

MINUTES
CIVIL RULES ADVISORY COMMITTEE
APRIL 7-8, 2008

1 The Civil Rules Advisory Committee met on April 7 and 8, 2008, in Half Moon Bay,
2 California. The meeting was attended by Judge Mark R. Kravitz, Chair; Judge Michael M. Baylson;
3 Hon. Jeffrey Bucholtz; Judge David G. Campbell; Judge Steven M. Colloton; Professor Steven S.
4 Gensler; Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Robert C. Heim, Esq.; Judge John G.
5 Koeltl; Chilton Davis Varner, Esq.; Anton R. Valukas, Esq.; and Judge Vaughn R. Walker.
6 Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present
7 as Associate Reporter. Judge Lee H. Rosenthal, chair, Judge Diane P. Wood, and Professor Daniel
8 R. Coquillette, Reporter, represented the Standing Committee. Judge Eugene R. Wedoff attended
9 as liaison from the Bankruptcy Rules Committee. Peter G. McCabe, John K. Rabiej, James Ishida,
10 and Jeffrey Barr represented the Administrative Office. Joe Cecil and Thomas Willging represented
11 the Federal Judicial Center. Ted Hirt, Esq., and Greg Katsis, Esq., Department of Justice, were
12 present. Andrea Kuperman, Rules Clerk for Judge Rosenthal, attended. Observers included Alfred
13 W. Cortese, Jr., Esq.; Joe Fagel, Esq.; Francis Fox, Esq.; Jeffrey Greenbaum, Esq. (ABA Litigation
14 Section liaison); Mark Landis, Esq.; Ken Lazarus, Esq.; and Professor Brooke Coleman.

15 Judge Kravitz opened the meeting by noting occasions for joy and sadness.

16 The Committee was saddened to learn of Judge Sam C. Pointer, Jr.'s death. Judge Pointer
17 chaired the Committee from 1991 to 1993. His ongoing impact on the Committee and its work
18 endured for many years after. He brought the 1993 disclosure and discovery amendments to a
19 successful conclusion. He launched the decade-long work of revising Rule 23, beginning with a
20 draft that completely restructured all of class-action practice; later work was measured in large part
21 by whittling down ideas that seem too bold for present implementation but that will remain as
22 important guides for any future work. He volunteered the Civil Rules to be first in the Style Project,
23 and personally made hundreds of revisions in the first draft prepared by Bryan Garner. The "Garner-
24 Pointer" draft became the foundation for successful restyling when the project was resumed after
25 a hiatus to study and learn from the restyling of the Appellate and then the Criminal Rules. As a
26 judge, he continued to be involved in the work of the American Bar Association, to contribute to
27 many other collaborative projects that advanced good procedure, and to demonstrate innovative and
28 often-emulated advances in procedure for resolving the cases that came before him. His work to
29 coordinate the work of the myriad courts involved in the silicone-gel breast implant litigation was
30 particularly imaginative and important. And his work as a practicing lawyer compensated in some
31 measure for the loss when he retired from the bench.

32 Occasions for joy include the recent marriage of Andrea Kuperman. The loss of Judge Filip
33 as a Committee member would be sad, but the loss fades before his confirmation as Deputy Attorney
34 General. It is equally a pleasure to have Greg Katsis present for the meeting and to anticipate his
35 imminent confirmation as Assistant Attorney General for the Civil Division.

36 Another happy event is the appointment of new Committee member Judge Colloton. He has
37 had extensive experience in the Department of Justice, in the Independent Counsel's Office, and as
38 United States Attorney for the Southern District of Iowa before appointment to the Eighth Circuit.

39 Judge Kravitz turned to the agenda, noting that it includes two massive topics in Rule 56 and
40 the revisions of the Rule 26 treatment of expert trial witnesses. Other topics are familiar, but require
41 the close attention needed for all final recommendations. These include the Time-Computation
42 Project and review of the proposals published for comment in August 2007.

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November 2007 Minutes

The draft minutes for the November 2007 meeting were approved, subject to correction of typographical and similar errors.

Rule 56

Judge Baylson introduced the Rule 56 Subcommittee report. He began by noting that the Federal Judicial Center has continued its Rule 56 research, and has worked diligently to respond to questions the Committee raised during reports on earlier phases of the research. The results of this work are important in framing recommendations for revision.

Joe Cecil described the report that was submitted for this meeting. It describes experience in the district courts by grouping them in three categories according to their local rules. In the first group, a movant is required to provide a detailed statement of uncontested facts with references to the record and a nonmovant is required to respond in the same form. In the second group, the movant is required to provide the statement and references but the nonmovant is not required to respond in kind. The third group does not have any comparable requirements. In many ways the most significant finding was that there are few differences among the groups in the frequency of motions, or the rate of grants or denials in whole or in part. These similarities held true across different types of cases. But three of the tables attached to the report are particularly interesting.

Table 3 shows that courts that have point-counterpoint requirements similar to those proposed in draft Rule 56 decide a higher fraction of summary-judgment motions than other courts. Some part of the explanation may be that in the other districts a higher portion of the cases are settled before the motion is decided, but that simply leads to the question whether the settlement rate is affected by the summary-judgment practice. Perhaps motions are made earlier in point-counterpoint districts in relation to development of the case. The point-counterpoint structure, for whatever reason, does seem to encourage decision of the motions.

Table 5 shows that courts take longer to decide summary-judgment motions in the point-counterpoint districts. That might be tied to the higher rate for actually deciding them. Supplemental analysis suggested other reasons — these districts have higher median weighted case loads, greater numbers of pending cases per judge, and require more time to reach disposition in all cases.

Table 12 shows that the percentage of cases terminated by summary judgment is similar across all three district types. The greatest divergence is in employment discrimination cases; termination by summary judgment occurs in 13% of these cases in point-counterpoint districts, 10% in “movant only” districts, and 9% in districts that do not require detailed fact statements by either movant or nonmovant. (Judge Baylson noted that Tables 2 and 3 show a higher rate of motions in employment cases than any other category of cases, and also a higher rate of granting in whole or in part, in all types of districts.)

The tables highlight dimensions in which there is a greater than 5% difference among the types of districts. This figure, however, is arbitrary; it was chosen for purposes of drawing attention. The familiar “95%” threshold of statistical significance is used in considering the results of sampling studies. It does not apply when, as in this study, an entire population is studied. This study began with all cases terminated in fiscal 2006. It was whittled down by excluding some categories of cases in which the number of cases is imprecise, and other categories in which summary judgment motions are not likely to be made. Cases from three districts were excluded because useable CM/ECF data and local rule information were not available. The result was a population of 155,803 cases — 56% of cases terminated in fiscal 2006. At least one summary-judgment motion was made in 23,725 of these cases; in all, 46,633 separate motions were analyzed.

89 Discussion of the FJC study began by asking whether the rate of motions and grants in
90 employment discrimination cases suggests that the point-counterpoint structure in proposed Rule
91 56 encourages too many partial or full summary judgments. It was noted that there are many
92 possible explanations apart from the structure of the practice. One distinction is the burden-shifting
93 “prima facie case” rule. Another is a perception that complaints in these cases often advance every
94 conceivable theory against every conceivable defendant; many of the grants simply pare down the
95 case to the solid core of potential claims and plausible defendants.

96 It also was noted that the tables must be read carefully. Table 12, describing cases
97 terminated by summary judgment, refers to complete termination of the case. Table 3, referring to
98 motions “granted in whole,” refers to granting all of the relief requested by the motion — often that
99 is less than termination of the whole case.

100 The “no disposition” information from Table 3 was described by one committee member as
101 “astonishing.” The range is from 50% in the point-counterpoint districts to 62% in the districts that
102 require only the movant to provide a detailed statement and 58% in the other districts. The theory
103 that settlement often intervenes between the motion and disposition simply leads to the question why
104 settlement did not happen earlier. The study will continue to explore these issues. There are some
105 indications that the districts that do not have point-counterpoint requirements resolve more cases by
106 other dispositive motions.

107 Concern about the motions not resolved was expressed from a different perspective.
108 Lawyers have complained that some judges refuse to decide Rule 56 motions, pushing toward trial
109 in the hope of coercing a settlement. But it will be difficult to tease out an answer to this fear from
110 studying docket information. It will be possible to find out how long the unresolved motions were
111 under consideration, and whether trial actually started in the “motion unresolved” cases.

112 Another possibility to remember is that point-counterpoint motions may be decided more
113 frequently because it is easier to decide a motion that has been carefully presented.

114 It would be possible to get more information by taking a hard look at a sample of perhaps
115 1,000 case files. But the questions to be asked would have to be defined in order to identify the
116 sample. If the study were to focus on the “no disposition” question, for example, the sample of cases
117 would be drawn differently than the sample that might be used to explore employment
118 discrimination cases. The actual file studies would be done by law students working with a carefully
119 drawn study protocol.

120 Judge Kravitz expressed the Committee’s thanks and appreciation for the excellent work
121 done by the FJC. As with other studies done for the Committee, this work has been very important
122 and helpful.

123 Judge Baylson then presented the Rule 56 Subcommittee report. He identified a set of issues
124 for consideration from those identified in — and by — the footnotes in the agenda book version.

125 Motion on whole action (notes 1, 24): Note 1 raises a question that has recurred. Draft Rule 56(a)
126 begins by stating that “[a] party may move for summary judgment on all or part of a claim or
127 defense.” The Style convention is to draft in the singular, understanding that this language
128 authorizes a motion that addresses every claim and every defense in the action. But it has been
129 suggested that the rule text should explicitly refer to case-terminating motions, perhaps as “summary
130 judgment on the action or on all or part of a claim or defense.”

131 Discussion noted that this question also is presented by subdivision (g), which addresses
132 partial summary judgment and, as presented, begins by addressing the situation in which summary
133 judgment is not granted on the whole action. In the end, subdivision (g) was revised to address the

134 situation in which the court fails to grant all the relief requested by a motion for summary judgment.
135 The distinction will be further sharpened by adding to the tag line for subdivision (a), which will
136 read: “(a) Motion for Summary Judgment or Partial Summary Judgment.”

137 “Should” or “must” grant (notes 2, 3): Rule 56 originally stated that summary judgment “shall” be
138 granted when there is no genuine issue as to any material fact and the moving party is “entitled” to
139 judgment as a matter of law. The 2007 Style version of the rule translates “shall” as “should.” The
140 2007 Committee Note explains that this rendition of the ever-ambiguous “shall” was necessary to
141 reflect the cases that recognize discretion to deny summary judgment even when the movant
142 apparently has carried the Rule 56 burden of showing there is no genuine issue.

143 “Should” has met continuing resistance even after Style Rule 56 took effect. Defendants,
144 more than plaintiffs, are likely to protest that there should be no discretion to force on them the
145 burdens of trial if a sufficient summary-judgment showing has been made. Andrea Kuperman
146 studied a large number of cases in response to this concern. She found several cases, including cases
147 from several circuits, explicitly recognizing discretion to deny summary judgment. She also found
148 many cases that repeat the common refrain that summary judgment is a matter of law, reviewed de
149 novo by the appellate courts without recognizing any district-court discretion. But most of these
150 statements were made in boilerplate paragraphs announcing standards of review for whatever issues
151 were before the court, commonly in cases in which summary judgment was granted. Only one
152 circuit court opinion rejecting discretion to deny involved review of a denial of summary judgment;
153 that was a Seventh Circuit case that involved an official-immunity defense, a matter in which the
154 specific substantive concern to protect against the burdens of trial and discovery may well explain
155 a duty to grant a properly supported motion.

156 The Subcommittee, after studying the question again, continues to recommend “should.”

157 The first question was why not revert to “shall.” Courts seem to be divided, at least in
158 pronouncement, on the propriety of discretion to deny a properly supported motion. “Must” is clear.
159 “Should” is clear. “Shall” — because it is not clear — will better support continued evolution in
160 the case law.

161 It was noted that in bankruptcy practice motions for summary judgment often are filed on
162 the eve of trial in a contested matter. The judge should be able to say the motion is too late to be
163 considered. The rule should not impose a mandatory obligation to grant a motion in terms that will
164 require hasty and ill-considered action or postponement of a trial that may present urgent needs for
165 immediate action.

166 A Committee member expressed continuing confusion. “How can we think ‘should’ means
167 the same as ‘shall’?” The Kuperman memorandum and outside letters, however, show that courts
168 have different views. The proposal adopts “should” “because we like it better.” But this is
169 confusing to the bar. The high rate of “no disposition” outcomes in the FJC study does not tell us
170 whether, or how often, the failure to decide a summary-judgment motion reflects a judge’s view that
171 there is discretion to deny. We should not do anything that might encourage courts to refuse to grant
172 a motion — as by simply not ruling on it — because they would prefer that the case settle. We
173 should be clear about what we’re doing, and clear in the ways in which we inform the bar.

174 This comment prompted the response that it shows why “shall” has been eliminated from
175 the rules lexicon. It is ambiguous. It can mean “must,” “should,” or “may.” Translations in the
176 Style Project were chosen to reflect what the word had come to mean in practice. “Should” was
177 selected to fit the cases recognizing discretion to deny, in part because those cases seemed right for
178 many circumstances. Serious problems would arise if “shall” were restored to exist in unambiguous
179 uniqueness among all the rules but with ambiguous meaning for this particular rule.

180 The effect of the 2007 change was discussed further. Rule 56(c) will say “should” at least
181 until December 1, 2010; the cycle of rules amendments makes any earlier change impracticable.
182 The current project is aimed at improving summary-judgment procedure and making it uniform
183 across the country. It is not intended to change the standard as it is now established, including the
184 2007 clear recognition of discretion to deny. Discretion to deny, moreover, is established for very
185 good reason. It would be folly to say that when summary judgment is appropriate on only part of
186 a claim or defense the court “must” grant it. Perhaps it would be helpful, in Committee Note or in
187 reporting to the Standing Committee and for publication, to offer examples of discretion to deny.
188 Examples might include that the motion is too late; summary judgment is proper only as to a small
189 part of a case; the facts and issues that must be tried so far overlap anything that might be resolved
190 by summary judgment that granting summary judgment may prove costlier than denial; and so on.

191 It also might be appropriate to add an observation to the Committee Note that the procedural
192 discretion to deny may be superseded by substantive principles. Official immunity is the familiar
193 example. Both qualified and absolute immunities have been recognized to establish protection not
194 merely against liability but also against the burdens of trial and even the burdens of pretrial. This
195 substantive principle might easily develop to defeat discretion to deny summary judgment; the many
196 cases that decide collateral-order appeals from denials do not hint at discretion to deny. Instead
197 denial is reviewed as a matter of law.

198 Further support was expressed for “should.” The draft Committee Note makes its use clear.
199 It might help to provide additional examples; “we’re following the law, not changing it.” Another
200 Committee member agreed, suggesting that recognition of discretion to deny is appropriate as to fact
201 issues and law issues that might better be resolved after the assurance of full trial-level presentation
202 of the facts. As to matters of law, one consequence may be increased use of Rule 12(c) motions to
203 catch out legal inadequacies that now are caught by Rule 56 motions.

204 Still another member supported “should,” but urged that the Committee Note should be
205 expanded to note the prospect that substantive immunity principles may overcome discretion to
206 deny. The point might be made in general terms: The general procedural discretion to deny may
207 yield to substantive-law principles that are designed to protect against the burdens of further pretrial
208 proceedings or trial. This may be true even when, as in the Seventh Circuit case, a defendant clearly
209 is not entitled to summary judgment on one claim and the only question is whether summary
210 judgment is warranted as to another claim.

211 Another member commented on reading the cases described in the Kuperman memorandum.
212 The 1986 Supreme Court cases “look more like ‘must’”; the 2007 Committee Note seems generous
213 on the scope of discretion if we want to keep the law as it was up to 2007. We may change the law
214 by trying to address all permutations. Perhaps it is better to delete all of the draft Committee Note
215 that addresses discretion to deny, and to avoid any comments about qualifying the discretion when
216 substantive principles supervene.

217 This suggestion was supported by a reminder that the Standing Committee prefers that notes
218 be shorter rather than longer. Adding examples of discretion and possible limits may move too far
219 from the simple advice that the discretion should be sparingly exercised.

220 Judge Baylson noted that the Subcommittee had struggled to choose the verb. The
221 Committee Note begins by honoring the 1986 Supreme Court decisions and leaving continuing
222 evolution of the summary-judgment standard to judicial decisions. “Shall” will not be accepted by
223 the Standing Committee. “Should” seems better than “must.”

224 The proponent of “shall” agreed that if it will not be “shall,” then “should” is the best choice.
225 But the Committee Note should be stripped down.

226 It was noted that no cases have yet been found that rely on or explore the 2007 change from
227 “shall” to “should.”

228 Further support for “should” was expressed by noting that Rules 50(a) and (b) say that
229 judgment as a matter of law “may” be granted. It is common to deny judgment at the close of the
230 case, choosing to submit it for jury decision to get a “bullet-proof judgment.” The same option
231 should be available for summary judgment. Going to trial and getting a trial judgment may in fact
232 spare the parties a lot of time and expense.

233 On motion, “should” was approved, 9 votes yes and 3 votes no.

234 Discussion returned to the Committee Note. Support was expressed for retaining the draft
235 discussion of discretion, adding a discussion of immunity. Immunity springs from substantive law,
236 not Rule 56. There may be other substantive doctrines that also defeat discretion to deny summary
237 judgment. It would help to recognize this in the Note.

238 A different view was that there should be some change in the statement that “[t]here is no
239 change in the rule that a court has discretion to deny summary judgment even if it does not appear
240 that there is a genuine issue.” Even though the Seventh Circuit decision involved official immunity,
241 the court did not expressly rely on that in stating there is not discretion to deny.

242 The suggestion that it would be better to delete the entire paragraph on discretion to deny
243 was renewed. It was supported by a reminder that care always must be taken to ensure that a
244 Committee Note does not contradict rule text, and does not become the occasion for expanding rule
245 text.

246 This reminder led another participant to suggest that the draft Note “has way too much useful
247 stuff in it.” It is important to explain why the rule should be changed, and how it is changed. But
248 much of the explanation can be in the report to the Standing Committee and the letter transmitting
249 the proposal for public comment. The Committee Note should be “leaner and meaner.” It is right
250 to say that the proposed rule does not change the summary-judgment standard. It may not be wise
251 to say anything more.

252 Another Committee member supported the suggestion to delete the entire paragraph on
253 discretion to deny. “Should” may seem to signal an expansion of the discretion to deny. It is better
254 to leave the discussion to the 2007 Committee Note, relying on the new Committee Note for the
255 initial observation that the standard is not changed. Two other members agreed, although one of
256 them expressed continuing concern that it would be useful to say something about official-immunity
257 cases.

258 A slightly different view was that it would be wise to delete much of the draft paragraph on
259 discretion to deny, but that it would be useful to retain the final two sentences that quote and then
260 elaborate on the 2007 Committee Note.

261 A variation suggested simple revision of the first sentence of the paragraph on discretion.
262 It would say there is no change in the decisions addressing the question whether there is discretion
263 to deny.

264 Further support was expressed for deleting the entire paragraph. It clearly has bothered many
265 people, who thought Rule 56 established a right to summary judgment on making the proper
266 showing. Denial is serious business; in most circumstances it is not appealable, and is not
267 reviewable after trial and final judgment. The Style revision painted us into a corner. It is better to
268 avoid anything that might emphasize and eventually expand discretion to deny.

269 An effort to bring this discussion to a conclusion posed two alternatives: Delete the entire
270 paragraph on discretion to deny, or retain the final two sentences describing and supplementing the
271 2007 Note — perhaps with an added bit on substantive principles that may defeat discretion.
272 Support was voiced for each approach. Deletion of the entire paragraph was suggested because
273 “‘must’ is just as wrong as ‘should.’ The less said about it the better. The Note should not try to
274 express all the law.” Deletion was further supported as clean. It avoids the inconsequence of simple
275 repetition and the risk that any variation would be an inappropriate effort to amend the 2007
276 Committee Note.

277 It was agreed to delete the part of the paragraph before the final two sentences. A vote on
278 retaining the final two sentences divided evenly, 6 yes and 6 no.

279 An effort to draft a revised incorporation of the 2007 Committee Note was urged. Many
280 lawyers are concerned about “should.” Saying nothing may lead some courts who prefer “must” to
281 read “should” as “must.” “You have to tell the bar again and again.” And it was argued again that
282 something should be said about official immunity as a substantive right to be protected against
283 further process.

284 The last view expressed was that the 2007 Committee Note should stand on its own. It was
285 written when “should” was written into the rule. It is unwise to embellish it now. Nor is it
286 appropriate for the Committee Note on a procedural rule to express views about what substantive
287 law is or may come to be. (This view was expressed again later in the discussion of partial summary
288 judgment. The Committee Note should not be used to re-explain a rule provision that is not being
289 changed. The issue can be identified in the Report to the Standing Committee to pave the way for
290 the memorandum transmitting the proposal for public comment. If there is extensive comment
291 suggesting that the Note should be expanded, it can be taken into account.)

292 Reasons for disposition (note 4): After the November 2007 Committee meeting the Subcommittee
293 unraveled a fractured vote by preparing a draft saying that the court must state on the record the
294 reasons for granting summary judgment and should state the reasons for denying it. After further
295 deliberation the Subcommittee decided that it would be better to direct simply that the court should
296 state on the record the reasons for granting or denying the motion. The Committee Note continues
297 to distinguish grants by stating that it is particularly important to state the reasons for granting
298 summary judgment and that the statement should be dispensed with only if the reasons are apparent
299 both to the parties and to the appellate court. The only discussion agreed with this choice. At times
300 a district judge will not sufficiently explain the reasons. But in some cases the reasons are painfully
301 obvious; in those cases nothing would be gained by forcing a redundant statement. This version of
302 Rule 56(a) was approved.

303 Order of subdivisions — time for motion, procedure (note 5): The draft structure sets the times for
304 motion, response, and reply in subdivision (b), while the procedures are covered by subdivision (c).
305 Some participants have believed that it is clearer to present the procedures first, locating the time
306 provisions later in the rule. But the procedures in subdivision (c) tie closely to the succeeding
307 subdivisions for cases in which a nonmovant shows that it cannot yet present facts to justify its
308 opposition (d); the consequences of failure to respond or to respond properly (e); judgment
309 independent of the motion (f); and partial grant of a motion (g). Pushing the time provisions to next-
310 to-last is likely to be inconvenient for many readers.

311 Some support was suggested for relocating the timing provisions. One observation was that
312 by placing the timing provisions first the structure will create confusion as to the nature of the reply
313 governed by the time to reply — there is a risk that this will seem to address a reply brief, not the
314 subdivision (c)(2)(C) reply to additional facts stated in a response.

315 There was no direct disposition of this question, but the proposed structure seemed to be
316 accepted.

317 Order for different time (note 8): Subdivision (b) allows for different timing if “the court orders
318 otherwise in a case.” It was asked whether an order should be required if the parties stipulate to
319 extended time. From the parties’ perspective, there will be great anxiety as the rule-set time
320 approaches if the court has not yet “so ruled” on the stipulation. It was noted, however, that in most
321 cases courts routinely accept the stipulation by order, while in some cases the court has an interest
322 in rejecting the stipulation in order to maintain control over the case’s progress. It would be possible
323 to write a rule that provides protection for the parties if there is no ruling either way by the time of
324 the rule-set deadline. But was agreed that this complication is not necessary.

325 Motion, response, reply, brief (note 9): The structure of subdivision (c)(2) presents drafting
326 challenges. It has been agreed that the motion should be made in three separate sets of papers: the
327 motion itself, as a brief identification of each claim, defense, or part of each claim or defense as to
328 which summary judgment is sought; a concise statement of material facts the movant asserts are not
329 genuinely in dispute, with citations to supporting materials; and a brief. The response is two sets
330 of papers: the first combines a fact-by-fact response to the motion, any challenges to the
331 admissibility of evidence cited to support the motion, and any additional facts the nonmovant asserts
332 to defeat summary judgment; and a brief. The reply likewise is two documents: a reply to any
333 additional facts stated in the response, and a brief. These elements are clear on careful reading. But
334 the rule may not provide sufficient guidance to the less-than-careful reader.

335 The first observation was that the response indeed is a different kind of thing because it
336 combines into one document the responses with citations, arguments about admissibility, and
337 additional facts with citations.

338 One modest drafting change would be to amend the caption of proposed (c)(2) to become
339 “Motion and Statement of Facts; Response and Responsive Statement of Facts; Reply and
340 Responsive Statement of Facts. The captions of paragraphs (A), (B), and (C) would be changed to
341 mimic the relevant one-third of the subdivision caption. Then it would be possible to separate the
342 response from the citation of record support and evidentiary challenges, and to do the same for the
343 reply.

344 It was agreed that a reply brief can be helpful, and indeed may be the first thing the judge
345 consults.

346 The next comment was that the rule should clearly identify what the movant needs to submit,
347 what the nonmovant needs to submit, and what the movant needs to do by reply. The briefs should
348 be clearly separated from the motion, response, and reply. Clarity is particularly important because
349 adverse consequences can flow from failure to move in proper form, and the draft rule itself provides
350 adverse consequences for failure to respond or reply in proper form.

351 Renewed support was offered for separating the motion from the statement of facts asserted
352 to be beyond genuine dispute. But the language of the draft for the statement of facts seems
353 unfortunate in calling for a “statement that states concisely * * *.” It was agreed to change this to
354 “a statement that states concisely identifies in separately numbered paragraphs * * *.”

355 (Later discussion concluded that further changes should be made, working on a reorganized
356 version of subdivision (c) prepared by Professor Gensler.)

357 Support for positions (note 13): Draft (c)(2)(D) reads “a statement or dispute of fact must be
358 supported by * * * (ii) a showing that the materials cited to *dispute or* support the fact do not
359 establish *a genuine dispute or* the absence of one * * *.” This provision has not been much

360 discussed. There is no question about showing that the materials cited to support a fact do not
361 establish the absence of a genuine dispute. A nonmovant is not obliged to provide any record
362 citations; it suffices to respond that the citations provided by the movant do not carry the burden of
363 showing the absence of a genuine dispute. So too there is no question that a movant is free to argue
364 that materials cited to dispute a fact do not establish a genuine dispute. The defendant, for example,
365 might support a motion by pointing to the deposition statements of three disinterested witnesses that
366 the light was green for the defendant. The plaintiff's response pointing to testimony by the same
367 witnesses that the sky was cloudy does not, without more, contribute to showing a genuine issue as
368 to the color of the light. But the defendant-movant's argument on this score is ordinarily included
369 in a reply brief. When will it be appropriate for a party to include a "does not establish a genuine
370 dispute" assertion in a motion, response, or reply? There are some possibilities. The most likely
371 illustration may be that a so-called "additional fact" asserted in a response is irrelevant or is really
372 an inadequate attempt to dispute a fact in the movant's statement. The movant might assert in a
373 reply, for example, that the "additional fact" that the sky was cloudy is not an additional fact but an
374 ineffectual attempt to dispute the showing that the light was green. It also may prove convenient
375 to use the reply to challenge the effectiveness of a "self-serving, self-contradicting" affidavit. The
376 defendant might support a motion by pointing to the plaintiff's deposition testimony that the light
377 was green for the defendant; the plaintiff's response includes an affidavit that the light was red for
378 the defendant. It seems a legitimate use of the reply to assert that the court should disregard the
379 affidavit — as many courts have done — as something that does not establish a genuine dispute.

380 It was agreed that the draft should remain as proposed.

381 "No-evidence" motion (note 14): Draft subdivision (c)(2)(D) says that "a statement or dispute of fact
382 must be supported by: * * * (ii) a showing * * * that an adverse party cannot produce admissible
383 evidence to support the fact." This language is intended to cover the "Celotex no-evidence motion."
384 This motion is made by a party who does not have the burden of production at trial, asserting that
385 the nonmovant does not have sufficient evidence to carry the burden of production. It relies
386 purposefully on "showing," a word taken from the Celotex opinion. This word does not say just
387 how the movant makes the showing, a subject of continuing uncertainty in the courts and bar. This
388 provision is included in the rule because it is an important aspect of the present summary-judgment
389 standard, no matter how uncertain its scope may be.

390 The first observation was that this provision for a "no-evidence" motion is intended to be
391 something quite different from the (c)(2)(B)(ii) direction that a response may include a statement
392 that material cited to support a fact is not admissible in evidence. The response to a motion is quite
393 different from a motion; it addresses material cited to support the motion's statement that a fact is
394 not genuinely in dispute. There is some overlap — the motion itself may show that the trial burden
395 cannot be carried if the movant has the trial burden on the fact and the admissibility rulings show
396 that the movant cannot carry the trial burden.

397 Other issues were noted. As reflected in the Committee Note, the rule is intended to dispense
398 with any need to make a motion to strike inadmissible evidence cited to support a motion for
399 summary judgment. The cited "evidence," for example, might plainly be triple hearsay.

400 A separate question reflects longstanding drafting dilemmas. Many participants have found
401 it awkward to speak of a "no-evidence" motion as one that includes a statement of facts that are not
402 genuinely in dispute. Part of this reaction may stem from the common local-rule references to a
403 statement of "undisputed" facts. The no-evidence motion does not say that the facts are undisputed
404 in the sense that the movant and nonmovant agree. Instead it says that the nonmovant cannot
405 generate a genuine dispute. What the motion looks like in practice will depend on how the court
406 understands the "showing" referred to in the Celotex opinion. If the movant is allowed to say simply
407 that the nonmovant must come forward in response with enough evidence to carry the trial burden

408 of production on its claim or defense, there would be little guidance for the response. But draft
409 (c)(2)(A)(ii) requires a statement of “those material facts that the movant asserts are not genuinely
410 in dispute.” (c)(2)(D)(ii) allows a showing that an adverse party cannot produce admissible
411 evidence to support “the fact.” The direction of the rule, then, is that the movant must identify
412 specific material facts as to which the nonmovant has, but cannot carry, the trial burden of
413 production. The only remaining ambiguity about the “showing” element of the Celotex opinion is
414 whether the movant must do something more to demonstrate that the nonmovant cannot carry the
415 burden or whether it suffices to identify the facts and challenge the nonmovant to carry the burden.
416 Resolution of that ambiguity one way or the other would change the summary-judgment standard
417 as it stands in some courts today.

418 For all the clarity of purpose, risks of misunderstanding may remain. Professor Gensler
419 prepared a revision of subdivision (c) designed to express the same substance in ways that may be
420 clearer on initial reading. The Committee agreed that this revision should be used as a guide to
421 further reorganization, perhaps in directions that return closer to earlier drafts that were themselves
422 reorganized to achieve the present rather succinct expression.

423 Specific phrases in the current draft were examined. (c)(2)(D) begins: “A statement or
424 dispute of fact must be supported by * * *.” What is a dispute of fact? Perhaps it would be better
425 to say “A motion, response, or reply must be supported * * *.”

426 (c)(2)(D)(1) refers to citations to materials without noting an admissibility requirement.
427 Perhaps it should be “citations to particular parts of materials in the record that are admissible in
428 evidence, including * * *.” The difficulty with adding this reference, however, is that “affidavits
429 or declarations” ordinarily are not admissible. “Depositions” may be admissible, but may not. It
430 was agreed that admissibility should not be added.

431 The required citations are to “parts of materials in the record.” It was asked whether this
432 requires separate filing. The history of this version is clear. At the November 2007 meeting the
433 Committee changed a portion of an earlier draft to read: “A party must ~~attach to file with~~ a motion
434 * * *” cited materials not already on file. Then it was concluded that it suffices to require citation
435 to materials in the record — if they are not already in the record, they must be filed with the motion.
436 A participant observed that Rule 56 should not be required to do all the work. Rule 5 describes
437 filing, and includes a direction that most disclosures and discovery materials must not be filed until
438 they are used in the proceeding. “Use” includes citation to support or oppose summary judgment.
439 There is no need to encumber Rule 56 with overlapping directions.

440 Filing may not be enough. If the record is lengthy and the case complex, it may be important
441 to assemble the materials in a way that makes them readily accessible to the court. At the November
442 miniconference Judge Swain noted that some cases have lists of docket entries that by themselves
443 may run for hundreds of pages; locating materials that in fact have been filed and are in the court
444 record may be a difficult and time-consuming task. Throughout the development of Rule 56, Judge
445 Fitzwater continually championed the use of appendixes of the cited materials and urged the
446 legitimacy of local rules requiring appendixes. This question returned for further discussion later.

447 Noncomplying motions (note 18): Subdivision (e) addresses a response or reply that does not
448 comply with Rule 56(c), as well as the failure to respond or reply at all. One set of questions
449 addressed to this subdivision ask whether it also should include motions that fail to comply with
450 Rule 56(c).

451 A version that would include noncomplying motions was included in a footnote for purposes
452 of illustration. The inclusion does not much complicate the rule. It would begin “If a motion,
453 response, or reply does not comply with Rule 56(c) * * *.” The list of actions the court might take
454 includes “(2) deny a noncomplying motion [with or without prejudice to renewal].”

455 Earlier discussions concluded that there is no need to address noncomplying motions. Courts
456 regularly confront motions of all kinds that do not comply with procedural requirements, and have
457 established ways of dealing with them. Summary-judgment motions can be handled as they have
458 been; the need to address defective responses or replies arises primarily from the desire to establish
459 and regulate a “deemed admit” practice.

460 The first suggestion was that the rule seems “unbalanced” if it does not address
461 noncomplying motions. Noncomplying motions are denied; why not say so in the rule?

462 This theme was reiterated with a variation. Rule 56(c)(2) establishes the requirements for
463 a motion. If a motion does not comply with the requirements there is no need to go further. But at
464 the same time, it may be important to include noncomplying motions in the rule text as reassurance
465 that the Rule 56 revision is neutral as between movants and nonmovants.

466 Support was expressed for leaving noncomplying motions out of the rule text, but adding
467 some observations to the Committee Note. The observations might draw from the “one sentence”
468 alternative suggested in the agenda footnote. The single sentence says that the rule text does not
469 address defective Rule 56 motions because courts have general approaches to dealing with defective
470 motions of all kinds, and because there may be a variety of defects that call for different responses.
471 This single sentence might be elaborated by illustrating a variety of defects — making two
472 documents where there should be three; failing to file cited materials not already on file; failure to
473 cite to supporting materials clearly or at all; and compound or unclear statements of fact.

474 A more positive reason was then advanced for addressing noncomplying motions in the rule
475 text. The rule text presses a nonmovant to make a very long response. It should be clear that the
476 duty to respond can be avoided by attacking the motion for failure to comply with Rule 56(c)(2).
477 Without this reassurance the nonmovant will fear the consequences of not filing a costly but timely
478 response. An obvious alternative is to file a motion to strike the noncomplying motion, but these
479 motions are not popular and courts seldom rule on them. This dilemma is compounded in courts that
480 rule that failure to move to strike waives objections — even to the point of ruling that failure to
481 challenge the admissibility of materials offered to support a motion waives objections to admission
482 at trial.

483 One response was that the court itself might be pleased to strike a motion that is too long.

484 A second observation was that the judge would like to have both the response and the
485 argument that the motion does not comply; having both filed within the time to respond avoids
486 delay. Another judge agreed.

487 It was noted that this dilemma is similar to the dilemma encountered when a nonmovant
488 moves for time to conduct additional investigation or discovery. The draft Committee Note includes
489 advice that a party seeking relief of this sort ordinarily should seek an order deferring the time to
490 respond to the motion. This procedure supports the court’s control over the timing question. But a
491 good answer is hard to find.

492 It was asked whether experience under local point-counterpoint rules shows a need to add
493 noncomplying motions to the rule text. The Committee has heard repeated complaints about
494 motions that include massive statements of undisputed facts, accompanied by “boxes” of supporting
495 materials. Do these courts have a practice of requiring that the motion be trimmed down before
496 imposing the burden of response? An immediate reaction was that a nonmovant should not be
497 allowed to respond by saying only that the movant states too many facts. The bloated statement may
498 not be what the rule is intended to permit, but the Committee has properly abandoned any attempt
499 to set a limit on the number of facts that can be advanced as not genuinely disputed. Complex cases
500 may indeed turn on large numbers of facts. A lawyer then observed the experience that the judge

501 focuses the parties on the issues before the motion is made. A motion to strike adds nothing to the
502 response, even if the motion is far off the track. Another lawyer observed that focusing by the judge
503 occurs in the actively managed case, the big case.

504 The final note was that the rule text should not include anything that will encourage motions
505 to strike. The conclusion was that noncomplying motions will not be addressed in the rule.

506 “Deemed admitted” (notes 19, 20): Local rules adopting the point-counterpoint structure reflected
507 in draft Rule 56(c) also include provisions that a fact is deemed admitted if there is no proper
508 response. Successive drafts of what has become Rule 56(e) in the current version have gradually
509 expanded the place for this practice, but some uncertainties have persisted. Ms. Kuperman has
510 provided a research memorandum on the practice that illuminates some of the issues.

511 One issue was quickly resolved. Rule 56 drafts have moved away from directing that a
512 response admit or deny a fact to directing that it dispute or accept a fact. A recent draft of the
513 “deemed admit” provision spoke of acceptance, but further reflection suggested that it is more
514 accurate to refer to a failure to respond, or to respond in proper form, as a failure to dispute. This
515 change in (e)(2) was accepted: the court may “consider a fact [~~as~~] accepted undisputed for purposes
516 of the motion.”

517 Judge Kravitz noted that the Standing Committee discussion in January led to no clear
518 conclusion. There was concern about considering a fact undisputed when the motion does not cite
519 any support for it. One way to address this would be to add a few words: the court may “consider
520 a fact supported by the record undisputed * * *.” The cases do seem to support imposition of
521 adverse consequences for failing to respond, or for responding in improper form. One alternative
522 would be to consider undisputed “a properly supported fact.” Inserting “properly,” however, faces
523 two obstacles. One is a simple matter of style — who would think that an improperly supported fact
524 should be considered undisputed? That objection need not be fatal; adding “properly” makes clear
525 that the court must undertake some examination of the materials cited to support the fact. But the
526 related objection is more important. “Proper” support is ambiguous. Does it mean that there are,
527 as required, citations to the record? That the cited record materials do in some way support the fact?
528 Or that the cited materials suffice on their own to carry the movant’s summary-judgment burden,
529 so that the failure to respond properly means only that the nonmovant has lost the opportunity for
530 examination of other record facts that would defeat the movant’s apparently sufficient showing?

531 The question can be framed as asking whether the trial judge is to be required to do the work
532 that should have been done by the nonmovant in framing a response. Or — and no one has
533 advocated that the judge must undertake an independent examination of all the materials that have
534 been filed in the action, much less ask whether there are unfiled materials that might bear on the
535 motion — should the judge be required to do some lesser part of the nonmovant’s work? Or should
536 there be unlimited discretion whether to do any part of the work, or instead to treat the absence of
537 a proper response to a fact asserted by a movant as a default on that fact?

538 One part of the answer embraced by the draft is clear. It says that the court “may” consider
539 the fact as undisputed. If it is changed to say that it may consider undisputed a fact supported by
540 the record, then the court would have some obligation to consider the record. The extent of the
541 examination, however, would remain uncertain: is apparent support enough, or must the court
542 undertake a full-fledged, if one-sided, summary-judgment evaluation of the materials cited by the
543 movant?

544 A further complication emerges from the drafting of (e)(3). It says that the court, faced with
545 no response or a noncomplying response, may “grant summary judgment if the motion and
546 supporting materials show that the movant is entitled to it.” This language has carried forward from
547 an earlier period when it was intended to say that the court must undertake a full examination of all

548 the materials cited by the movant to determine whether, absent citation of contradicting materials,
549 they satisfy the summary-judgment standard. It does not fit well with the later addition of the
550 “considered undisputed” provision of (e)(2).

551 Whatever is made of the reference to record support, it must be clear from the rule text that
552 considering a fact undisputed does not of itself establish a right to summary judgment. The court
553 must still consider the facts established after weighing any proper part of the response and adding
554 facts considered undisputed for want of a proper response, then set the outer limits of permissible
555 fact inference on the basis of those direct facts, and finally determine the legal consequences of these
556 direct and inferential facts.

557 This duty to determine the consequences of facts considered undisputed was supported as
558 a clear, simple approach. The court does not grant summary judgment simply because some or all
559 of the movant’s asserted facts have not been properly disputed. And the court should be required
560 to determine whether the materials cited by the movant at least support its position.

561 Further discussion emphasized the need to be clear in using the various terms that frame the
562 discussion. Everyone accepts the proposition that the trial judge is not required to examine the
563 record for materials that have not been cited by the parties, to ferret through the record or sniff about
564 for buried truffles. Everyone agrees that failure to respond properly should not be treated as default
565 of the entire action. There is some support for the view that the failure to respond as required by
566 Rule 56(c)(2) should not relieve the court of the obligation to undertake a full summary-judgment
567 examination of the materials cited by the movant. The “deemed admit” practice, however, rejects
568 that view. The rejection could be more or less thorough-going. It might relieve the court of any
569 obligation even to look at the movant’s cited materials. Or it might require the court to look at the
570 materials to determine whether they “support” the fact in some measure — a plaintiff’s self-serving
571 deposition testimony that the defendant went through a red light does not entitle the plaintiff to
572 judgment as a matter of law because the court or jury need not believe the plaintiff, but it does
573 support the plaintiff’s assertion that the light was red. The defendant could have established a
574 genuine issue by doing no more than responding that the cited material does not establish the
575 absence of a genuine dispute, see draft (c)(2)(D). But failing to do so allows the court to consider
576 the fact undisputed if the court finds that appropriate. Looking at the cited materials for support
577 would lead to a different result if the only material cited by the movant-plaintiff is deposition
578 testimony that the light may have been red, it may have been green or yellow, “I don’t know.” That
579 material does not support the plaintiff’s position.

580 It was asked whether the rule text should attempt to address examination of the movant’s
581 cited materials. The rule says only that the court may consider a fact undisputed if there is no
582 complying response. The court’s decision will depend on a host of circumstances of the particular
583 case. In most cases the first response is likely to be notice that the nonmovant has failed to respond
584 as required and that failure to comply may lead to consideration of facts as undisputed. Why try to
585 dictate further?

586 The problem of integrating (e)(2) with (e)(3) was addressed by suggesting that words should
587 be added to (e)(3) to clarify the role of facts considered undisputed: The court may “grant summary
588 judgment if the motion and supporting materials including the facts considered undisputed —
589 show that the movant is entitled to it * * *.” One question was whether this addition is unnecessary
590 because “supporting materials” includes both materials cited by the movant and facts considered
591 undisputed. An answer was that it is better to be explicit. The “may consider undisputed” in (e)(2)
592 gives the judge discretion whether to treat a fact as undisputed because there is no proper response.
593 (e)(3) then does different work by recognizing authority to grant summary judgment, but only if
594 warranted by applying the law to the direct facts established according to the summary-judgment
595 standard or considered undisputed under (e)(2), together with the facts that might be inferred on the

596 basis most favorable to the nonmovant. All agreed to add “including the facts considered
597 undisputed” to (e)(3).

598 A last suggestion was that the paragraphs of (e) should be reordered to set first the authority
599 to grant summary judgment, then the authority to consider facts undisputed, and then authority to
600 afford a second chance to respond or reply as required by Rule 56(c). This suggestion failed for
601 want of support.

602 Action on the court’s own (note 23): Draft Rule 56(f)(3) recognizes the court’s authority, established
603 under present decisions, to consider summary judgment on its own. The court must identify for the
604 parties material facts that may not be genuinely in dispute. Discussion in the Standing Committee
605 last January raised the question whether the procedure should be revised to one in which the court
606 invites submission of one or more motions for summary judgment. The Subcommittee recognized
607 that there is an advantage in inviting a motion because that will trigger the clear procedural
608 framework of subdivision (c). This advantage is described in the draft Committee Note. At the
609 same time, the Subcommittee concluded that the court may wish to move more directly. A common
610 illustration arises when an individual public official moves for summary judgment on the basis of
611 official immunity and the court rules that there was no constitutional or statutory violation. The
612 official’s municipal employer did not move for summary judgment because it cannot claim
613 immunity. The court might well suggest that the parties should address the reasons why it should
614 not grant summary judgment for the employer on the basis of the determination that there was no
615 violation at all.

616 The first question was whether the judge should be directed to identify for the parties
617 material facts that may not be genuinely in dispute. Why not rely on the general obligation to give
618 notice and a reasonable time to respond that applies to all independent actions by the court under
619 subdivision (f)? The notice can identify the claims or issues, rather than specific facts, or, for
620 another example, ask why summary judgment should not be granted for the employer in light of the
621 ruling that the employee did not violate the plaintiff’s rights.

622 One response was that if the court is not inviting a motion, the notice is at least similar to a
623 notice to show cause. The parties need guidance as to what the court thinks important. Perhaps a
624 sentence could be added to the Note observation about the invited-motion alternative, making it
625 clear that the court can either identify facts for the parties or invite a motion. Unless the rule text
626 is changed, however, any such statement would need to be consistent with the rule text on
627 identifying facts.

628 A different approach was taken by asking whether the requirement of notice inherently
629 demands identification of facts that may not be in genuine dispute, so there is no need for a
630 redundant reminder in (f)(3).

631 A different question asked why there is any need for considering summary judgment on the
632 court’s own, when subdivision (f)(1) allows the court to grant summary judgment for a nonmovant.
633 The answer is that the question may come to the court in a context independent of a motion for
634 summary judgment. An important illustration is Rule 16(c)(2)(E), describing as one of the matters
635 for consideration at any pretrial conference “determining the appropriateness and timing of summary
636 adjudication under Rule 56.”

637 This discussion concluded by leaving the way open for modest expansion of the Committee
638 Note if that is not inconsistent with the more general goal of reducing the length of the Note.

639 Partial summary judgment (notes 1, 24, 25): The Committee has repeatedly considered the
640 relationship between what have become subdivisions (a) on summary judgment in general and (g)
641 on partial summary judgment. Discussion in the Standing Committee last January again drew

642 attention to this question. It has been decided repeatedly that there is no need to refer to summary
643 judgment “on the whole action” in subdivision (a). But it has seemed convenient to distinguish
644 subdivision (g) by describing partial summary judgment as a device used when summary judgment
645 is not entered on the whole action.

646 The first observation suggested that “partial summary judgment” is not a proper label. The
647 motion may be for summary judgment on only a single claim or defense, or even part of a single
648 claim or defense. The court may grant the motion in full without disposing of the whole action, or
649 even disposing of a major part of the action. This observation was expanded. It is useful to adopt
650 a well-recognized and much-used term. Courts and litigants continually refer to “partial summary
651 judgment,” even though the term does not now appear in Rule 56. As styled in 2007, Rule 56(d)’s
652 caption refers to “case not fully adjudicated on the motion,” and the text begins: “If summary
653 judgment is not rendered on the whole action * * *.” The present draft simply builds on the “whole
654 action” term in the source. But it may be misleading for the reasons suggested. Perhaps it would be
655 better to preface subdivision (g) like this: “If the court does not grant all the relief requested by a
656 motion for summary judgment * * *.”

657 The purpose of present subdivision (d) is to encourage orders specifying facts not in genuine
658 dispute even when summary judgment is not appropriate as to all of a claim or defense. That
659 purpose was expressed in the pre-2007 version by saying that “the court * * * shall if practicable
660 ascertain what material facts exist without substantial controversy.” Style Rule 56(d) eliminated the
661 unfortunate suggestion of a “substantial controversy” standard different from the “genuine issue”
662 standard of former and Style Rule 56(c), and reduced shall to “should, to the extent practicable * *
663 *.” Draft Rule 56(g)(2), freed from the constraints of the Style project, carries the notion of
664 practicability one step further. It says simply that the court “may enter an order stating any material
665 fact * * * that is not genuinely in dispute.” This recognizes that summary disposition of individual
666 facts may require great effort by the court without any substantial benefit to the parties at trial, and
667 indeed with some risk that a trial limited by facts taken as established will be distorted.

668 The question of identifying “partial summary judgment” was carried further. Many
669 situations arise. Summary judgment may be sought on all claims among all parties. But it may be
670 sought only as to one party, even an intervenor. It may be sought as to only one claim. Granting
671 all the relief requested by the motion is partial disposition of the case, but a full grant of the motion.

672 One suggestion was that the subdivision (g) caption should be changed to “partial grant of
673 motion.” As revised to “partial grant of summary judgment, and still later to “Partial Grant of
674 Summary Judgment Motion,” this motion carried.

675 Further discussion led to an interim rejection of the proposal to begin subdivision (g) as “If
676 the court does not grant all the relief,” and so on. “[N]ot granted on the whole action” was thought
677 better because it covers the case in which the motion is completely granted but does not dispose of
678 the entire case.

679 The long-abiding puzzle of the fit of the partial summary-judgment provision with the
680 general summary-judgment provision was brought back for discussion. Subdivision (a) says that
681 the court “should” grant a motion for summary judgment on a claim, defense, or part of a claim or
682 defense. Subdivision (g) says that if summary judgment is not granted on the whole case, the court
683 “should, if practicable, grant summary judgment on a claim, defense, or part of a claim or defense.”
684 Why are these not inconsistent, conflicting in the force of the direction to grant summary judgment?

685 The first response was that it may not be wise to enter summary judgment on part of a claim
686 or defense. It is better to direct only that the court should do this if practicable. A claim should not
687 be “sliced up into little pieces.” But what, then, is the intended distinction between “should, if

688 practicable” grant as to part of a claim or defense, and “may” state material facts not genuinely in
689 dispute? This needs further thought.

690 Following informal discussions, the doubts about the relationship between subdivision (g)(1)
691 and subdivision (a) prevailed. Subdivision (a) should be the only one that addresses summary
692 judgment on all or part of a claim or defense. “Should grant” will prevail as the standard without
693 any confusion about “should, if practicable” created by draft (g)(1). (g)(1) will be eliminated. The
694 proper focus of subdivision (g) then becomes the discretionary authority to determine that a material
695 fact is not genuinely in dispute. This authority is useful when the court does not grant all the relief
696 requested by the motion. In effect, the relief requested by the motion determines what is “all or part
697 of a claim or defense.” To the extent that the court does not grant the motion request, it has
698 discretion whether to determine individual material facts.

699 This integration is to be accomplished by changing the caption of subdivision (a) as noted
700 earlier: “Motion for Summary Judgment or Partial Summary Judgment.” That will be the only
701 reference to partial summary judgment, implicitly identifying it as a motion that does not seek to
702 dispose of the entire action. Subdivision (g) will become a single subdivision without separate
703 paragraphs:

704 **(g) Partial Grant of Summary Judgment Motion.** If the court does not grant all
705 the relief requested by a motion for summary judgment it may enter an order
706 stating any material fact — including an item of damages or other relief —
707 that is not genuinely in dispute and treating the fact as established in the
708 action.”

709 The Committee Note may be revised to say that the court can grant a motion in part. It might
710 also express the Style convention that a reference to a motion on “all or part of a claim or defense”
711 authorizes a motion as to all claims and defenses as to all parties. Again, much will depend on the
712 determination as to overall Note length.

713 Appendix of supporting materials (note 33): The draft rule text, subdivision (c)(2)(D), requires that
714 supporting material be in the record. It does not address the question whether the supporting
715 materials might be gathered in an appendix. The Committee Note observes that the parties may find
716 an appendix useful, or the court may order that the parties prepare one. The next sentence says that
717 the appendix procedure can be established by local rule. This sentence has persisted in the Note in
718 large part due to the repeated urgings of Judge Fitzwater. The Subcommittee has been uneasy about
719 supporting local rules in light of the general ambivalence about local rules and a fear of encouraging
720 a proliferation of rules on this subject. But it concluded that the sentence should remain in the Note.

721 A lawyer member said that lawyers will appreciate this sentence. “The more guidance on
722 what the court wants, the better.” A judge suggested that the sentence will not actually encourage
723 courts to adopt local rules — they will, or not, as they wish. The Committee agreed to retain the
724 sentence.

725 Judge Baylson moved that, subject to the discussion and the revisions agreed upon, the
726 Committee approve transmission of Rule 56 to the Standing Committee with a recommendation that
727 the proposal be published for comment. The revised draft will be circulated for review by the
728 Advisory Committee on the understanding that there will be no need for a second vote of approval
729 unless a Committee member asks for one.

730 The motion to recommend publication was approved, 12 yes and 0 no.

731 Judge Kravitz concluded the discussion by noting that work remains to be done on Rule 56,
732 but the Subcommittee has done an enormous amount of work very well.

733 *Expert Trial Witness Discovery and Disclosure*

734 Introduction and background: Judge Campbell introduced the Discovery Subcommittee report on
735 discovery and disclosure of expert trial witnesses. This will be the Committee's fourth discussion
736 of these problems. The Subcommittee has worked to great effect in advancing the topic.

737 One set of issues arises from rather frequent disregard of Rule 26(a)(2)(B) limits on trial-
738 expert disclosure reports. The rule requires a report only if the witness is retained or specially
739 employed to provide expert testimony in the case or is a party's employee whose duties as an
740 employee regularly involve giving expert testimony. A number of courts, however, reasoning that
741 reports are a good thing, have required reports from employee experts who do not regularly give
742 expert testimony.

743 A related set of issues affect treating physicians. It has proved difficult to draw a line that
744 identifies the point at which a physician's testimony becomes that of an expert retained or specially
745 employed to provide expert testimony. The difficulty may mean that a party who has relied on a
746 treating physician to provide testimony on issues that go beyond treatment finds the testimony
747 excluded for want of a Rule 26(a)(2)(B) report.

748 The American Bar Association has adopted recommendations on additional questions, urging
749 that discovery be denied as to communications between an attorney and a trial-witness expert and
750 also be denied as to drafts of the Rule 26(a)(2)(B) report. Discovery of these matters, however
751 attractive it may seem in the abstract, has led to practices that impede the most desirable use of
752 experts and at the same time defeat any effective discovery. Parties avoid creating draft reports; they
753 limit attorney communications with trial-witness experts; they retain otherwise unnecessary sets of
754 experts who function only as "consultants," not as trial witnesses; and indulge still other behaviors
755 to ensure that nothing discoverable is created or preserved.

756 The Subcommittee recommendations address these problems in five parts.

757 The first part is an addition to Rule 26(a)(2)(A). For any identified expert who is not
758 required to provide a report under Rule 26(a)(2)(B), the party's disclosure must state the subject
759 matter on which the expert is expected to provide expert evidence, and a summary of the facts and
760 opinions. An example of the summary might be: "the cause of the injury was the defendant's
761 product." This disclosure will solve the problem of surprise and should eliminate the trend to
762 require reports contrary to the rule.

763 The second part is a revision in the list of items required in a Rule 26(a)(2)(B) report. Item
764 (ii) will be revised to read: "the ~~facts or data or other information~~ considered by the witness in
765 forming [the opinions]." "Information" has been one impetus, along with the 1993 Committee Note,
766 toward discovering "information" about the contents of attorney-expert communications and draft
767 reports.

768 The third part is an addition of a new item (ii) to Rule 26(b)(4)(A): "Rules 26(b)(3)(A) and
769 (B) protect drafts in any form of any disclosure or report required under Rule 26(a)(2)." This
770 extends work-product protection to draft reports.

771 The fourth part similarly extends work-product protection to "communications in any form
772 between an expert and retaining counsel." But there are three exceptions for communications that
773 can be discovered in the ordinary course — those regarding compensation for the expert's study or
774 testimony, identifying facts or data the expert considered in forming the opinions to be expressed,
775 or identifying assumptions or conclusions suggested by the attorney and relied upon by the expert
776 in forming the opinions.

777 The fifth part is the Committee Note.

778 At the Committee meeting last November there was general acceptance of the proposal to
779 add party disclosure of testimony that is not subject to the report requirement, and also of the
780 proposal to substitute “facts or data” for “data or other information” in Rule 26(a)(2)(B)(ii). The
781 difficult questions have been draft reports and attorney-expert communications.

782 Costs and failures of present practice: Judge Campbell then presented a chart summarizing the
783 reasons for believing that the proposed amendments will not defeat discovery of significant
784 information that is discovered under present practice. At the same time, many untoward practices
785 will be averted.

786 The first point is that those who oppose limiting discovery reject the view that the expert
787 witness is properly part of a litigation team. But today’s expert is an advocate, influenced by
788 counsel. That will not change, whatever the discovery rules provide.

789 Adding work-product protection of draft reports and attorney-expert communications will
790 rarely defeat discovery that actually occurs now. Discovery of draft reports occurs only if the
791 attorney and expert are both so inexperienced as to create and preserve them, or in the rare case in
792 which the court orders preservation. Attorneys and experts now go to great lengths to avoid having
793 communications that might be discoverable, so again adding protection will not defeat much
794 discovery that actually occurs now.

795 The proposals do not limit discovery of other information such as facts and data identified
796 by the attorney and considered by the expert, work papers, and development of the expert’s
797 opinions. Further thought must be given, however, to discovery of the scope of the expert’s
798 assignment.

799 The advantages of the proposals are not the mere negative that they will not defeat much
800 discovery that actually happens now. Present practice leads to little actual discovery because the
801 rules lead parties and experts to avoid preparing draft reports, inefficient communications between
802 attorney and expert, duplicate sets of consulting and trial experts, wasted deposition time devoted
803 to generally fruitless efforts to discovery drafts and communications, and occasional fights about
804 discovery of drafts. The proposals will not eliminate all of these costs, but should substantially
805 reduce them. The use of duplicating sets of consulting experts, for example, is likely to be reduced
806 but not likely to be eliminated.

807 Room remains to worry that the loss of discovery will lead to less restrained behavior by
808 counsel in dealing with trial-witness experts, with unfortunate consequences. But New Jersey
809 lawyers report that this has not been a problem under a rule similar to the proposals.

810 The proposals, in short, are designed to reduce litigation costs without losing useful
811 information. Many years of continuing effort have not succeeded in significantly reducing discovery
812 costs. Any progress that can be made is important.

813 Subcommittee members seconded these remarks. These discovery issues are “near and dear
814 to practitioners.” The proposals embody a real-world approach to what is happening. Expert
815 witnesses “are not pristine; I do not pay \$1,000 an hour for an expert to tell the court how good my
816 opponent’s case is.” And there are many experts who are professional witnesses. Present practice,
817 indeed, makes it difficult to hire many of the best experts. Even if they might be willing to endure
818 the behavior required to reduce exposure to discovery, discovery of communications about how to
819 be an expert witness makes it impossible to have the communications. And draft reports are not
820 prepared; lawyers go to great lengths to avoid them. A lawyer may have two or even three sets of
821 experts; the best of them may be assigned to the consultant role. Depositions focus on who the

822 expert talked to, not the basis for the opinions. Such discovery generally is unnecessary; “I’ve never
823 seen an expert survive cross-examination if the opinion is based on counsel’s wishes, not sound
824 expertise.”

825 Another Subcommittee member noted that there was a high level of agreement among
826 lawyers, both those who regularly represent plaintiffs and those who regularly represent defendants.
827 The proposals will not only reduce costs but also enable lawyers to feel better about themselves by
828 dispensing with the behaviors now used to deflect discovery.

829 A third Subcommittee member noted that the proposals will have “some cost in truth
830 finding,” and will generate some line-drawing problems. The savings, however, justify these costs.
831 Problems will remain with the use of experts in settings apart from trial, such as class certification
832 or complex discovery disputes. But the process of developing the proposals has been good. The
833 Subcommittee has dealt thoughtfully with all of the questions and challenges that were put to it.

834 Judge Kravitz noted that the Subcommittee has approached its work seriously, without an
835 agenda to reach any predetermined result. He also noted that he had been able to discuss these
836 topics with large groups of lawyers whose members include both plaintiffs’ and defendants’
837 representatives. They all want “something like this.” But this common wish does not of itself
838 justify action. All lawyers want to be free to “speak through their experts.” Without more, the
839 proposals might seem to impede truth-finding. Yet there may be little practical loss. We have been
840 told repeatedly that efforts to discover attorney-expert communications and draft reports seldom find
841 anything. And expert witnesses generally will be persuasive, or not persuasive, according to the
842 strength of their opinions. Successful distortions by lawyer influence may be rare. And there may
843 be great practical gain in avoiding the behaviors that are responsible for the general failure of
844 discovery efforts.

845 Professor Marcus opened the detailed discussion of the proposals.

846 Party disclosure: The Rule 26(a)(2)(A) proposal for party disclosure of the substance of the opinions
847 to be offered by an expert who is not obliged to give a Rule 26(a)(2)(B) report in one way carries
848 back to the practice before 1993. From 1970 to 1993 a party could use interrogatories to learn the
849 substance of the facts and opinions to be expressed by another party’s expert witnesses, and a
850 summary of the grounds for each opinion. The 1993 amendments substituted the more detailed
851 report for experts covered by (a)(2)(B), but omitted any provision for other experts. The present
852 proposal fills the gap, although it has been limited to a “summary” of the expected testimony without
853 also requiring a statement of the “substance.” Earlier drafts called for disclosing the substance of
854 the opinions, but “summary” has been substituted in light of concerns expressed at the Standing
855 Committee meeting last January. There is a real concern that treating physicians “may not be
856 forthcoming on substance.” The summary gives notice of what is coming. The witness can be
857 deposed.

858 In response to a style question, it was noted that it is important to say “such” witness in the
859 26(a)(2)(A) disclosure provision because that limits the category to a witness who may present
860 expert evidence at trial. Without this limit, the rule might seem to require a disclosure as to many
861 witnesses saying that this witness will not provide evidence under Evidence Rules 702, 703, or 705
862 on any subject.

863 In response to an observer’s question, it was noted that the disclosure covers the subject
864 matter and summary of “expected” testimony because of a concern most readily identified with
865 respect to treating physicians. Many lawyers report that it is difficult to get a treating physician to
866 cooperate during the discovery process. Presumably the party will want to be in communication
867 before calling the witness; the pre-1993 (b)(4)(A) interrogatory would have required such
868 communication. The proposal is “a middle ground.” The Committee Note underscores the need to

869 identify these expert witnesses. In response to the observer's further question, it was stated that it
870 will not be sufficient disclosure to say a physician will testify to "all aspects of treatment" if the
871 party wants testimony on such matters as the prognosis for the next 20 years, the percent of
872 disability, and the cost of future treatment. It also was suggested that a party acts at its own peril
873 in attempting to set out a summary without having squared it with the witness.

874 The party disclosure proposal in Rule 26(a)(2)(A) was accepted without opposition.

875 "Facts or data": The New Jersey rule calls for discovery of "facts and data" disclosed by the attorney
876 to the expert. It seems to work well — so well that there has been no case law developing its
877 meaning. The present "facts or other information" and the 1993 Committee Note have supported
878 discovery of attorney-expert communications and draft reports. Changing the term in Rule
879 26(a)(2)(B) is just a first step toward the 26(b)(4)(A) proposals.

880 It was asked when is a datum not a fact — why not just refer to facts? Several Committee
881 members responded that "facts" emphasize matters unique, individual to the particular case. "Data"
882 may seem to imply a larger, and perhaps anonymous, aggregation of facts.

883 This proposal was accepted without further discussion.

884 Draft reports: The first explanation was that after repeated discussions, it was decided that the
885 protection for draft reports and attorney-expert communications should be provided in Rule 26(b)(4).
886 Although the protection is defined by referring to the work-product protection of (b)(3), two reasons
887 counsel locating the protection in (b)(4). (b)(4) is the general provision for expert discovery; it is
888 where people will look first. And it is easier to work free from the "documents and tangible things"
889 limit in (b)(3) by relying on (b)(4).

890 The work-product protection for draft reports relates also to the protection for attorney-expert
891 communications — the drafts may be used as part of their communications. The protection extends
892 to drafts "in any form," not only those in the form of a document or tangible thing. The protection
893 includes drafts of the (a)(2)(A) disclosure as well as drafts of the (a)(2)(B) report. Although the door
894 is closed on general discovery, discovery can be had on making the (b)(3)(A) showings of
895 substantial need for the materials and inability to obtain the substantial equivalent without undue
896 hardship. If discovery is allowed on this basis, the court still must protect mental impressions and
897 the like as provided by (b)(3)(B).

898 The first question admitted to misreading what the draft intends. "[D]rafts in any form of
899 any disclosure or report" was not immediately connected to the intention to expand protection
900 beyond reports in the form of documents or tangible things. It was agreed that an attempt will be
901 made to redraft in an effort to avoid possible misinterpretation by others.

902 The important question remains whether to extend this protection to draft reports. It was
903 agreed that protection is wise, but asked how will parties and courts draw the line between draft
904 reports and work papers? The Subcommittee decided that work papers should be freely discoverable
905 as essential elements in understanding the evolution — and hence the quality — of the expert's
906 opinions. But the rule will invite experts to mark every paper as a draft report. Some things will
907 readily fall outside the draft report category, no matter what label is attached. Calculations
908 providing the foundation for the opinion are an example. So are the facts or data considered. But
909 "he called me and told me to change it" will fall into the attorney-expert communication, not the
910 draft report protection.

911 Attorney-expert communications: Proposed (b)(4)(A)(iii) extends work-product protection to all
912 communications between an expert and retaining counsel, but then lists "bullet" exceptions that

913 make three categories of communications freely discoverable. Different words are used to introduce
914 the different categories to indicate different degrees of expansiveness.

915 The central question whether any protection should be provided for attorney-expert
916 communications was quickly answered. All agreed that yes, protection should be provided.

917 *Retaining Counsel.* The first question asked why the limit on discovery addresses only
918 communications between the expert and “retaining” counsel. How about house counsel who is also
919 present? Or lawyers from other firms — perhaps those representing coparties? The draft Committee
920 note urges a “realistic approach * * * in defining the contours of ‘retaining’ counsel.” A sensible
921 understanding of this term will include the range of counsel whose communications with the expert
922 generate the kinds of discovery problems the Committee has been hearing about. “Counsel” alone
923 seems too broad — we want the protection to be somehow tethered to this attorney and this case.
924 Flexibility to accommodate a variety of situations is the goal. And it was difficult to find expanded
925 rule text language that would be reasonably clear. Further suggestions were “the party’s counsel,”
926 or “coparty counsel.” But it was observed that the same attorney may retain the same expert for
927 many cases: we need to protect against discovery of communications in earlier cases that involved
928 a different party.

929 The possibility of framing a definition of “counsel” was briefly considered and rejected
930 because of the pitfalls that seem to beset efforts to define rule terms. There are only a few
931 definitions in the rules, and some of them have caused difficulty.

932 Another alternative was suggested: “between a party’s expert and counsel.” But that might
933 encounter difficulty in the phenomenon that usually it is the attorney who retains the expert, albeit
934 acting as the party’s agent.

935 It was agreed that “the last thing we want is litigation over who is ‘retaining’ counsel.” The
936 Subcommittee will try one more time to see whether a suitable expansion or substitution can be
937 found.

938 *Communications about compensation.* The first bullet provides for discovery of communications
939 “regarding” “any” compensation for the expert’s study or testimony. “Regarding” is used as broader
940 than “identifying” in the next two bullets. Discovery into the scope of potential sources of bias
941 should be broad. And discovery into other sources of information about compensation is not
942 touched.

943 It was noted that “any” compensation is a potential trap — it seems more expansive than
944 “the” compensation required to be disclosed in the (a)(2)(B) report. But it was intended to be
945 broader, to reach such communications as “if you do well in this case, I have 15 more cases in which
946 you can be retained.” It was agreed that “any” is appropriate if the rule is intended to be this broad.

947 A Committee member observed that it is proper, at deposition or trial, to ask how much time
948 did the expert spend? What is your hourly rate? Have you testified in other cases for this party?
949 How much money have you made in all? And this remains freely discoverable under the proposed
950 rule — indeed these questions do not even inquire into communications about these matters, only
951 the facts.

952 A different question asked about the reference to compensation “for the expert’s study or
953 testimony.” Suppose the expert is also providing consulting services: is that, if not testimony,
954 “study”? If the expert says “I got paid for other things,” is it proper to ask what the expert did?
955 Does the exception open the door to that? “Study or testimony” was taken from (b)(2)(B), which
956 requires that the report include “a statement of the compensation to be paid for the study and
957 testimony in the case.” The question was addressed by supposing an expert who is paid \$50,000 for

958 trial opinions and \$950,000 for “consulting.” The answer given by one committee member is that
959 the \$950,000 is discoverable. You can ask how much money have you earned from this client.
960 Another member agreed that you lose some protection if you use one expert for both trial testimony
961 and consulting. A third member described the combined-functions expert as moving in a gray area
962 that does lose some protection. A different response was that payment for “study” seems to address
963 directly compensation for consulting in the case. And “compensation” covers the promise of
964 retaining the expert in future cases.

965 Omission of “in the case,” as compared to (b)(2)(B)(vi), was explained by concern to allow
966 discovery of communications in past cases (here again the illustration about promises for future
967 work) and those looking forward to future cases. These examples are covered as communications
968 about “any” compensation.

969 It was noted that it is common to retain an expert for consultation and then, when the expert’s
970 views turn out to be favorable, to make the expert a testifying witness. Discovery should extend to
971 the entire compensation paid for all work.

972 This discussion led to the question why there should be any limit to compensation for “study
973 or testimony” — why not allow discovery of all communications about compensation? It was
974 responded that it is proper to ask about the compensation, as suggested in the earlier discussion. If
975 the expert has earned \$5,000,000 from testifying in cases brought by this lawyer, discovery is useful.
976 But why go beyond to inquire into communications about compensation in those other cases?

977 A different aspect of “study or testimony” was noted. Large firms engage in the business
978 of providing expert testimony. One firm member may be the actual witness, with compensation
979 figured separately for the witness, while many firm employees do the work that will support the
980 testimony, with compensation figured separately for that work. Discovery properly extends to
981 communications about compensation for all of that “study.”

982 It was asked whether “compensation” is broad enough to clearly cover the agreement to pay
983 \$50,000 for this case coupled with a communication suggesting the possibility of earning \$950,000
984 for testifying in 19 future cases. Should it be “compensation anticipated by the expert”? This
985 suggestion was resisted as the likely source of much litigation. And the Committee Note is clear —
986 discovery extends to communications “about additional benefits to the expert, such as further work
987 in the event of a successful result in the present case * * *.”

988 It was observed that a post-dated check should count as present compensation.

989 A different suggestion was “any compensation or benefits” for study or testimony.

990 Again it was noted that the protection and the exception address only communications
991 between attorney and expert. The exception applies only to those aspects of a communication that
992 the exception describes. Communications about other things the witness did are not
993 communications about compensation. And questions about the compensation, not about
994 communications, are proper.

995 The Subcommittee agreed to consider further the language of the compensation exception.

996 *Communications about facts or data.* The second bullet exception provides free discovery of
997 communications between retaining counsel and an expert “identifying” “any” facts or data that
998 counsel provided to the expert and that the expert “considered” “in forming” the opinions to be
999 expressed.

1000 “Identifying” facts or data is meant to be broad, but not as broad as “regarding” in the
1001 exception for communications regarding compensation. Communications transmitting facts or data

1002 should be discoverable; discovery of all subsequent communications about (“regarding”) the facts
1003 or data, or even other parts of the communication that transmits the facts or data, could easily extend
1004 too far, to include to all communications about the opinions to be expressed.

1005 In response to a question it was stated that facts or data “considered” here, as in
1006 26(a)(2)(B)(ii), includes facts or data that the expert did not rely upon to support the opinions to be
1007 expressed. This word is used to prevent defeat of discovery by saying “I did not rely on it.” The
1008 next question asked how can it be that an expert does not “consider” facts or data provided by
1009 counsel? Minor examples were noted — the facts or data may be provided in an e-mail attachment
1010 or letter the expert never opened, or opened but discarded without reading. More importantly, the
1011 expert may be functioning in two roles: some facts or data are supplied for the consulting function,
1012 and are not considered in performing the trial-witness function. In addition, a lawyer may furnish
1013 a great deal of irrelevant information to the expert, not knowing what is relevant: a deep stack of
1014 medical records may be provided to a neurologist, who as expert makes the first determination
1015 which records should be considered in forming an opinion.

1016 “Considered” was further questioned by asking whether discovery should extend to
1017 communications of facts or data “in connection with” the opinions to be expressed. The response
1018 returned to the dual-capacity expert. One expert may both be providing trial testimony and helping
1019 to evaluate settlement, prepare for cross-examination, and the like. We do not want discovery of
1020 communications directed at these nontestifying functions. “In connection with” could be too broad.
1021 “Considered” is the word chosen in (a)(2)(B)(ii), and seems better here.

1022 Continuing enthusiasm was expressed for “in connection with forming the opinions,” and
1023 also continuing doubts. There is a clear contrast between “considered” and “relied upon” in the third
1024 exception addressing assumptions or conclusions the expert relied upon.

1025 This discussion concluded by acquiescence in the conclusion that the choice between
1026 “considered” and “in connection with” is a matter of “wordsmithing” that can be left to the
1027 Subcommittee.

1028 It also was noted that it is proper to ask why an expert did not consider something, whether
1029 fact, datum, or something else. All the proposed rule does is protect against discovery of attorney-
1030 expert communications regarding facts or data not considered by the expert in forming the opinions
1031 to be expressed.

1032 The consequences of this exception were explored by asking what happens if the expert is
1033 asked at deposition about communications of facts or data. The expert gives a detailed answer, but
1034 omits a fact or two. The omitted facts are not critical, and may not have affected the opinion. Will
1035 this become a basis for excluding testimony at trial? The response was that so long as the facts are
1036 in the (a)(2)(B) report there is no basis for exclusion in Rule 37(c)(1).

1037 *Assumptions or conclusions.* The third bullet exception allows free discovery of communications
1038 between an expert and retaining counsel “identifying” “any” “assumptions or conclusions” that
1039 counsel “suggested” to the expert and that the expert “relied upon” in forming the opinions to be
1040 expressed. Again, “identifying” was chosen over “regarding” for the same reasons as supported the
1041 exception for communications “identifying” facts or data. Both “assumptions” and “conclusions”
1042 are covered. As compared to facts-or-data communications, this exception addresses only
1043 assumptions or conclusions the expert relied upon; discovery as to those discussed but not relied
1044 upon would be too broad. And as with the other two exceptions, this one applies only to escaping
1045 the general work-product protection for attorney-expert communications. It does not speak to other
1046 discovery of assumptions or conclusions relied upon or not relied upon.

1047 An observer commented that it is important to address both “assumptions” and
1048 “conclusions.” A witness may be told to assume a fact — an assumption — but also may be told
1049 to accept a conclusion. The expert might be directed to give an opinion of value that rises to at least
1050 \$X, or to frame an opinion by assuming the accuracy of a conclusion provided by a different expert.

1051 The first question was whether the exception should be broader than assumptions or
1052 conclusions “suggested.” Several members suggested that “provided” to the expert would be better.
1053 This suggestion was accepted by the Subcommittee.

1054 The next question built on an observation in the draft Committee Note that this exception
1055 does not extend to “more general attorney-expert discussions about hypotheticals, or exploring
1056 possibilities based on hypothetical facts.” Why not? The generalized response was that extending
1057 discovery this far would inhibit lawyers from having freewheeling discussions that may be valuable
1058 in improving the ultimate opinions. An example might be: “Would it matter if the light was green?
1059 Why? Why not?” Yes, discovery of these discussions might be valuable. But these proposals are
1060 designed to address the practical consequences of expansive discovery: the discussions would not
1061 occur, and there would be nothing to discover.

1062 Further discussion in the same vein agreed that it would be useful to discover the
1063 hypotheticals discussed by counsel and the expert. But the question is what cost is paid for the
1064 discovery. “You do not often get it under the present system. They manage not to create a
1065 discoverable trail.” So the limit to assumptions or conclusions that the expert relied upon is
1066 justified.

1067 For similar reasons, the exceptions should not be read to mean that “assumptions” are
1068 discoverable as facts or data, governed by the broader scope for things “considered” by the expert.
1069 If the expert is told it is a fact, then the communication is discoverable under the broader
1070 “considered” standard. But if the expert is told only to assume it to be a fact, the communication is
1071 discoverable only if the expert relied on it. The purpose is to protect communications about
1072 hypotheticals. As an example: Assume another expert will testify that the braking system was
1073 improperly designed. Your task is to testify whether the accident would have happened anyway.

1074 Although this narrowing purpose is accepted, a line-drawing problem will remain. One way
1075 would be to delete the qualification added by “considered” to the facts-or-data communications
1076 exception, so that free discovery extends to communications “identifying any facts or data that
1077 counsel provided to the expert,” period, end of sentence. The same argument would be made for
1078 dropping “in connection with” if that is substituted for “considered by.” In response it was
1079 suggested that “assumption” is easier to identify than “facts or data.”

1080 The need to allow attorney-expert discussion of hypotheticals free from the fear of discovery
1081 returned to the discussion. Limiting discovery to “assumptions or conclusions that counsel
1082 suggested to the expert and that the expert relied upon in forming the opinions to be expressed” may
1083 not provide protection enough. It might open the door to discovery of all communications about the
1084 conclusions the expert will express — counsel might seem to “provide” the conclusion, whatever
1085 its origin, by discussing it without rejecting it. The need to allow discovery of such matters as the
1086 conclusions of another expert relied upon by this witness expert can be satisfied by allowing
1087 discovery only of “assumptions that counsel provided to the expert and that the expert relied upon.”
1088 The expert has been told to assume the conclusion, making it an assumption for this purpose.
1089 “[C]onclusions” will be deleted from this exception.

1090 This discussion concluded with a general observation that addressed all of the (b)(4)(A)
1091 proposals. Many lawyers have told the Subcommittee that they regularly stipulate out of the current
1092 discovery rules. Three attorney members of the Standing Committee volunteered examples of their

1093 standard stipulations at the meeting last January. Routine bargaining out of the system provides
1094 strong reason to doubt its worth.

1095 Agreeing that the source of the assumptions relied upon by the expert should be discoverable,
1096 it was suggested that it would be better to delete “suggested” and extend the exception to discovery
1097 “identifying any assumptions or conclusions that counsel ~~suggested~~ provided to the expert * * *.”
1098 The Subcommittee agreed to this change.

1099 *Scope of the assignment.* The Subcommittee studied a possible fourth bullet exception that would
1100 provide free discovery of communications “defining the scope of the assignment counsel gave to
1101 the expert regarding the opinions to be expressed.” Drafted in this form, the Subcommittee
1102 concluded that the exception would authorize open discovery of anything counsel said to the expert.
1103 Communications about the conclusions reached by the expert, alternatives considered, and so on
1104 might be discovered. And it was difficult to define an alternative exception that would allow
1105 important discovery while avoiding undesirable discovery.

1106 The first question posed a hypothetical: Suppose the expert testifies to the market for
1107 automobile sales in the United States. Counsel for the other party then asks whether the expert
1108 considered the world market? And if not, why not? If the expert wants to say “I did not, although
1109 usually I do, because counsel told me not to,” what do we do? Part of the response is that the
1110 question can be asked as framed, and can also be asked by inquiring into any assumptions counsel
1111 provided to the expert. These questions can fully explore the failure to examine the world market.
1112 There is little practical reason to be concerned about the prospect of an artificial response: “I always
1113 consider the world market, but I did not for this case.” “Why not?” “I cannot tell you why not.”
1114 That response would devastate the expert’s credibility. The expert could answer instead “that was
1115 not part of my assignment.” Failure to provide an exception to the protection of attorney-expert
1116 communications on this count only affects the way in which the questions are asked; it does not
1117 constrain the ways in which the expert chooses to respond. The lawyer will have to decide whether
1118 to limit the assignment in consultation with the expert about the vulnerability of an opinion based
1119 on a limited assignment.

1120 *Proposals accepted.* Discussion of the proposed rule text closed with the conclusion that the
1121 Committee had accepted the substance of all the proposals and “ninety-nine percent of the wording.”
1122 “This is terrific work.” Only the draft Committee Note remains for discussion.

1123 *Committee Note.* Like the Committee Note for Rule 56, the Note for the expert-witness discovery
1124 proposals should be examined to determine whether some parts of the valuable information it
1125 provides would be better used as part of the memorandum reporting the recommendation to the
1126 Standing Committee and transmitting the proposals for publication.

1127 This question was put in a different way. The draft Note is excellent, but “too excellent.”
1128 It would be helpful to transfer some of the explanation and justification to the report to the Standing
1129 Committee. On the other hand, it may be that some of the passages that look like “sales talk” also
1130 will provide a useful guide to ongoing practice, as a constant reminder of the realities of litigating
1131 behavior that prompted the amendments.

1132 It was concluded that the Rule 56 and Rule 26 Committee Notes will be carefully examined
1133 so that the Standing Committee can be reassured that the Committee worked hard to strip out
1134 everything that can be deleted.

1135 The draft Note cites a law review article that describes the cases that expand the expert-
1136 witness report disclosure in defiance of the rule text, and asks whether it would be better to cite
1137 some of the cases. Discussion of this question suggested that it is generally risky to cite cases as
1138 authority. Cases may be overruled, or superseded by growth in a different direction. It is less risky

1139 to cite cases not as authority but as illustrations of a problem, including cases that create a problem
1140 that should be corrected. There is no risk that such cases will lose their value as note material if they
1141 are overruled — most especially if they are overruled by the rule amendment addressed in the Note.

1142 An observer asked an unrelated question: did the Subcommittee consider dropping the
1143 requirement that a Rule 26(a)(2)(B) disclosure report must be signed by the expert? The party
1144 disclosure proposed for (a)(2)(A) is not signed by the expert. The Subcommittee recognizes that
1145 expert testimony commonly involves a collaboration between counsel and the witness. The
1146 Subcommittee responded that it had not considered omitting the signature. But the suggestion did
1147 not seem wise. The proposed amendments, as the prior rules, recognize the importance of cross-
1148 examining the expert on the positions taken by the expert. It is important to maintain the rule that
1149 this is the expert's report of the expert's testimony. There is value in requiring that the expert at least
1150 read and reaffirm the report by signing it. Indeed some Subcommittee members initially resisted
1151 the idea of protecting attorney-expert communications, but became reconciled to the protection
1152 because it is, in the end, the expert's opinion and testimony. Signing the report is important to keep
1153 the expert "on the hook."

1154 The final paragraph of the Note discusses the importance of extending to trial the work-
1155 product protection the proposals establish for discovery. This paragraph was included to reassure
1156 lawyers that they need not worry that the protection provided in discovery will be undone at trial.
1157 There is a risk that absent this reassurance lawyers will continue in all the artificial behaviors they
1158 have adopted to thwart discovery, at great cost and with some sacrifice of stronger expert testimony.
1159 But the Note offers advice on something that is outside the scope of the rules proposals. The
1160 proposals are deliberately confined to discovery. A rule governing trial may seem better suited to
1161 the Evidence Rules. There even is some risk that a "protection" at trial might be viewed as a matter
1162 of "privilege" for the statute, 28 U.S.C. § 2074(b), that requires that Congress approve any rule
1163 creating a privilege. In addition, this paragraph cites as "cf." a Supreme Court decision stating that
1164 work-product protection applies at trial of a criminal case. It seems peculiar to cite a decision that
1165 is no more than a "cf.," even a "see" citation may be a warning flag. And there is a risk in citing any
1166 case to establish a substantive proposition, given the possibility that the case might be overruled.

1167 One approach would be to leave this paragraph in the Note for the time being, with a request
1168 that the Standing Committee consider the wisdom of sending it forward for publication.

1169 *Approval.* Discussion of the expert-witness discovery proposals concluded with a motion that the
1170 Subcommittee be permitted to make changes in the rule text in accordance with the Committee
1171 discussion and votes; that the revised proposals be circulated to the Committee for information, but
1172 not for a vote unless a Committee member requests a vote; and that the revised proposals be
1173 submitted to the Standing Committee with a recommendation for publication. The motion was
1174 adopted, 12 yes and 0 no.

1175 *Time-Computation Project*

1176 Common concerns: Judge Kravitz introduced the Time-Computation Project by noting that
1177 concerns remain about integrating the effective date of the rules amendments with desirable statutory
1178 changes and with the need to allow local rules committees time to integrate local rules with the new
1179 time provisions. On the present track, the time-computation amendments will take effect December
1180 1, 2009. The question is whether integration can be achieved by providing clear notice of each step
1181 from Standing Committee transmission to the Judicial Conference on through Supreme Court
1182 transmission to Congress. As to statutes, it has been hoped from the beginning that the several
1183 advisory committees will be able to create brief lists of noncontroversial statutory changes that can
1184 be recommended to Congress this year. Some communications from the Department of Justice

1185 seemed to evince skepticism about the feasibility of enacting legislation on this schedule, but current
1186 developments in the committees suggest reasons for greater optimism.

1187 Judge Rosenthal reported that she and John Rabiej had visited with staff of the House and
1188 Senate Judiciary Committees to discuss a variety of “advance-information” issues. The staffs
1189 thought there would be no difficulty in amending some statutes; indeed they were both sympathetic
1190 to anything that might alleviate the time-computation agonies suffered by practicing lawyers and
1191 optimistic about working on a schedule aiming for an effective date on December 1, 2009.

1192 Judge Rosenthal further observed that the shorter the list of statutes to be amended, the
1193 better. The Bankruptcy Rules Committee has a list of 10 statutes, but all involve simply changing
1194 5-day periods to 7. With advice from the Department of Justice, the Criminal Rules Committee has
1195 a list of 20 statutes, but 5 of them are on other committees’ lists. It remains to be seen whether any
1196 of them are controversial.

1197 As to local rules, the Administrative Office is working on a plan and timetable to see how
1198 many discrepancies there are between local rules and the new national rules. It will be desirable,
1199 if it is possible, to develop a transition plan to assist local rules committees and the bench and bar.

1200 These preliminary observations concluded by noting that there were few comments on the
1201 published proposals. No one asked to testify. Subject to integration with statutory amendments and
1202 local rules, the project remains on track for adoption in the regular course. It is important that all
1203 advisory committees continue to work in harness toward this goal.

1204 Discussion turned to identifying the statutes that might be nominated for amendment. Only
1205 one seems to require change. Proposed Rule 72(a) and (b) change from 10 days to 14 days the time
1206 to object to magistrate judge orders and recommendations. Because of the change to computing time
1207 by counting every day, the increase to 14 days is not an increase at all. Ten days always meant at
1208 least 14 days under the former method of computing that excluded intermediate Saturdays, Sundays,
1209 and legal holidays. The former computation method applied also to the 10-day period set by 28
1210 U.S.C. § 636(b) for filing objections; the statute now means, and has meant all along, that “10” days
1211 means at least 14 days. It is imperative that statute and rule continue to operate in harmony. This
1212 statute will be recommended for amendment.

1213 Professor Struve compiled a lengthy list of statutes containing time periods shorter than 11
1214 days. Many of them apply to proceedings in civil actions. At least two of them seem strong
1215 candidates for revision, but the reasons for revision do not arise from the Time-Computation Project.
1216 28 U.S.C. § 144 sets the time for filing an affidavit that a judge is biased or prejudiced at “not less
1217 than ten days before the beginning of the term at which the proceeding is to be heard.” Section 138
1218 directs that “[t]he district court shall not hold formal terms.” There is an obvious problem in
1219 combining these two statutes, but the subject is sensitive and it may be better for the judiciary to
1220 stand back. The removal provisions of the Class Action Fairness Act include a notorious scrivener’s
1221 error in 28 U.S.C. § 1453(c)(1), setting the time to apply for permission to appeal a remand order
1222 at “not less than 7 days.” A bill already has been introduced to substitute the manifestly intended
1223 “not more than 7 days.”

1224 Apart from these statutes, it was decided that no others need be recommended for
1225 amendment. Some statutes involve matters of clear political concern, such as those limiting the
1226 duration of temporary restraining orders in labor disputes. More generally, Congressional adoption
1227 of short deadlines reflects concern that speedy action is required; rules committees are wise to defer
1228 to that judgment. Deference might counsel wholesale changes if it were thought that Congress
1229 intentionally relied on the Rule 6(a) computation methods in setting deadlines, but that seems
1230 unlikely — indeed it is impossible for statutes such as the Norris-LaGuardia Act that were enacted
1231 before the Civil Rules came into being. A determination whether to recommend changes, moreover,

1232 would require clear understanding of the many different substantive areas involved in these statutes
1233 as well as an understanding of current practice and the realistic needs of practice. There is some
1234 reason to doubt whether the direction to compute statutory time periods according to Rule 6 is
1235 always remembered and relied upon in practice. One possible reflection is the Federal Deposit
1236 Insurance Corporation's comment on the published rules urging that there be no recommendation
1237 to change the statutory times relevant to its actions because it already employs the calendar-day
1238 approach.

1239 The last problem common to all the sets of rules to be noted was a last-minute question about
1240 whether to include state holidays in computing backward-counting periods. The potential problem
1241 is easily illustrated. Proposed Rule 6(c) sets the time to file a motion at 14 days before the hearing.
1242 A motion set for hearing on a Friday ordinarily should be filed on Friday two weeks earlier. But
1243 suppose the Friday for filing is an obscure state holiday little known to lawyers in other states and
1244 perhaps eccentrically observed even within the holiday state. Because this is a backward-counting
1245 period, filing is due on Thursday, one day early. This could be a trap for the unwary. The Time-
1246 Computation Subcommittee struggled over a revised draft that would exclude state holidays only
1247 in computing forward-counted periods. In the end it decided that the resulting level of rule
1248 complexity would be more costly than the risk of inadvertently late filings. Even the most careful
1249 lawyers — and perhaps especially the most careful lawyers — are uncomfortable with complexity
1250 in computing time periods. There is little risk that a federal court would be persuaded to treat as
1251 untimely a filing caught up in an obscure state holiday; the Rule 6(b) authority to extend will be
1252 liberally exercised in this setting. It was noted that the Bankruptcy Rules Committee took no action
1253 to disagree, even though the Bankruptcy Rules do have a seemingly mandatory backward-counted
1254 period.

1255 The Committee voted to approve the proposed Time-Computation “template” rule,
1256 conveniently published as Civil Rule 6(a), with the proviso that the chair can accede to any further
1257 changes recommended by the Time-Computation Subcommittee.

1258 Civil-Rules specific concerns: Few concerns specific to the Civil Rules emerged during the comment
1259 period.

1260 One comment asked whether the “count every hour” approach will countermand the
1261 Committee Note advice that breaks and adjournments should be omitted in applying Rule 30(d)(1),
1262 which presumptively limits a deposition to “1 day of 7 hours.” The Committee concluded that there
1263 is no appreciable danger that Rule 30(d)(1) will be regarded as a “time period” requiring
1264 “computing” by this method.

1265 Several comments raised a question about the change from 10 days to 30 days for filing post-
1266 judgment motions under Rules 50, 52, and 59. The change was proposed because the former 10-day
1267 period, always at least 14 days in practice, was simply too short for filing these motions in many
1268 complex cases. Courts have adopted responses to cope with the provision in Rule 6(b)(2) that
1269 prohibits extending these periods. One strategy, the simplest and safest, is to defer entry of
1270 judgment; the drawbacks are that the court has to be alert to the problem and may feel guilty about
1271 this method of subverting the direction that it cannot extend the period. A different strategy is to
1272 require timely filing of a skeleton motion, setting an extended time for briefing that will fill out the
1273 motion. The reasons for extending the time are strong.

1274 The difficulty with the proposed 30-day period is that it coincides with the time to file the
1275 notice of appeal in most civil actions. Appeals may be filed on the same 30th day as one or more
1276 post-judgment motions, requiring that the notice of appeal be suspended, only to revive upon the last
1277 disposition of any timely filed motion. Revival itself may be a trap because of the need to amend
1278 the notice or to file a separate notice if any party wishes to challenge the action taken on the post-

1279 judgment motion. The Appellate Rules Committee's Deadlines Subcommittee believes that it would
1280 be better to adopt a period somewhat shorter than 30 days.

1281 Discussion began by renewing enthusiastic support for extending the period beyond 10 or
1282 14 days. A deliberate choice was made in the Time-Computation Project to carry forward the Rule
1283 6(b)(2) provision prohibiting extension of these time periods, fearing the dangers that inhere in
1284 attempting to add flexibility to periods related to the "mandatory and jurisdictional" time limits for
1285 filing a notice of appeal. Perhaps that question should be reconsidered. Revision of Rule 6(b)(2),
1286 however, requires more time than can be devoted in the context of the Time-Computation Project.
1287 In choosing a period shorter than 30 days, 21 days is only 7 days longer than was effectively allowed
1288 by the former 10-day period. That is not much of an improvement. 28 days would be better;
1289 although there are no 28-day periods in the time-amended rules, preserving 7-day increments is
1290 attractive. But if 28 days seems too perilously close to the 30-day appeal period, it may be better
1291 to fall back on 21 days. Adopting a mid-range compromise such as 25 days would set a period that
1292 appears nowhere else and does not have the advantage of fitting with the 7-day increment approach
1293 taken in setting common periods at 7, 14, and 21 days.

1294 It was noted that the Department of Justice would always prefer to have more than 21 days,
1295 but that it could comply with a 21-day period, particularly if there is some opportunity to expand on
1296 the motion in the brief. The appeal period is 60 days in actions to which the United States is a party,
1297 but that does not seem to warrant setting different motion periods in Rules 50, 52, and 59 for those
1298 cases.

1299 A lawyer Committee member observed that the bar would be grateful even for 21 days; that
1300 may be the best choice. A judge suggested that 28 days is better; it is not a big problem if a
1301 premature notice of appeal is filed. "Premature" notices, indeed, are a common experience. With
1302 CM/ECF, all parties are likely to have virtually immediate notice of all filings.

1303 The need to integrate with the judgment of the Appellate Rules Committee led to resolution
1304 on these terms: The Rules 50, 52, and 59 periods will be set at 21 days. But the Appellate Rules
1305 Committee will be advised that the Civil Rules Committee would prefer 28 days if the Appellate
1306 Rules Committee believes that will not cause undue disruption. (The Appellate Rules Committee
1307 met two days later and agreed to the 28-day period.)

1308 The Committee voted to recommend adoption of all of the other rules published for comment
1309 as part of the Time-Computation project, changing only from 30-day periods to 28-day periods in
1310 Rules 50, 52, and 59.

1311 *Rules Published for Comment in August 2007*

1312 Apart from the Time-Computation Project, other rule proposals published for comment in
1313 August 2007 included amendments of Rules 8(c), 13(f), 15(a), 48(c), and 81(d). A new Rule 62.1
1314 also was published for comment.

1315 Rule 8(c): The proposed amendment of Rule 8(c) would strike "discharge in bankruptcy" from the
1316 list of specifically identified affirmative defenses. Bankruptcy judges have been urging this
1317 amendment for several years on the ground that statutory changes make void any judgment on a
1318 discharged debt whether or not the discharged debtor pleads the discharge as a defense. Continued
1319 listing as an affirmative defense is inconsistent with the statutory scheme, and might mislead
1320 someone to believe that the statutory protection is lost if the debtor fails to plead discharge as an
1321 affirmative defense. Comments by the Department of Justice have argued that the proposed change
1322 should not be adopted. The multiple arguments advanced by the Department have so far failed to
1323 persuade either the bankruptcy judges who have considered the arguments or the Reporter for the
1324 Bankruptcy Rules Committee. Nonetheless the arguments must be taken seriously, and should be

1325 considered with the continuing assistance of bankruptcy judges and the Bankruptcy Rules
1326 Committee. Discharge in bankruptcy has persisted in the Rule 8(c) list for many years after the
1327 relevant statutory changes without causing any apparent real-world problems. Little will be lost if
1328 action on this proposal is deferred one more year in the rulemaking cycle. At the same time there
1329 is a prospect that further discussions with Department lawyers may persuade the Department to
1330 support the proposal as published. The Committee voted to recommend adoption of the proposal,
1331 subject to deferring the recommendation if the Department continues its opposition in the Standing
1332 Committee.

1333 The published Committee Note will be changed at least as follows: “ * * * These
1334 consequences of a discharge cannot be waived; the Bankruptcy Code provisions governing the effect
1335 of a discharge are self-executing. If a claimant persists in an action on a discharged claim, the effect
1336 of the discharge ordinarily is determined by the bankruptcy court that entered the discharge, not the
1337 court in the action on the claim.” Additional changes may emerge from further discussions with the
1338 Department. One possible change would add this sentence: “This amendment does not address
1339 pleading by a claimant who believes that a claim is not barred by an adversary’s discharge.”

1340 Rule 13(f): Rule 13(f) allows amendment of a pleading to add an omitted counterclaim. The
1341 published proposal deletes this subdivision. The standards for allowing amendment are expressed
1342 in words different from the general amendment standards in Rule 15, but are interpreted to mean the
1343 same thing. Apart from this source of potential confusion, courts have remained uncertain whether
1344 the relation-back provisions of Rule 15(c) apply to an amendment that adds a counterclaim.
1345 Deletion of Rule 13(f) will mean that all amendments are governed by Rule 15, including the
1346 relation-back provision. The only comment on the published proposal supported it. The Committee
1347 agreed to carry forward with the proposal.

1348 Rule 15(a): Under present practice service of a responsive pleading terminates the right to amend
1349 a pleading once as a matter of course. Service of a responsive motion does not terminate this right
1350 to amend, which — so long as no responsive pleading is served — persists at least until the court
1351 rules on the motion, and perhaps beyond. The published proposal treats a responsive pleading and
1352 a motion under Rule 12(b) (e), or (f) in the same way: the right to amend once as a matter of course
1353 persists, but only for 21 days after service. Some of the few public comments urged that either a
1354 responsive pleading or a responsive motion should cut off this right to amend immediately on filing.
1355 The grounds for the comments were the same as those considered by the Advisory Committee and
1356 by the Standing Committee in several different meetings. The Committee agreed to carry forward
1357 with the proposal.

1358 Rule 48(c): This proposal adds a new subdivision (c) on jury polling to Rule 48. The proposal is
1359 modeled on Criminal Rule 31(d), with variations to accommodate the differences between some
1360 aspects of criminal and civil procedure. There were no public comments. The Committee agreed
1361 to carry forward with this proposal.

1362 Rule 81(d)(2): Rule 81(d)(2) has defined “state” as used in the Civil Rules to include, “where
1363 appropriate,” the District of Columbia. The published proposal added to the District of Columbia
1364 “any United States commonwealth, territory[, or possession].” Among the comments was one by the
1365 Department of Justice renewing earlier-expressed concerns about including “possession” in this
1366 definition. The Department has not been able to identify any entity that might qualify as a United
1367 States “possession,” with the possible exception of American Samoa. It fears, however, that
1368 reference to a “possession” might be incorrectly interpreted to refer to military bases overseas.
1369 Control over these bases is allocated by agreements with foreign countries. The Committee agreed
1370 to acquiesce in the Department’s recommendation that “or possession” be deleted. It further agreed
1371 to carry forward with the proposal as modified, and with conforming changes to the Committee
1372 Note.

1373 Approval of Rule 81(d)(2) means that the conditional proposal to add a similar definition to
1374 Civil Rule 6(a)(6)(B), published as part of the Time-Computation project, will be withdrawn.

1375 Rule 62.1: Proposed new Rule 62.1 responds to a suggestion by the Solicitor General several years
1376 ago. Most circuits have established a procedure for district court response to a motion to vacate a
1377 judgment under Rule 60(b) when a pending appeal defeats district-court jurisdiction to grant the
1378 motion. The court can defer action, deny the motion, or indicate that it would (or, in some circuits,
1379 might) grant the motion if the case is remanded. Many lawyers, however, are not familiar with this
1380 “indicative ruling” practice, and some newer district judges also are not aware of it. Proposed Rule
1381 62.1 was refined over the course of several meetings. It was decided that it should be generalized
1382 to apply beyond the Rule 60(b) setting, so as to reach any situation in which the district court lacks
1383 authority to grant requested relief “because of an appeal that has been docketed and is pending.”
1384 As the work progressed the Appellate Rules Committee concluded that it would be better to adopt
1385 an integrated Appellate Rule, published simultaneously as proposed new Appellate Rule 12.1, so
1386 that provisions addressed to action by the court of appeals would be found in the Appellate Rules
1387 rather than the Civil Rules.

1388 There were few comments on this proposal. Further consideration of proposed Appellate
1389 Rule 12.1 suggests two minor changes in the Committee Note. Rule 12.1 and the accompanying
1390 Committee Note focus attention on the distinction between a limited remand that retains control of
1391 the appeal in the court of appeals and a remand of the entire action that dismisses the appeal. The
1392 Rule 62.1 Committee Note refers in two places to remand of the “action” or “case.” These casual
1393 references will be changed to refer to remand for the purpose of acting on the motion in the district
1394 court.

1395 The path of integration with Appellate Rule 12.1 has led to changes from earlier references
1396 to the appellate court to specific references to the “circuit clerk” and the “court of appeals.” That
1397 means that the Rule does not address the rare but important circumstances of a direct appeal from
1398 a district court to the Supreme Court. Discussion of this result led to the conclusion that it is better
1399 not even to add a sentence to the Committee Note commenting that the courts will continue to
1400 evolve practice pending direct appeal to the Supreme Court as experience shows wise.

1401 The Committee agreed to carry forward with proposed new Rule 62.1 with the changes in
1402 the Committee Note.

1403 (After the meeting concluded it was noticed that the version of Rule 62.1 in the agenda
1404 materials did not conform in all details to the published version. The variations in the Committee
1405 Note are readily conformed to the Note as published. One variation in the published text of Rule
1406 62.1(c) requires a change to conform to the version submitted to the Standing Committee at its June
1407 2007 meeting: “(c) **Remand.** The district court may decide the motion if the court of appeals
1408 remands for ~~further proceedings~~ that purpose.” Substitution of “that purpose” conforms subdivision
1409 (c) to subdivision (a)(3), which refers to the district court’s indication of action “if the court of
1410 appeals remands for that purpose.” It also is better because it clearly refers to a remand in response
1411 to the motion and the district court’s indicative statement. The more open-ended “remands for
1412 further proceedings” could be misread to include circumstances in which the court of appeals retains
1413 the appeal, decides on grounds that moot the motion but that require further proceedings for different
1414 reasons, and remands. This change was circulated to the Advisory Committee and accepted as the
1415 Committee’s recommendation.)

1416 *Federal Judicial Center Study: Class-Action Fairness Act*

1417 Thomas Willging presented the current phase of the Federal Judicial Center Study of the
1418 impact of the Class Action Fairness Act on the number of class actions in federal diversity
1419 jurisdiction. He began by noting that long ago when the Judicial Conference supported legislation

1420 to use diversity jurisdiction as a means of moving class actions from state courts to federal courts,
1421 the Center predicted that the change would bring on the order of 300 additional class actions a year
1422 to federal courts. That prediction has proved remarkably accurate.

1423 Figure 1 of the study presents the big picture. During the study period from July 2001 to the
1424 end of June 2007, the number of all class actions in federal courts increased by 72%, from 1350 to
1425 more than 2300. The largest increase came in “labor” cases, particularly opt-in classes under the Fair
1426 Labor Standards Act that are not governed by Civil Rule 23. (Occasionally state-law claims are
1427 added when there strong case law, at times in hopes of winning certification under Rule 23.) The
1428 next-largest increase was in “consumer protection and “fraud” classes, which are mostly federal-
1429 question cases although state-law claims are occasionally added. There is no reason to believe that
1430 CAFA affected the increase in these filings. “Contract” cases have increased at a fairly steady pace.
1431 The effects of CAFA have appeared primarily in contract actions, state-law consumer fraud actions,
1432 and to some degree in property-damage tort claims. The increase attributed to CAFA hovers in
1433 the range from 23 to 25 cases a month. This is remarkably close not only to the FJC prediction of 300
1434 cases a year but also to the Congressional Budget Office prediction. The CBO prediction, however,
1435 was based on completely wrong foundations. They predicted 300 removals a year, and that all state-
1436 court class actions would be removed. They did not know how many class actions there are in state
1437 courts. The number is probably impossible to determine for all states, but good numbers are
1438 available at least for California; there are still thousands of class actions in California state courts.

1439 Figure 2 shows original diversity filings and also removals. The increase begins immediately
1440 after the effective date of CAFA in February 2005.

1441 Figure 3 shows that the origin of diversity cases has changed over time from the enactment
1442 of CAFA. Original filings began an upward trend that continues; removals went up, and now are
1443 declining. In response to a question, Mr. Willging recognized that the increase in original filings
1444 may reflect the choice of plaintiff class lawyers to file in federal court to have the advantage of
1445 picking which federal court they prefer, as compared to picking a state court they would prefer only
1446 to suffer removal to a less-desired federal court.

1447 Figure 4 shows the percentage changes in original filings and removals on a circuit-by-circuit
1448 basis. It must be remembered that percentage changes may be more dramatic than the absolute
1449 numbers of cases. The dramatic percentage increase in filings shown for the Eastern District of New
1450 York in a later figure, for example, reflects a change from 1 case to 7. The increases are widely
1451 dispersed among the circuits; the greatest percentages are shown in courts in the Third, Ninth, and
1452 Eleventh Circuits.

1453 Figure 7 shows that contract filings have increased greatly, from 14 a month to more than
1454 30 a month. Consumer-protection actions have tripled, from 3 a month to 9 a month. These are
1455 seemingly low numbers that add up over time. The contract actions often involve warranty claims
1456 or insurance practices. Hurricane Katrina may figure in the contract claims rates. Tort-property
1457 claims have risen from 3 a month to 5 a month. Tort-personal injury classes, apparently the source
1458 of the concerns that drove enactment of CAFA, have declined. The decline probably reflects the
1459 general disuse of class actions for these actions. The low absolute numbers must be understood,
1460 however, in relation to the counting method used for this study. If class actions are consolidated for
1461 MDL proceedings or are otherwise consolidated into a single proceeding, they were counted as a
1462 single action.

1463 The next phase of the FJC study will look at two samples of pre-CAFA actions and post-
1464 CAFA actions. One pair of samples will involve an intense look at diversity cases; the other pair
1465 will look at federal-question cases, mostly to determine whether there has been an increase in the
1466 addition of state-law claims to federal-question classes. The plan is to report on at least the pre-

1467 CAFA diversity sample at the fall Advisory Committee meeting. Studying the post-CAFA sample
1468 may be delayed because it is important to study terminated cases, and many of the recently filed
1469 cases may not soon terminate.

1470 It was noted that experience in California state courts may not reflect experience in all states.
1471 An intensive study of California filings is being conducted with the help of students from the
1472 Hastings College of the Law. Experience so far seems to show an 8% to 10% decline in California
1473 state-court filings. The FJC is helping a law student who has taken on a study of class-action
1474 activity in Michigan.

1475 It also was observed that at least newspaper reports have indicated that the disfavor of
1476 “coupon settlements” shown by CAFA has affected state courts, leading to refusals to approve
1477 settlements and insistence on cash payments instead.

1478 Judge Kravitz thanked the FJC for its work and resources devoted to the work. The study
1479 is very important for the Committee’s continuing responsibilities to monitor class-action
1480 developments. The appearance of many new diversity class actions may have a significant impact
1481 on the way Rule 23 is used. It may be too early to begin an active Rule 23 project, but active
1482 attention remains important. The use of settlement classes has never been dismissed from the
1483 agenda, and one day may be a fit subject for possible rule revisions.

1484 *Administrative Office Forms*

1485 The Director of the Administrative Office has authority to prescribe procedures in clerk’s
1486 offices. This authority is reflected in Civil Rule 79(a)(1), which directs the clerk to keep a civil
1487 docket in the form and manner prescribed by the Director with the approval of the Judicial
1488 Conference. Peter McCabe noted that the Office has been drafting forms since the 1940s. The E-
1489 Government Act raised questions about privacy, prompting a review of the forms to determine
1490 whether any of them call for information that should not be gathered. The review process turned
1491 up 567 forms. A number of them raised questions under the Act and have been corrected.

1492 The forms also have to be changed to keep pace with changes in the relevant bodies of rules.
1493 One illustration is Civil Rule 45. Rule 45 is printed on the back of subpoenas; when Rule 45
1494 changes, the subpoena form must be changed.

1495 The Office has asked Joseph Spaniol to restyle the forms used in courts. He has done 33 of
1496 what will be a total of approximately 100 forms.

1497 The Civil Rules forms have been posted by the AO on its “outside” website, enabling people
1498 to fill them in for use. These forms have never been reviewed by the Advisory Committee. The AO
1499 is considering whether the process of generating and reviewing the forms should be changed.

1500 *Sealing Subcommittee*

1501 Judge Koeltl and Professor Marcus reported on the January 13 meeting of the Standing
1502 Committee Subcommittee on Sealing. The Subcommittee was initially created in response to
1503 questions about the practice in some courts that omits any reference to a sealed case from the court’s
1504 docket. This problem has been addressed. But the practice of sealing whole cases remains for
1505 further consideration.

1506 The question addressed at the Subcommittee meeting was to define the scope of its further
1507 work. Three possibilities were considered. The narrowest would be to look only at fully sealed
1508 cases. There are not many of them. The FJC study of sealed settlements worked on a sample of
1509 227,000 cases; only 23 of them were sealed. A broader possibility would be to look generally at
1510 materials filed under seal. A still broader possibility would be to study other orders restricting the

1511 dissemination of information. The Civil Rules Committee considered some of these problems
1512 several years ago, in large part in response to proposals for “sunshine” legislation, and concluded
1513 after extensive work that there was no need for rules amendments at that time.

1514 The Subcommittee decided to deal only with wholly sealed cases. That was the subject that
1515 led to creating the Subcommittee. This subject is difficult in itself. It will be necessary to find out
1516 just what cases are sealed. Indeed it will be necessary to define what should be treated as a “case”
1517 for purposes of the study — should the study extend to things like applications for search warrants
1518 or grand-jury reports? Going further to explore standards for sealing parts of cases, the proper use
1519 of discovery protective orders, and the like, would be a complicated and difficult undertaking.

1520 The Federal Judicial Center will assist the Subcommittee by studying how many cases are
1521 being sealed, and why.

1522 *Sunshine in Litigation Act*

1523 Judge Rosenthal reported that legislation pending in the Senate would affect Rule 26(c)
1524 protective orders by requiring specific findings that the order does not affect the public health or
1525 safety, or that any effect on the public health or safety is outweighed by the need for privacy. If any
1526 protective order is justified, the court is required to limit it to the narrowest protection needed to
1527 protect the identified privacy interests. The same process must be repeated when the case ends to
1528 determine whether the protective order should survive.

1529 The legislation addresses sealed settlements in similar terms.

1530 The Advisory Committee has concluded there is no need for such legislation, drawing in part
1531 on a valuable study conducted by the Federal Judicial Center. There is no substantial ground to
1532 conclude that protective orders, or sealed settlements, deny the public knowledge of products,
1533 conditions, or persons that pose a risk to public health or safety. Absent any general need, the
1534 legislation is a bad idea. It would impose heavy burdens on the courts — indeed, given the
1535 proliferation of discovery materials as electronically stored information yields ever greater volumes
1536 of material, the burdens could become unmanageable. Apart from the burden on the court, discovery
1537 practice would be impeded. Parties unable to rely on protective orders would delay or impede
1538 discovery in many ways, both imaginative and confounding.

1539 Similar legislation has been introduced in many Congresses. This time it has been reported
1540 out by the Senate Judiciary Committee and has bipartisan support. Careful communications with
1541 Congress on this topic will be important.

1542 *Future Work*

1543 Judge Kravitz raised the question of future Committee work. The Committee continually
1544 reminds itself that it may be appropriate to avoid a work schedule that brings revised rules every
1545 December 1. The bench and bar had to absorb the e-discovery rules in 2006 and the Style Rules in
1546 2007. 2008 brings a respite, with only one technical conforming amendment of a Supplemental
1547 Rule. 2009 will bring the Time-Computation Project changes. On the present schedule, both
1548 summary judgment and expert witness discovery amendments will take effect in 2010. Perhaps
1549 2011 will turn out to provide another respite from change. But urgent needs for change might
1550 emerge that require prompt action, or some minor amendments will seem achievable without causing
1551 any need for significant adjustments in practice. However that proves out, the process of generating,
1552 refining, and adopting rules changes seldom takes less than 3 years and often takes much longer.
1553 It is always important to pursue the Judicial Conference’s § 331 duty to “carry on a continuous study
1554 of the operation and effect of the general rules of practice and procedure.”

1555 One item that will be on the agenda for the fall Committee meeting is last year's pleading
1556 decision in the Twombly case. Judge Kravitz noted that the Twombly decision was discussed at
1557 length by a distinguished panel at the Standing Committee meeting last January. The materials
1558 submitted for discussion by the panel have already been cited in a published opinion. The Standing
1559 Committee likely will want the Advisory Committee to examine many possible variations of
1560 amended pleading rules as experience develops under the influence of the Twombly opinion. The
1561 illustrative pleading Forms appended to the rules also will deserve reconsideration. It seems too
1562 early to begin serious drafting looking toward proposals to publish in 2009. But it is not too early
1563 to begin initial consideration of what possibilities might be explored. The Federal Judicial Center
1564 is thinking about possible ways to measure the frequency of motions on the pleadings and the
1565 frequency of granting the motions. As with all other topics on which they have done empirical
1566 research to support Civil Rules amendments, any help they can provide will be most welcome. A
1567 preliminary overview will be on the Advisory Committee agenda next fall.

1568 Professor Gensler has suggested that the Committee investigate the advisability of adopting
1569 a national rule on privilege logs. Practice under Rule 26(b)(5)(A) is now governed in large part by
1570 local rules. That may not be a good thing. Loss of privilege for failure to comply with one local rule
1571 can easily mean loss of the privilege for all purposes. The national rule sends no message, or
1572 perhaps mixed messages, on questions like the time to provide the privilege log. It would be useful
1573 to learn whether practitioners find problems in this area. One Committee member observed that the
1574 subject at least deserves consideration. Privilege-log practice is intertwined with e-discovery, which
1575 has effected a sea change in dealing with privilege and privilege logs. Compiling privilege logs is
1576 the biggest expense in discovery today; it can easily run up to a million dollars in a complex case.
1577 A second member concurred — privilege logs are a source of huge expense, satellite litigation, and
1578 traps for the unwary. It was agreed that Professor Gensler will prepare a memorandum to support
1579 further inquiry.

1580 It was further suggested that Professor Marcus should carry on his exploration of the ways
1581 in which the e-discovery amendments are working out with an eye to determining whether there are
1582 problems that need to be fixed. Professor Marcus pointed out that evaluating the development of
1583 e-discovery practice will be a difficult task. "Big bucks are involved." One widely quoted estimate
1584 is that annual revenues for consultants on e-discovery compliance will soon reach four billion
1585 dollars. Privilege logs are an example. The rule has stood unchanged since 1993. Some vendors
1586 of e-discovery products say that it is easy to compile a log if only you buy their product. It is
1587 difficult to get reliable, dispassionate advice on e-discovery in general. It may be equally difficult
1588 if the focus is narrowed to privilege logs. "Looking hard may be a good thing, but it will be hard
1589 to do anything."

1590 The perspective shifted a few degrees with the observation that it is a good idea to begin
1591 looking at these topics. But the "shifting sands" problem is always present. Evidence Rule 502 is
1592 at least well on the way to adoption by Congress. One impact may be that the resulting protection
1593 against inadvertent privilege waiver will increase the pressure to reply promptly to discovery
1594 requests, affecting the time to prepare a privilege log. Technology changes, whether in hard- or
1595 software, could change still further both practice and the problems of practice. There is no question
1596 that the time will come when it is important to look hard at all aspects of e-discovery. The first
1597 challenge will be to know when the time has come. It may be too soon now. Dissatisfactions are
1598 bound to arise now, but the need will be for a systematic inquiry. The "when" and "how" of the
1599 inquiry remain uncertain. It may be premature to designate a Subcommittee until the Committee
1600 has a good view of the landscape as a whole.

1601 A Committee member agreed that the passage of time will be beneficial. The e-discovery
1602 rules have been good. Their intersection with things like privilege logs has had a material effect on

1603 the economics of law practice. Large firms now have “staff lawyers” or “contract lawyers” who
1604 work full time reviewing documents for privilege and responsiveness. The expense is substantial.
1605 It is an unusual dynamic.

1606 Another Committee member noted that consulting firms are growing up. They offer services
1607 directly to general counsel, at a stated price per page. These consulting firms may take the place of
1608 staff lawyers or contract lawyers hired by law firms.

1609 It was noted that the American College of Trial Lawyers is funding research into the actual
1610 cost of discovery. The project is just beginning, but it may provide information about the cost of
1611 privilege logs.

1612 Thomas Willging noted that the Federal Judicial Center has “a pretty full workload,” but
1613 might be able to assist a discovery project. The 1997 survey that supported earlier discovery
1614 amendments might provide a model.

1615 These discovery topics will be considered further at the fall meeting.

1616 On other topics, an observer noted that the American Bar Association Litigation Section is
1617 studying the desirability of working toward uniform pretrial orders. Some courts require a lot of
1618 make-work. The study may conclude that pretrial conferences should be held closer to trial, after
1619 rulings on summary-judgment motions. It was noted, however, that experience with Rule 16
1620 amendments has shown a great deal of judicial sensitivity about pretrial practices. Many judges will
1621 resist changes that interfere with their preferred habits.

1622 The suspended project on simplified procedure also was brought to mind. There is a
1623 continuing perception that many cases in the federal courts would be better governed by less
1624 searching and less expensive procedures. There is a related perception — for some a fear — that
1625 simplified procedures might bring to federal courts more federal-question claims for small damages.
1626 Experience with local “tracking” rules that have sought to assign some cases to more expeditious
1627 and less expensive procedures seemed discouraging when the simplified-procedure project was
1628 actively considered. Perhaps it would be useful to design a conference to consider the question
1629 whether the Civil Rules have developed into a system that is “just right” for an intermediate range
1630 of cases, but too expensive and cumbersome both in the oft-discussed “large” “complex” cases and
1631 also in actions for potential recoveries that cannot support huge outlays on costly procedure. The
1632 Committee was reminded that RAND did a study of experience under the Civil Justice Reform Act.
1633 The “multiple tracks” approach was not recommended. Since then, litigation has grown more
1634 complex and costly. Judges have no desire to increase either cost or complexity. Much of the
1635 difficulty arises from the fact that many cases include at least one party that wants to promote
1636 obfuscation. Another Committee member noted that the source of much contention and cost is
1637 disclosure and discovery, “the fight over access to the underlying proof.”

1638 *Next Meeting*

1639 The fall meeting likely will be held in Washington. If Rules 26 and 56 are published for
1640 comment, it seems likely that there will be requests to testify at the public hearings. It may be wise
1641 to schedule three hearings, with the expectation that two may suffice. The Committee meeting
1642 might be scheduled for November, giving enough time after August publication to enable some
1643 participants to prepare. November hearings, however, are too early for most organizations — the
1644 sources of many helpful comments — to prepare. A November hearing is most likely to be useful
1645 when the Committee wants an early sense of public reactions that will support preparation for the
1646 later hearings, including developing alternatives that might be discussed at the later hearings. The
1647 date will be set soon on consideration of all Committee members’ calendars.

1648

Adjournment

The Committee, having finished all agenda items, voted to adjourn.

Respectfully submitted

Edward H. Cooper
Reporter