through an affidavit, the document combined with the record material sufficiently established its admissibility.<sup>260</sup> This approach exemplifies the litigant's ability to establish admissibility for the purposes of summary judgment by explaining the "admissible form that is anticipated."<sup>261</sup> When a court is aware of a way that a litigant can make a document admissible at trial, it is justified in tolerating technical authentication defects.

To summarize, the rules of trial evidence govern the presentation of summary judgment material. However, they are adjusted and applied leniently to take into account the technical defects that the limitations of a paper record create. This adjustment ensures the core requirements that the rules of evidence demand so that the proffered presentation of summary judgment material sufficiently demonstrates a genuine dispute. They must have the reliability and reasonable certainty of being reduced to an admissible form. Affidavits and depositions are the most convincing way to demonstrate these characteristics. However, Rule 56 provides for numerous other ways to demonstrate these core characteristics of admissibility, such as productions of letters, documents, interrogatory responses, or electronically stored information in the record.<sup>262</sup> Furthermore, nowhere does Rule 56 language mandate use of affidavits or depositions. In fact, *Celotex*, the most prominent case on federal summary judgment, implies the contrary.<sup>263</sup> In turn, alternative presentations of the record that rise to the level of reliability and reducibility to satisfy the court of trial admissibility are sufficient to demonstrate a genuine dispute.

This description of summary judgment admissibility accounts for the formal concerns of the trial admissibility theory because it keeps intact the general application of the rules of evidence in order to achieve the substantive ends of those formalities. The presentation of summary

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257. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989).

258. *Id.*

259. *Id.* at 1551-52.

260. *Id.*

261. FED. R. CIV. P. 56 advisory committee's notes (effective Dec. 1, 2010); *see also* REPORT OF COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 9, app. C. at C47.

262. FED. R. CIV. P. 56(c)(1)(A) (effective Dec. 1, 2010).

263. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

judgment material in the record must evoke a reasonably certain, and not hypothetical, way that the litigant will convert the material into admissible evidence. Thus, it ensures that summary judgment material used will be available within the formal constraints of the rules of evidence at trial. It also makes the material's sufficiency to demonstrate a dispute the end result. Consequently, trial admissibility and sufficiency collapse into the following single question: does a presentation of summary judgment material sufficiently resemble admissible trial evidence to demonstrate a genuine dispute? Of course, its content must also still demonstrate that dispute as well. The synthesis merely approximates the process a judge goes through on admissibility at trial.<sup>264</sup>

Up to this point, this view of summary judgment admissibility has failed to address a major difficulty: *admissibility tolerance* contemplates some inconsistency in result. For example, it is true that some courts consider imperfect affidavits despite their infirmities.<sup>265</sup> Courts also consider documents and letters that fail to adhere to Rule 56 formalities.<sup>266</sup> However, some courts are not as lenient and declare such materials inadmissible or insufficient to demonstrate a genuine dispute.<sup>267</sup> In other words, courts' tolerance may vary. This potential for inconsistent results makes for an embarrassing rule, but it is an anomalous product of tying summary judgment standards to trial standards. With such an arrangement, summary judgment is necessarily predictive of what will occur later at trial and produces uncertainty about whether a litigant will produce admissible evidence in the future. One can avoid this uncertainty by replacing it with a formal, black letter rule for summary judgment admissibility, such as requiring sworn and perfected affidavit or deposition transcript testimony. Although this rule ignores the reality that perfected affidavit and deposition testimony is predictive and therefore still uncertain, it at least creates a uniform and relatively reliable result. However, there is a way to address the uncertainty of summary judgment material through a court's evidentiary discretion and to explain Rule 56's ability to accommodate apparently inconsistent results.

The rules of evidence and procedure accord courts discretion in considering evidence so long as it was not harmful to a "substantial right" of the party affected.<sup>268</sup> Several courts have noted this evidentiary

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264. Cf. FED. R. EVID. 103.

265. See discussion *supra* Part III.A.

266. See discussion *supra* Parts III.B-C.

267. See authorities cited *supra* Part III.

268. See FED. R. EVID. 103; FED. R. CIV. P. 61; see also FED. R. EVID. 403 (placing within court's discretion evaluation of whether "probative value is substantially outweighed by the danger of unfair prejudice . . .").

discretion in the context of summary judgment.<sup>269</sup> For example, the *Hal Roach* court stated that a “district court’s determination of the admissibility of evidence . . . will not be overturned on appeal except for an abuse of discretion.”<sup>270</sup> Furthermore, a court may exercise its discretion to allow a party “to remedy the defect” in its evidence or to obtain “a fuller factual foundation” that a fully developed record would present.<sup>271</sup>

As mentioned above in *Hal Roach*, there were numerous ways that the unattached and unauthenticated would be made admissible at trial.<sup>272</sup> Assuming the party will cure or actually cured the admissibility defect at trial, the admission of the document despite its admissibility flaws at the summary judgment stage did not affect a “substantial right” because there would be no change in result.<sup>273</sup> Rule 56 fails to require use of affidavits; therefore, the movant did not have a right to summary judgment. The court was within its discretion to allow the litigant to remedy the defect at trial. In contrast, if the same assumption is made, the decision to grant summary judgment against the proponent of a flawed document could be an abuse of discretion because it would affect the outcome of the case. However, the court cannot always reasonably make this assumption. Instead, it may become clear that the party is unable to cure the admissibility defects in its summary judgment materials. For example, a party may be asked to identify a witness who will authenticate the document. If the party is unable to fulfill this request, in contrast to *Hal Roach*, it casts doubt on whether the party will have admissible evidence at trial. The court would be within its discretion in excluding the document and potentially entering summary judgment.

Evidentiary discretion makes sense at summary judgment because the task of evaluating admissibility is in some ways more difficult than it is at trial. At trial, the assessment is made in the present. At summary judgment, admissibility is a prediction of the future.<sup>274</sup> This prediction

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269. See, e.g., *Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (declining to remand to remedy authentication defect when another witness could authenticate); *Ballen v. City of Redmond*, 466 F.3d 736 (9th Cir. 2006) (abuse of discretion review excluding witness statements at summary judgment); *Schubert v. Nissan Motor Corp.*, 148 F.3d 25, 30 (1st Cir. 1998) (applying abuse of discretion review to lower court’s exclusion of affidavit that lacked competence); *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1552 (9th Cir. 1990); see also 10A WRIGHT, MILLER & KANE, *supra* note 15, § 2728 (acknowledging that judicial discretion exists at summary judgment).

270. *Hal Roach Studios*, 896 F.2d at 1552.

271. 10A WRIGHT, MILLER & KANE, *supra* note 15, § 2728.

272. *Hal Roach Studios*, 896 F.2d at 1550-52.

273. The full extent of when a decision would or would not be an abuse of discretion is discussed fully in Part IV.

274. See *Risinger*, *supra* note 3, at 37-38. Professor Shannon also acknowledges these

presupposes deference to the particular judge who finds the presentation of summary judgment material sufficiently acceptable to press ahead toward trial even though there is no absolute guarantee that the genuine dispute will be preserved with admissible evidence at trial. That is always the risk of denying summary judgment. Therefore, such a decision cannot be a crystal and unwavering rule that is destined to produce the same result every time. At best, summary judgment material must always meet the minimum threshold of potential admissibility by presenting the court with an analogue to admissible evidence; however, whether the court is convinced of the material's future admissibility is a matter of discretion. Consequently, admissibility tolerance has a limit that permits a predictable range of evidentiary discretion, which may be the best one can hope for at the uncertain stage of summary judgment.<sup>275</sup>

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difficulties. At the summary judgment stage,

[o]ne might know with some certainty what will not be admissible at trial; an example might be the deposition transcript from Catrett's worker's compensation proceeding. What will ultimately be admissible, though also knowable with some certainty, is somewhat harder to predict, for one cannot know for sure whether any particular item of evidence will be admitted at trial until it is proffered. Even relevant evidence may be excluded if deemed cumulative or unfairly prejudicial, and some evidence may be admissible if proffered by one party, but not the other.

Shannon, *supra* note 23, at 832.

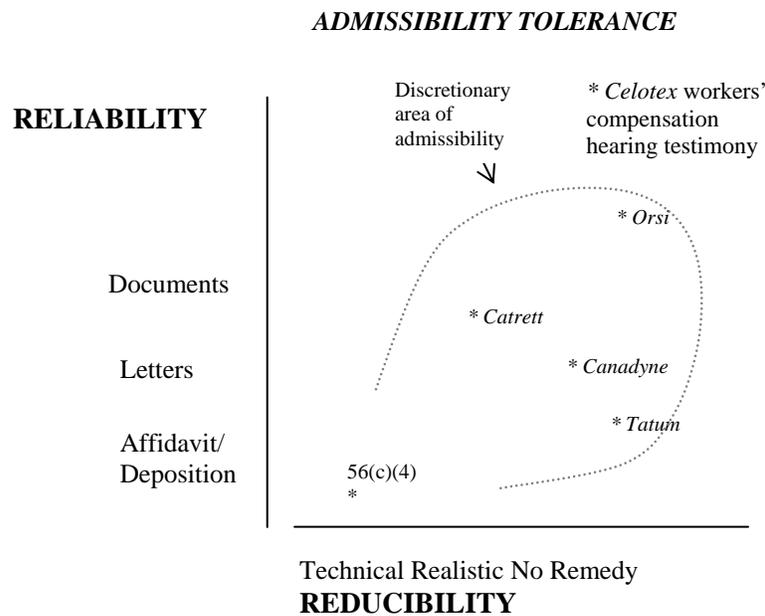
275. This discretion may seem objectionable following the recent amendment to Rule 56 restoring the word "shall" after it was replaced with "should" in 2007. *See* FED. R. CIV. P. 56 (effective Dec. 1, 2010). Furthermore, it seems inconsistent with Rule 56's requirement for "judgment as a matter of law," which parallels the former directed verdict standard in Rule 50. FED. R. CIV. P. 50, 56(c) (the directed verdict and summary judgment rules were amended in 1993 to use the same words "judgment as a matter of law"). It may seem contradictory to have judgment as a matter of law that allows for discretion on an admissibility question. *Admissibility tolerance*, at least in some occasions, appears to allow evidence, which is not "legally sufficient," to overcome the directed verdict because it is not admissible. FED. R. CIV. P. 50(a)(1). Of course, summary judgment evidence could be "legally sufficient" if it is later replaced by admissible evidence at trial, but this conversion requires discretion that the directed verdict standard does not seem to contemplate. At the moment of summary judgment, it is insufficient as a matter of evidence law.

If this tension creates a flaw in this Comment's admissibility proposal, it is a fascinating one. It illustrates one of many problems with using trial procedure as a "mirror" for summary judgment procedure. Perhaps the directed verdict standard does not contemplate this discretion because it can never have a truly congruent relationship with the summary judgment standard. For further elaboration on difficulties with applying directed verdict congruently with summary judgment, see Stempel, *supra* note 7. In terms of the 2009 amendment, much of courts' discretion at summary judgment existed prior to the "shall" or "should" controversy. *See* 10A WRIGHT, MILLER & KANE, *supra* note 15, § 2728 (citing numerous authorities exemplifying judicial discretion prior to recent amendments).

The discretion also is workable at summary judgment, even if it requires straining to remain true to the directed verdict standard. At the directed verdict stage, all evidentiary questions are answered. *See* FED. R. EVID. 104(a). The judge can cleanly evaluate the sufficiency of the nonmovant's case. Treating admissibility separately from the sufficiency inquiry at summary judgment simulates the way judges handle directed verdict at trial. Convinced that a summary

#### IV. A SCOPE OF ADMISSIBILITY

The zone of evidentiary discretion that may lead courts to divergent results is not entirely unpredictable. A graphical representation is a helpful way of uniformly describing this scope of admissibility. Using an X and Y axis, the following graph plots a scope of admissibility based on the reliability of a summary judgment material and the severity of the admissibility defect. The result is a depiction of courts' willingness to tolerate admissibility defects in summary judgment materials.<sup>276</sup>



judgment material can be converted to admissible evidence at trial, a judge can admit a summary judgment material for the purposes of summary judgment and in terms of admissibility, it will be "legally sufficient." See FED. R. CIV. P. 50(a)(1). It then may proceed to the sufficiency of factual disputes inquiry. Professor Risinger describes such a two-step method: "First, [the court] must make a prediction about what the record will look like at trial, and second, it must appropriately apply the sufficiency standard." Risinger, *supra* note 3, at 38.

276. A disclaimer is necessary as well. The following depiction aspires not to be a dispositive means of ascertaining admissibility of a summary judgment material. Rather, the description provides a useful and objective tool to evaluate the likelihood that a court will consider a summary judgment material admissible. It also is a uniform and all-encompassing way to illustrate the prediction courts must make when determining whether a summary judgment material is capable of being "reduced" to admissible evidence at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

The vertical Y axis represents the reliability of a summary judgment material. Placed closest to the crosshairs is perfected affidavit and deposition testimony, which takes precedence due to their evidentiary reliability.<sup>277</sup> Somewhere near the center of the vertical axis sits the list of materials in Rule 56 that one “normally” would expect litigants to choose from.<sup>278</sup> At the outermost point are those materials such as documents and letters.<sup>279</sup> Admissibility defects in documents and letters are the least tolerable among courts (particularly because they lack the formalities of affidavits and depositions), recognizing, however, that their attachment to an affidavit can easily be accomplished.<sup>280</sup>

The horizontal X axis represents the extent of an admissibility defect in a summary judgment material. It is measured by the possibility that the summary judgment material can be realistically reduced to admissible evidence at trial.<sup>281</sup> The defect’s placement on the axis does not necessarily depend on the type of defect: typically hearsay, authentication, personal knowledge or competency. A problem in any of those areas could result in inadmissibility at trial.<sup>282</sup> Instead, the plot point on the axis is a measure of a court’s actual ability to predict, based on the record, whether admissible evidence at trial will replace the defective material.<sup>283</sup> This prediction

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277. *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997) (citing FED. R. CIV. P. 56(e)); *Waldrige v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994); *Winskunas v. Birnbaum*, 23 F.3d 1264, 1266 (7th Cir. 1994)); *see also* BRUNET & REDISH, *supra* note 11, at 207 (“Rule 56(e) regulates the form of affidavits so closely that it is clear that the drafters of Rule 56 intended a major role for the affidavit as an evidentiary ingredient on a motion for summary judgment.”).

278. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

279. *See Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 577 (1986) (considering “mass of documents”); *First Nat’l Bank v. Cities Serv. Co.*, 391 U.S. 253, 299 (1968) (considering contract document); *see also* BRUNET & REDISH, *supra* note 11, at 209 (“[Documents] omission in Rule 56(c)’s listing of summary judgment evidence should therefore be considered inadvertent.”); 10A WRIGHT, MILLER & KANE, *supra* note 15, § 2721 (“The particular forms of evidence mentioned in the rule [Rule 56] are not the exclusive means of presenting evidence on a Rule 56 motion. The Court may consider any material that would be admissible or usable at trial.”).

280. *See, e.g., Orsi v. Kirkwood*, 999 F.2d 86, 92 (4th Cir. 1993) (chastising plaintiff for failing to attach letter to an affidavit when it had two weeks to do so); *Brown v. Marriott Int’l, Inc.*, No. 1:04-CV-3255-WSD, 2006 U.S. Dist. LEXIS 56426, at \*4-6 (N.D. Ga. June 15, 2006) (noting that the plaintiff only needed to attach an exhibit to an affidavit to have it considered).

281. *See Celotex*, 477 U.S. at 327; *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 37 (D.C. Cir. 1987).

282. *See* FED. R. EVID. 901; FED R. CIV. P. 56(e) (effective Dec. 1, 2010).

283. *See, e.g., Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (declining to remand to remedy authentication defect when another witness could authenticate); *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990) (respecting lower court’s discretion to consider unauthenticated document that could be easily authenticated at trial by the custodian of records).

depends entirely on the litigants' summary judgment analogue to admissible evidence. Nearest to the crosshairs, an affidavit's hearsay status would be plotted on the horizontal axis because the remedy of the technical hearsay problem is highly predictable.<sup>284</sup> However, across the spectrum on the horizontal axis sit hearsay problems with no potential resolution. The absence of any hypothetical way to comport with the rules of evidence forecloses the possibility of a trial admissibility remedy such as calling a witness for direct testimony.<sup>285</sup>

The measurement is objective because it makes no difference how much a litigant subjectively plans to get admissible evidence. If the material or its content is inevitably inadmissible, then a court should not consider it at summary judgment.<sup>286</sup> Also, even if there is still some potential that it could be made admissible—such as voluntary appearance by a witness in a foreign country or otherwise beyond subpoena power—the reality of the situation must be considered.<sup>287</sup> In all likelihood, the litigant will not be able to obtain a voluntary appearance from a foreign witness by trial.<sup>288</sup> Consequently, the defect should be placed on the far end of the horizontal axis.

The two axes combine to define the fluctuating scope of admissible materials at the summary judgment stage. The farther away a material is plotted on the graph from the crosshairs, the less likely a court will consider the material at summary judgment. Placement near the crosshairs makes it more likely that the court will consider it. For example, take an unsworn, unauthenticated document that fails to identify its author and was acquired outside of formal discovery such as the ones in *Orsi*. The document has an extremely low chance of being considered admissible at summary judgment.<sup>289</sup> On the vertical axis, the document would be high because it is not material “normally” referred to at summary judgment stage.<sup>290</sup> Its evidentiary defect, authentication and hearsay,<sup>291</sup> is extensive because there is no way to know who could authenticate it at trial. Unless it can fit in the

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284. See discussion *supra* Part III.A.

285. Barring its fit within a hearsay exception, FED. R. EVID. 803-804, the summary judgment material would not be admissible at trial or summary judgment.

286. For example, former testimony within Rule 804 would not be admissible at summary judgment unless it fit the former testimony exception. See Steinman, *supra* note 19, at 131; see also Nelken, *supra* note 7, at 60.

287. Metro. Enter. Corp., v. United Techs. Int'l Corp., No. 3:03cv1685, 2005 U.S. Dist. LEXIS 4373, at \*19 (D. Conn. Sept. 21, 2005) (refusing to consider signed and identified letter when author was unavailable to testify because he resided in foreign jurisdiction).

288. *Id.*

289. *Orsi v. Kirkwood*, 999 F.2d 86, 92 (4th 1993).

290. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

291. *Orsi*, 999 F.2d at 92.

business records exception or be construed as an admission, there is little that can be done to remedy the evidentiary problem. Consequently, it would fall far to the right on the horizontal axis, and is mapped at the upper right corner of the graph.

Generally, the areas near the crosshairs and those on the outer reaches of either axis are black and white questions of admissibility at summary judgment. Courts would commit reversible error if they admitted a letter in the upper right hand corner to establish a genuine dispute or excluded an affidavit that met the formal requirements.<sup>292</sup> However, somewhere in between, there is a discretionary gray area where a variety of factors could either cause a court to accept or reject the material at summary judgment.<sup>293</sup> This gray area is congruent with a lower court judge's discretion on evidentiary issues.<sup>294</sup> The discretion does not mirror the kind that a judge exercises at trial.<sup>295</sup> As mentioned earlier, the evidentiary exercise is distinct in nature at the summary judgment stage.<sup>296</sup> Summary judgment discretion is tailored to the aim of the procedure: to ensure triable issues. Thus, it comprises the flexibility necessary to measure whether a litigant will subsequently convert materials in a state of inadmissibility at summary judgment into admissible evidence at trial, and sufficiently establish a triable issue.<sup>297</sup>

Take the example in *Canadyne-Georgia Corp.*, where a deponent identified the letters attached to the summary judgment motion rather than an affidavit or deposition.<sup>298</sup> The letters would land high on the Y axis, but somewhere near the crosshairs on the X because the defect is a mere technicality. Thus, they fit within the gray area on the graph because there is little doubt that a litigant will authenticate them at trial. Availability of a

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292. FED. R. CIV. P. 61. Appellate courts typically only reverse a lower court's evidentiary error if it is manifestly erroneous. *See also* United States v. Smith, 383 F.3d 700 (8th Cir. 2004) (stating standard of review for evidentiary rulings is an abuse of discretion); United States v. Bluebird, 372 F.3d 989 (8th Cir. 2004) (noting deference to lower court judge on admissibility questions pursuant to Rule 403 and characterizing errors of law as abuse of discretion).

293. *Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (declining to remand to remedy authentication defect when another witness could authenticate); *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990) (respecting lower court's discretion to consider unauthenticated document that could be easily authenticated at trial by the custodian of records).

294. *See* discussion *infra* Parts IV.A-C; *see also* FED. R. CIV. P. 61.

295. *See generally* FED. R. EVID. 103, 403. A judge has a variety of concerns that do not exist at summary judgment. Unintended use or effect of admitted evidence is central to those concerns. At summary judgment, the concern is much narrower. A judge need only focus on whether there will be sufficient evidence at trial to create a genuine dispute.

296. *Risinger*, *supra* note 3, at 38.

297. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326-27 (1986).

298. *Canadyne-Ga. Corp. v. Bank of Am.*, 174 F. Supp. 2d 1337, 1344 (M.D. Ga. 2001).

realistic remedy for an admissibility problem permits the lower court discretion to admit or exclude the evidence.<sup>299</sup>

## V. SHAPING EVIDENTIARY DISCRETION IN SUMMARY JUDGMENT

The graph depicts an uncertain, discretionary area in which a judge might admit or exclude material. Allowing evidentiary discretion at summary judgment is a necessary concession to invoke the *Celotex* reducibility dicta at all. The discretion recognizes that it is impossible to know absolutely whether a litigant will convert summary judgment material into admissible evidence. Even a perfectly executed affidavit lacks a guarantee that the witness will show up to trial and testify to the contents of an affidavit. He or she may change their testimony.

Due to this inherent uncertainty in summary judgment, admissibility questions are best left to the discretion of a lower court judge. As a judicial manager, the lower court judge is closest to the totality of circumstances needed to make a prediction about reducibility of summary judgment material. Case law also establishes evidentiary discretion at the summary judgment stage.<sup>300</sup> This section describes how the court should exercise its evidentiary discretion.

Having identified the discretionary area of a lower court's *admissibility tolerance*, it is necessary to form an objective standard for exercising that discretion to ensure that courts exercise their discretion reasonably and not in a way to disguise improper reasons for an evidentiary ruling.<sup>301</sup> The following four guidelines draw on circumstances in the

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299. A variety of external factors also could constrict or expand this gray area as well. For one, the court's general attitude toward the admissibility question could affect admissibility within the gray area of discretion. If it is intolerant of technical defects, then the court's discretion would be exercised narrowly and defective evidence would tend to be inadmissible. If it is highly tolerant, evidence may be considered without qualification or with stipulation such as that the defect must be remedied by the time of the pre-trial conference. *See* FED. R. CIV. P. 16(c)(2). That the litigant relying on the defective material is *pro se* may also push a court to expand the scope of admissibility to admit evidence within a greater portion of the gray area. *See* *Celestino v. Montauk Club*, No. 97 CV 3943, 2000 U.S. Dist., LEXIS 21845 (E.D.N.Y. Mar. 12, 2000).

300. *See, e.g.*, *Gen. Elec. v. Joiner*, 522 U.S. 136, 143 (1997) (mandating abuse of discretion review for *Daubert* expert testimony ruling at summary judgment); *Bias v. Moynihan*, 508 F.3d 1212, 1224 (9th Cir. 2007) ("Evidentiary rulings made in the context of summary judgment motions are reviewed for abuse of discretion and can only be reversed if they were both manifestly erroneous and prejudicial.") (internal quotations and citations omitted); *Ballen v. City of Redmond*, 466 F.3d 736 (9th Cir. 2006) (abuse of discretion review excluding witness statements at summary judgment); *Schubert v. Nissan Motor Corp.*, 148 F.3d 25, 30 (1st Cir. 1998) (applying abuse of discretion review to lower court's exclusion of affidavit that lacked competence); *see also* FED R. CIV. P. 61; FED R. EVID. 103.

301. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 765 (1982) ("Even

above discussion that appeared to influence courts' discretion on the issue of summary judgment admissibility, even if it was not explicit in the decision's reasoning. They also aim to reflect the practical realities that shape a court's handling of litigation and the recent shift toward judicial management in the federal courts.<sup>302</sup> Within the basic rule of reducibility to admissible evidence, a court should consider (A) the severity of the admissibility defect, (B) the probative value of the content within the material, (C) the litigant's ability—past and present—to put the content into a more traditionally acceptable summary judgment format; and (D) whether the risks of tolerating defective summary judgment material outweigh the cost of further discovery and delay to remedy the defect or place it in a more reliable summary judgment format. These considerations are not an explicit test that a court performs when evaluating an admissibility question at summary judgment. Their consideration means to influence a judge's discretion in an objective and transparent manner. In fact, courts likely already consider some of these factors without saying so explicitly.

#### A. EXTENT OF DEFECT IN EVIDENTIARY ADMISSIBILITY

This factor is the most important and a threshold element. Conceptually, it is what a court would identify first because they should not consider other characteristics of the evidence without first identifying admissibility problems. To apply this guideline appropriately, a court must consider alternative ways that the material may be made admissible.<sup>303</sup> Rule 56's committee note appears to permit this type of scrutiny of the record because it allows the court to consider the anticipated form of the summary judgment material.<sup>304</sup> Furthermore, it is supported in case law and is consistent with the reducibility standard that *Celotex* articulated.<sup>305</sup> If the defect is a mere technicality, then its remedy should be all but certain, and

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when a statute or rule expressly confers discretion or uses the verb 'may' or some similar locution, there is still the implicit command that the judge shall exercise his power reasonably.'").

302. See FED. R. CIV. P. 16. A judge has "substantial pretrial discretion . . . to manage their caseloads." *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 189 (D.C. Cir. 1985) (Bork, J., dissenting) (citing FED. R. CIV. P. 16), *rev'd*, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). For further discussion of the trend toward judicial management, see Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) and Daisy Hurst Floyd, *Can the Judge Do That? – The Need for a Clearer Judicial Role in Settlement*, 26 ARIZ. ST. L.J. 45 (1994).

303. *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997) (considering the various possibilities for admissibility of a hearsay document at summary judgment); see also BRUNET & REDISH, *supra* note 11, at 221.

304. FED. R. CIV. P. 56(c)(2) advisory committee's note (effective Dec. 1, 2010).

305. See, e.g., *Jaramillo v. Colo. Judicial Dep't*, 427 F.3d 1303, 1314 (10th Cir. 2005) (cannot be reduced to non-hearsay and would not be able to put on as admissible at trial); *Carter v. Univ. of Toledo*, 349 F.3d 269, 274 (6th Cir. 2003) (evaluates whether hearsay statement will be admissible as definitional non-hearsay).

discretion should weigh toward admissibility at summary judgment. This would be the case with an affidavit, a declaration, or a signed letter that could easily be authenticated at trial by a witness listed in the pre-trial order or in an interrogatory response.<sup>306</sup> If there is no conceivable way to remedy the defective evidence, then the material should not be considered. For example, if a hearsay declarant is unavailable and no hearsay exception applies, then the material is worthless to the summary judgment endeavor.<sup>307</sup> Even if considered at summary judgment, it would inevitably be inadmissible at trial. Unless the proponent had other admissible summary judgment evidence, the analysis would end there.

### B. PROBATIVE VALUE

Assuming the litigant presents the court with a summary judgment analogue to admissible trial evidence, probative value of the content of the material is highly significant.<sup>308</sup> The court must look not only at a material's ability to establish a genuine issue of material fact, if admitted, but also how important the evidence is to the litigant's case as a whole. Evidence's gravity provides a penetrative window into the likelihood that the evidence will be reproduced in admissible form. If the defective evidence is critical to the case, a litigant would strain to put it into admissible form by trial. Doing otherwise would severely damage its case.<sup>309</sup> Furthermore, excluding highly probative evidence on a technicality is more likely to prejudice a litigant and distort the accuracy of the proceeding since the likelihood is great that the litigant will reproduce the evidence in admissible form at trial. This factor weighs in favor of tolerating the evidentiary defect when it becomes clear that the probative value of the evidence is so high that a litigant would not go to trial without

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306. *See, e.g.*, *Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (declining to remand to remedy authentication defect when another witness could authenticate); *Clark v. Clabaugh*, 20 F.3d 1290, 1294 (3d Cir. 1994) (unsworn police report admitted); *Church of Scientology Flag Serv. v. City of Clearwater*, 2 F.3d 1514, 1530 (11th Cir. 1993) (hearsay documents admitted); *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990) (respecting lower court's discretion to consider unauthenticated document that could be easily authenticated at trial by the custodian of records); *Pennington v. Vistron Corp.*, 876 F.2d 414, 426 (5th Cir. 1989) (newspaper documents admitted); *AMFAC Distrib. Corp. v. Harrelson*, 842 F.2d 304, 305 (11th Cir. 1988) (substantial compliance with 902 self-authentication); *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 37 (D.C. Cir. 1987) (considering other ways that letter could be made admissible).

307. *See Metro. Enter. Corp. v. United Tech. Int'l Corp.*, No. 3:03cv1685, 2005 U.S. Dist. LEXIS 43473 (D. Conn. Sept. 20, 2005) (excluding letter where proponent could not show how its author could be present at trial to authenticate it).

308. *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 37 (D.C. Cir. 1987).

309. *Davis v. City of Chicago*, 841 F.2d 186, 189 (7th Cir. 1988) (describing the deficient probative value of evidence).

it.

This forward looking approach focuses on the content of the evidence rather than its current form at summary judgment.<sup>310</sup> Take the hearsay letters in *Celotex*, for example. They were crucial to the plaintiff's ability to establish causation for the decedent's exposure to asbestos.<sup>311</sup> The letters also could have been highly convincing since the defendant's own employee admitted to the potential exposure.<sup>312</sup> It is unlikely that the plaintiff would have risked trying to admit the letters unauthenticated at trial. Because of their importance, the plaintiff would necessarily have the authors of the letters testify at trial.

#### C. EASE IN PLACING MATERIAL IN A MORE TRADITIONAL FORM FOR SUMMARY JUDGMENT

This factor looks at whether the defective evidence could easily be put in another more reliable form for summary judgment. For example, it would be significant that a litigant relies on a letter or document that could have been easily authenticated through affidavit or deposition testimony. It seems unfair to reward sloppy legal work by considering a document that could have been authenticated properly. Nevertheless, the costs and hardship of obtaining a more convincing summary judgment analogue can be significant to excuse this failure. Litigants must devote extensive time and resources to taking or defending a deposition. For this reason, it is understandable why *Celotex* clarified that it did not mean that an opposing party would have to depose friendly witnesses.<sup>313</sup> While this factor could influence discretion, it should do so minimally because the law does not require the use of affidavits or depositions.<sup>314</sup> A judge or opposing counsel might prefer their use, as a matter of professionalism, but annoyance is no reason to enter or deny a judgment on the merits based on a technical deficiency.

#### D. THE USEFULNESS OF FURTHER DISCOVERY

Rather than enter or deny summary judgment, the court can delay its ruling until the defective summary judgment material is remedied.<sup>315</sup> In exercising this element of discretion, efficiency should be the dominant

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310. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 327 (1986) (making the form-content distinction).

311. *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 37 (D.C. Cir. 1987).

312. *Id.*

313. *Celotex*, 477 U.S. at 324.

314. *Id.* at 324, 327.

315. FED. R. CIV. P. 56(e)(1) (effective Dec. 1, 2010).

concern.<sup>316</sup> A court must assess the dual risks of inefficiency that could result if it either requires a litigant to remedy an admissibility defect prior to trial or proceeds to try a genuine issue of fact that a litigant established with evidence in inadmissible form. Delaying its ruling is particularly inefficient if the defect will clearly be remedied at trial. Within the scenario of a minor defect, disproportionate economics between opposing parties would warrant *admissibility tolerance*. For example, a litigant with relatively limited resources and ability to acquire the necessary information likely should receive latitude on admissibility defects such as an authentication problem. This tolerance ensures that a poor plaintiff is not pushed out of court simply because it is disadvantaged or could not afford to litigate an otherwise meritorious claim.<sup>317</sup> Similarly, a court should measure its tolerance based on the relative simplicity or complexity of a trial.

Taking this tolerance too far, however, heightens the risk that litigants will lack admissible evidence at trial, resulting in the unnecessary expense of trying a case that could have been adjudicated at summary judgment. Therefore, a court should temper its willingness to tolerate an admissibility defect with the concern for avoidance of unnecessary trials. At times, this balancing may prompt stricter application of at-trial evidentiary rules to summary judgment materials. For example, it could consider an unauthenticated letter for the purposes of establishing a genuine issue, but demand proper authentication of the letter before trial.<sup>318</sup>

The economics and complexity of the case should also dictate which of the two efficiency concerns takes precedence. For example, a court should enforce evidentiary rules more stringently in a mass joinder case, where the trial will have numerous issues, multiple parties, and weeks of trial evidence. For one, the court needs to pare down the case to the parties who actually may be liable.<sup>319</sup> Furthermore, proceeding to trial could result in waste and confusion where unnecessary parties and issues are retained for a complex trial.

### CONCLUSION: A PROPOSAL TO RE-INVENT SUMMARY JUDGMENT PROCEEDINGS

Regardless of how one interprets Rule 56, the debate over summary

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316. FED. R. CIV. P. 1. ("These rules . . . should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.")

317. *See, e.g.*, *Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77, 81 (5th Cir. 1987) (granting leeway for affidavits of party opposing the motion for summary judgment).

318. FED. R. CIV. P. 56(e)(1) (effective Dec. 1, 2010).

319. William Schwarzer, Alan Hirsh & David Barrans, *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 496 (1992).

judgment admissibility is likely to continue with little likelihood of uniformly acceptable results. This Comment's description attempts to approximate trial admissibility while accommodating the limitations on presenting evidence at summary judgment. However, the proposal fails to cure much of the uncertainty that goes with subjecting summary judgment materials to trial admissibility requirements. In fact, it accepts that summary judgment by its nature is an uncertain procedure and attempts to explain how courts can handle this uncertainty within their evidentiary discretion. This explanation also requires accepting that summary judgment involves judicial discretion.<sup>320</sup>

This approach is necessary because—rightly or wrongly—summary judgment has become a paper trial both in the rules that apply and in the significance that litigants extend to it.<sup>321</sup> Tying summary judgment standards to those present at trial is an elegant theoretical explanation for how the procedure relates to trial, but it requires one to analogize summary judgment components to trial components, a process that often produces anomalies.<sup>322</sup> This Comment exposes a significant one in admissibility. There appears to be no way to apply the rules of evidence congruently with the paper material that litigants must rely on at the summary judgment stage. This presents inevitable uncertainties in the conversion of the material to admissible evidence and the need for discretion.

Perhaps the best resolution for these uncertainties is to expand the operation of summary judgment even further and use live testimony at summary judgment. With live testimony heard before the court, the rules of evidence would apply identically at either stage of litigation. There would be no need for analogy and therefore no uncertainty about whether the evidence would be made admissible because a litigant would have already produced admissible evidence. The rules of procedure appear to supply this possibility. Rule 43(c) allows the court to hear a motion “wholly or partly on oral testimony.”<sup>323</sup> Although used sparingly today, much of the admissibility problems courts face could be resolved by expanding Rule 43's use at summary judgment.

This resolution seems drastic, but it illustrates the severity of tying trial standards to summary judgment. Taken seriously or not, the proposal rests on the implication of the *Celotex* trilogy when given its full effect. If one is serious about the expansive use of summary judgment that ties its standards to trial, it seems reasonable that one avoid uncertainties of

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320. See 10A WRIGHT, MILLER & KANE, *supra* note 15, § 2728.

321. See BRUNET & REDISH, *supra* note 11, at 1-4, 206-07.

322. See *generally* Stempel, *supra* note 7, at 146.

323. FED. R. CIV. P 43(c).

deciphering how trial rules must be adjusted to a pre-trial setting. Those uncertainties are particularly significant given a constitutional jury right may be at stake.<sup>324</sup> Furthermore, the fact that neither Rule 56, the courts, nor scholarship has provided a satisfactory solution to those uncertainties makes the idea worth considering.

A full discussion of how this intermediate trial would function is beyond the scope of this Comment. However, it would likely be limited to testimony only necessary to generate a dispute. Similar to the point of a directed verdict motion, the party without the burden of proof at trial would not put on any of its own testimony. Live testimony also could be limited to occasions where a party objects to admissibility of its opponent's summary judgment material and demands that it be produced in admissible form through live testimony. Under Rule 56(e), effective December 1, 2010, the court can issue "any other appropriate order," which could include a short hearing where a litigant would establish its ability to provide admissible evidence at trial through oral testimony. Even with this meager discussion, one can see how this scenario mirrors trial much more adequately than superimposing trial rules of live evidence on summary judgment procedure that caters to a paper record. Also, this would not cause a loss of much efficiency in the grand scheme of civil procedure. The 12(b)(6) motion has already begun to supplant summary judgment's handling of the paper record as an efficient pre-trial mechanism for screening out meritless claims.<sup>325</sup> In turn, there is good reason to push summary judgment into a new role that recognizes its importance and better facilitates its relationship with trial.

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324. See U.S. CONST. amend. VII; see also John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 551 (2007) (arguing that summary judgment is unconstitutional).

325. See generally Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly* (Illinois Public Law Research Paper No. 09-16, 2009).

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**Admissibility Tolerance Under Rule 56**

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**APPENDIX A**

Proposed Amendments to the Federal Rules of Civil Procedure  
(effective Dec. 1, 2010)

**Rule 56. Summary Judgment**

(a) **Motion for Summary Judgment or Partial Summary Judgment.** A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) **Time to File a Motion.** Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

**(c) Procedures.**

(1) *Supporting Factual Positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) **When Facts Are Unavailable to the Nonmovant.** If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery;

or

(3) issue any other appropriate order.

(e) **Failing to Properly Support or Address a Fact.** If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) **Judgment Independent of the Motion.** After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) **Failing to Grant All the Requested Relief.** If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) **Affidavit or Declaration Submitted in Bad Faith.** If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

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**Admissibility Tolerance Under Rule 56**

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**APPENDIX B****Rule 56. Summary Judgment**

(a) **BY A CLAIMING PARTY.** A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim.

(b) **BY A DEFENDING PARTY.** A party against whom relief is sought may move, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) **TIME FOR A MOTION, RESPONSE, AND REPLY; PROCEEDINGS.**

(1) These times apply unless a different time is set by local rule or the court orders otherwise:

(A) a party may move for summary judgment at any time until 30 days after the close of all discovery;

(B) a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later; and

(C) the movant may file a reply within 14 days after the response is served.

(2) The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

(d) **CASE NOT FULLY ADJUDICATED ON THE MOTION.**

(1) *Establishing Facts.* If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts—including items of damages or other relief—are not genuinely at issue. The facts so specified must be treated as established in the action.

(2) *Establishing Liability.* An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.

(e) **AFFIDAVITS; FURTHER TESTIMONY.**

(1) *In General.* A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

(2) *Opposing Party's Obligation to Respond.* When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

(f) **WHEN AFFIDAVITS ARE UNAVAILABLE.** If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) deny the motion;
- (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or
- (3) issue any other just order.

(g) **AFFIDAVIT SUBMITTED IN BAD FAITH.** If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)