

**ADVISORY COMMITTEE
ON
CIVIL RULES**

**Half Moon Bay, CA
April 7-8, 2008**

AGENDA
ADVISORY COMMITTEE ON CIVIL RULES
APRIL 7-8, 2008

1. Introductory remarks by the Chair and Reporter
 - * Report on the January Standing Committee and March Judicial Conference Meetings
 - * **ACTION** – Approve minutes of November 8-9, 2007 Advisory Rules Committee meeting
2. Report of the Rule 56 Subcommittee
 - * **ACTION** – Approve proposed amendments to Rule 56 for publication
3. Report on *Twombly v. Bell Atlantic*, 127 S.Ct. 1955 (2007)
 - * Next steps
4. Report of the Rule 26 Subcommittee
 - * **ACTION** – Approve proposed amendments to Rule 26 for publication
5. Report on Sealing Subcommittee
6. Report on Time Computation Rules Published for Comment
 - * **ACTION** – Approve proposed amendments to Rule 6(a)
 - * **ACTION** – Approve proposed amendments to Rules 12, 14, 15, 23, 27, 32, 38, 50, 52, 53, 54, 55, 56, 59, 62, 65, 68, 71.1, 72 and 81, Supplemental Rules B, C, and G, and Forms 3, 4, and 60
7. Report on Other Rules Published for Comment
 - * **ACTION** – Approve proposed amendments to Rules 8(c), 13(f), 15(a), 48(c), and 81(d)
 - * **ACTION** – Approve proposed new Rule 62.1
8. Status of Pending Legislation on Discovery Protective Orders
9. Report from FJC, including Status Report on CAFA Study
10. Report on Restyled AO Forms Used in Civil Cases
11. Dates of Next Meeting to be Announced

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Michael M. Baylson	D	Pennsylvania (Eastern)	2005	2007
Jeffrey Bucholtz*	DOJ	Washington, DC	----	Open
Steven M Colloton	C	Eighth Circuit	2008	2010
David G. Campbell	D	Arizona	2005	2008
Steven S. Gensler	ACAD	Oklahoma	2005	2008
Daniel C. Girard	ESQ	California	2004	2010
C. Christopher Hagy	M	Georgia (Northern)	2003	2009
Robert C. Heim	ESQ	Pennsylvania	2002	2008
John G. Koeltl	D	New York (Southern)	2007	2010
Randall T. Shepard	CJUST	Indiana	2006	2009
Anton R. Valukas	ESQ	Illinois	2006	2009
Chilton Davis Varner	ESQ	Georgia	2004	2010
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DRAFT MINUTES
CIVIL RULES ADVISORY COMMITTEE
NOVEMBER 8-9, 2007

1 The Civil Rules Advisory Committee met on November 8 and 9, 2007, at the Administrative
2 Office of the United States Courts. The meeting was attended by Judge Mark R. Kravitz, Chair;
3 Judge Michael M. Baylson; Hon. Jeffrey Bucholtz; Judge David G. Campbell; Professor Steven S.
4 Gensler; Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Robert C. Heim, Esq.; Judge Paul J.
5 Kelly, Jr.; Judge John G. Koeltl; Chilton Davis Varner, Esq.; Anton R. Valukas, Esq.; and Judge
6 Vaughn R. Walker. Professor Edward H. Cooper was present as Reporter, and Professor Richard
7 L. Marcus was present as Special Reporter. Judge Lee H. Rosenthal, chair, Judge Diane P. Wood,
8 Judge Sidney A. Fitzwater, and Professor Daniel R. Coquillette, Reporter, represented the Standing
9 Committee. Judge Eugene R. Wedoff attended as liaison from the Bankruptcy Rules Committee.
10 Peter G. McCabe, John K. Rabiej, James Ishida, Jeffrey Barr, and Monica Fennell represented the
11 Administrative Office. Joe Cecil, Emery Lee, and Thomas Willging represented the Federal Judicial
12 Center. Ted Hirt, Esq., Department of Justice, was present. Andrea Thomson, Rules Clerk for
13 Judge Rosenthal, attended. Observers included Alfred W. Cortese, Jr., Esq.; Jeffrey Greenbaum,
14 Esq. (ABA Litigation Section liaison); Chris Kitchel, Esq. (American College of Trial Lawyers
15 liaison); and Ken Lazarus.

16 Judge Kravitz opened the meeting by noting that it is a “humbling pleasure” to become Chair
17 of the Advisory Committee. He has reviewed the Advisory Committee’s work over a 6-year period
18 as a member of the Standing Committee. Viewed from that perspective, the Advisory Committee
19 has done great work. His first encounter was a class-action conference convened by the Advisory
20 Committee at the University of Chicago Law School; it was a masterful performance. The work on
21 class actions, discovery of electronically stored information, and Style has been demanding but the
22 results are rewarding. It will be hard to fill the shoes of Judge Rosenthal and her predecessor, David
23 Levi, as chair. To paraphrase a politician, “I know Judge Rosenthal, I’ve worked with her, she’s my
24 friend. I am no Lee Rosenthal.” Working with the Discovery and Rule 56 Subcommittees over the
25 summer has been a good introduction to the Committee’s work. The Rule 56 miniconference
26 convened the day before this meeting was masterfully directed by Judge Baylson.

27 Gratitude was expressed for the work of Committee members whose terms have expired or
28 who have moved out of the office establishing ex officio membership. Judge Cabranes was not able
29 to attend this meeting. Acting Attorney General Peter Keisler was occupied with his other
30 responsibilities. But Judge Kelly was present and was recognized. Judge Rosenthal said that all
31 members of the Committee are deep, fascinating, complex people. Judge Kelly is a fine example,
32 and unique in his own special ways. In addition to remaining current on his appellate docket he
33 carries a substantial district-court docket; “I cannot tell you how that warms my heart.” He does both
34 jobs, trial and appellate, continually and very well. He also is a full-time volunteer fireman. And
35 a sailor. “He is a remarkable guy.” The Committee has been fortunate to have him bring all these
36 qualities and insights to the Committee’s work. “We have enjoyed our time with you.” Judge Kelly
37 responded that he has never worked with another committee that gives such intellectual stimulation,
38 nor found such fun and companionship. “I have enjoyed it very much.”

39 Judge Kravitz also noted that three Committee members, Baylson, Girard, and Varner had
40 been appointed to renewed 3-year terms.

41 Two new members have been appointed. He described the backgrounds of Judge Filip and
42 Judge Koeltl. He also noted the background of Judge Wood, the new liaison from the Standing
43 Committee, and Jeffrey Bucholtz from the Department of Justice.

44 *April 2007 Minutes*

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

47 *Agenda Items*

48 Pending agenda items were briefly described. Expert trial witness disclosure and discovery
49 and summary judgment will occupy most of the agenda for this meeting. The effects of the
50 Twombly opinion on notice pleading practice will be discussed, but without any immediate prospect
51 of drafting possible amendments to Rules 8 or 9. The Standing Committee has appointed a
52 Subcommittee on case sealing, chaired by Judge Harris Hartz. Judge Koeltl is the Civil Rules
53 member of the Subcommittee; Professor Marcus is the reporter. The topic began with a request that
54 something be done to correct the programming that led the electronic case-filing system to report that
55 "there is no such case" when an inquiry is made about a case that has been sealed in its entirety. That
56 problem has been addressed. The topic then expanded to study at least the practice of sealing an
57 entire case; it is possible that it may also consider whether to study practices in sealing specific
58 items in a case file.

59 The Appellate Rules Committee has begun consideration of the problems that arise when a
60 litigant loses the opportunity to take a timely appeal by relying on erroneous advice from the district
61 court. If the Appellate Rules project goes to the point of framing specific rules proposals, it may
62 prove useful to consider whether the Civil Rules should be amended to accommodate the Appellate
63 Rules proposals.

64 Legislation is pending that includes a provision that would exclude application of part of
65 Civil Rule 45 that might interfere with efforts to ensure that witnesses from around the country can
66 be subpoenaed by the federal court in New York for "9/11" proceedings.

67 *June 2007 Standing Committee Meeting*

68 Judge Rosenthal reported briefly on the June 2007 Standing Committee meeting, in part as
69 a preface to the work on Rule 56 that carries forward at the present meeting. The June agenda was
70 presented in five books. That was too much material, with too many important topics, to permit a
71 deliberate focus on Rule 56. As Advisory Committee chair she and Judge Levi agreed that it would
72 be better to defer consideration of Rule 56 for publication so that the Standing Committee could
73 consider it carefully and in depth. This coming January will be a good opportunity for a first
74 presentation to the Standing Committee. The January meeting ordinarily is used in large part as a
75 period of reflection, considering long-range questions or taking a first look at topics that will be
76 brought back for action in June. Of course it is proper to present action items as well, taking
77 advantage of the common circumstance that all of the advisory committees together typically present
78 few action items. But the opportunity for a first careful look, allowing considered reaction by the
79 advisory committees, is particularly valuable.

80 Judge Rosenthal also reported that the Standing Committee had considered and approved
81 work by Professor Capra, Reporter for the Evidence Rules Committee, on standing orders. The use
82 of standing orders is a subject for concern, in much the same way as local rules continue to cause
83 concern. Standing orders are "the level below local rules." They are used in very different ways by
84 different courts and judges. They are made available on court web sites in different ways. The
85 report will be sent to the chief district judges, asking them to consider development of common
86 standards on the allocation of subjects between local rules, court standing orders, and individual
87 judge standing orders.

88 *Rule 26(a)(2), (b)(3), and (b)(4): Expert Witnesses*

89 Judge Kravitz introduced the report of the Discovery Subcommittee. He noted that the
90 Subcommittee has worked hard — while he was a member of the Standing Committee he sat in on
91 the miniconference held in Arizona after the January Standing Committee meeting. Since then there
92 have been another miniconference with New Jersey lawyers and many conference calls. Hard work
93 has uncovered the difficulty of many issues that did not seem so complex on first acquaintance.
94 Judge Kravitz and Professor Marcus attended an American Bar Association session on expert
95 discovery. The session attracted a standing-room-only crowd of 285. “People are really interested”
96 in these questions. And it was agreed by those present that the problems with present practice affect
97 both plaintiffs and defendants; this is not a one-sided issue.

98 Judge Campbell began the Discovery Subcommittee report. He noted that this is the third
99 time the Subcommittee has brought these issues to the Committee for discussion. The continued
100 exploration and development reflect “how thorny the issues are.” The purpose of the present report
101 is to describe the Subcommittee’s tentative suggestions and to get the Committee’s views.

102 The Subcommittee’s work began with two different sets of suggestions. One raised the rather
103 narrow issue framed by the Rule 26(a)(2)(B) distinction that requires disclosure reports by expert
104 witnesses whose duties as employees of a party regularly involve giving expert testimony, but not
105 from employees whose duties do not. More than a few courts have ignored this distinction,
106 reasoning that a report is useful in preparing to cross-examine and to rebut without regard to the
107 frequency with which the employee witness acts as a witness. Related questions were raised,
108 particularly by Judge Kravitz in Standing Committee discussions, about the problems that have
109 emerged from discovery of treating physicians who appear as witnesses. Treating physician
110 testimony is often challenged at trial on the theory that the physician has crossed the line from
111 treating physician to expert retained or specially employed to give expert testimony, so that the
112 testimony must be excluded for want of a disclosure report.

113 The other suggestions were framed by an ABA Litigation Section proposal to limit discovery
114 of attorney-expert communications and to bar discovery of draft reports. The present system,
115 fostered by the Committee Note to the 1993 amendments that added Rule 26(a)(2) disclosure, is seen
116 as imposing extensive costs in time and money without revealing much useful information. And the
117 prospect of discovery causes artificial behavior — experts do not make notes, they do not prepare
118 drafts, they discuss their approaches orally with the lawyers, they scrub their hard drives to eliminate
119 any trace of discoverable matter, and so on. Lawyers who want to protect communications with
120 experts often are driven, when the client can afford it, to retain two sets of experts: consulting
121 experts, protected against discovery by Rule 26(b)(4)(B), and trial-witness experts. Parties who
122 cannot afford this expense are left at a disadvantage.

123 The Arizona miniconference attracted a good cross-section of the bar from different parts of
124 the country. The April miniconference with New Jersey lawyers attracted lawyers from all aspects
125 of practice, both private and public; the consensus was uniform enthusiasm for the New Jersey rule
126 that sharply curtails discovery of expert witness exchanges with counsel. Practice, indeed, was said
127 to go beyond the rule by recognizing still greater protection.

128 Since the miniconferences the Subcommittee has held seven conference calls. Each was
129 long, and each could have run longer still. Four sets of issues have emerged:

130 Employees who are not required to make a disclosure report under Rule 26(a)(2)(B) and
131 treating physicians — as well as other experts not retained or specially employed to give testimony
132 in the case — are addressed in the draft Rule 26(a)(2)(A) set out at p. 109 of the agenda materials.

133 This draft requires disclosure by the lawyer, not by the expert. The disclosure would describe the
134 subject matter of the expected testimony and give the substance of the facts and opinions. The other
135 side could then depose the witness under Rule 26(b)(4)(A). Plaintiff lawyers have made it clear that
136 there is a risk of losing treating physicians as witnesses if they are required to prepare reports. Nor
137 should the “drill-press operator” be required to prepare a report. The attorney disclosure will enable
138 effective depositions if the other side wishes, and will avoid surprise at trial. The Subcommittee is
139 comfortable with this recommendation.

140 The second and third issues run together. They involve discovery of attorney-expert
141 communications and draft expert reports. The Subcommittee is satisfied that some protection is
142 warranted. The challenge is to draw the lines of protection. What should be protected? How
143 stringent should the protection be? The drafts begin the protection by adding one word to Rule
144 26(a)(2)(B): the expert must disclose a “final” report. Then a new subparagraph would be added to
145 the work-product rule as Rule 26(b)(3)(D). This would say that draft reports and attorney-expert
146 communications are not discoverable unless the requesting party makes the showing required by
147 Rule 26(b)(3)(A) to obtain work product; even then the protection for “core” work product provided
148 by 26(b)(3)(B) would apply, barring discovery of mental impressions, conclusions, opinions, or legal
149 theories of the attorney or other representative concerning the litigation. Alternative approaches and
150 levels of protection have been explored and remain open for further consideration. These provisions
151 are both supported and offset by an amendment of Rule 26(a)(2)(B)(ii) to eliminate the source of
152 broad discovery that has taken root there. The expert’s report must contain “(ii) the facts or data or
153 other information considered by the witness in forming” the opinions. The upshot is that facts and
154 data communicated by the lawyer to the expert would remain discoverable. But beyond that the
155 communications and draft reports would be discoverable only on the need and hardship showings
156 required to defeat work-product protection.

157 The fourth issue involves expert work papers, as described at pp. 117-118 of the agenda
158 materials. This is the area least thoroughly explored by the Subcommittee. Discovery of work
159 papers will generate the same artificial behaviors that have emerged with respect to draft reports.
160 For that matter, it is difficult to define a line between “work papers” and “draft reports.” If a line is
161 defined, it is safe to predict that all working papers will be stamped as “draft report.” Fear of
162 discovery could also lead to continuing the practice of retaining two sets of experts, one as
163 consultants and another as witnesses. On the other hand, the need to test development of the opinion
164 requires access to the facts or data considered — both those considered and relied upon and those
165 considered and rejected.

166 **(1) Treating Physicians, Employees Not Regular Witnesses**

167 Professor Marcus launched more detailed discussion of the proposal for “lawyer disclosure.”
168 The Committee was advised of a rather common practice of misconstruing Rule 26(a)(2)(B) to
169 require disclosure reports by employee expert witnesses whose duties do not regularly involve giving
170 expert testimony. The theory seems to be that in framing the original rule the rulemakers did not
171 realize what a good thing the report is. That frames the question whether there are good reasons for
172 drawing the distinction between four categories of expert witnesses: those retained or specially
173 employed to give testimony; those whose duties as employees regularly involve giving expert
174 testimony; those whose duties as employees do not regularly involve giving expert testimony; and
175 other experts who are not a party’s employees and who are not retained or specially employed to give
176 expert testimony. One possible concern seems to have been put aside — lawyers say that they do
177 not forgo choosing the most useful expert because of the burden of preparing a report. If the best
178 witness is an employee who has never testified as an expert, that employee would still be used even

179 if a report had to be prepared. But there is frustration with respect to treating physicians, and perhaps
180 also fact witnesses who are also able to give expert opinions. The problems tend to surface at trial,
181 when an objection is made that the witness cannot offer an opinion because there was no disclosure
182 report.

183 The Subcommittee decided that there is no need to require a disclosure report by those who
184 are experts in a particular topic but not professionally engaged in giving expert testimony. Rule
185 26(a)(2)(A) would be revised to require disclosure by the lawyer as to the subject matter of the
186 opinion testimony and the substance of the facts and opinions. This disclosure will suffice to inform
187 other parties' decisions whether to depose the witness, and how to examine the witness at deposition
188 or trial. The draft Committee Note on this topic has not been considered by the Subcommittee. The
189 Note identifies treating physicians as one of the categories of experts who often will fall into this
190 lawyer disclosure. It was decided, however, that the rule text should not single out treating
191 physicians for special attention.

192 Judge Campbell noted that the Subcommittee had decided to delete a further requirement that
193 the lawyer disclosure state a summary of the grounds for each opinion. There was no great apparent
194 need for this kind of summary, and a fear that treating physicians might refuse to spend enough time
195 with the lawyer to support the summary.

196 Discussion began with the observation that trial often degenerates to a "gotcha" in opposing
197 treating physician testimony. Similar problems arise with respect to such witnesses as a state police
198 officer who investigated an accident. These problems are addressed vaguely in the 1993 Committee
199 Note. "The case law is punishing." Often these witnesses have been disclosed under 26(a)(1)(A)(i),
200 but not under (a)(2)(A), much less made to report under (a)(2)(B). Their testimony is often excluded.

201 The next observation was that at both miniconferences the lawyers thought that full opinions
202 are not needed. In most of these cases there will be abundant discovery materials to support
203 preparation for the deposition.

204 Then came a question: suppose records — for example medical care records — are attached
205 to the lawyer's summary disclosure. Will the attachment limit the opinions that can be expressed?
206 An answer was: "I've never seen a response saying only 'see attached.' Lawyers provide at least a
207 few paragraphs." A further response was that a treating physician will have records or notes, but that
208 often the notes do not address causation or prognosis. Opinions on these subjects may be excluded
209 unless they are included in the summary. The lawyer knows what she wants from the witness and
210 can include it in the summary. The other side can depose the witness if they want.

211 The next question asked how often do lawyers in fact follow up a summary disclosure with
212 a deposition. The first response was that in Arizona, which has a similar disclosure rule, lawyers do
213 not bother with a deposition if the witness is disclosed only for treatment. But if the witness will
214 offer opinions beyond the treatment, depositions are taken. An additional response was that one of
215 the expectations behind adoption of the Rule 26(a)(2)(B) disclosure report in 1993 was that the
216 detailed report often would forestall the need for any deposition; that expectation does not seem to
217 have been realized.

218 There are many technical issues surrounding the attorney disclosure. Suppose the witness
219 has already been deposed: is permission needed for a second deposition? Or suppose the side has
220 already taken ten depositions? These problems exist now. The Committee considered a timing rule
221 related to depositions, but decided any workable rule would be too complicated. It seems likely that
222 a second deposition will be allowed if the disclosure identifies an opinion that was not explored at
223 the first deposition. And the Subcommittee expects that an opinion not identified in the disclosure

224 will be excluded at trial. These topics might be addressed in the Committee Note; work on the Note
225 will continue.

226 **Draft Reports**

227 Draft language dealing with expert reports appears at pages 111 and 114 of the November
228 agenda materials. The first changes appear in Rule 26(a)(2)(B). One word is added in the first
229 sentence, describing the report that accompanies the expert witness disclosure as a “written final
230 report.” Item (ii) in the list of report contents is then changed as noted above: the report must contain
231 “the facts or data or other information considered by the witness in forming” the opinions. The word
232 “final” may be resisted as an unnecessary “intensifier,” but the common discovery quest for draft
233 reports may make this useful.

234 The provision directly addressing draft reports is combined with attorney-expert
235 communications in a new Rule 26(b)(3)(D) addressing communications between counsel and a
236 person identified as an expert by a Rule 26(a)(2)(A) disclosure and also “a draft report prepared by
237 such a person.” Discovery is limited to “facts or data considered by the expert in forming the
238 opinions the expert will express. The court may order further discovery only on a showing that
239 satisfies Rule 26(b)(3)(A)(i) and (ii). If the court orders further discovery, the protection of Rule
240 26(b)(3)(B) applies * * *.” This draft extends the protections accorded work product to attorney-
241 expert communications and draft expert reports. Discovery is allowed only on showing substantial
242 need for the materials and inability to obtain the substantial equivalent without undue hardship.
243 Even if these standards are met, the court — by virtue of (b)(3)(B) — “must protect against
244 disclosure of the mental impressions, opinions, or legal theories of a party’s attorney or other
245 representative concerning the litigation.” Treating these expert materials as if work product is not
246 the same as labeling them work product. Rule 26(b)(3) of itself protects only documents and
247 tangible things; protection of such things as oral communications by a lawyer in anticipation of
248 litigation or preparation for trial continues to depend on the “common-law” doctrine developed by
249 Hickman v. Taylor. It has seemed better to postpone any effort to redraft (b)(3) in a way that would
250 facilitate direct incorporation of these expert materials into work-product protection.

251 The agenda materials include at p. 114, note 13, a shorter alternative (b)(3)(D) that states that
252 the communications and draft reports “are protected as trial preparation material under Rule
253 26(b)(3)(A) and (B).” This version has been displaced because of concern that it might create
254 apparent conflicts by extending work-product protection beyond the documents and tangible things
255 protected by (b)(3). This approach, further, might exacerbate problems that trace back to the 1970
256 drafting of (b)(3) and (b)(4). In the 1970 Rules, (b)(4) provided that discovery as to experts could
257 be had “only as follows.” Because (b)(3) was then, as now, “subject to” (b)(4), it was clear that
258 experts were governed by a separate set of standards, independent of work-product theory. The
259 words “only as follows” were deleted from (b)(4) in the 1993 amendments. The desire to protect
260 attorney-expert communications in any form led to the longer draft version.

261 Drafting issues remain. The suggested version that applies the “core work-product”
262 protection of Rule 26(b)(3)(B) to expert materials includes in brackets: “applies [to counsel’s mental
263 impressions, opinions, or legal theories].” If the bracketed words are omitted, the expert’s mental
264 impressions, opinions, or legal theories also are protected. The choice is not an easy one.

265 One question has been protection of supplemental reports. Drafts leading to a final
266 supplemental report would be protected under the rule protecting draft reports.

267 The draft report questions lead directly to a difficult set of questions regarding “work papers.”
268 Can a meaningful line be drawn between work papers that should be subject to discovery and draft
269 reports that are protected? What is to stop an expert from stamping every paper as a draft report?

270 The first question asked how it has come to be that discovery is widely obtained with respect
271 to attorney-expert communications and draft reports? The practice seems to have grown out of the
272 1993 creation of the new Rule 26(a)(2)(B) expert witness disclosure report. The rule directed that
273 the report “contain * * * the data or other information considered by the witness in forming the
274 opinions.” The Committee Note says that given the obligation to disclose data and other information
275 considered by the expert, “litigants should no longer be able to argue that materials furnished to their
276 experts to be used in forming their opinions — whether or not ultimately relied upon by the expert
277 — are privileged or otherwise protected from disclosure when such persons are testifying or being
278 deposed.” The “other information” phrase has been seized upon to include attorney-expert
279 communications that have nothing to do with “data.” It is not at all clear whether the Committee
280 intended this result. It is surprising to think that the Committee might so casually defeat even the
281 protections of privilege without clearly identifying the issue and invoking the special Enabling Act
282 procedures that 28 U.S.C. § 2074(b) imposes on any rule “creating, abolishing, or modifying an
283 evidentiary privilege.” A casual inquiry directed to the Committee Reporter for the period in which
284 Rule 26(a)(2)(B) was developed elicited no clear recollection of attention to this issue. All that can
285 be said with confidence is that the 1993 amendments as a package were designed to move beyond
286 the 1970 version of Rule 26(b)(4) to establish deposition of a trial witness expert as a routine right.
287 This version confirmed practices that had become widespread in some, but not all, federal courts.
288 Overall, including the newly devised disclosure report, “which is intended to set forth the substance
289 of the direct examination,” it is clear that the Committee intended to establish a much more open
290 process with respect to trial-witness experts. It is clear that it did not want the witness to be able to
291 conceal the factual basis assumed in forming an opinion by invoking the work-product argument that
292 counsel had suggested the fact be assumed. Beyond that point, matters remain uncertain. Some
293 participants from the time believe that the Committee never intended the practices that have grown
294 out of the Committee Note.

295 Discussion turned to the question whether Evidence Rule 612 addresses the question,
296 however indirectly or awkwardly. It provides for production “at a hearing” “if a witness uses a
297 writing to refresh memory for the purpose of testifying, either (1) while testifying, or (2) before
298 testifying, if the court in its discretion determines it is necessary in the interests of justice.” A
299 famous ruling several years ago relied on Rule 612 to direct production of volumes of work-product
300 materials an attorney had given to an expert. But what is the line between information given to
301 create an opinion and information used to refresh memory — including “memory” of an opinion
302 never before formed? And for that matter, how far is it practicable to win a court ruling that the
303 interests of justice require production of materials considered by the expert before testifying at
304 deposition?

305 The draft refers to discovery of “facts or data.” What, it was asked, is the difference between
306 a fact and a datum? Referring to “data” alone might carry an untoward limitation by somehow
307 implying a rigorously collected set of anonymous facts, perhaps divorced from the immediate events
308 in litigation. There can be no doubt that “facts” includes all of the historic facts surrounding the
309 action. “‘Facts or data’ works in the New Jersey rule.”

310 A perennial question has been whether disclosure and discovery should be narrowed to facts
311 or data “relied upon” by the expert, foreclosing discovery of facts or data considered but put aside
312 in framing the opinion. Limitation to facts “relied upon” was rejected as too narrow. It is important

313 to be able to cross-examine the expert by asking whether fact X was considered, why it was not
314 considered if it was not, why it was not relied upon if it was considered, and so on. One of the
315 examples that recurred during Subcommittee discussions was the expert who ran the same test 37
316 times. It failed to produce the desired result 36 times, but did produce (or seem to produce) the
317 desired result once. Should the expert be able to express an opinion based on the one test he chose
318 to rely upon, and to bury the 36 other tests considered but not relied upon because unfavorable?
319 "Considered" appears to have been deliberately chosen in 1993, and continues to be the right choice.
320 An observer suggested that 90% of the problems arise from "or other information," not from
321 "considered." "Facts or data" are the heart of the opinion testimony and the heart of what should be
322 discoverable.

323 The same observer further suggested that there should be an absolute prohibition on
324 disclosure or discovery of draft reports. Present discovery practice has spurred many artificial
325 practices designed to prevent the emergence of anything that looks like a draft "report." If there are
326 any escape routes that will allow discovery, the same practices will continue. The response noted
327 that the Subcommittee had considered this possibility. But it concluded that adopting the work-
328 product standards for discovery would afford an effective protection that would abolish the
329 incentives to communicate by artificial and awkward means, scrub computer drives, and so on. It
330 will be difficult to show substantial need for discovery of a draft report, and it may also be difficult
331 to show an inability to obtain the substantial equivalent without undue hardship by turning to your
332 own experts. It seemed better nonetheless to hold open the possibility that some circumstances
333 might support these showings and thus warrant discovery. A draft report, for example, might reflect
334 facts or data that cannot be duplicated; destructive testing of evidence is the example most frequently
335 suggested. If a lawyer's "documents" are not absolutely protected by Rule 26(b)(3), why should an
336 expert's drafts be afforded greater protection?

337 This theme was expanded. "We're looking at a problem driven by practitioners." The
338 problem arises from the artificiality of forcing lawyers to communicate with experts in ways that do
339 not endure, to ensure that there are no "draft reports." Lawyers representing both plaintiffs and
340 defendants agree that everyone would be better off without this discovery. It is increasingly common
341 for lawyers to agree on a case-by case basis that they will not pursue discovery of draft reports or
342 attorney-expert communications. Raising protection to the level of work-product protection is so
343 effective that the artificial behaviors will disappear. "The destructive testing example is very rare.
344 There will seldom be occasions for discovery." The Committee Note makes it clear that "substantial
345 need" cannot be shown simply by arguing that discovery is needed to support effective cross-
346 examination.

347 Attention turned back to the Rule 26(a)(2)(B) reference to a "final" report. The amendment
348 would not change the time for disclosure set by (a)(2). It would simply emphasize that the disclosure
349 obligation is only a report that anticipates the direct examination, not all preliminary approaches
350 considered in framing the direct testimony. What we want at the time for disclosure is a "final"
351 report, and that is what judges require. At the same time, further consideration is required. Rule
352 26(e)(2) explicitly recognizes a duty to supplement the (a)(2)(B) report — the report is not "final"
353 in a sense that relieves the obligation to supplement when the expert's trial testimony will change.
354 Nor is it intended to cut off the right to supplement the report. If the only purpose for saying "final"
355 is to emphasize the explicit later rule limiting discovery of draft reports, it may be better to drop
356 "final."

357 The Committee agreed that it is sensible to protect against discovery of draft reports by
358 invoking the work-product discovery tests of Rule 26(b)(3)(A)(i) and (ii), as well as the core work-

359 product protection of (b)(3)(B). The Subcommittee remains free to refine the drafting as appropriate
360 and to consider further the issues left open.

361 **Attorney-Expert Communications**

362 Because a single draft provision embraces both draft reports and attorney-expert
363 communications, discussion of the communications issues was opened with the draft-report issues.
364 The origin and genesis of the issues seems to be the same — the 1993 Rule 26(a)(2)(B) Committee
365 Note. But it is possible that different drafting approaches are desirable, including different locations
366 within Rule 26.

367 The overall orientation of the draft responds to the sense expressed by participants in the
368 August ABA meeting: unbridled discovery of attorney-expert communications has many more bad
369 consequences in the development of expert testimony than it has good consequences in other
370 discovery or at trial.

371 As with draft reports, it would be possible to create an absolute protection. Or different
372 levels of protection could be invoked — a rule could protect only “core opinion” work-product, or
373 adopt the “exceptional circumstances” test applied to experts retained or specially employed to
374 consult but not testify, or the general substantial need and undue hardship test of Rule 26(b)(3)(A)(i)
375 and (ii). Or present practice could be left where it is. Among these choices, it again seemed best to
376 allow discovery only on satisfying the need-and-hardship test, and even then to protect mental
377 impressions, opinions, and legal theories. Protection of opinions and the like, however, must be
378 subject to the basic need to disclose and discover the opinions that will be expressed in testimony.

379 There are similar choices to be made in locating any new provision within Rule 26. The
380 problem began with the Committee Note to Rule 26(a)(2)(B), but the problem is one of discovery,
381 not the disclosure report. Locating a new provision here would invite casual disregard by occasional
382 federal-court practitioners. (b)(4), addressing expert-witness discovery, is a more likely possibility.
383 But (b)(4)(A) addresses only discovery by deposition; the protection should extend to all forms of
384 discovery. So (b)(3) was chosen for the draft.

385 The first question asked whether the scope of the present project should be expanded to
386 reconsider all of the rules addressed to expert-witness discovery. Although the present rules are
387 drafted with precision in a way that is helpful in some cases, perhaps it would be better to craft
388 simpler rules that leave more to the trial judge’s discretion. An answer was that discretion makes
389 it impossible to predict with any confidence what the ruling will be. The uncertainty would be
390 multiplied in litigation of topics that may become involved in different federal courts. Lawyers
391 would have to anticipate discovery according to the most expansive views that might be adopted.
392 “The result will be continuation of the problems we encounter now.” General propositions may not
393 afford an effective degree of protection. This answer was expanded by an observation that “it is
394 important to stop the mickey-mouse behavior that’s going on now. It gets in the way, and turns up
395 nothing of use.”

396 Still, there might be some advantage in developing a single rule that governs all aspects of
397 expert-witness disclosure and discovery. As Rule 26 has expanded over the years to far outstrip the
398 length of any other rule, and to become interdependent with other discovery rules, the structure more
399 and more resembles a tax code.

400 The discussion of locating protection of attorney-expert communications in the rules
401 expanded. Initially attention turned to the “facts or data” phrase that would be substituted in Rule
402 26(a)(2)(B)’s direction for the disclosure report. There is strong support for making this change

403 there. But it is critical to maintain discoverability in the provisions that address discovery, wherever
404 located. Those provisions could be located in (b)(4), working from the view that people will
405 naturally look to (b)(4) for the limits on expert-witness discovery. At the same time, it must be
406 remembered that the protection at deposition that might be provided in (b)(4)(A) also should
407 continue at trial — it would be a step backward to prohibit discovery of material that could be the
408 subject of examination at trial. Trial examination would then encounter all of the problems that led
409 to the 1970 addition of (b)(4) discovery. Although there is no present occasion to reexamine work-
410 product doctrine in general, protection of attorney-expert communications involves the attorney as
411 well as the expert. The focus on the attorney is even more clear if the eventual rule extends core
412 work-product protection only to the mental impressions, opinions, and legal theories of the attorney
413 and not those of the expert. (b)(3), to be sure, is incomplete as it stands; reliance on *Hickman v.*
414 *Taylor* remains necessary as to matters not covered as documents or tangible things. The choice is
415 further complicated by the need to choose the standard of protection — if it is to be the “exceptional
416 circumstances” standard of (b)(4)(B), perhaps (b)(4) is the better location. On the other hand, (b)(3)
417 extends protection to a party’s “consultant” and “agent.” The now ambiguous relationship between
418 (b)(3) and (b)(4) may mean that even now the expert witness’s documents fall directly into work-
419 product protection.

420 A still further complication was recognized. The draft protects all attorney-expert
421 communications, without attempting to distinguish among those that seem to involve something like
422 work-product and those that do not. One horrid example might be that an attorney tells the expert
423 that “if you do well in this case, I have 50 more; you can earn a lot of money.” We are
424 uncomfortable with paid witnesses in an intensely adversarial system. “If impeachment testimony
425 that comes through the lawyer is off limits, we may get awkward lawyer behavior.” The draft rule
426 seems to put all aspects of negotiating compensation off limits. This example, however, may serve
427 primarily to show that a rule cannot be drafted to cover all bad conduct. Rule 26(a)(2)(B) requires
428 disclosure of the compensation to be paid for the study and testimony in the case. Perhaps the
429 suggestion of future rewards falls within that. But more importantly, it is unlawful to arrange a fee
430 for expert testimony contingent on the outcome. Something like the crime-fraud exception should
431 justify discovery, and that may fit more readily within established work-product doctrine than within
432 a new expert-discovery rule.

433 More general discussion noted that the draft does not put off-limits all communications.
434 Facts or data communicated by the lawyer and considered by the expert remain discoverable without
435 any required showing of substantial need or undue hardship. And there are many ways to cross-
436 examine a witness. “We cannot write a rule without creating loopholes.” But we do need to shield
437 attorney-expert communications. We want a rule that people can rely on without attempting to
438 create loopholes. And the loss from affording this protection is *de minimis*. It is possible that the
439 disclosure report will be drafted by the lawyer, not the expert. That is rare. And that expert is likely
440 to fail on cross-examination. As soon as exceptions are recognized, the ability to rely on the rule will
441 diminish. The counter-productive behavior we have now will continue. “We need to enable dealing
442 with the expert comfortably.”

443 These themes were explored further. “Why limit discovery short of what is allowed at trial?”
444 At trial you can ask about compensation. It is in the disclosure report. Does the draft rule permit
445 inquiry on deposition? So of the question of who actually wrote the disclosure report. In one recent
446 trial the expert testified that the lawyer wrote the report. After the verdict, the jury revealed an
447 assumption that it is always the lawyer that writes the report.

448 Returning to the question of location within the rules, it was observed that the rule drafts
449 address discovery, not trial. "Putting it all in one place may not be possible." But will people look
450 to (b)(3)? And "if this all can come in at trial, what do we gain"?

451 The question of trial examination prompted the statement that although the discovery rule
452 will address only discovery, it must be anticipated that the same protection will carry over to trial.
453 If the protection does not carry over, none of the gains sought by limiting discovery will be realized.
454 The same artificial behaviors will continue. And so will the problems arising from the imbalance
455 between parties who can and those who cannot retain two sets of experts, one set to consult and
456 remain free from discovery, the other to testify and be subject to discovery. There continues to be
457 a substantial "common law" of work-product protection, and it applies at trial as well as in discovery.
458 So in criminal cases, without a work-product Criminal Rule, work-product is protected at trial.
459 There may be an advantage in situating the new provisions with the work-product provisions in
460 (b)(3) because courts are familiar with the concept that although there is no Evidence Rule to parallel
461 Rule 26(b)(3), work-product protection applies at trial.

462 This puzzle was developed further by asking what reason there might be to distinguish an
463 expert witness from other witnesses. It is fair to ask an ordinary witness what the witness discussed
464 with counsel. How is an expert different? Is it because we tacitly recognize an adversary dimension
465 of advocacy in the sworn truthful testimony of the expert that we do not recognize with a fact
466 witness? What should be done about an employee witness or, for example, a treating physician:
467 should examination be permitted at trial as to their communications with counsel? The draft
468 proposal extends discovery protection to any person identified under Rule 26(a)(2)(A), whether or
469 not a disclosure report is required under (a)(2)(B), although it may be relevant that the parallel
470 proposal will require attorney disclosure as to any (A) expert not required to give a disclosure report
471 under (B). Is it intended also to cut off examination at trial? If possible, it would be helpful to
472 articulate the reasons for closing off inquiry into communications between counsel and all these
473 experts, and for hoping to extend the bar to examination at trial.

474 The question of protecting oral communications then arose. Rule 26(b)(3), standing alone,
475 protects only documents and tangible things. The proposal to protect oral communications with
476 expert witnesses thus reaches further. Why should that be? One answer was that it would be
477 difficult to draw a line that distinguishes between communications that distinguish an attorney's
478 thinking about the case from other communications. The line that allows discovery of
479 communications about facts or data considered by the expert in forming an opinion is the most
480 workable line that can be drawn. The first response was that the line between an attorney's thought
481 processes and other matters is drawn at depositions now, but this response was qualified by agreeing
482 that the other side's theories and mental impressions are being disclosed now and that this practice
483 should be stopped if possible.

484 The role of expert witnesses was considered again. They are "unique creatures, one part
485 witness and another part helpers in preparing and presenting the case." Protection of attorney-expert
486 communications need not rest on characterizing them as closer kin to lawyers than to witnesses.
487 Protection simply reflects "practical reality."

488 The costs of present practice were recalled by observing again that sophisticated lawyers opt
489 out of this discovery. They agree not to ask for communications or drafts. And good people feel bad
490 about the way the practice makes them behave in dealing with experts, instructing them not to
491 prepare drafts, hedging communications, perhaps retaining a set of nontestifying experts. "These
492 are good reasons to change the rule."

493 A similar observation was that communications between attorney and expert witness are
494 different from communications with other witnesses. This proposition should be made clear in
495 advancing the proposals. "This is a set of problems that lawyers understand better than judges do.
496 Judges see the disputes cleaned up, not in raw form." The meeting with New Jersey lawyers offered
497 persuasive reasons for believing that although an occasionally useful bit of information will elude
498 discovery under the proposed protections, the tradeoff is desirable. "What you lose is a cost well
499 worth bearing." A rule that barred only questions going "solely" to an attorney's theories and
500 impressions sounds nice, but it would be hard to implement in practice.

501 The problem of extending the protection to trial was brought back for discussion. Can a Civil
502 Rule on discovery control evidence at trial? Can a sensible system be developed only by parallel
503 Civil and Evidence Rules? And again it was answered that one advantage of incorporating the
504 protection in Rule 26(b)(3) is that courts are accustomed to carrying work-product protection over
505 to trial, and will understand the need to carry over as well the parallel protections for attorney-expert
506 communications and draft reports. To be sure, the protection will extend beyond communications
507 that would now be protected as work product under *Hickman v. Taylor*. A lawyer who wants to
508 retain a highly qualified expert who has never appeared as an expert witness, for example, may now
509 be deterred by the prospect that efforts to train the expert in the ways of witnessing will be
510 discoverable.

511 The differences between experts and other witnesses were then approached from a new angle.
512 There are two kinds of experts. In some circumstances, the expert witness is an advocate, and
513 everyone knows it. The jury figures it out. Then there are others who appear as witnesses seldom,
514 and then only to testify for a party they think is right on the issues addressed by the expert testimony.
515 The jury figures out this picture as well. "The rule will not sacrifice much." But it will save great
516 expense, "and that is an important benefit for the party that ought to win."

517 Attempts to summarize this discussion led first to the response that no Committee member
518 wants open discovery of communications. Nor did anyone want to limit protection narrowly to an
519 attorney's mental impressions. But doubts remained whether discovery protection will extend to
520 protection at trial, underlined by grave doubts whether a discovery protection is worthwhile if the
521 matters ruled out of discovery can be explored at trial. It will be important to attempt, by further
522 research, to develop as good an idea as possible about the prospect that discovery limits will be
523 honored at trial.

524 **Expert Work Papers**

525 The Subcommittee devoted several hours to discussing the possible values and difficulties
526 of a rule protecting an expert witness's "work papers" against discovery. The question is difficult.
527 Both sides of the argument were presented first.

528 The "whole loaf" protection argument builds on the practice, indulged by litigants who can
529 afford it, of retaining two sets of experts. The experts who will be trial witnesses are carefully
530 excluded from development of the case. The experts who are retained only as "consultants" are
531 shielded from discovery by the "exceptional circumstances" test in Rule 26(b)(4)(B). They can
532 participate openly in shaping strategy, in sorting unsuccessful approaches out from more favorable
533 approaches, in helping to evaluate the case, in reviewing reports by the other side's experts, in
534 preparing cross-examination of the other party's experts, and so on. Smaller firms find this
535 burdensome, and many clients cannot afford it. The "collaborative process" that engages an expert
536 witness in counsel's work and work product should be protected by extending the Rule 26(b)(4)(B)
537 test to work that does not involve facts or data considered in forming the trial testimony. So, for

538 example, the expert may consider 3, or 4, or 5 different tests. Counsel picks the one that is most
539 favorable. If a consulting expert does all that, followed by a trial expert's consideration only of the
540 most, favorable test, the consultant's work is not discoverable. A trial expert should be allowed to
541 perform this consulting work, and to be protected in the same way.

542 Similarly, suppose an expert jots notes in the margins of a draft report: is that part of the draft
543 report, and not discoverable? Will efforts to draw a line between protected draft reports and
544 unprotected "working papers" lead to gaming behavior similar to the behavior now prevalent? Or
545 suppose counsel and expert discuss alternative approaches — is the discussion not a draft report, so
546 in discovery a line must be drawn between the mental processes of counsel that are protected as work
547 product and the mental processes of the expert that are not protected?

548 And if an expert's working papers or notes are discoverable, will that open the door to
549 discovery of attorney-expert communications?

550 The less protective "half-loaf" approach would be to accord different treatment to work
551 papers than to draft reports or attorney-expert communications. Facts and data considered by the
552 expert would remain discoverable, no matter whether counsel was the source. But it is very hard to
553 separate work papers from facts and data. Drafting a clear definition of the things protected as work
554 papers will be difficult.

555 A "whole-loaf" approach, further, would be polarizing. If an expert explores 5 tests that
556 produce the "right" result by different methods, and chooses to rely on 2 or 3 of them, the others
557 should be discoverable.

558 Discussion began with the observation that if work papers are discoverable, the incentive to
559 retain two sets of experts will remain. And there will be gamesmanship to defeat discovery,
560 instructing the expert to label everything as a "draft report." But the decision to allow discovery of
561 facts and data considered by the expert seems to require discovery of work papers.

562 An observer suggested that the rule must protect the opportunity to ask the expert to review
563 an adversary's expert report, and to participate in planning cross-examination. A lawyer should not
564 have to retain a separate consulting expert to be protected against discovery of such collaboration.
565 So protection should extend to such discussions as evaluating settlement options, perhaps by
566 estimating the damage awards that would result from adopting the approaches suggested by one
567 expert or the other, or from amalgamating them. Such matters are not discoverable from a trial
568 witness in New Jersey.

569 It was suggested that the problem of work papers emerged at an advanced stage of
570 Subcommittee deliberations. The New Jersey rule does not address work papers. Neither do the
571 ABA recommendations. Some part of an expert's mental processes must be open to discovery —
572 the only way to test an opinion is to explore the ways in which it was developed.

573 The observer responded that under New Jersey practice discovery extends to the calculations
574 supporting an opinion. Papers on the discount rate assumed, market analysis, and such are
575 discoverable. That does not directly address the problem of the expert who repeats a test 37 times,
576 rejecting 36 unfavorable results and adopting the 1 favorable result. Are the 36 unfavorable tests
577 facts or data considered in forming the opinion? Perhaps it is enough to address such questions by
578 examples in the Committee Note. Discovery clearly extends to "work papers" supporting the report.
579 Perhaps it should extend to other "reports" considered.

580 The problem of two sets of experts returned with the observation that if you do not know
581 what the results of a test will be, you hire an expert who will remain a consulting expert if the results
582 prove to be unfavorable. But perhaps that is not a general problem. In any event, anyone who may
583 become a testifying expert will be instructed to create no notes, or notes in a form that you want to
584 have produced. Experienced expert witnesses will not produce papers inconsistent with what they
585 are testifying to.

586 It was protested that protecting work papers will not protect the interests of justice. We want
587 to know whether the expert was told not to inquire into one subject or another.

588 The “facts or data” line was brought back for discussion. All drafts seek to allow discovery
589 of facts or data considered by the expert. But how does that address the examples of expert advice
590 offered to counsel? We want discovery of all matters that went into shaping the expert’s opinion,
591 but expert advice to counsel should not be discoverable.

592 The difficulty of distinguishing advice offered by the expert to counsel from development
593 of the expert’s opinion was tested by asking whether an expert’s opinion may be shaped by
594 reviewing for counsel the report of the adversary’s expert? Suppose the adversary’s expert engaged
595 in sophisticated “numbers crunching” — may not the expert’s trial testimony be shaped, in part to
596 respond and perhaps in part to back off from initial opinions that now appear unsustainable? But
597 if you can discover that, why not also permit questions about the ways in which conversations with
598 counsel may have shaped the opinions?

599 Returning to the earlier decision to protect attorney-expert communications and draft reports,
600 it was noted that these protections should extend to discussions of strategy and the related examples
601 of evaluating adversary expert reports, preparing to cross-examine adversary experts, and the like.
602 At the same time, the expert witness can be asked: “Did you ever consider X”?

603 The next step was taken by asking whether the trial expert could be asked whether she had
604 evaluated the adversary expert’s report? If she did, can the next question be: “What did you think
605 of it”? The person who thought the communications protected responded that these questions remain
606 proper. But, it was protested, that response means that you do after all have to hire consulting
607 experts to protect against discovery of trial experts.

608 A similar dilemma was expressed by suggesting that if we protect something framed as a
609 communication to counsel, discovery is blocked by framing everything as a communication to
610 counsel. Well, not everything would be protected — facts and data considered would remain
611 discoverable. Opinions to be expressed at trial are discoverable. But what about opinions that will
612 not be expressed at trial? The view was expressed that these are not facts or data, and should not be
613 discoverable. Nor should assistance in preparing cross-examination be discoverable; the expert can
614 deflect discovery by saying that the cross-examination communications were not considered in
615 framing the expert’s own opinions. One way to bolster this position is to ask the expert to evaluate
616 the adversary expert’s report, and to help to prepare cross-examination, only after your expert has
617 prepared her own report.

618 The same problems were examined again by confessing that it is difficult to draw the proper
619 lines. Facts or data bear on the opinions expressed on the stand. It may be hard to draw that line.
620 “Did you consider X” is proper. “What of our expert’s report” is proper. If considering the
621 adversary expert’s report changed the opinion of another party’s expert, that should be discoverable
622 — perhaps it amounts to facts or data considered? Would it be possible to say that if the effect
623 flowed only as a matter of high theory, divorced from specific facts, it is not discoverable or subject
624 to examination at trial? It is difficult to ignore the problem of work papers, but the best line may be

625 that adopted in the drafts for attorney-expert communications and draft reports: “facts and data
626 considered” are to be disclosed and are subject to discovery, while other matters are protected by the
627 work-product tests.

628 It was suggested that if there is no separate protection for work papers, it will be important
629 to provide examples of protected attorney-expert communications in the Committee Note. And also
630 some testing illustrations of what are “facts or data.” This suggestion was seconded. At times it is
631 impossible to frame clear rule text that answers all of the prominent problems. Examples in the
632 Committee Note may help to clarify the rule text without creating unforeseen traps.

633 An observer noted that the ABA report implicitly deals with these problems. Analysis for
634 settlement, critique of an opposing expert, and exploration with the expert of competing
635 methodologies should be protected. But the “36 tests that disappear” may not be addressed by the
636 ABA resolution. And if “work papers” do not include “notes in the margin,” discovery of work
637 papers may be appropriate — the expert’s methodology is important.

638 But a challenge was put: “Do we agree that we should bar discovery of an expert’s critique
639 of an opposing expert”? Suppose the critique is factually based? Doesn’t the adversary need to
640 discover that? All the calculations the expert did that support or undermine the adversary expert’s
641 opinion should be fair game for discovery.

642 It was responded that if, after an expert’s disclosure report is filed, the retaining party asks
643 him to analyze the other party’s expert report, that analysis is not something that informed the
644 expert’s opinion. Production should not be required.

645 The need for protection was underscored by observing that one of the participants in the
646 January miniconference was an attorney who often takes “small-injury cases.” He cannot afford to
647 hire two experts. And he needs to be able to ask his expert for an opinion on what the case is worth
648 — but he cannot do that if the opinion will be subject to discovery.

649 A broader perspective was suggested by noting that what we are trying to avoid is the use of
650 an expert “witness” as an attorney’s mouthpiece to present the case. We protect the expert
651 consultant because that expert is not a mouthpiece. The expert witness should be subject to
652 discovery that uncovers the mouthpiece role.

653 This view was met by the suggestion that in reality, cross-examination will reveal the witness
654 who testifies as mouthpiece, not as expert.

655 A different but also broad perspective was taken in noting that as our system has evolved
656 trials have become more and more infrequent. Expert witnesses are used more on summary
657 judgment, certification of class actions, electronic discovery, and other events. Examination of an
658 expert is different in these contexts. The “documents” are critical in determining what other parties
659 can use in framing their examinations.

660 The difficulty of the “work papers” question was underscored by a suggestion that perhaps
661 it would be useful to publish a proposal for comment, indicating at the same time that the fall-back
662 position might be to rely only on protection for attorney-expert communications and draft reports.
663 Tentative publication for the purpose of eliciting comment to inform decision on controversial
664 proposals is at times appropriate. But the first task should be to reach the best judgment the
665 Committee can. If it seems unwise to attempt protection of work papers, it may suffice to note that
666 decision in the communication transmitting for publication the proposals on attorney-expert
667 communications and on draft reports. The important thing is to find a mode of publication that

668 elicits comments that may enable a decision to go forward without repeating the publication-and-
669 comment process.

670 The question whether to continue to allow discovery of facts or data “considered” returned
671 with the suggestion that the focus on facts or data “considered” in forming an opinion comes close
672 to facts relied upon, and that the problems posed by discovery of work papers might be solved by
673 limiting disclosure and discovery to facts “relied upon.” This suggestion was not pursued further.

674 An effort to focus the discussion on reaching decisions began by asking whether a rule should
675 be proposed to bar discovery of all work papers. No one supported this approach. Four votes were
676 offered for an attempt to draw a line that would allow discovery of work papers that “go to the heart
677 of the opinion, but not otherwise.”

678 Then it was recognized that sufficient protection might be found in limiting discovery of
679 communications with an attorney. The protection might be fleshed out by examples in the
680 Committee Note. And so it was concluded that the most promising approach is to carry forward with
681 the provisions that apply work-product standards to discovery of attorney-expert communications
682 and draft reports, while allowing discovery of facts and data considered by the trial-witness expert
683 in forming the opinions to be expressed.

684 **Duration of Protection**

685 A final question addressed a problem not framed by any draft rule text. How long should the
686 protection against discovery of expert trial witnesses extend? If protection is provided in the first
687 case, what about a second case with the same attorney, the same expert, and the same or closely
688 related subject matter? If we allow discovery in the second case of all communications and draft
689 reports in the first case, have we lost all of the benefits of the protections in any situation that
690 includes the possibility of related actions?

691 This question is nearly the same as the question of extending work-product protection from
692 one action to another.

693 The Subcommittee is investigating these questions. A recent decision has been found in
694 which an expert was involved in a first case. The same expert then became involved in a second
695 case involving similar subject matter, but different parties and a different lawyer. There were added
696 complexities. The court allowed discovery of the expert’s work in the first case. Is that proper? The
697 question is in some ways similar to the question raised by the “retaining counsel” question. Suppose
698 one defendant confronts 100 actions by 100 different plaintiffs with 100 different lawyers, all of
699 whom retain the same expert? The question is complicated. The Supreme Court has approached
700 it only in a Freedom of Information Act case, *FTC v. Grolier*. The Subcommittee has begun to
701 explore these problems only recently. There may be a real need to provide some form of protection
702 for the lawyer who often hires the same expert for similar actions, or closely related actions.

703 These questions may only be aggravated in mass torts. Imagine, for example, the expert
704 retained for the bellwether trial in the first of 14,000 similar product-liability cases.

705 A further question may be posed by the “turncoat” expert who consults for one party and then
706 changes sides to work for an opposing party.

707 It was noted that agreements with expert witnesses commonly contain confidentiality
708 provisions, but that courts do not seem to feel bound to enforce them.

709 Discussion of expert-witness discovery problems concluded with the Subcommittee's
710 undertaking to prepare for the spring meeting a proposal that may be suitable for a recommendation
711 to publish.

712 *Rule 56*

713 Judge Baylson introduced the Rule 56 Subcommittee discussion by noting that the
714 miniconference held on November 7 was structured in the same way as the New York conference
715 in January. It was perhaps a bit larger — counting Subcommittee members there were perhaps 30
716 people gathered around the table. The discussion proceeded on a very high level throughout and
717 produced many excellent suggestions. The Subcommittee met for two hours after the conference
718 to consider which points were the most valuable. The next step will be a revised draft, framed in
719 reliance on the Committee's discussion today. The plan is to have a draft that can be presented for
720 initial discussion in the Standing Committee next January, with the hope to have a recommendation
721 for publication by next spring. The work has been strongly supported by Joe Cecil's research at the
722 Federal Judicial Center.

723 **Rule 56(a)**

724 The time-for-motion provisions in draft Rule 56(a) are in essence the same as the proposals
725 published last August as part of the Time-Computation Project.

726 The provision that allows the Rule 56(a) time periods to be changed by local rule has drawn
727 the questions that invariably arise when local rules are recognized. But allowing local rules will
728 recognize local docket circumstances and motion-practice traditions. This provision seems secure.

729 The provision allowing the court to order different time periods will be revised by adding
730 words to require that the order be made "in a case." These words are intended to discourage
731 "standing orders."

732 Subdivision (a)(1) describes a motion for summary judgment "on an issue." This phrase will
733 be changed to "part or all of a claim or defense." Inviting motions on "an issue" may lead to requests
734 for summary judgment on evidentiary issues. But it remains important to recognize well-established
735 partial summary judgment practices. One illustration used during miniconference discussions was
736 defining the relevant market in an antitrust case.

737 There has been little discussion of the decision last spring to set the motion deadline at 30
738 days after the close of all discovery. Elimination of the alternative that would have set the deadline
739 at 60 days before trial has been accepted.

740 Some miniconference participants thought that 21 days is not sufficient time to respond,
741 suggesting that 30 days would be better. It was argued that "parity" requires the same time as set for
742 the motion. But setting the motion deadline at 30 days after the close of discovery is not a simple
743 parallel — for one thing, deposition transcripts may not be immediately available upon the close of
744 all discovery.

745 No questions have been raised as to the 14-day period set for replying to a response.

746 **Rule 56(b)**

747 The Subcommittee wants to restore references to declarations in the places where the rule
748 refers to affidavits. Many younger lawyers are accustomed to declarations and may be puzzled by
749 the reference to affidavits. Some older lawyers may be accustomed to affidavits and will benefit
750 from a direct reminder that declarations can be used. The Style Subcommittee prefers to avoid

751 references to declarations in Rule 56 in order to avoid inconsistency with other rules that refer only
752 to affidavits. There may be some risk of ambiguous implications from the inconsistency.
753 Nonetheless the question will be raised once again.

754 There has been some question whether the Rule need direct that the affidavit or declaration
755 “show” that the affiant or declarant is competent. Most witnesses are competent. Perhaps a
756 statement should suffice. Present Rule 56(e)(1) directs that the affidavit “show affirmatively” that
757 the affiant is competent. Style Rule 56(e)(1) reduces this to “show.” There no indication that this
758 requirement has caused any real difficulty in practice. “Show” will remain in the next draft.

759 Later discussion agreed that it remains important to authorize support and opposition to
760 summary judgment by affidavits or declarations. Ordinarily these materials are not admissible in
761 evidence. But the provision will be relocated to become part of the procedure directions in
762 subdivision (c).

763 **Rule 56(c)**

764 The overall structure of the Rule 56 draft has been discussed, reflecting concern that it may
765 be too dense to be “user friendly.” Restructuring will be considered. Subdivision (c) could be
766 restructured by rearranging and consolidating the paragraphs. Paragraph (1) will remain as (1),
767 identifying the “default” quality of the detailed procedures by stating at the outset that the court can
768 order different procedures in a case. Paragraph (2) will begin with the provisions defining the
769 motion, response, and reply. Then it will continue with the common provisions for citing support
770 for fact positions; the description of affidavits or declarations; the direction to file cited materials;
771 and the provision for briefs. The hope is that this will be a clearer package. Clarity is important
772 because the draft departs from the structures of both present and Style Rule 56.

773 Committee members supported the rearrangement.

774 Discussion moved to a question that has been explored several times. Should the statement
775 of facts be a part of the motion, or should it be a separate document? Early drafts adopted a 3-
776 document approach that provided for a (brief) motion, a separate statement of facts, and a brief.
777 Later drafts reflected a decision to telescope the motion and statement of facts into one paper.

778 It was noted that practice in the District of Arizona follows the 3-document approach. The
779 motion is part law — the requested relief. It is brief. The statement of facts is separate. Other
780 judges reported 3-document practices in their districts, and expressed support for this approach. Still
781 another judge urged that there can be confusion as to what is the “motion”; the statement of facts is
782 a separate thing.

783 Another judge, however, suggested that it is better to include the statement of facts in the
784 motion. Although subdivision (c) is calculated to discourage overly long statements of fact, the
785 tendency to undue length may be restrained if the statement is part of the motion. This suggestion
786 prompted the concession that it is difficult to predict which format might provoke longer statements.

787 An observer suggested that from a practitioner’s viewpoint there is less risk of confusion if
788 the statement of facts is separated from the motion. A separate fact document will make it easier to
789 identify failures to comply with the rule’s other requirements and to give notice.

790 Yet another judge noted that in the Northern District of Illinois the statement of facts is
791 separate. Separation may help people remember they are supposed to do it — some lawyers who
792 appear in federal court are not regular federal practitioners, and even with the separate statement
793 requirement may forget to do it.

794 The separate fact statement was reflected in asking whether the response should similarly be
795 divided between a brief “response” and a separate paper addressing each fact in the statement
796 accompanying the motion. It would be possible to divide still further by requiring a third paper to
797 state additional facts that preclude summary judgment. But it also is possible to simplify the
798 response by providing that a single paper responds to the movant’s statement of facts and also states
799 the additional facts. It may not be as important to have a separate statement replying to a separate
800 motion. The nonmovant can be expected to dispute the summary-judgment relief sought in the
801 motion. Still, separation into a brief “response” and a separate responding statement of facts might
802 have advantages. The nonmovant may be willing to concede part of the relief sought, perhaps
803 pretermittting the occasion for responding at all to some of the facts stated by the movant.

804 Without taking a vote, six Committee members expressed a preference for the 3-document
805 approach to the motion, while 3 preferred the 2-document approach.

806 Later discussion asked whether it would be better to identify the elements without mandating
807 a 1, 2, or 3-paper process. If, for example, the rule directs 3 papers, some people still will include
808 everything in a single document. The response may be a protest that the motion is improper in form.
809 Why proliferate the opportunities for minor noncompliance, the number of hoop-jumping exercises
810 without reason?

811 Various wording issues were addressed. It was noted that if a 3-document approach is
812 adopted for the motion the provision for citing support should refer to a statement of fact “in a
813 movant’s statement,” or something like that, not “in a motion.” It might help to caption the response
814 provision as “Response to Statement of Facts” as a better reminder that a nonmovant is supposed to
815 respond. The provision for the movant’s statement of facts can be improved by “state concisely in
816 separately numbered paragraphs,” and “entitle the movant to summary judgment as a matter of law.”
817 Deletion of the reference to judgment as a matter of law will be supported if the basic standard is
818 articulated in the first subdivision by rearranging the present subdivisions.

819 Attention also was directed to the provision that a response may “qualify” a fact. Fear was
820 expressed that an open-ended “qualify” “invites a novel.” This word has been discussed extensively.
821 It is apparent that many readers attribute an expanded meaning, including arguments that supporting
822 evidence is not admissible or does not support, or that the asserted fact is not material. No
823 immediate disposition was expressed to change the word. The issue was discussed further, however,
824 in considering the provision for supporting positions on the facts.

825 Many participants in the November 7 miniconference asked whether the rule text could
826 clearly identify the place for arguing that the evidence identified to support an asserted fact is not
827 admissible. There was no particular concern as to what the place might be, whether in a response,
828 reply, or brief. Clear guidance could be provided by adding a provision to the rule on responses.
829 That would address replies as well since the procedure for a reply is the same as for a response. The
830 next draft will illustrate this approach.

831 Later discussion of the provision for supporting fact positions asked whether it is better to
832 provide for disputing an asserted fact rather than denying it. This change was accepted. The quest
833 is to identify genuinely disputed facts. It may be a more comfortable position for a lawyer who
834 believes that an asserted fact may be true but that the party asserting the fact cannot prove it.

835 The draft includes a separate subparagraph recognizing that a response “may state that those
836 facts do not support judgment as a matter of law.” This statement is the equivalent of a demurrer
837 to a complaint. It can be as general as a statement that summary judgment is not warranted even if
838 all the asserted facts are established beyond dispute. It is essentially argument, not a response in

839 factual terms. It was included as a “marker,” with the thought that it may help the court to know
840 when perusing the fact dimensions of the response that the nonmovant also is asserting that any
841 dispute as to this fact makes no difference. This discussion led to a consensus that this provision
842 addresses matters of argument better relegated to the brief. It will be deleted from the next draft.

843 The brief provision for a reply elicited little comment. It was noted that the rule text might
844 be revised to reflect the statement in the Committee Note that the reply may be addressed “only to
845 any additional fact stated in the response.” That is the intent — the reply is not to become a vehicle
846 for challenging the response’s positions on the facts in the movant’s statement or for adding new
847 citations to bolster the movant’s initial statements.

848 The provision for citing support has been economically drafted to include the motion,
849 response, and reply. That means that it includes terms that do not apply to all three of those papers.
850 A motion, for example, will not be supported by a showing that materials cited to support a fact do
851 not establish the fact. Care must be taken to avoid potential confusion.

852 One part of the provision on citing support recognizes a showing that materials cited to
853 support a fact do not establish the absence of a genuine dispute. This provision is incomplete; it
854 might well be expanded to refer to materials cited to support or dispute a fact, and say “do not
855 establish a genuine dispute or the absence of one.” Whether or not expanded, it is important to avoid
856 any invitation to add elements of argument that would better be included in a brief. But the rule is
857 both incomplete and misleading if it seems to say that there must be citations to specific materials.
858 A response, for example, need not cite anything to support the argument that the materials cited by
859 the movant do not establish the absence of a genuine dispute. The additional provision suggested
860 for a response challenging the admissibility of the supporting materials also does not require citation
861 of counter-materials.

862 This discussion led to more elaborate exploration of the way to provide for admissibility
863 arguments. It was urged that the response should be the place to say “because it is not admissible.”
864 Agreement was expressed by observing that it is important to provide an immediate indication that
865 a stated fact is disputed because the supporting materials are not admissible — “red flags go up if
866 there is no citation to support the response.” We should not rely on permission to “qualify” a fact
867 in a response; a qualification is a response that the fact is partly true. The purpose is to tell the judge
868 which facts are in dispute.

869 A related question arises from the provision for “showing that * * * no material can be cited
870 to support the fact.” This provision addresses a motion made by a party who does not have the trial
871 burden of production and who asserts that the nonmovant will not be able to carry its trial burden
872 of production. Finding a clear expression may be a challenge. But the issue clearly goes to one
873 proper form of motion; it is not something that can be relegated to the brief. The difficulty actually
874 begins with the description of the motion in draft (c)(2)(B). The motion is to state “facts that the
875 movant asserts are not genuinely in dispute.” But the “no-evidence” motion seems to be stating a
876 non-fact: “I was not driving the car.” More accurately, the motion states “you do not have evidence
877 to show that I was driving the car.” Is that a statement of a fact not genuinely in dispute? Yes. A
878 fuller statement would be that there is no genuine dispute as to the fact because the nonmovant, who
879 has the trial burden, cannot carry the trial burden. Alternative drafting would be awkward; the
880 language chosen should not misdirect a lawyer intent on making a “no evidence” motion by
881 “showing” an adversary has no evidence. The reference to “showing * * * no material can be cited,”
882 moreover, is a deliberate choice to avoid resolving what appears to be continuing uncertainty about
883 a notorious ambiguity in the Celotex opinion. Some observers still argue that a movant who does
884 not have the trial burden of production can “show” the nonmovant lacks evidence sufficient to carry

885 the burden by simply asserting that proposition without doing anything more to illuminate the lack
886 of evidence. Many others believe that the movant must do something more, such as ask by
887 interrogatory what evidence the nonmovant has to prove an issue and then address in the motion the
888 insufficiency or inadmissibility of any evidence the nonmovant identifies in its answer.

889 Discussion became more specific. Suppose discovery has closed: Can a defendant say there
890 is no evidence of scienter in a securities fraud case, or no evidence of agreement to conspire in an
891 antitrust case, without doing anything more? One response was that such motions are not made.
892 Movants do point to specific parts of the discovery materials and perhaps other supports such as
893 declarations.

894 The Subcommittee will consider possible drafting changes, but it was agreed that some
895 version of showing that nothing can be cited to support a fact should remain in the draft submitted
896 for Standing Committee consideration.

897 Draft (c)(6) will be changed to read “A party must ~~attach to~~ file with a motion * * *.” The
898 final words will be deleted: “~~or at a time the court orders.~~” The court’s authority to alter by order any
899 procedure specified in subdivision (c) is ensured by (c)(1).

900 The provision for filing only materials that have not already been filed presents a more
901 important issue. Some courts have local rules directing that all materials referred to in a Rule 56
902 motion be gathered in an appendix whether or not they are already on file. The draft Committee
903 Note approves this practice. This may be a case in which the rule text should expressly support the
904 Note. In addition, at the November 7 miniconference Judge Swain suggested that some bankruptcy
905 files are so mammoth — she described one with 1,000 pages of docket entries — that the judge may
906 face serious problems in attempting to retrieve a paper that is somewhere in the file. Consideration
907 should be given to revising the rule text to recognize appendix practice and to allow a court order
908 to refile information already on file.

909 Finally, an old question was reopened by asking whether the argument paper should be
910 referred to as a “memorandum” rather than a “brief.” The choice to substitute “brief” for
911 memorandum, made last spring, was reconfirmed.

912 It also was agreed that the provision authorizing use of affidavits or declarations should be
913 moved into subdivision (c) as one aspect of the procedure.

914 **Rule 56(d)**

915 Draft Rule 56(d) addresses the consequences of a failure to respond or a response that does
916 not comply with the procedural requirements of Rule 56(c). One question is whether it also should
917 address a motion that does not comply with Rule 56(c), the failure to reply (does that admit new facts
918 stated in the response?), and a failure to reply in proper form. Arguments have been made that it is
919 unfair to address only one form of impropriety. The imbalance leaves nonmovants uncertain about
920 the proper procedure, and may seem to imply favoritism for movants. One approach, for example,
921 would be to provide a motion to strike a motion in improper form. But providing the motion might
922 invite make-work challenges to trivial defects in the motion. Worse, it might invite arguments that
923 more serious defects — such as failure to cite any supporting material, or failure to challenge the
924 admissibility of cited material — are waived by failure to move to strike. Courts have extensive
925 experience in dealing with defective motions; there is no need to add a provision for defective
926 motions here. But consideration should be given to the failure to reply: the first question will be
927 whether permission to reply should entail an obligation to reply on pain of accepting any new facts
928 in the response not addressed by a reply.

929 The draft includes “any other appropriate order” in the list of responses to a failure to respond
930 or to respond properly. The Subcommittee discussed the “deemed admitted” practice at length and
931 initially decided to recognize this practice in the Committee Note, and in a subordinate position.
932 Rather than take the failure as a deemed admission of a fact not properly responded to, the Note
933 suggested that the court enter an order that the fact would be deemed admitted unless a proper
934 response is filed. On further consideration, it may be better to write deemed admission into rule text
935 as a direct consequence of the failure to respond properly. The text could, for example, include an
936 order that “a fact not properly responded to is not controverted for purposes of the motion.” This
937 would both enhance the duty to respond and give clear notice in rule text of the consequences of
938 failing to respond.

939 It was asked why not say “deemed admitted” in the rule? It was answered that some circuits
940 seem hostile to this practice, preferring that even if there is no response the district court must
941 examine the motion and supporting materials to determine whether there is a genuine dispute.

942 The relationship to partial summary judgment was noted. If a fact is considered not
943 controverted (or “deemed admitted”), the result may be summary judgment on the whole action,
944 summary judgment as to some part of the action, or denial of any summary judgment because the
945 fact is not material or other facts establish a genuine dispute.

946 The limitation of the considered acceptance of a fact to the purposes of the Rule 56 motion
947 was thought important. The result should be the same as for a response that explicitly accepts a fact
948 only for purposes of the motion. If summary judgment is not granted on the fact, it remains open to
949 dispute at trial. Of course careful pretrial practices are likely to flag this fact as one of the topics for
950 discussion in defining the issues for trial.

951 Hesitation was expressed. Appellate courts are wary of granting summary judgment without
952 examining the materials offered to show that there is no room for genuine dispute. This concern
953 rises higher in cases involving pro se or prisoner litigants. By whatever name, “deemed admitted”
954 will be controversial. One protection will be a direction that a pro se litigant must be given notice
955 of the need to respond, and perhaps a second notice after there is no response or an inadequate
956 response.

957 The discussion concluded by a straw poll that showed 7 members in favor of adding to the
958 rule a provision for an order that a fact is “deemed accepted” for want of a proper response, with 4
959 against.

960 **Rule 56(e)**

961 Draft Rule 56(e) began as a provision recognizing common practices not directly addressed
962 in the present rule. Courts may grant summary judgment without any motion; may grant a motion
963 for reasons not stated in the motion; and may grant summary judgment for the nonmovant.
964 Incorporation in the rule provides notice to the parties of the general practice. The rule also
965 recognizes the established requirement that the court should give notice and a reasonable time to
966 respond before doing any of these things. Including these provisions seems desirable.

967 Last spring it was decided that this subdivision seemed incomplete because it did not include
968 an admittedly redundant reminder that the court can also grant or deny the motion. That reminder
969 was included in the present draft. But it is redundant with other provisions, and may cause confusion
970 precisely because it is redundant.

971 This discussion led to a suggestion that had been made earlier. It may be better to rearrange
972 the subdivisions so that the first subdivision, (a) does the work done by subdivision (c) in present
973 and Style Rules 56. The rule can begin with a statement of the power to grant summary judgment,
974 just as Rules 50 and 59 begin with a statement of the powers to grant judgment as a matter of law
975 or a new trial, followed by the procedural details of time to move and the like. Rule 60(b) is similar
976 — the power to vacate a judgment is stated before the time limits. This arrangement will reduce the
977 redundant provisions in the present draft that anticipate the summary-judgment power that is not
978 announced directly until subdivision (g). It was agreed that a rearranged draft will be prepared for
979 consideration.

980 **Rule 56(f)**

981 Draft Rule 56(f) carries forward Style Rule 56(f) with little change. It adds a new recognition
982 that when the court orders time for further discovery it can deny a motion rather than defer a ruling.

983 Some effort has been made to retain this provision as subdivision (f) because that has been
984 its familiar designation. But as the subdivisions come to be rearranged, logical sequencing may
985 require that it be relocated.

986 **Rule 56(g)**

987 Draft subdivision (g) states the basic power to grant summary judgment. Its language carries
988 forward the traditional core of the summary-judgment standard, substituting “dispute” for “issue”
989 but otherwise leaving the standard unchanged. Summary judgment is proper if there is no genuine
990 dispute as to any material fact and a party is entitled to judgment as a matter of law.

991 Some issues remain. Style Rule renders as “should” the direction in present Rule 56(c) that
992 the court “shall” grant summary judgment. The Committee Note for the Style Rule explains that it
993 has become well established that there is a one-way discretion on summary judgment. The court has
994 no discretion about granting summary judgment — a grant is proper only if the summary-judgment
995 record would require judgment as a matter of law at trial, a question reviewed de novo without any
996 deference to the trial court. But there is discretion to deny summary judgment even though the same
997 evidence at trial would not allow judgment on a contrary jury verdict. The Style Rule Note also
998 indicates that the discretion to deny summary judgment should be used sparingly: “‘Should’ in
999 amended Rule 56(c) recognizes that courts will seldom exercise the discretion to deny summary
1000 judgment when there is no genuine issue as to any material fact.”

1001 It was noted that the Style Project was forced by style conventions to find some substitute
1002 for “shall” in the present rule. Given the established discretion to deny summary judgment, “should”
1003 was the proper approach for the Style Project. But the present project supports substantive
1004 amendment. Substituting “must” for “should” would not violate the decision to leave the summary-
1005 judgment standard unchanged. The standard remains the same. If in the continuing language of the
1006 rule a party is “entitled to judgment as a matter of law” under the unchanged standard, there should
1007 be no discretion to deny.

1008 A counter-example was offered. Gender- and national-origin discrimination claims may be
1009 joined in a single action. The facts bearing on each claim may be almost entirely the same. Even
1010 though the evidence on one theory may seem very thin — for example the national-origin theory —
1011 it may be better to try all theories together to avoid the risk that a partial summary judgment rejecting
1012 the national-origin claim might be reversed and require a new trial.

1013 A more general question asked whether judges often exercise discretion to deny a summary
1014 judgment that is warranted under the summary-judgment standard? One response was that this is
1015 not a real problem in practice. "If a judge wants it to go away the judge will sit on the motion and
1016 the parties may settle." But it also was observed that some lawyers find it frustrating that a court
1017 may refuse to whittle a case down by partial summary judgment. A further frustration occurs when
1018 a summary-judgment motion is decided on the brink of trial. Recognizing these frustrations does
1019 not mean that it is possible to provide an effective response through Rule 56.

1020 Further discussion resolved the issue with 8 straw votes in favor of "should" and 2 for
1021 "must."

1022 A second set of questions arises from the direction that "[a]n order or memorandum granting
1023 summary judgment should state the reasons." Would it be better to say that the court "must" state
1024 reasons for a grant? Should the rule address an order denying summary judgment, either stating that
1025 the order "should" or "must" state the reasons?

1026 The strongest argument for saying that an order granting summary judgment must state the
1027 reasons arises when the judgment disposes of the entire action. There is likely to be an appeal.
1028 Although the court of appeals is obliged to provide de novo review, it is essential to understand the
1029 reasoning of the district judge who first undertook a comprehensive analysis of the record. The rule
1030 could distinguish grants from denials, either omitting denials or saying only that an order denying
1031 summary judgment should state the reasons.

1032 Reasons were offered for not saying that the court must give reasons for a denial. One
1033 example is a determination that the case is close, that sustained work will be required to determine
1034 whether summary judgment is indeed appropriate, and there is a real risk that any summary judgment
1035 will be reversed. Denial in deference to a trial that will produce a definitive answer may be wise.
1036 But little is gained by stating such reasons. This question relates to the question whether the court
1037 should identify specific issues that are genuinely disputed. Identifying disputed issues can help focus
1038 the parties' trial-preparation work, but also may be an investment of the court's time that pays few
1039 dividends. It also was suggested that given de novo review, the prospect that very few denials will
1040 come up on appeal outside official-immunity and similar collateral-order appeals, and general
1041 present practice, nothing more need be said on a denial than that there is a material disputed issue.

1042 It also was suggested that an obligation or strong encouragement to state reasons becomes
1043 more complicated when the court grants summary judgment as to only part of a case, or grants in part
1044 and denies in part.

1045 Straw voting at the end of this discussion produced some double votes. Three members
1046 favored a rule that the court must state reasons both in granting and in denying summary judgment.
1047 Five favored must for a grant and should for a denial. Five also favored should for both grant and
1048 denial.

1049 The question whether the basic statement of summary-judgment authority should be relocated
1050 to become subdivision (a) came back for further consideration. It was suggested that if it comes at
1051 the beginning, this provision is the proper place to refer to "evidence that would be admissible at
1052 trial." But the provision addressing the need to state reasons might better be relocated. Further
1053 support for relocation was offered: it is better to begin with the fundamental proposition in the model
1054 of several other rules, and then flesh out the surrounding procedures and incidents. This should not
1055 be buried in the last quarter of the rule. A rearranged draft will be prepared for consideration by the
1056 Subcommittee.

1057

Rule 56(h)

1058 Draft Rule 56(h) recognizes the long-established practice and terminology of “partial
1059 summary judgment.” The draft remains open to further wordsmithing here as everywhere else.

1060 Discussion focused on the provision in subdivision (h)(2) for an order stating that a material
1061 fact is not in dispute “and treating the fact as established in the action.” Should “established” be
1062 replaced by “accepted”? The response was that “accepted” is not appropriate for a court
1063 determination. “Accepted” is appropriate when addressing the “deemed admitted” consequence of
1064 a failure to respond properly because then there is no actual court determination that the record
1065 shows there is no genuine dispute. (h)(2), in contrast, requires a court determination on the
1066 summary-judgment record. Its language is close to present Rule 56(d) — “the facts so specified shall
1067 be deemed established” — and is drawn directly from Style Rule 56(d)(2) — “must be treated as
1068 established in the action.”

1069

Rule 56(i)

1070 Style Rule 56(g) provides that the court “must” order payment of the reasonable expenses,
1071 including attorney fees, caused by submitting a Rule 56 affidavit in bad faith or solely for delay. The
1072 court also may hold the offending party in contempt. Draft Rule 56(i) carries these provisions
1073 forward, but reduces the command to permission — the court “may” order these sanctions. The FJC
1074 responded to a request to study the use of Rule 56(g), finding that there are very few motions and
1075 almost no grants. The Subcommittee has thought about simply abolishing this provision as
1076 moribund. Civil Rule 11 and 28 U.S.C. § 1927 may be sufficient deterrents.

1077 Some participants in the November 7 miniconference thought Rule 56(i) should be expanded
1078 beyond bad-faith affidavits. They fear that summary-judgment motions are often made for strategic
1079 purposes of delay or to impose crippling costs on an adversary with few resources for the litigation.
1080 They recognize also that a hopeless response may be filed. The recommended solution is to create
1081 a cost-shifting sanction similar to the sanctions Rule 37 provides for unsuccessfully making or
1082 resisting a discovery motion.

1083 An observer expanded this proposal by suggesting that it is not properly characterized as
1084 cost-bearing or as cost-shifting. It is an attempt to discipline the parties to follow the structure of the
1085 new rule. A motion, response, or reply submitted without reasonable justification would be subject
1086 to a discretionary sanction to compensate the adversary. It would apply to all parties. It would not
1087 be a “lose and pay” rule.

1088 The underlying concerns reflect not only the strategic motion but also the “400-page
1089 statement of uncontested facts.”

1090 Competing observations suggested that the proposal goes well beyond the “bad faith”
1091 exception to the “American Rule” that the loser is not responsible for an adversary’s attorney fees.
1092 It also goes far beyond Civil Rule 11. It could easily be challenged as at least testing Enabling Act
1093 limits. Rule 37 discovery sanctions rest on failure to comply with the procedural obligations
1094 imposed by other discovery rules. The obligation not to make a strategic Rule 56 motion may not
1095 be as purely procedural. Rule 56 does state a summary-judgment standard, and it does address
1096 premature motions through the provision for further discovery. But translating these provisions into
1097 a procedural obligation that is a suitable foundation for a procedural sanction is not easy. Tort
1098 remedies for abusive litigation are deliberately narrow. Expanding “procedural” remedies may
1099 approach substantive law too closely for comfort.

1100 A more direct response was “thanks, but no thanks.” Any such sanction “will never be
1101 applied.” Rule 37 was amended in 1970 in an attempt to foster free use of discovery cost-shifting
1102 sanctions, but courts have been reluctant to follow the lead. And after a decade of experience, Rule
1103 11 was modified to reduce the volumes of collateral litigation spawned by the 1983 amendments.

1104 It was determined that draft Rule 56(i) should be retained in the draft form, with the addition
1105 of an explicit direction to give notice and a reasonable time to respond before a sanction order is
1106 entered.

1107 **FJC Study**

1108 Judge Baylson introduced presentation of the most recent phase of the FJC summary-
1109 judgment project by noting that it had been presented at the November 7 miniconference. At the
1110 end of the conference, Professors Burbank and Schneider both focused attention on Table 5. Table
1111 5 suggests that the median time to dispose of summary-judgment motions is significantly longer in
1112 courts with local rules that require, more or less as draft Rule 56(c) would require, counterpoint
1113 statements of fact and supporting citations in motion and response.

1114 Joe Cecil presented the study results. The study looked for possible effects of different local-
1115 rule patterns. Taking the count supplied by the Administrative Office, they categorized 20 districts
1116 as having statement and counterpoint reply rules similar to proposed Rule 56(c). They then
1117 compared those districts to those that require only a formal statement of uncontested facts by the
1118 movant, with supporting citations, and districts that do not require either a formal statement by the
1119 movant or a counterpoint response.

1120 Most of the tables show that there are no meaningful or even suggestive differences in the
1121 rates of filing or granting summary judgment, nor even in terminations of whole cases.

1122 Table 5 shows median time to disposition of 23 weeks in districts that require both statement
1123 and response, 17 weeks in districts that require the statement but not a response, and 14 weeks in
1124 districts that do not require either statement or response. This pattern holds when broken down for
1125 various types of cases. But the pattern does not of itself establish a causal relationship, much less
1126 an explanation for any causal relationship. The districts with a longer time to disposition also have
1127 longer times to disposition across the board; differences in summary-judgment times may or may
1128 not be reflected in the overall disposition times. It may be that the statement-counterpoint-response
1129 districts allow more time for briefing, or take more time for deliberation. Case loads and weighted
1130 case loads also must be taken into account.

1131 It was noted that at least some courts have standing orders that adopt the statement-
1132 counterpoint requirement established by local rule in other districts. The study took account of this
1133 phenomenon by removing from the analysis cases before any judge for whom such a standing order
1134 was identified.

1135 It was asked whether there really is a difference between practice in courts that formally
1136 require a counterpoint response and practice in courts that formally require only a statement of
1137 undisputed facts? Do responses in fact follow the seemingly natural path of counterpoint? The study
1138 may be able to explore actual motions to provide some insight on this question.

1139 Table 12 shows no differences among the three groups in terminations of whole cases by
1140 summary judgments. But there may be a higher rate in employment cases in districts with statement-
1141 counterpoint rules.

1142 The data are not ideal. Several districts, including large districts, have been excluded because
1143 the docket information cannot be unraveled. Further efforts may make it possible to include some
1144 of these districts. But there is no reason to anticipate that inclusion of these districts will change the
1145 pattern.

1146 And a further caution. There is no “scientific” basis for determining what is a significant
1147 difference in a study of this kind. Determination of significance must be a policy judgment.

1148 One observation was that “employment cases” that come to court tend to be weak. There are
1149 strong claims, but those tend to be resolved by administrative processes.

1150 Dr. Cecil agreed that the employment cases “are starting to look different from other cases.”
1151 There are many summary-judgment motions. Some of the motions are designed to get some of the
1152 parties out of the case.

1153 A final question asked whether it will be possible to study appellate review differences. The
1154 FJC studied appellate outcomes in some districts 12 years ago. It found reversal rates in summary-
1155 judgment cases that were similar to the rates in other cases. So, it was observed, the decisions
1156 granting summary judgment may be right, as measured by de novo appellate review, as often as other
1157 types of dispositions.

1158 *Class Action Fairness Act Report*

1159 Emery Lee presented the fourth interim report on the Federal Judicial Center study of the
1160 Class Action Fairness Act’s impact on federal courts.

1161 The first phase of the study involves collecting data on filings and removals of class actions
1162 from July 1, 2001 through June 30, 2007. The data reveal an increase in both filings and removals
1163 after enactment through June 30, 2006, especially in diversity class actions. The data for July 1,
1164 2006 through June 30, 2007 are being collected to determine whether these trends continue.

1165 Phase 2 will examine what happens in a class action case, and will ask particularly whether
1166 the amount of work has increased. The first part will begin by examining 300 pre-CAFA cases for
1167 all aspects of the work done through appeal; this part cannot yet be completed because some of the
1168 cases remain pending. A sample of post-CAFA cases will be examined for comparison. That step
1169 also cannot be taken yet. The second part of this phase will look at federal-question cases before and
1170 after CAFA, to address the question whether CAFA has created incentives to assert federal claims.
1171 One aspect of the question is whether plaintiffs who earlier would have pleaded only state-law
1172 claims so as to lock the case into state court are now adding federal claims because the case can be
1173 removed under CAFA. A related aspect is to see whether the number of state claims added to
1174 federal-question cases has changed.

1175 Of course the impact of CAFA also involves what is happening in state courts. A big
1176 increase in federal filings and even removals would not seem as significant if there is a parallel
1177 increase in state-court class actions. These data will be very difficult to get — few states collect
1178 them. California data may be available. Figure 1 on p. 5 of the FJC report shows a drop in
1179 California state-court filings in 2004-2005, accompanied by an increase in federal-court filings. The
1180 federal share of all class actions in California increased. This phenomenon may have been caused
1181 by CAFA. There has been a slight diminution in total civil-case filings in California, but there is
1182 nothing yet to indicate that the decrease in class actions is driven by the decrease in overall filings.
1183 The FJC will continue to work closely with California officials. The National Center for State

1184 Courts is interested in these questions; at one point they had funding for a study, but the funding was
1185 withdrawn.

1186 It was noted that California is studying actual court files; “that’s a whole lot of effort.”
1187 Students from the Hastings College of the Law are participating in the work.

1188 Federal-court studies can begin with CM/ECF, a real help. Previous reports identified a few
1189 particular categories of cases and included others as “other statutory actions.” This residual category
1190 is not satisfying. It is possible to recode many of these actions. Many of them are Title 15
1191 consumer-protection actions, such as the Truth in Lending Act. Figure 2 in the report shows the
1192 trend line. The biggest increase was in 2005 — the year CAFA took effect in mid-February.

1193 Remand rates for diversity actions have not shown a big change, from 32.5% pre-CAFA to
1194 27.5% post-CAFA. Even this difference may narrow — some more of the post-CAFA cases may
1195 yet be remanded.

1196 It was noted that many of the early post-CAFA remands involved sorting out actions that
1197 were not removable because they had been commenced in state court before CAFA’s effective date.
1198 Data for later periods will help to balance that effect.

1199 In response to an observer’s question, it was noted that the FJC study is not seeking to
1200 determine whether plaintiffs are seeking to avoid CAFA removals. But in diversity cases the study
1201 is looking to see where plaintiff class members are from.

1202 *Notice Pleading: Bell Atlantic v. Twombly*

1203 The last half year has generated great excitement about federal pleading standards. The topic
1204 was introduced by a brief recapitulation of recent events.

1205 Notice pleading has held a continuing place on the Committee agenda since the Leatherman
1206 decision in 1993. Throughout this period the Supreme Court has alternated between rulings that
1207 “heightened pleading” can be required only when authorized by statute or court rule and other rulings
1208 that seemed, without using the “heightened pleading” phrase, to exact greater pleading detail than
1209 required to identify the events in suit and a sustainable legal theory. Lower-court decisions generally
1210 came to repeat the “no heightened pleading” formula, but at the same time often seemed to require
1211 greater pleading detail in some kinds of actions than in others. If it is possible to measure degrees
1212 of pleading specificity, the thermometer seemed to register differently.

1213 Last May 21 the Supreme Court decided *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955.
1214 The opinion is rich in phrases describing the demands of a notice pleading sufficient to state a claim
1215 and show that the pleader is entitled to relief. Many of the phrases focus on some level of fact
1216 specificity. Many of them look for sufficient fact context to make the claim “plausible.” The Court
1217 explicitly retracted the statement in *Conley v. Gibson*, 1957, 355 U.S. 41, that a complaint should
1218 not be dismissed for failure to state a claim “unless it appears beyond doubt that the plaintiff can
1219 prove no set of facts in support of his claim which would entitle him to relief.” Beyond the phrases
1220 of the opinion, the result suggests that at least reasonably detailed fact pleading was contemplated.
1221 The Court, reversing the court of appeals, ruled that the complaint was properly dismissed for failure
1222 to state a claim. There was, however, no doubt that the complaint gave clear notice of the claims.
1223 Neither was there any doubt that the complaint relied on a sustainable legal theory — the Sherman
1224 Act is violated by an “agreement” among four incumbent local exchange carriers to refrain from
1225 entering into competition with each other, and to engage in similar acts to discourage competitive
1226 local exchange carriers from entering. The demand for sufficient facts to first cross the line between

1227 the conclusory and the factual, and to then cross the line “between the factually neutral and the
1228 factually suggestive,” seems — despite the Court’s disavowal — to exact heightened fact pleading.

1229 The general reach of the Twombly opinion has created uncertainty from the outset. The
1230 Court spent some time decrying the enormous burdens that could be imposed by discovery, and in
1231 doubting the possibility that effective management of staged and focused discovery can be used to
1232 enable a plaintiff to determine, at relatively reasonable cost to the defendants, whether information
1233 exclusively available to the defendants can be used to supply a better preliminary fact showing that
1234 will justify full-scale discovery and litigation. The Court also relied heavily on its own sense of
1235 economically rational behavior in highly concentrated markets. One speculation has been that the
1236 opinion is no broader than antitrust pleading, and may be narrowed specifically to pleading § 1
1237 conspiracy claims.

1238 The narrow interpretation of the Twombly opinion gained some support from the decision
1239 on the certiorari papers in *Erickson v. Pardus*, 2007, 127 S.Ct. 2197. Reversing dismissal of a
1240 prisoner’s complaint claiming injury caused by removal from a Hepatitis C treatment program, the
1241 Court quoted Twombly quoting *Conley v. Gibson*: “Specific facts are not necessary; the statement
1242 need only “give the defendant fair notice of what the . . . claim is and the grounds upon which it
1243 rests.””

1244 A third decision soon after the Twombly and *Erickson* decisions added an intriguing side
1245 light. In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 2007, 127 S.Ct. 2499, the Court ruled that
1246 heightened pleading requirements do not violate the Seventh Amendment.

1247 Faced with the multifarious and often exacting phrases of the Twombly opinion, lower courts
1248 have struggled to determine whether pleading standards have in fact changed. The sense of struggle
1249 does not imply that changes are unwelcome. There is strong support for the proposition that lower
1250 courts have long applied standards close to the “contextual plausibility” test that can be teased out
1251 of the Twombly opinion. Greater pleading detail is required in cases that threaten to impose massive
1252 pretrial and trial burdens. Greater detail also may be required in facing substantive claims that courts
1253 sense are often misused. Greater detail may be required when appropriate to protect particular
1254 interests that limit the underlying claim — the detailed pleading of defamation claims required by
1255 some courts may be an example. License to do more openly what courts have been doing all along
1256 may prove welcome, once the decisions work the way through to finding clear license.

1257 A small sampling of the literally thousands of citations to the Twombly decision can begin
1258 with *Iqbal v. Hasty*, 2d Cir.2007, 490 F.3d 143. The opinion examines the “conflicting signals” of
1259 the Twombly opinion and concludes:

1260 [T]he Court is not requiring a universal standard of heightened fact pleading, but is
1261 instead requiring a flexible “plausibility” standard, which obliges a pleader to amplify
1262 a claim with some allegations in those contexts where such amplification is needed
1263 to render the claim plausible.

1264 Other appellate decisions provide interesting insights. The importance of context is
1265 suggested by two examples. One is a decision dealing with a claim of retaliation for complaining
1266 about employment discrimination. The court ruled that although a complaint for discrimination need
1267 only plead the basis of the discrimination — for example, race, age, or gender — a complaint for
1268 retaliation must plead the nature of the plaintiff’s protest about discrimination. The plaintiff should
1269 know the nature of the plaintiff’s own conduct and should be required to plead it to enable a
1270 determination whether the protest involved matters within the reach of discrimination law. A second
1271 is a decision dealing with a claim that the defendants violated the plaintiff’s First Amendment Free

1272 Exercise rights by terminating him from a fieldwork practicum for an advanced social work degree.
1273 Ruling that the plaintiff must plead a sincerely held religious belief, the court also ruled that it
1274 suffices to state that the plaintiff “sincerely” holds a “religious” belief. There is no need to plead
1275 additional facts to support sincerity or to support the religious character of the belief. How else, the
1276 court asked, can a plaintiff assert these matters?

1277 With this introduction, it was suggested that it may be premature to embark on a major
1278 pleading project. The Standing Committee will have a program on pleading in January. They may
1279 provide some sense whether there is anything useful to be done now while the courts are working
1280 toward a new understanding of Rule 8. For that matter, the Supreme Court may render more
1281 opinions.

1282 One judge suggested that although there is no statistical basis for it, there is an impression
1283 that the number of motions to dismiss has increased. Many of the motions seem to request
1284 application of a fact-pleading requirement. And it seems clear that some members of the bar want
1285 more pointed pleading. But there are different views at the bar.

1286 Other judges were not sure whether there has been an increase in motions to dismiss. Of
1287 course *Twombly* is cited repeatedly in all motions. “Before *Twombly* courts could rely on context
1288 and plausibility.” The *Dura Pharmaceuticals* decision requiring clear pleading of loss causation is
1289 an illustration. There is a long line of Second Circuit decisions holding antitrust complaints
1290 insufficient, influenced by fear that discovery and other burdens are so great as to coerce settlement.
1291 It remains to be seen whether *Twombly* will apply only in complex cases that involve expensive
1292 discovery.

1293 A similar view was expressed by another judge. *Conley v. Gibson* has been the mandatory
1294 citation on motions to dismiss. Now it will be *Twombly*. It will be fascinating to see, five or ten
1295 years from now, whether the result has been anything more than a change in the boilerplate citation.

1296 It was agreed that renewed interest in pleading is clearly linked to discovery. The greater the
1297 continuing uneasiness about the burdens of discovery in some cases, and the greater the doubts about
1298 the success of continuing discovery rule amendments, the greater the interest in raising pleading
1299 requirements as a preliminary shield.

1300 The very notion of contextual plausibility, moreover, brings back the question of
1301 transsubstantive procedure. The question of substance-specific pleading rules has often been raised
1302 by asking whether the particularized pleading categories in Rule 9 should be increased. Even those
1303 suggestions have encountered doubts about the potential effects on substantive rights. More open-
1304 ended and potentially less disciplined invocation of particularized pleading requirements according
1305 to an individual judge’s sense of substantive values seems more troubling still. Come to think of it,
1306 it may be asked whether we have any sense whether Rule 9(b) works well? The Private Securities
1307 Litigation Reform Act raised pleading standards above the general Rule 9(b) fraud-pleading
1308 standards for securities actions; does Rule 9(b) work better in other settings? Why was it limited to
1309 mistake and fraud?

1310 It was noted that *Twombly* emphasizes both notice and entitlement to relief. Courts develop
1311 their own special tests. The Second Circuit, for example, requires pleading the precise defamatory
1312 statement complained of.

1313 The suggestion that *Twombly* may be nothing more than an antitrust pleading decision was
1314 renewed. The Court relied on the parallel summary-judgment approach to antitrust cases in the

1315 Matsushita case. The Court relies on its own concepts of economic rationality to measure the
1316 plausibility of claimed conduct.

1317 This suggestion elicited a partly sympathetic response that there is much for the “antitrust
1318 only” view, but that explicitly withdrawing the much-used “no set of facts” test clearly applies to all
1319 cases. A “plausibility” test clearly does not require a determination whether the plaintiff will, or
1320 even can, win. But the pleading standard must be reconsidered across the board.

1321 A specific example was offered. In a big MDL antitrust litigation, the Department of Justice
1322 is willing to share documents with the plaintiffs. But the defendants argue that the plaintiffs must
1323 first draft their pleadings without access to the documents. The linkage of pleading and discovery
1324 in the Twombly opinion will cause trouble even in a case such as this where the discovery will cost
1325 the defendants nothing — they are not the ones that have to produce the documents. Experience with
1326 litigating many 12(b)(6) motions, including through appeals, has shown problems enough under pre-
1327 Twombly pleading standards. It could take 4 or 5 years to reach the point of establishing that the
1328 complaint states a claim. What will lawyers and judges talk about under a “plausibility” test? The
1329 test seems completely subjective, judge-by-judge. It will be as so many Rorschach blots, with self-
1330 same complaints interpreted differently by each viewer. Even now, motions to dismiss commonly
1331 assert that the complaint “does not sufficiently allege * * *.” This has almost become a legal
1332 standard. To say that pleading requirements are “contextual” does not much advance the inquiry or
1333 practice.

1334 This example was paralleled by asking whether, under a “contextual plausibility test” — if
1335 that is what emerges from Twombly — it matters who possesses the information needed to plead
1336 with adequate fact specificity?

1337 One example of institutionalized pleading requirements has been “case statements” in actions
1338 under the Racketeer Influenced and Corrupt Organizations Act. Some courts have had local rules
1339 or standing orders requiring these statements. But some of these courts have abandoned them for
1340 fear they violate notice pleading rules. Perhaps the Twombly case offers renewed authority for this
1341 practice.

1342 Employment cases are another category that may provide interesting applications of the
1343 Twombly tests. The courts of appeals have not addressed pleading in these cases in a substantive
1344 way. They arise in infinite variety.

1345 Product-liability cases were offered as another example. Simplified notice pleading seems
1346 to work well for them.

1347 It also was noted that good lawyers have been filing pretty detailed complaints for many
1348 years. They want to tell the story and to frame the issues. It seems likely that the Twombly decision
1349 will have little or no impact in most cases brought by careful lawyers.

1350 This example was used as a basis for asking whether, under a “contextual plausibility test”
1351 — if that is what emerges from Twombly — it matters who possesses the information needed to
1352 plead with adequate fact specificity? The plaintiff, for example, knows her race and gender, and that
1353 she was fired. She may know about a few questionable remarks. But much important information
1354 is in the employer’s hands. So can pleading standards be adjusted to require statement of what the
1355 plaintiff can fairly be expected to know, and no more? This question was echoed in the suggestion
1356 that perhaps Twombly will help “sort out who is the lower-cost information provider.”

1357 It was observed that if more fact-specific pleading is required, plaintiffs will be required to
1358 front-load the case, as has happened in securities actions after the PSLRA. But once the plaintiff
1359 survives a motion to dismiss, the lawyers presume there is merit to the claim. The result is earlier
1360 and higher settlements. But the value of front-loading the pleadings as an offset to the difficulty of
1361 controlling discovery does not come without cost. The cost is not only on the parties; motions will
1362 put the cost on courts as well. In situations that involve a contest among counsel to become the first
1363 to file and thus to gain advantage in becoming lead counsel, moreover, the ability to front-load
1364 preparation may be undercut by the need to respond promptly with a parallel filing after the most
1365 eager lawyer has filed without much loading at all.

1366 The past was recalled by noting that the Supreme Court seems to march up and down the
1367 specific pleading hill. The FJC did a study of motions to dismiss almost 20 years ago, responding
1368 to this Committee's study of a proposal to abolish the Rule 12(b)(6) motion. The tie to discovery
1369 practice in the Twombly opinion raises a similar empirical question: have judges been more or less
1370 engaged in managing discovery, particularly in targeting initial discovery, in ways that might reduce
1371 the concerns about launching discovery with no more than a complaint identifying the events that
1372 will become the focus of discovery?

1373 The possibility of empirical inquiry was pursued. The FJC might be able to design a study
1374 that will show whether fact pleading has increased. There is a foundation in earlier studies in the
1375 frequency and outcomes of motions in 1975, 1986, 1990, and 2000. That work, at least, can be
1376 updated. The Committee agreed that such work will be enormously helpful if the time comes to
1377 consider amending the rules.

1378 It was suggested that it may be desirable to resurrect the Rule 12(e) proposals that were put
1379 on hold a year ago. Case-specific pleading requirements directed by the judge with an eye to the
1380 needs of effective management of the particular case may be a good substitute for more open-ended
1381 requirements imposed at the initial pleading stage. The concern about inviting boilerplate motions
1382 may be offset by concern that at least for a while the Twombly opinion may encourage reflexive
1383 motions to dismiss. Although the potential uses of present Rule 12(e) have been reduced, revision
1384 may prove worthwhile.

1385 This discussion was extended by noting that there was a time when lawyers were too quick
1386 to file Rule 12(e) motions. Courts in effect told them not to bother — this is a notice-pleading
1387 system. Lawyers took the message to heart. Another lawyer agreed that “Rule 12(e) is no use.”
1388 There seemed to be a similar lesson on Rule 12(b)(6) — be really careful; a losing motion is a bad
1389 way to start a case. The Twombly opinion is seen by practitioners as an invitation. CLE seminars
1390 are springing up. Practitioners will reinvigorate motions practice. And we have yet to see what
1391 courts will do.

1392 Discussion of the vistas opened by the Twombly opinion concluded with general agreement
1393 that the Committee should not immediately move into more aggressive action on its pleading
1394 projects.

1395 *James Duff Report*

1396 James Duff, Director of the Administrative Office of the United States Courts, met with the
1397 Committee to discuss its ongoing work and pending legislation. Judges Kravitz and Rosenthal
1398 expressed appreciation for the support the Administrative Office has provided for the work of the
1399 rules committees. Special appreciation was expressed for the outstanding work of the Rules
1400 Committee Support Office, and particularly the work and support provided by Peter McCabe, John
1401 Rabiej, James Ishida, and Jeffrey Barr.

1402

Rule 68

1403 The Committee was reminded that proposals to “put teeth” into the Rule 68 offer-of-
1404 judgment provisions continue to arrive “in the mail box” at rather regular intervals. Rule 68 was
1405 studied, and revisions were published for comment, in the 1980s. These proposals may have been
1406 the origin of the warnings that one proposal or another will generate a firestorm of protest. They did.
1407 Rule 68 was studied again in the 1990s in response to an elegant “capped benefit-of-the-judgment”
1408 proposal advanced by Judge Schwarzer. The FJC undertook a study of Rule 68 practice to support
1409 the work. That undertaking led to an increasingly complicated draft and eventually to abandonment
1410 of the project without publishing any proposal. Last year the Second Circuit published an opinion
1411 explicitly inviting revision of Rule 68 to address the problems presented by cases that involve
1412 specific relief. Recent empirical work investigating the use of Rule 68 offers in fee-shifting cases
1413 involving employment discrimination and civil rights has been undertaken by Professors Thomas
1414 A. Eaton and Harold S. Lewis, Jr.. Specific proposals will emerge from their work.

1415 It was noted that Pennsylvania state courts use added interest awards as an incentive to accept
1416 an offer of judgment. It may be possible to rely on enhanced costs or interest awards to make Rule
1417 68 more effective without intruding on the traditional attorney-fee rules that apply outside the realm
1418 of statutory fee shifting.

1419 It was agreed that Rule 68 can remain on the agenda for possible future consideration.

1420

Other Topics

1421 The major topics on the current agenda are those discussed at this meeting — expert-witness
1422 discovery and summary judgment. They are well advanced in the Committee’s initial process.
1423 There soon will be room in the agenda for active consideration of new topics. That does not mean
1424 that something must be found to occupy all available energies. Recent years have been the occasion
1425 for many important projects, and it is useful to give the bar a rest. Concern with the wave of changes
1426 led to an explicit decision to not publish any proposals in August 2006; barring some emergency,
1427 no new amendments are in the pipeline to take effect on December 1, 2008, apart from a minor
1428 technical revision of Supplemental Rule C(6). It is not essential to have something to take effect on
1429 December 1, 2011. But most projects require at least three years from start to effective date, and
1430 many require more. It is not too early to be asking about possible new topics.

1431 One possibility might be to revisit the simplified procedure project that was opened and then
1432 put aside a few years ago. The proposal was not shaped as a distinctive practice for pro se cases.
1433 Although the procedure would be simplified for cases brought within the rules, understanding would
1434 not be easier — the simplified procedures could be understood only as simplification of the general
1435 procedures. Various concerns led to the decision to defer further work. One was reports of
1436 experience in courts that have established multiple “tracks” by local rules. Few if any lawyers seem
1437 willing to believe that their “federal cases” really are simple cases calling for simplified procedures.
1438 And some observers were worried that judges might somehow direct attention away from more
1439 complex cases in order to tend to the simplified cases.

1440 An observer reported that the ABA has a task force examining the great variations in pretrial
1441 order forms used across the country. Some forms exact such great detail as to amount almost to a
1442 first trial on paper, a true ordeal. Great expense may be entailed. At the same time, settlement may
1443 be promoted because the preparation requires the lawyers to take a close look at the cases.

1444 It was reported that the new privacy rules are about to take effect, spurring a review of
1445 Administrative Office forms for consistency. Some forms call for filing information that is
1446 inconsistent with the privacy rules — requirements for social security numbers are the most common
problems. Various privacy issues may come back to the rules committees.

Respectfully submitted,

Edward H. Cooper
Reporter

RULE 56: ADVANCE CIRCULATION

The attached version of Rule 56 is in the form that will be in the agenda materials for the April 7-9 Advisory Committee meeting. It is being circulated now to provide ample opportunity for review and for advance comment. [This version of Rule 56 had been circulated to the committee on March 5 for an early review. No changes have been made since.]

As noted below, some major issues clearly demand careful discussion during the Committee meeting. Another few issues may well be worthy of discussion. With luck, the resolution of many potential issues presented by the rule text and Committee Note will seem so clearly right as to require no further discussion. Determination of which issues should be discussed will be facilitated by early review and responses identifying issues that should be discussed. One member's interest suffices; alerting others before the meeting will enhance the discussion.

Form of Proposal

The questions that have been identified as possible subjects for Committee discussion are described in footnotes attached to rule text or Note. The list may not be complete; any issue that a Committee member thinks worthy of discussion should be flagged and added to the discussion issues.

The footnotes include reporting on preliminary discussion of the Rule 56 proposal at the January Standing Committee meeting. The proposal was presented as a first look, both to establish a foundation for more detailed discussion at the Standing Committee's June meeting and to gain insights that further improve the proposal. The discussion succeeded on both counts. The Standing Committee's initial reaction supports the ongoing work.

Beyond that the footnotes run the range from minor drafting choices to major issues about the procedures that surround summary judgment. Subcommittee recommendations are identified as to a few issues, and a few others are simply referred to the Committee for resolution. The choices made in anticipating a few of these issues here are not meant to discourage interest in any of the others.

The footnotes have seemed sufficient to identify all but the most minor editorial revisions made in the draft considered at the November Advisory Committee meeting. Underlining is used sparingly.

Time-Consuming Issues

Footnote 2: The Style Project translated "shall grant" summary judgment in former Rule 56 to be "should grant." That is the present rule text and will remain the rule unless it is amended. The choice was made deliberately because of the cases recognizing discretion to deny summary judgment even though the movant has carried the Rule 56 burden. Over the last few months Committee members have renewed the question whether the rule should say "must grant" summary judgment when there is no genuine dispute. Andrea Thomson, Judge Rosenthal's Rules Clerk, has provided a memorandum describing the cases that recognize discretion to deny. As described in footnote 2, the Subcommittee recommends that "should" be retained.

Footnote 4: Subdivision (a) emerged from the November Committee meeting in a form that said the court must state the reasons for granting summary judgment and should state the reasons for denying summary judgment. The votes were closely divided on both points. Following discussion in the Standing Committee, the Subcommittee considered the question further and now recommends that the rule say that the court "should" state reasons both for granting and for denying summary judgment.

Footnote 18: In November the Committee considered and rejected arguments that subdivision (e) should address defective motions as well as failures to respond or reply and defective responses and replies. The Subcommittee continues to support that decision. But the questions are important, and will figure prominently in public comments when the proposal is published.

Footnote 20: Perhaps the most difficult question of all is the adaptation of "deemed admission" practice into the rule. The discussion might usefully focus on an intermediate proposal: if there is no response, or the response is defective, the court may consider a fact undisputed only if examination of the materials cited by the movant show "support" for the fact. The idea of "support" (or, more tendentiously, "proper support") is necessarily vague. It would impose on the court a duty to look at the record, but not the duty to determine whether the cited materials would warrant summary judgment if the response had said simply that they do not establish the absence of a genuine dispute. The difficulty of expressing this middle ground may be ground for caution, but it also may be an advantage. Andrea Thomson is preparing a memorandum on "deemed admitted" practice that will be circulated soon.

Other Issues

The suggestions of a few other issues are deliberately limited to avoid any exclusionary implications that might be drawn from a long list.

Footnotes 1, 24: The Subcommittee refers to the Committee the question whether it is necessary to add to subdivision (a) an explicit statement that the court may grant summary judgment on the "whole action."

Footnote 36: The reference to local rules requiring an appendix of summary-judgment materials has had a checkered history. General wariness about blessing local rules might yield to respect for the stalwart champion of this sentence.

Rule 56: March 3, 2008 With Discussion Notes

Rule 56. Summary Judgment

1 (a) **Summary Judgment.** A party may move for summary judgment on all or part or ~~all~~ of a claim
2 or defense.¹ The court should² grant

¹ *The Standing Committee discussion showed some concern about the fit of this first sentence — or, alternatively, the second sentence — with subdivision (g). The point seems to be that nowhere does the rule say that the court should grant summary judgment on all of an action. The first sentence could be revised to read: "may move for summary judgment on the whole action or on all or part of a claim or defense." The question seems to be a matter of style only.*

*A related suggestion was to discard the first sentence entirely. Subdivision (a) could begin: "The court should grant summary judgment [on the whole action or on all or part of a claim or defense] if there is no genuine dispute * * *." This approach would leave the motion mechanism to first mention in subdivision (b), and would tie also to subdivision (f)'s provision for action on the court's own. But it seems more than a bit abrupt to begin without referring to party initiation — in the Style Project version that took effect in 2007, both subdivision (a) and (b) begin with "A party * * * may move."*

The subcommittee refers this question to the Committee.

² *The choice between "should" and "must" grant summary judgment was discussed extensively by the Standing Committee, perhaps fueled by some last-minute outside letters. The letters either failed to reflect the adoption of "should" as of December 1, 2007, or relegated that Style Project change to passing description as a mistake. Toward the end of the discussion it seemed to be recognized that it really will not do to say that the court "must" grant summary judgment whenever the standard is met as to any part of a case. There was no reaction to the suggestion that it would be awkward (as well as wrong, on the view that has prevailed so far) to work out a rule that the court "must" grant summary judgment when the standard is met as to the whole action, but "should" when it is met as to less than the whole action. It also was recognized — for the most part indirectly — that "must" would require careful integration with the "facts are unavailable" provision of subdivision (d).*

Part of the concern was that some judges "are afraid of summary judgment." They fear reversal, or find it easier to have a trial, or simply dislike summary judgment.

Much of the concern was fueled by the fear of defense practitioners that courts are too prone to let a Rule 56 motion fester without any action at all. The very first question pointed to Table 3 of the FJC report showing "no disposition" as to 50% of the motions in point-counterpoint districts, 55% in districts that require a statement of disputed facts but no counterpoint response, and 58% in districts that require neither point nor counterpoint. Failure to act is quite different from discretionary denial. It is difficult to believe that the choice between "must" and "should" will often be invoked by a supplemental motion that requests a district judge to mandamus herself to act on the motion, much less by a real motion for appellate mandamus. Joe Cecil plans to see whether the FJC data will support some further explanation of the "no disposition" rate. Settlement is an obvious explanation. The optimistic view would be that the motions so educate the parties that settlement is advanced for good reasons. That view does not quiet the fear that judges simply hang on to the motion to coerce settlement. Another explanation may be that motions are made so close to trial that it is better to maintain the trial date than to defer trial in order to rule on the motion.

Concern also was expressed that denial of summary judgment forces defendants to settle ill-founded cases for fear of irrational jury verdicts. Statistics that show plaintiffs lose more trials than they win are based on the universe of cases that defendants refuse to settle because the defense position seems overwhelming.

A contrary concern was offered: If the rule says "must" grant, some enterprising attorneys will argue that failure to rule promptly can be appealed on the collateral-order theory that the court

3 summary judgment if there is no genuine dispute as to any material fact and a party is entitled
4 to judgment as a matter of law.³ The court must should⁴ state on the record the reasons for

has denied a right that cannot be effectively protected on appeal from a final judgment. (This fear may be real despite the manifest failure of the attempted appeals to satisfy the additional requirement for collateral-order appeal that the appeal raise issues separate from the merits of the action.)

More general support was expressed for "should." "When motions come in boxes," there must be some way to manage the work.

A committee member suggested that the Note should say still more firmly that "should" means "almost always should," or be strengthened in some other way. The only observer suggested during a break that at least the Committee Note should focus more pointedly on the Style Project change to "should" and should repeat still more forcefully the suggestion that discretion should seldom be exercised to deny a properly supported motion.

Note 3 includes alternative suggestions that would avoid the choice between "must" and "should" by departing further from the present rule text statement of the summary-judgment standard.

Finally, we might consider whether the Committee Note should address a problem suggested by one Standing Committee member: a discretionary denial of summary judgment on part of an action may mean that the jury is exposed to prejudicial evidence that otherwise would be excluded. That could be one factor that influences the discretion. But we may not wish to use the Note to provide an illustration of the factors that may influence discretion.

The Subcommittee recommends that "should" be retained. The research memorandum prepared by Andrea Thomson explores the decisions that recognize discretion to deny a motion that satisfies the tests for judgment as a matter of law. Discretion to deny continues to seem a good idea. The Committee Note is revised to emphasize that discretion to deny should be employed only in special circumstances.

³ *Much of the "must"- "should" debate is fueled by the contrast between "entitled" and "should." The same contrast existed under the pre-2007 version that contrasted "shall" with "entitled," at least in the eyes of those who would translate "shall" as "must." Discretion to deny was established under the pre-2007 version.*

The reason for carrying forward "entitled to judgment as a matter of law" from the distant past is to reduce fears that different words will lead to a change in the summary-judgment standard. But perhaps these words do not have the iconic force of "no genuine dispute as to any material fact."

*If we are disposed to reduce the links to the past, we could pick up alternative suggestions. One tentative set of suggestions was "must grant * * * unless." Completing the "unless" is difficult — "exceptional circumstances," "good reason," and similar suggestions could easily lead off in unforeseeable directions. Another set of suggestions offered a laundry list of alternatives to complete the sentence: "Summary judgment is [appropriate, proper, mandatory, warranted, required] if there is no genuine issue as to any material fact." Yet another set varied this choice by express incorporation of Rule 50(a): "The court should grant summary judgment if there is no genuine dispute as to any material fact and judgment as a matter of law would be proper under Rule 50(a)."*

The Subcommittee concluded that avoiding the question by any of these variations would only obscure an important aspect of established practice.

⁴ *The choice between "must state" and "should state" was discussed in the Standing Committee without resolution. One concern was that "must" in this sentence would, by contrast, expand the discretion implicit in saying in the preceding sentence that the court "should" grant summary judgment. A related observation was that diluting the need to explain a denial may tilt the scales*

5 granting—and should state on the record the reasons for or denying — summary judgment.

6 **(b)⁵ Time for a Motion, Response, and Reply.** These times apply unless a different time is set by
7 local rule or the court orders otherwise in a case:

8 **(1)** a party may move for summary judgment at any time⁶ until 30 days after the close of all
9 discovery;

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

12 **(3)** ~~the movant may~~ must file any⁷ reply by the movant must be filed within 14 days after the
13 response is served.

14 **(c) Procedures.**

15 **(1) In General.** The procedures in this subdivision (c) apply unless the court orders

toward denial, making the grant a more serious and less common event. A second concern was that "must" would encourage lawyers to challenge the sufficiency of the statement on appeal. The Advisory Committee found the choice difficult in November.

The Subcommittee recommends that "must" be deleted. The Committee Note is revised to state that the court should almost always state reasons for granting the motion.

⁵ *One Standing Committee member suggested that it would be better to transpose (c) and (b). There would be some advantage: in reading the time provisions you know about the motion, response, and reply. But the time provision seems to interrupt a logical flow that runs from (c) through (g); relocating it to the end, or close to the end, seems unattractive.*

⁶ *The time provisions were published last August as part of the Time-Computation Project. That does not insulate them from further discussion. Standing Committee discussion addressed the relationship between allowing a motion at any time and the "facts unavailable" provision of subdivision (d). Discussion began with the contrast between a motion made before any discovery and a motion made after the true completion of all discovery. That discussion never came to the focus of suggesting different procedures, primarily because it was immediately agreed that there are many intermediate circumstances. It seems likely that scheduling orders will address the problem in most of the cases that might seem most peculiar — if discovery is staged by subject, for example, summary-judgment activity may be expressly coordinated with the separate stages. It is difficult to find any particular suggestion for further consideration.*

⁷ *This version reflects two propositions. A movant may file a reply only if the response states "additional facts." Thus it is potentially misleading to say that the movant "must" file a reply. But if the response does state additional facts, the movant can respond only by a reply. Thus it is potentially misleading to say that the movant "may" file a reply. Style conventions permit "any" in some circumstances, and also permit use of the passive voice when that works better. ("Must" becomes even more important if subdivision (e) is adopted in a form that allows the court to consider as undisputed additional facts in a response that are not met by a reply.)*

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16 otherwise in a case.⁸

17 **(2) Motion, Response, Reply; Support; Briefs.**

18 **(A) Motion.** The motion must:

19 (i) identify each claim, defense, or the part of each claim or defense as to
20 which summary judgment is sought; and

21 (ii) be accompanied by⁹ a [separate] concise statement that states concisely
22 in separately numbered paragraphs of only those material facts¹⁰ that
23 the movant asserts are not genuinely in dispute and entitle the movant

⁸ Various comments were made in the Standing Committee discussion. One was that there might be a cross-reference to Rule 16 pretrial management, either in (c)(1) or perhaps in (d). Another was that it might be desirable to say something, somewhere, about "standing orders." The "standing order" discussion was tied to the relatively recent decision to add "in a case" in an attempt to foreclose reliance on standing orders.

The standing order discussion began with a suggestion that (c)(1) would permit a judge to routinely enter the same order departing from (c)(2) procedures in every action. This possibility was defended on the ground that it is a benefit to the parties to know what procedure the judge finds most congenial, and that entry of an actual order in the action obviates concerns about lawyers who may not be aware of all standing orders. This defense met some resistance, but no final resolution in any direction. Later discussion offered an illustration — an order limiting the number of undisputed facts stated by the movant. See (c)(2)(A)(ii).

The Subcommittee concluded that the rule text is correct as it stands. The Committee Note is revised to emphasize that the order must be specifically entered in each particular case. The Note also adds as an example the order that limits the number of undisputed facts that may be stated in a complex case.

⁹ There was very little discussion of the structure in the Standing Committee. It may be a fair reading of the meeting — and particularly of the overall endorsement of the Rule 56 project as very much worthwhile — that the subdivision (c) structure found general support. At least one committee member said so, briefly. There was no discussion at all of the choice between the "2-document" and "3-document" approaches.

As a drafting matter, "accompanied by" may suffice to convey the separate-document approach. If so, we can delete the bracketed "[separate]." But this may be a message that wants reinforcement.

¹⁰ One Standing Committee member asked whether (c)(1) authorizes a judge to order a limit on the number of facts the movant asserts are not genuinely in dispute. Another member observed that one way of accomplishing this result is to stage discovery to focus on a defined set of issues, to be followed by a summary-judgment motion addressing only the relevant facts. Beyond that, the authority to "order[] otherwise" seems to permit such a limit. It was pointed out that the burden of responding to statements that set out too many facts may be reduced by the opportunity a nonmoving party has to accept, for purposes of the motion only, facts that it thinks immaterial. **(As noted with (c)(1), the Committee Note is revised to use this as an illustration of a proper case-specific order.)**

24 to summary judgment.

25 **(B) Response.** A response:

26 **(i)** must, by correspondingly numbered paragraphs, accept, dispute, or accept
27 in part and dispute in part — either generally or for purposes of the
28 motion only — each fact in the Rule 56(c)(2)(A)(ii) statement;

29 **(ii)** may state without argument that the material cited to support a fact is not
30 admissible in evidence;¹¹ and

31 **(iii)** may state in separately numbered paragraphs additional material facts
32 that preclude summary judgment.

33 ~~(C)ply.~~ The movant must¹² reply in the form required for a response to any additional
34 fact stated in the response.

35 ~~(D)ing~~ *Support for Positions.* A statement or dispute of fact must be supported by:

36 **(i)** citations to particular parts of materials in the record, including
37 depositions, documents, electronically stored information, affidavits
38 or declarations, stipulations (including those made for purposes of the
39 motion only), admissions, interrogatory answers, or other materials;
40 or

41 **(ii)** a showing that the materials cited to [dispute or] support the fact do not
42 establish [a genuine dispute or] the absence of one,¹³ or that an

¹¹ *This provision was specifically identified for discussion at the Standing Committee meeting. It met no dissent.*

The Subcommittee discussed a proposal to move this provision to subparagraph (D)(ii), to become part of "citing support for positions." It concluded that it is better to keep this provision "up front" as part of the response. (Many lawyers at the second miniconference asked for clear direction in the rule text, but had no strong feelings about location in the text.)

¹² The consequences for failing to reply are addressed by subdivision (e). Whatever form subdivision (e) finally takes, failure to reply to additional facts stated in the response will result in adverse consequences. "must" is the appropriate word. See footnote 7.

¹³ The bracketed words present a question that has not been discussed. The Reporter thinks they are necessary to make the rule text complete, but there are many occasions when it is better to adopt incomplete text. The question is whether the circumstances that the bracketed words address are too rare to justify the confusion that may arise when careful readers wonder just what they add.

What the words address is one part of a simple proposition. One party cites materials to show there is a genuine dispute as to a stated fact; the other party responds that the materials do not

43 adverse party cannot produce admissible evidence to support the
44 fact.¹⁴

45 **(E) Materials not Cited.** The court may — but need not — consider materials of
46 record outside those called to its attention under Rule 56(c)(2)(D).¹⁵

show a genuine dispute. That happens a lot. But most of the time it will happen in briefs or some other form of argument. The structure of motion-response-reply will not often provide an occasion to make the argument in the response or the reply. The motion states facts beyond dispute, citing materials; the response says there is a dispute, citing competing materials; the reply is not allowed to address the competing materials, because it can only address any "additional facts" advanced by the response.

But things may not always follow this tidy format. Suppose the motion not only cites materials that support a stated fact but also anticipates and seeks to refute the effect of materials that might seem to dispute it. The response should be allowed to assert that these materials do show a genuine dispute. Or suppose the response asserts an "additional fact" to defeat summary judgment. The movant should be allowed to reply that the assertedly additional fact is no more than an unsupported attempt to dispute a fact in the movant's statement (the movant states the light was red; the nonmovant responds with the "additional fact" that the light was green, citing only to things that do not bear on the light's color).

So the question: does the possible confusion overcome the goal of completeness? Might the proposition be relegated to a Committee Note? Or, given the proper aversion to substituting Note comment for rule text, should the proposition be ignored?

If the complication is to be ignored, the rule text would read:

(ii) a showing that the materials cited to support the fact do not establish the absence of a genuine dispute, or * * *

¹⁴ *There was essentially no discussion of the "no-evidence" motion in the Standing Committee. But one comment was that as lawyers become increasingly frustrated with the inability to achieve coherent identification of an adversary's position by pleading and contention discovery, "no-evidence" motions are being used to flush out contentions; they should not be permitted at the beginning of the action.*

¹⁵ This provision appeared in early drafts, was deleted, and then restored. Trial judges lament that summary judgments are reversed for failure to look to record information not cited by the parties. A clear statement that the court need not consider uncited materials, reflecting common statements in appellate opinions and in some local rules, would be welcome. But the statement could be misleading if the rule text does not also recognize that the court may deny summary judgment by considering record information that establishes a genuine dispute, despite a nonmovant's inept failure to point to that information. On the other hand, recognizing the authority to look beyond the parties' record citations may raise concerns that the court will rely on materials the parties recognize as unreliable. The Committee Note attempts to illustrate the intended uses of this provision. *Standing Committee discussion showed support for the "need not" part. It was recognized that it may be desirable to deny summary judgment on the basis of record materials not cited in a response, particularly if the motion is made against a pro se litigant. There was no discussion of the dangers that inhere in recognizing the authority to take an unguided tour through the record. One approach might be to tie this subdivision to the "grounds not raised" provisions of subdivision (f): the court must give notice if it intends to grant summary judgment on the basis of record materials that have not been cited. The most likely approach would be to modify (f)(2): "the court may * * * (2) grant*

47 (F) *Affidavits or Declarations*.¹⁶ An affidavit or declaration used to support a
48 motion, response, or reply must be made on personal knowledge, set out facts
49 that would be admissible in evidence, and show that the affiant or declarant
50 is competent to testify on the matters stated.

51 (G) *Brief*. A party must submit its contentions as to the controlling law or the
52 facts in a separate brief filed with the motion, response, or reply.¹⁷

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

55 (1) defer consideration of the motion or deny it;

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

57 (3) issue any other appropriate order.

58 (e) **Failure to Respond or Properly Respond**.¹⁸ If a response or reply does not comply with Rule

or deny a motion for summary judgment on grounds or record materials not raised by the motion or response." But perhaps it suffices to say in the Committee Note that "grounds not raised" includes record materials not cited by the parties.

¹⁶ "Declarations" was in every successive draft until the Style Consultant protested that adding it to Rule 56 will create an ambiguity in every other rule that refers to an affidavit without also referring to a declaration. The Advisory Committee rebelled. Many younger lawyers are so accustomed to using declarations in Rule 56 practice that they do not quite know what an affidavit might be. The rule text should reflect common practice.

¹⁷ This provision is not intended to bar a "reply brief" by a movant who does not file a reply to additional facts. To the contrary, a reply brief may be important to explain why the disputes attempted by the nonmovant are not genuine. Does it suffice to make this point in the Committee Note?

¹⁸ Some observers suggested that this subdivision should also address a motion that fails to comply with the requirements of (c)(2)(A). Last November it was decided, at least tentatively, that there is no need to do so. The theory was that courts know how to deal with defective motions without further guidance. This subdivision is designed to address questions raised by local rules and general practices relating to defective responses. The Standing Committee discussion barely referred to this question.

It may be desirable to reconsider. Perceptions that the revisions are pro-summary judgment and [to some observers, "therefore"] pro-defendant will be fueled by the failure to recognize that the motion also may not satisfy subdivision (c) requirements. Defective motions can be included in the rule without adding many words. And something positive might be accomplished beyond showing that the amendments are not designed simply to favor movants.

The sketch set out here includes some variations of issues addressed in note 20. It does not imply resolution of those issues; it can be adapted to whatever resolutions are made.

- 59 56(c) — or if there is no response or reply — the court may:
- 60 (1) afford an opportunity to respond or reply as required by Rule 56(c);

(e) Improper Motion; Failure to Respond or Reply; Improper Response or Reply. If a motion, response, or reply does not comply with Rule 56(c) — or if there is no response or reply — the court may:

- (1) afford an opportunity to comply with Rule 56(c);
- (2) deny a noncomplying motion [with or without prejudice to renewal];
- (3) consider as undisputed a properly stated fact that is not addressed by a proper response or reply [and is:
 - (i) supported by citation to record materials that would satisfy the movant's burden of production at trial, or
 - (ii) supported by an apparent showing that the nonmovant could not satisfy its burden of production at trial]; {rather than (i) and (ii), this could be: "consider as undisputed a properly stated fact that is not addressed by a proper response or reply and is properly supported; see the last two paragraphs of note 20}
- (4) grant summary judgment if the motion and supporting materials show that the movant is entitled to it; or
- (5) issue any other appropriate order.

The brackets in (2) present a question that might be addressed only in the Committee Note or not at all. It might be Noted that (4) allows the court to grant summary judgment even when the motion does not comply with subdivision (c); that much seems to inhere in the (c)(1) authority to dispense with the (c)(2) procedures.

The brackets in (3) address a trickier issue. This issue, and parallel issues that arise from (4), are addressed in note 20.

An alternative to express rule text would be to add something to the Committee Note. The Note is long. And it is always uncertain whether to use the Note to address questions deliberately omitted from rule text. Explanation seems called for only if there is a risk that the rule text alone might seem to reflect a (nonexistent) bias favoring movants. The explanation might be relatively brief. One sentence could explain that the rule text does not address defective Rule 56 motions because courts have general approaches to dealing with defective motions of all kinds, and because there may be a variety of defects that call for different responses. Making two documents where there should be three; failure to file supporting materials; failure to cite supporting materials clearly or at all; compound or unclear statements of fact ("the light was working and it was red"); and many other examples could be offered if we wish. A second sentence might add that a nonmovant remains free to point out the defects, and to ask for an extension of time to respond until the defects are cured. There might even be a third sentence observing that silence in the rule text does not mean that a nonmovant's failure to point out the defects waives the defects.

The Subcommittee considered adding defective motions to subdivision (e) and recommends against the addition. But it recognizes that the question is important and recommends it for Committee discussion.

(2) consider a fact ~~[as] accepted undisputed~~¹⁹ for purposes of the motion,²⁰

¹⁹ The change to "undisputed" was endorsed by the Subcommittee. There is an element of fiction in any of the familiar phrases — "deem admitted," "consider accepted," or "consider undisputed." But "undisputed" reduces the element of fiction by tying directly to the obligation to dispute.

²⁰ *Standing Committee discussion revealed uncertainty as to the "deemed admitted" practice. Reconsideration is desirable in several directions.*

A small point was the simple drafting question. The paragraph (2) "considered undisputed" provision seems at odds with the paragraph (3) text that seems to require the court to inspect supporting materials. At a technical level, there is no inconsistency. A response may properly address part of the motion, while failing to respond at all — or responding improperly — to another part. The court considers undisputed the facts not properly addressed, and examines the record for the facts properly disputed. But if the distinction is maintained it may be desirable to add something to (3): "grant summary judgment if the motion and supporting materials and the facts considered undisputed show that the movant is entitled to it."

The larger point went directly to the question whether a party should win summary judgment simply because the nonmovant has failed to respond properly. There was support for the proposition that the court should not consider a fact as undisputed, but instead should determine whether the materials establish a stated fact beyond genuine dispute. This is the most important question presented by this project. It deserves continued attention.

Four stages may be identified along the spectrum of possible responses:

The most thorough "default" approach would be to treat a failure to respond, and perhaps also a failure to respond in proper form, as default on the entire motion. The court would not even consider the materiality or legal consequences of the facts stated to support the motion — the motion would be granted without any reflection. No one has yet supported this approach.

A softer default approach is to allow the court to take the fact as undisputed without looking to the materials cited to support it. This approach treats failure to respond in proper form as a default as to the fact, although not as to the motion. The court still would be required to determine the legal consequences of the facts considered undisputed, and to make the determination in the context of its application of the summary-judgment standard to any facts that are disputed in proper form. This is the apparent character of the "deemed admitted" approach in pure form.

At the other end of the line, the court could be required to examine the materials cited to support the fact and would be allowed to grant summary judgment only if the cited materials satisfy the summary-judgment standard and moving burdens. On this approach the nonmovant's failure sacrifices only the opportunity to have the court consider favorable materials that the nonmovant has not cited — remember that (c)(2)(E) says the court need not examine the record for materials not cited.

In the middle, we could require the court to look at the materials cited by the movant and to grant summary judgment only if the materials "support" the fact in some sense short of meeting the summary-judgment standard. An easy illustration is a motion by the plaintiff supported by the plaintiff's declaration or deposition statement that the defendant went through a red light. A jury would not have to believe the plaintiff; this showing does not entitle the plaintiff to judgment as a matter of law on the red-light issue. But it does "support" the plaintiff. A not-fanciful example of cited material that does not "support" a position would be an attempt to show the light was red by citing only to the deposition of a witness who says: "It may have been red, it may have been green, it may have been yellow. I don't know." If this is the only cited material, the court could not consider the red-light issue to be undisputed. Of course this would become complicated if the plaintiff cites both his own red-light testimony and another witness's green-light testimony: part supports, part contests, and the plaintiff has directed the court to both without any need for the court to examine the record independently.

- 62 (3) grant summary judgment if the motion and supporting materials show that the movant
63 is entitled to it,²¹ or
- 64 (4) issue any other appropriate order.
- 65 **(f) Judgment Independent of Motion.** After giving notice²² and a reasonable time to respond the
66 court may:
- 67 (1) grant summary judgment for a nonmovant;

This example reflects back on the (c)(2)(E) provision that the court need not search the record for materials not cited by a party in another way. Suppose the plaintiff supports the motion by filing his own affidavit stating "I saw the light, it was red, and I have plenty of other witnesses to prove it." If the plaintiff does not provide declarations or depositions showing the testimony of the other witnesses, and the defendant fails to respond, should the court feel free to ignore the suspicions raised by the plaintiff's failure to do anything more to bring in their testimony?

It may prove difficult to find rule text that captures the thoughts that lie between "default" and "grant only if the cited materials satisfy the summary-judgment burden and standard." Particular difficulty may come in moving beyond credibility (red light or green light) into inference (can discriminatory intent be inferred from treatment of other employees, untoward remarks by a supervisor, and such). The draft in note 18 seeks to resolve these difficulties by referring to the trial burden of production. If the movant would have the trial burden, there is sufficient support to consider a fact undisputed if the cited materials would carry the trial burden of production, a showing often far short of the showing that would entitle the movant to judgment as a matter of law. If the nonmovant would have the trial burden, the fact may be considered undisputed if the movant makes an "apparent showing" that the nonmovant cannot carry the trial burden. This attempt to provide some focus for the idea of "support" is not entirely satisfying. The alternative is to leave the required measure of support open-ended. Open-ended is not always bad. Fixing the standard at the minimum showing required to carry the trial burden of production might actually encourage summary judgment as compared to a "properly supported" standard that more obviously leaves room for intuitive discretion. The Committee Note could elaborate a "properly supported" standard without tying it down.

The difficulty of defining a "considered undisputed" approach does not mean that the approach should be abandoned. Several courts have established "deemed admitted" rules, and seem to be attached to them. The deeper question remains: once a party has stated a legally sufficient claim in these Twombly days, or has denied a claim, should failure to respond properly to summary judgment relieve the court of the responsibility to determine whether the movant has carried the Rule 56 burden? And how far should the court be relieved — should it at least be required to look for some reasonable support for the motion, even if not to determine whether the full demands of the summary-judgment test have been met?

²¹ Should we add to the Committee Note a statement that the "other appropriate order" in (4) might include an order denying summary judgment because the movant has not replied to additional facts? Or even might include an order granting summary judgment for the nonmovant for the same reason? Do we want to clutter the rule text with these thoughts?

²² *Standing Committee discussion raised the question whether this should be "notice on the record." The concern was that a vague exchange in a chambers conference might later be passed off as the required "notice." This question may go to a level of detail better omitted from rule text.*

68 (2) grant or deny a motion for summary judgment on grounds not raised by the motion or
69 response; or

70 (3) consider summary judgment on its own²³ after identifying for the parties material facts
71 that may not be genuinely in dispute.

72 (g) **Partial Summary Judgment.**²⁴ If summary judgment is not granted on the whole action, the
73 court:

74 (1) may should, if practicable²⁵ grant partial summary judgment on a claim, defense, or part

²³ *Standing Committee discussion asked whether it would be better to define this procedure as one in which the court invites a motion. The advantages of inviting a motion are to provide a clear basis for the point-counterpoint procedure in subdivision (c)(2). An additional advantage may be that no party wants summary judgment — even the potential winner may believe that the odds of reversal are so high as to defeat any real benefit. Others, however, suggested that this opportunity should be left fluid. The court may prefer presentation in a format, and in an order, better defined in a notice that directs the parties how to respond. A judge may realize during a pretrial conference that the case is ripe for summary judgment, and should be able to launch the question without having to invite a formal motion. Rule 16(c)(2)(E) lists the appropriateness and time for summary adjudication under Rule 56 as a proper topic for pretrial conference. One example frequently encountered: public official defendants win summary judgment on the ground that their acts did not violate the plaintiff's rights. Their municipal employer had not moved for summary judgment because it could not claim official immunity. In granting judgment for the officials, the court might simply give notice that it is contemplating summary judgment for the municipality on the same ground — that the officers did not violate the plaintiff's rights.*

Another observation was that there is not much "space" between inviting a motion and acting on the court's own. "The invitation is almost always going to be accepted." But an invited motion does serve the function of launching the point-counterpoint presentation.

The Subcommittee concluded that the Committee Note should refer to an invited motion, recognizing that it is not the only proper procedure.

²⁴ *The Standing Committee discussion asked whether the rule should say somewhere that summary judgment can be granted on the whole action. Perhaps the Style Subcommittee should be consulted; there seems little need for an express statement beyond the clear direction in subdivision (a) that the court should grant summary judgment when there is no genuine dispute as to any material fact.*

The Subcommittee refers this question to the Committee. See note 1.

²⁵ *Standing Committee discussion devoted some time to the concern that "may" here further dilutes, and may seem inconsistent with, "should" in subdivision (a). Subdivision (a) does say that a party may move for summary judgment on all or part of a claim or defense, and that the court should grant the motion if there is no genuine dispute as to any material fact. Present Rule 56(d)(1) says: "If summary judgment is not granted on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely in issue * * *." The proposed "should, if practicable," does reduce the force of "should," and seems to recognize more discretion than the present rule's "should, to the extent practicable." Discretion seems appropriate; the gains from partial summary judgment may be much less than the gains from summary judgment on the whole action, and may be offset by the time needed to make the rulings, the prospect that trial on the*

- 75 of a claim or defense; and
- 76 (2) may enter an order or memorandum²⁶ stating any material fact — including an item of
- 77 damages or other relief — that is not genuinely in dispute and treating the fact as
- 78 established in the action.²⁷
- 79 **(h) Affidavit or Declaration Submitted in Bad Faith.**²⁸ If satisfied that an affidavit or declaration

remaining issues will — perhaps at negligible cost — provide a better basis for determining whether judgment as a matter of law is warranted, and the risk that partial summary judgment on some issues will be reversed after final judgment at the cost of a second trial.

²⁶ It seems awkward to refer to "entering" a memorandum. Revised wording could avoid the awkwardness: "may, by order or memorandum, state any material fact * * *." But there is little apparent need to refer to a memorandum.

²⁷ There has been lively discussion of a possible third paragraph: "should identify on the record material facts that are genuinely in dispute." This paragraph would recognize the value of guiding the parties by statements more detailed than contemplated by the subdivision (a) provision that the court should state the reasons for denying summary judgment. If it were included in the rule text, the Committee Note might look like this:

Subdivision (g)(3) expressly recognizes that when the court denies summary judgment on the whole action it may identify facts that are genuinely in dispute. The specification may help to focus the parties in ways similar to the guidance that can be achieved through Rule 16 procedures. In some cases the guidance may be important because the denial is appealable. Official-immunity cases provide the most common example. The appeal does not extend to reviewing the determination that there are one or more genuine disputes of material fact. Instead the court of appeals addresses the questions of law presented when all of the facts left open for trial are resolved in favor of the plaintiff. A statement by the district court of the facts open for trial can advance the argument and decision of the appeal.

The court may embody its identification of disputed facts in an order, memorandum, or on the record.

The only discussion in the Standing Committee asked how to measure the "lively" discussion of this issue as compared to the "spirited" discussion of the cost-bearing issue described in note 28.

²⁸ There was spirited discussion of the suggestion that this subdivision should be transformed into a cost-bearing provision reaching beyond Rule 11. The central idea would be that an unsuccessful motion, response, or reply inflicts costs that may appropriately be compensated. The standard might be "unreasonable," or something else. Plaintiffs in some fields might welcome this provision as a protection against clearly premature and often strategically motivated motions. Defendants too might welcome it, on the view that they can avoid motions likely to trigger cost-bearing and that they will benefit from deterring unsuccessful responses (and perhaps deterring the filing of weak actions). The current disposition is to put aside this suggestion. Given the fact that more judgments result from Rule 56 than from trial — and that many of them favor defendants — even a relatively high standard for cost-bearing might be a substantial inroad on the general attorney-fee rules. Employment cases might be particularly troubling, since they often involve statutory fee provisions designed to favor plaintiffs.

The Standing Committee seemed to favor the decision to avoid any cost-shifting provision. There was one suggestion that some time in the future it would be desirable to establish a uniform standard for all "sanctions," whether under Rule 11, Rule 37, Rule 56, § 1927, or otherwise. One

80 under this rule is submitted in bad faith or solely for delay, the court — after notice and a
 81 reasonable time to respond — may order the submitting party to pay the other party the
 82 reasonable expenses, including attorney's fees, it incurred as a result. An offending party or
 attorney may also be held in contempt.

COMMITTEE NOTE

[The Committee Note reflects the rule text; it does not attempt to anticipate resolution of the questions left open in the new footnotes. A few of the parts that might be deleted are redlined.]

1 Rule 56 is revised to improve the procedures for presenting and deciding summary-judgment
 2 motions and to make the procedures more consistent with those already used in many courts. The
 3 standard for granting summary judgment remains unchanged. The language of subdivision (a)
 4 continues to require that there be no genuine dispute as to any material fact and that a party be
 5 entitled to judgment as a matter of law. The amendments will not affect continuing development
 6 of the decisional law construing and applying these phrases. The source of contemporary summary-
 7 judgment standards continues to be three decisions from 1986: *Celotex Corp. v. Catrett*, 477 U.S.
 8 317; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242; and *Matsushita Electrical Indus. Co. v. Zenith*
 9 *Radio Corp.*, 475 U.S. 574.

10 The practice and procedures implementing Rule 56 have grown away from the rule text.
 11 Many districts have adopted local rules governing summary-judgment motion practice. These local
 12 rules have generated many of the ideas incorporated in these amendments. Not surprisingly, some
 13 local rules provisions are inconsistent with parallel provisions in the local rules of other courts. So
 14 too some are inconsistent — or at least fit poorly — with some of these amendments. Local rules
 15 committees should review their local rules to ensure they continue to meet the Rule 83 standard that
 16 they be consistent with and not duplicate Rule 56.

17 **Subdivision (a).** Subdivision (a) carries forward the summary-judgment standard expressed in
 18 former subdivision (c), changing only one word — genuine "issue" becomes genuine "dispute."
 19 "Dispute" better reflects the focus of a summary-judgment determination.

20 There is no change in the rule that a court has discretion to deny summary judgment even if
 21 it does not appear that there is a genuine dispute. This discretion remains valuable. It may be less
 22 burdensome or more transparent to hold a trial than to resolve close questions whether the summary-
 23 judgment standard is satisfied, particularly when issues that must be tried are closely related to issues
 24 that might be suitable for disposition by summary judgment. Information not admissible at trial may
 25 show a prospect that a nonmovant will be able to find sufficient admissible evidence in time for trial.
 26 Or it may be wise judicial management to resolve important issues — particularly those of broad

member suggested that Rule 11 should suffice, as shown by the almost complete non-use of present Rule 56(g)'s mandatory sanction.

The Subcommittee continues to recommend that no change be made in the proposed rule text.

March 3, 2008 draft

27 public interest — only on the basis of a full trial record. But as observed in the Committee Note to
 28 the 2007 amendments, the direction that summary judgment "should" be granted "recognizes that
 29 courts will seldom exercise the discretion to deny summary judgment when there is no genuine issue
 30 as to any material fact." Summary judgment is an important means of protecting both courts and
 31 litigants against trial of claims or defenses that will end in judgment as a matter of law.

32 The first sentence is added to make clear at the beginning that summary judgment may be
 33 requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense.²⁹

34 Subdivision (a) also adds a new direction that the court should state on the record the reasons
 35 for granting or denying summary judgment. Most courts recognize this practice, which facilitates
 36 appeals or subsequent trial-court proceedings. It is particularly important to state the reasons for
 37 granting summary judgment; the statement may be dispensed with only when the reasons are
 38 apparent both to the parties and to an appellate court. The form and detail of the statement of
 39 reasons are left to the court's discretion.

40 The statement on granting summary judgment is not a matter of finding facts in the sense of
 41 Rule 52. Appellate review will continue to be as a matter of law. But the statement should identify
 42 the general reasons that support the judgment, addressing the dispositive facts and underlying law
 43 in a way that supports the decision whether to appeal and the argument and decision of the appeal.

44 The statement on denying summary judgment need not address every available reason —
 45 identifying every genuine dispute of potentially material fact would be burdensome, if not
 46 impossible, in complex cases. But identification of central issues may help the parties to focus
 47 further proceedings.

48 **Subdivision (b).** The timing provisions in former subdivisions (a) and (c) [were consolidated and
 49 substantially revised as part of the time computation amendments that took effect in 2009.] These
 50 provisions are adapted by new subdivision (b) to fit the context of amended Rule 56.³⁰

51 ~~[The rule allows a party to move for summary judgment at any time, even as early as the~~
 52 ~~commencement of the action. If the motion seems premature both subdivision (a) and Rule 6(b)~~
 53 ~~allow the court to extend the time to respond. The rule does set a presumptive deadline at 30 days~~
 54 ~~after the close of all discovery.~~

55 ~~———— The presumptive timing rules are default provisions that may be altered by an order in the~~
 56 ~~case or by local rule. Scheduling orders are likely to supersede the rule provisions in most cases;~~
 57 ~~deferring summary-judgment motions until a stated time or establishing different deadlines.~~
 58 ~~Scheduling orders tailored to the needs of the specific case, perhaps adjusted as it progresses, are~~

²⁹ This paragraph may suffice to make the point that summary judgment often encompasses an entire action. If the point is added to rule text — see note 1 — this paragraph would simply reflect the express rule text.

³⁰ The overlined material that follows is retained provisionally. If the Time Project amendments go forward on schedule it will be deleted. If the Time Project is deferred, the Note will be adjusted.

59 likely to work better than default rules. A scheduling order may be adjusted to adopt the parties'
60 agreement on timing, or may require that discovery and motions occur in stages — including
61 separation of expert-witness discovery from other discovery.

62 ——— Local rules may prove useful when local docket conditions or practices are incompatible with
63 the general Rule 56 timing provisions.

64 ——— If a motion for summary judgment is filed before a responsive pleading is due from a party
65 affected by the motion, the time for responding to the motion is 21 days after the responsive pleading
66 is due.]

67 **Subdivision (c).** Subdivision (c) is new. It establishes a common procedure for summary-judgment
68 motions synthesized from similar elements found in many local rules.

69 The subdivision (c) procedure is designed to fit the practical needs of most cases. Paragraph
70 (1) recognizes the court's authority to direct a different procedure by order in a case that will benefit
71 from different procedures. The order must be specifically entered in the particular case [a "standing
72 order" is not effective unless it is entered by a case-specific order]. The parties may be able to agree
73 on a procedure for presenting and responding to a summary-judgment motion, tailored to the needs
74 of the case. The court may play a role in shaping the order under Rule 16.

75 The circumstances that will justify departure from the general subdivision (c) procedures are
76 variable. One example frequently suggested reflects the (c)(2)(A)(ii) statement of facts not in
77 dispute. The court may find it useful, particularly in complex cases, to set a limit on the number of
78 facts the statement can identify — the danger of indiscriminate statements of peripheral facts is noted
79 below.

80 Paragraph (2) spells out the basic procedure of motion, response, and reply. It identifies the
81 methods of supporting the positions asserted, recognizes that the court is not obliged to search the
82 record for information not cited by a party that supports a position, carries forward the authority to
83 rely on affidavits and declarations, and directs that contentions as to law or fact be set out in a
84 separate brief.

85 Subparagraph (2)(A) directs that the motion must describe each claim, defense, or part of
86 each claim or defense as to which summary judgment is sought. This requirement is expressed in
87 terms that anticipate the "partial summary judgment" provisions in subdivision (g). A motion may
88 address discrete parts of an action without seeking disposition of the entire action.

89 The motion must be accompanied by a separate statement that states concisely in separately
90 numbered paragraphs only those material facts that the movant asserts are not genuinely in dispute
91 and entitle the movant to judgment as a matter of law. Many local rules require, in varying terms,
92 that a motion include a statement of undisputed facts. In some cases the statements and responses
93 have expanded to identification of hundreds of facts, elaborated in hundreds of pages and supported
94 by unwieldy volumes of materials. This practice is self-defeating. To be effective, the motion
95 should focus on a small number of truly dispositive facts.

96 The response must, by correspondingly numbered paragraphs, accept, dispute, or accept in
 97 part and dispute in part each fact in the Rule 56(c)(2)(A)(ii) statement. A response that a material
 98 fact is accepted or disputed may be made for purposes of the motion only. The response should
 99 fairly meet the substance of the asserted fact without seeking to take advantage of imprecise wording.

100 The response also may be used to challenge the admissibility of material cited to support a
 101 fact. The challenge can be supported by argument in the brief, or may be made in the brief alone.
 102 There is no need to make a separate motion to strike. If the case goes to trial, failure to challenge
 103 admissibility at the summary-judgment stage does not forfeit the right to challenge admissibility at
 104 trial. (This challenge to the admissibility of materials relied upon by an adversary to support a
 105 summary-judgment assertion that a fact is not subject to genuine dispute is different from supporting
 106 a summary-judgment motion by arguing that a party who has the trial burden of production cannot
 107 produce admissible evidence to support a fact. See subdivision (c)(2)(D)(ii).)

108 The response may go beyond responding to the facts stated to support the motion by stating
 109 in separately numbered paragraphs additional material facts that preclude summary judgment.

110 The movant must reply — using the form required for a response — only to additional facts
 111 stated in the response. The exchanges stop at this point.³¹ The reply may not be used to address
 112 materials cited in the response to dispute facts in the statement accompanying the motion. The rule
 113 does not provide for a sur-reply to additional facts stated in the reply, nor for still further stages. But
 114 briefs may be useful in completing the statements of position, and the court may order further
 115 exchanges if that would aid in deciding the motion.

116 Subparagraph (c)(2)(D) addresses the ways to support a statement or dispute of fact. Item
 117 (i) describes the familiar record materials commonly relied upon and requires that the movant cite
 118 the particular parts of the materials that support the facts. Specific citations are important to enable
 119 the parties and the court to address the facts efficiently and effectively. Specific citations to factual
 120 materials often will be provided even by a party who does not have the trial burdens on an issue,
 121 including citations to discovery responses, stipulations, or other concessions by the party who does
 122 have the trial burdens. Materials that are not yet in the record — including materials referred to in
 123 an affidavit or declaration — must be placed in the record. Legal sources cited to support a party's
 124 position need not be filed.³² Once materials are in the record, the court may, by order in the case,
 125 direct that the materials be gathered in an appendix, a party may voluntarily submit an appendix, or
 126 the parties may submit a joint appendix. The appendix procedure also may be established by local
 127 rule.³³ Direction to a specific location in an appendix satisfies the citation requirement. So too it

³¹ We might add here: "A reply is not to be used to challenge the response to facts stated by the movant, nor does the rule provide for a sur-reply * * *."

³² This sentence was added when there was an independent filing requirement. It seems less useful now, and might well be deleted.

³³ Up to the November 2007 meeting the Committee Note recognized the legitimacy of local rules calling for an appendix. This approach reflected Judge Fitzwater's enthusiastic support. The sentence was omitted after the November meeting. It may deserve further consideration. Judge

128 may be convenient to direct that a party assist the court in locating materials buried in a voluminous
129 record.

130 Subdivision (c)(2)(D)(ii) recognizes that a party need not always point to specific record
131 materials. One party, without citing any other materials, may respond or reply that materials cited
132 to dispute or support a fact do not establish a genuine dispute or the absence of one. And a party
133 who does not have the trial burden of production may rely on a showing that a party who does have
134 the trial burden cannot produce admissible evidence to carry its burden as to the fact.

135 Subdivision (c)(2)(E) reflects judicial opinions and local rules provisions stating that the
136 court may decide a motion for summary judgment without undertaking an independent search of the
137 record. The court is entitled to rely on the adversaries to identify all the information relevant to the
138 decision. Independent searching may even be dangerous because Rule 5(d)(1) directs that many
139 disclosure and discovery materials must not be filed until they are used in the action; when no party
140 relies on particular material of record, no party may bother to file other materials that dispel the
141 effects of filed materials. Nonetheless, the rule also recognizes that a court may consider record
142 materials not called to its attention by the parties. Consideration is more likely to be appropriate
143 when uncited material shows there is a genuine dispute. If the court intends to rely on uncited record
144 material to grant summary judgment it usually should give notice to the parties by analogy to
145 subdivision (f)(2).³⁴

146 Subdivision (c)(2)(F) carries forward some of the provisions of former subdivision (e)(1).
147 Other provisions are relocated or omitted. The requirement that a sworn or certified copy of a paper
148 referred to in an affidavit or declaration be attached to the affidavit or declaration is omitted as
149 unnecessary given the requirement in subdivision (c)(2)(D)(i) that a statement or dispute of fact be
150 supported by materials in the record.

151 A formal affidavit is no longer required. 28 U.S.C. § 1746 allows a written unsworn
152 declaration, certificate, verification, or statement subscribed in proper form as true under penalty of
153 perjury to substitute for an affidavit.

154 Subdivision (c)(2)(G) directs that contentions as to the controlling law or the evidence
155 respecting the facts must be made in a brief. The brief is the place to argue that summary judgment
156 is not warranted even if there is no genuine dispute as to facts asserted by an adversary. The rule text
157 addresses only briefs that support a motion, response, or reply. It does not bar additional briefs. A
158 movant may do a good service to the court by a reply brief that explains why the nonmovant's
159 attempted disputes are not genuine, and it may be that still further briefing will be useful. These
160 matters are best addressed by scheduling orders or other case-specific accommodations.

Fitzwater worked intensively with summary-judgment practice in revising his court's local rules and this sentence in the Committee Note was important in winning his support for the proposals.

³⁴ Compare note 15: the text of (f)(2) could be modified to make this point explicit — "(2) grant or deny a motion for summary judgment on grounds or record materials not raised by the motion or response."

161 **Subdivision (d).** Subdivision (d) carries forward without substantial change the provisions of former
162 subdivision (f).

163 A party who seeks relief under subdivision (d) ordinarily should seek an order deferring the
164 time to respond to the summary-judgment motion.

165 It may be better to deny a motion that is clearly premature, without prejudice to filing a new
166 motion after further discovery. Further discovery may so change the record that both the statement
167 of material facts required by subdivision (c)(2)(A)(ii) and the record citations required by subdivision
168 (c)(2)(D) will have to be substantially changed. Ordinarily the denial will be without prejudice to
169 renewal when the record is better developed, although a pressing need for prompt decision may mean
170 that a case should proceed to trial without the delay occasioned by consideration of summary
171 judgment. Rather than deny the motion, it may be feasible to defer consideration if there is a
172 prospect that it can be addressed without substantial change after further discovery.

173 **Subdivision (e).**³⁵ Subdivision (e) addresses questions that arise when a response or reply does not
174 comply with Rule 56(c) requirements or when there is no response or no reply to additional facts
175 stated in a response. Summary judgment cannot be granted by default even if there is a complete
176 failure to respond or reply, much less when an attempted response or reply fails to comply with all
177 Rule 56(c) requirements. Subdivision (e)(3) recognizes that the court can grant summary judgment
178 only if the motion and supporting materials show that the movant is entitled to it. At the same time
179 the court may consider a fact as undisputed for purposes of the motion when response or reply
180 requirements are not satisfied. This approach reflects the “deemed admitted” provisions in many
181 local rules. The fact is considered undisputed only for purposes of the motion; if summary judgment
182 is denied, a party who failed to make a proper Rule 56 response or reply remains free to contest the
183 fact in further proceedings. And the court may choose not to consider the fact as undisputed,
184 particularly if the court knows of record materials that show grounds for genuine dispute.

185 When a failure to reply to additional facts stated in a response leads the court to consider the
186 additional facts as undisputed, the result may be not only denial of the motion but summary judgment
187 for the nonmovant. [The notice and time-to-respond provisions of subdivision (f)(1) would apply.]³⁶

188 Before deciding a motion absent a proper response or reply, however, the court may afford
189 an opportunity to respond or reply in proper form, or make another appropriate order. The choice
190 among possible orders should be designed to encourage proper responses and replies. Many courts
191 take extra care with pro se litigants, advising them of the need to respond and the risk of losing by
192 summary judgment if an adequate response is not filed. And the court may seek to reassure itself
193 by some examination of the record before granting summary judgment against a pro se litigant.

194 **Subdivision (f).** Subdivision (f) brings into Rule 56 text a number of related procedures that have

³⁵ The Note on subdivision (e) remains tentative; it will be revised when (e) is cast in final form.

³⁶ This statement seems the correct reading of (f)(1). Is it helpful?

195 grown up in practice. After giving notice and a reasonable time to respond the court may grant
 196 summary judgment for the nonmoving party, grant or deny a motion on grounds not raised by the
 197 motion or response,³⁷ or consider summary judgment on its own. In many cases it may prove useful
 198 to act by inviting a motion; the invited motion will automatically trigger the regular procedure of
 199 subdivision (c).

200 **Subdivision (g).** “Partial summary judgment” is a term often used despite its absence from the text
 201 of former Rule 56. It is a convenient description of well-established practices. A summary-
 202 judgment motion may be limited to part of an action, including parts of what would be regarded for
 203 other purposes as a single claim, defense, or even part of a claim or defense. And a motion that
 204 seeks to dispose of an entire action may fail to accomplish that purpose but succeed in showing that
 205 one or more material facts is not genuinely in dispute. Former subdivision (d) supported the practice
 206 of establishing such facts for the action.

207 This procedure is carried forward in a form that better conforms to common practice. The
 208 frequent use of summary judgment to dispose of some claims, defenses, or parts of claims or
 209 defenses is recognized. The court’s discretion to determine whether partial summary judgment is
 210 useful is more clearly identified.

211 If it is readily apparent that summary judgment cannot be granted the court may properly
 212 decide that the cost of determining whether some potential disputes may be eliminated by summary
 213 disposition is greater than the cost of resolving those disputes by other means, including trial. Even
 214 if the court believes that a fact is not genuinely in dispute it may refrain from entering partial
 215 summary judgment on that fact. The court has discretion to conclude that it is better to leave open
 216 for trial facts and issues that may be better illuminated — perhaps at little cost — by the trial of
 217 related facts that must be tried in any event. Exercise of this discretion may be affected by the nature
 218 of the matters that are involved. The policies that underlie official-immunity doctrines, for example,
 219 may make it important to grant partial summary judgment for a defendant as to claims for individual
 220 liability even though closely related matters must be tried on essentially the same claims made
 221 against the same defendant in an official capacity.

222 **Subdivision (h).** Subdivision (h) carries forward former subdivision (g) with two changes.
 223 Sanctions are made discretionary, not mandatory, reflecting the experience that courts seldom invoke
 224 the independent Rule 56 authority to impose sanctions. See Cecil & Cort, Federal Judicial Center
 Memorandum on Federal Rule of Civil Procedure 56(g) Motions for Sanctions (April 2, 2007). In
 addition, the rule text is expanded to recognize the need to provide notice and a reasonable time to
 respond.

³⁷ Should we add a statement that “grounds not raised” includes reliance on record materials not cited by the parties? Compare note 15. Notice is important because the record materials may be incomplete, and also because the court’s review of the record may not be complete.

RULE 56 SUBCOMMITTEE NOTES: FEBRUARY 13, 2008

The Rule 56 Subcommittee met by conference call at 5:00 p.m., Eastern Standard Time, February 13, 2008. The meeting was attended by Hon. Michael M. Baylson, Chair; Hon. Mark R. Kravitz, Committee Chair; Robert C. Heim, Esq.; Ted Hirt, Esq.; Hon. Randall T. Shepard; and Hon. Vaughn R. Walker. Professor Edward H. Cooper, John R. Rabiej, Esq., and Andrea Thomson, Esq., also participated.

Judge Kravitz briefly summarized the Rule 56 discussion at the January Standing Committee meeting. The Standing Committee endorses the concept that shapes the Rule 56 agenda. The project aims not to change the summary-judgment standards or burdens, but instead to achieve a nationally uniform practice that reflects the best parts of present practices, recognizing the need to allow authority to tailor practice to the specific needs of individual cases. Both the judge and lawyer members seemed enthusiastic. The issues raised in the discussion are reflected in the notes that annotate the January 24, 2008 draft submitted for Subcommittee consideration. Many of the issues are familiar from past Subcommittee and Advisory Committee deliberations. Some are new, and must be considered carefully.

Andrea Thomson reported on two research projects. The project closer to completion reviews the cases recognizing discretion to deny summary judgment even when the movant has met the standard for judgment as a matter of law. These cases are matched by frequent statements that there is no discretion either to grant or to deny summary judgment, but almost all of these cases reflect boilerplate recitations of the standard of review in appeals that do not involve a district court's exercise of discretion to deny. Only one appellate decision reviewing a denial says that there is no discretion to deny summary judgment, and that decision involved a question of official immunity that is universally seen as resting on a need to protect against the burdens of trial. This research will be expanded to look for district-court opinions exercising the discretion to deny.

The other project, less advanced, examines decisions that sustain application of local district rules that treat failure to properly respond to a fact stated by a movant as a deemed admission. It seems to be recognized that deemed admission carries only far enough to establish the fact; the legal consequences of the fact still must be considered by the court.

Rule 56(a)

Discussion of Rule 56(a) began with the question whether the rule text should refer to summary judgment "on the whole action." This suggestion reflects a desire to establish a clear contrast with partial summary judgment on all or part of a claim or defense. An alternative would be to eliminate all references to a motion, leaving that to subdivision (b) and the related subdivision (f) provision for judgment on the court's initiative: "The court should grant summary judgment [on the whole action or on all or part of a claim or defense] if there is no genuine dispute * * *." This alternative led to the suggestion that the draft could be simplified: A party may move for summary judgment ~~on all or part of a claim or defense~~; The court should grant summary judgment if * * *." It was concluded that these alternatives should be left for discussion by the Committee.

The next question was the familiar question whether the rule should continue to say, as provided in the 2007 Style version, that the court "should" grant summary judgment if there is no genuine dispute. Discussion reflected the consensus that led to the 2007 version — "shall" in the earlier rule did not mean "must." There is discretion to deny. Several suggestions were made in the Standing Committee to avoid the issue entirely by adopting drafting that does not say "must" or "should." But such attempts to obscure the issue are not helpful. Standing Committee discussion also reflected concern by lawyer members that some district judges are prone to holding summary-judgment motions without any resolution. The "no disposition" rates in the FJC study began at a low of 50% in districts with point-counterpoint rules and rose to 58% in districts that do not require even

a statement of uncontested facts. But it was thought that a change to "must" grant summary judgment will not change this phenomenon. It was agreed that "should" will remain. The Committee Note, however, should reenforce the statement in the 2007 Committee Note that ordinarily the court should grant summary judgment when the standard is met.

The final question was whether the court "must" always state the reasons for granting summary judgment. Two reasons were advanced for falling back to "should." There may be cases in which the reason for granting summary judgment are so apparent that there is no need for explanation. And "must" in this sentence may diminish the exhortatory force of "should" in the preceding sentence directing that summary judgment should be granted.

The other side of the discussion noted that it is important to have a statement of reasons for granting summary judgment.

It was agreed that this sentence should be revised: "The court ~~must~~ should state on the record the reasons for granting or ~~and should state on the record the reasons for~~ denying summary judgment." The Committee Note should be revised to state that the court almost always should state the reasons for granting summary judgment, emphasizing the importance of showing the parties that the motion has been carefully studied and the value of these statements to the parties in deciding whether to appeal and to the court of appeals in considering any appeal.

Rule 56(b)

A drafting issue was resolved for paragraph (3): "~~the movant must file a~~ Any reply by the movant must be filed within 14 days * * *." The tricky task is to reflect two propositions: the movant is entitled to reply only if the response states "additional facts" — it cannot be said that the movant must file "a" reply. But if the response states additional facts, the movant must timely reply or forfeit the opportunity to challenge the additional facts. (The question whether the additional facts will be considered undisputed will be resolved by subdivision (e).) Adopting the passive voice seems to better reflect these two propositions.

Rule 56(c)

Standing Committee discussion reflected concern that the (c)(1) authority to depart from the procedures spelled out in (c)(2) by order "in a case" would lead to routine disregard of the national rule under guise of "standing orders." Two concerns war with each other. The generally uniform practices in (c)(2) seem workable only if departures can be made for special cases, particularly complex cases. On the other hand, national uniformity could easily be rent if recalcitrant judges adopt a routine habit of entering orders to deviate in every case.

The concern for uniformity was expressed by observing that in a large district of 30 judges, it might happen that 15 adopt routine practices that depart from the national rule, while the other 15 adhere to the national rule. That would substantially defeat the drive toward uniformity. It also would defeat the judgment that the practices reflected in revised Rule 56 are best for most cases.

The concern for flexibility was illustrated by the lament repeatedly voiced in the miniconferences. Both lawyers and judges deplored the motions accompanied by 100-page statements of uncontested facts and matched by still longer responses. The motions "come in boxes." Such overblown motions often are self-defeating, and seldom are as effective as much clearer and more succinct motions. The judge should have authority to impose limits, even though the Committee has not been prepared to adopt in subdivision (c)(2) even a presumptive limit on the number of undisputed facts a movant may state.

A more difficult illustration was put: some judges, and the Southern District of New York generally, require a conference and permission before a Rule 56 motion can be filed. The idea that a judge might absolutely refuse to consider any motion for summary judgment may make sense in a small number of cases, but as a routine practice this device should be used to guide the timing and shape of the motion, not to deny the right to move. Viewed as part of scheduling and general Rule 16 practice, however, timing and shape orders may be useful.

One possible response would be to work a reference to Rule 16 into the text of subdivision (c)(1). That approach might seem to imply that only Rule 16 can be used, however, and it may prove difficult to find an effective "or otherwise" provision for alternative means of making case-specific orders.

A further observation was that "standing order" is a slippery concept. The rule text requiring that the order be made "in a case" is meant to direct that the order be specifically entered in each particular case to which it applies. A judge who automatically enters such an order in every case on the docket might be said to have a "standing order." But the fact that the order is specifically entered in each case resolves a major part of the concern with standing orders — the parties have clear notice of what is expected. And the other concern that standing orders may undesirably depart from sounder practices established by a national rule may be reduced by the prospect that both parties and court are better served by presenting the motion in a form congenial to the court. For that matter, it would be difficult to stand in the way of a judge bent on using powers established by Rules 16(b)(3)(B)(vi) and (c)(2)(E) and (P) to modify the general Rule 56 procedure.

It was concluded that subdivision (c)(1) should not be revised. The Committee Note can emphasize that the general procedure can be modified only by a specific order entered in a particular case. It also might be improved by adding an additional example — perhaps a reference to the value of controlling the length of a statement of undisputed facts in a complex case.

Picking up a suggestion by Judge Hagy, it was agreed that (c)(2)(A)(ii) should be revised: "be accompanied by a [separate] ~~concise~~ statement that states concisely in separately numbered paragraphs of only those material facts that * * *."

Subdivision (c)(2)(B)(ii) responds to the concern expressed by many lawyers at the miniconferences that they want a clear direction on the means to raise the argument that material cited to support a fact is not admissible in evidence. The lawyers said a clear direction is more important than the means chosen. The Subcommittee considered a suggestion that this provision should be relocated to become part of (D)(ii) on citing support for positions. The conclusion was that it is better to keep this provision "up front" as part of the response.

Brief note was made of (c)(2)(E)'s provision that the court "need not" consider record materials outside those called to its attention by the parties. The Standing Committee seemed to support this approach.

Rule 56(d)

Subdivision (d)(1) provides that a court may "deny" a motion if the nonmovant shows that it cannot yet present facts essential to justify its opposition. It was asked whether words should be added: "deny without prejudice." It sounds "harsh" to say simply that the court may deny the motion. But it seems implicit that ordinarily denial is because the motion is premature in relation to development of the case, leaving the way open for renewal when the case is better developed. And it may be unduly restrictive to suggest that denial always must be followed by an opportunity to renew. The case may be on a fast track for urgent reasons that leave too little time to present and decide a motion for summary judgment. The Committee Note may add a comment on this issue.

Rule 56(e)

A style revision in paragraph (2) was accepted as an improvement: "consider a fact ~~as~~ accepted undisputed for purposes of the motion." This wording accurately reflects the consequence of failure to dispute in the required manner.

A question barely referred to in the Standing Committee discussion resurfaced. Some participants in the miniconferences thought the rule text should address a motion that does not comply with Rule 56(c) as well as responses and replies that do not comply. This more complete version would present a clearer appearance of impartiality as between movant and nonmovant. It is important that these revisions do not seem to favor movants; the rule would not be much lengthened by including defective motions. On the other hand, courts have long experience in dealing with defective motions and do not really need guidance. This question has been discussed in earlier meetings. It was concluded that it should be sent on to the Committee for further discussion.

The Standing Committee discussion reflected substantial concern with the "considered undisputed" provision of (e)(2). This provision was added to the rule only at the November 2007 Advisory Committee meeting. Several generations of drafts did not refer to this "deemed admitted" practice at all. Those drafts required the court to evaluate the movant's showings and allowed summary judgment only if the movant carried the Rule 56 burden of showing no genuine dispute. After the April 2007 meeting the Committee Note was revised to state that an "appropriate order" might be notice that a fact not addressed by a proper response would be deemed admitted unless a proper response was made. The question has been hotly debated. It was observed that present practice in at least some circuits would not allow the court to grant the motion without examining the cited materials, and would not allow summary judgment if the cited materials do not "support" the asserted fact. If the plaintiff seeks to prove the light was red by citing only to materials stating that it was green, summary judgment is inappropriate even if there is no response at all to the motion. But summary judgment might be allowed if the cited materials offer support, even though the support falls short of the showing required for summary judgment if there is proper opposition: the plaintiff's own deposition or declaration that the light was red does not satisfy the test for judgment as a matter of law, but does support the plaintiff's position and might suffice to consider the fact undisputed if there is no proper response. This issue too will be referred to the Committee for further discussion and final resolution in April.

Rule 56(f)

Standing Committee discussion asked whether the procedure for granting summary judgment on the court's own should be to invite a motion. It was agreed that it is better not to impose this formal requirement. The Committee Note can observe that often it may be most effective to invite a motion, framing the matter in the familiar procedure of Rule 56(c).

Rule 56(g)

A style change was made in (g)(2): "may enter an order ~~or memorandum~~ stating * * *." It seems awkward to refer to "entering" a "memorandum." This issue could be avoided by different drafting — "may, by order or memorandum, state" — but there is no apparent need to provide for acting by memorandum.

Rule 56(h)

Brief discussion reconfirmed the conclusion that Rule 56(h) should not be converted into a more general cost-bearing rule addressing the costs imposed by failing, or even improvident, motions, responses, or replies.

RULE 56 MINICONFERENCE NOTES

1 The Rule 56 Subcommittee held a miniconference on a Rule 56 draft on November 7, 2007,
2 at the Administrative Office of the United States Courts in Washington, D.C.. Subcommittee
3 participants included Judge Michael M. Baylson, chair, Judge C. Christopher Hagy, Robert C. Heim,
4 Esq., Hon. Ted Hirt, Anton R. Valukas, Esq., and Judge Vaughn R. Walker. Other Advisory
5 Committee members also attended, including Judge Mark R. Kravitz, chair, and Judge David G.
6 Campbell, Professor Steven S. Gensler, Daniel C. Girard, Esq., Judge Paul J. Kelly, Jr., Judge John
7 G. Koeltl, and Chilton Davis Varner, Esq.. Judge Lee H. Rosenthal, Judge Sidney A. Fitzwater,
8 Judge Marilyn Huff, John G. Kester, Esq., and Andrea Thomson, Esq. — Judge Rosenthal's "rules
9 clerk" — represented the Standing Committee. Judge Laura Taylor Swain represented the
10 Bankruptcy Rules Committee. Invited participants included S. Jack Balagia Jr., Esq.; Professor
11 Stephen B. Burbank; Alfred W. Cortese, Jr., Esq.; E. Donald Elliott, Esq.; Judge Paul L. Friedman;
12 Joseph D. Garrison, Esq.; Thomas A. Gottschalk, Esq.; Jeffrey J. Greenbaum, Esq.; Hunter R.
13 Hughes III, Esq.; Chris Kitchel, Esq.; Cheryl A. Krause, Esq.; Jocelyn D. Larkin, Esq.; Michael J.
14 Leech, Esq.; Melissa H. Maxman, Esq.; Alan B. Morrison, Esq.; Stephen G. Morrison, Esq.;
15 Professor Elizabeth M. Schneider; John Vail, Esq.; James R. Weiss, Esq.; and Steven E. Zipperstein,
16 Esq.. Judge Barbara Rothstein and Joe Cecil represented the Federal Judicial Center. Peter G.
17 McCabe, John K. Rabiej, James Ishida, Jeffrey Barr, and Monica Fennell represented the
18 Administrative Office.

19 Judge Kravitz opened the conference by thanking all participants for taking time from their
20 busy schedules for this service to the rules process. He recognized that the participants represent the
21 true experts in summary judgment as something they deal with on a daily basis. Each of the
22 suggestions that will emerge will be studied seriously by the Subcommittee and the Committee.

23 Judge Baylson then launched discussion by asking each of the participants to identify
24 themselves by type of practice, parties represented, and so on.

25 Professor Burbank teaches at the University of Pennsylvania Law School. He also engages
26 as a consultant on litigation, and does arbitration and mediation. He is intensely interested in
27 summary judgment.

28 Joe Garrison represents employees in his practice. He is responsible for the comments
29 submitted by the National Employment Lawyers Association. He brings the perspective of the
30 employee-plaintiffs' bar with 30 years of experience. He takes many cases to jury trial — it is
31 possible to survive a summary-judgment motion. Rule 56 "can benefit from some tweaking."

32 John Vail is vice-president and senior litigator at the Center for Constitutional Litigation,
33 which represents the American Association for Justice. The plaintiffs' bar sees Rule 56 as a menace,
34 depriving litigants of the right to jury trial.

35 James Weiss engages in antitrust practice. He suggested that the pleading decision in *Bell*
36 *Atlantic v. Twombly* "may cut us off short of summary judgment."

37 Cheryl Krause practices at the Dechert firm in Philadelphia. She engages in securities
38 litigation, white-collar criminal defense, and criminal investigations. She practiced at the U.S.
39 Attorney's Office in the Southern District of New York, and clerked for Justice Kennedy.

40 Judge Paul Friedman noted that he spends a lot of time on summary-judgment motions. And
41 for many years now he has spoken on summary judgment at Sol Schreiber's ALI-ABA CLE
42 procedure programs.

43 Judge Sidney Fitzwater chaired the local rules committee that drafted the summary-judgment
44 rule for the Northern District of Texas. He also has participated extensively in the ongoing Rule 56
45 deliberations of the Civil Rules Committee as liaison to the Committee from the Standing
46 Committee.

47 Stephen Morrison described himself as "an old-time trial lawyer." He has tried more than
48 200 cases to jury verdict, all around the country. He is past president of the Defense Research
49 Institute and Lawyers for Civil Justice. As those affiliations suggest, he ordinarily represents the
50 defense side. His interest is in procedures that deliver the most justice at the least cost. There is an
51 important space for pretrial disposition of some issues.

52 Melissa Maxman currently engages in an antitrust practice, with experience both in
53 Philadelphia and more recently in the District of Columbia. She has encountered Rule 56 on both
54 the plaintiff and the defense side.

55 E. Donald Elliott teaches at Yale Law School and practices. He supports the changes
56 incorporated in the draft presented for discussion, but believes that further changes should be made.

57 Alan Morrison is now Special Counsel to the Attorney General of the District of Columbia.
58 He recently was a senior lecturer at Stanford Law School. He has experience with Rule 56 in a wide
59 variety of litigation.

60 Professor Elizabeth Schneider has taught procedure for 25 years; she engaged in civil rights
61 litigation before that. She is very concerned about the impact of Rule 56 on plaintiffs, particularly
62 civil-rights plaintiffs.

63 Jeffrey Greenbaum engages in class-action defense and business litigation for both plaintiffs
64 and defendants. He is the liaison from the ABA Litigation Section to the Civil Rules Committee,
65 and has been president of the Association of the Federal Bar in New Jersey.

66 Michael Leech is co-author of an employment law treatise. He also is the liaison from the
67 College of Employment Lawyers to the American Law Institute Restatement of Employment Law.

68 Judge Laura Taylor Swain, Southern District of New York, chairs the Bankruptcy Rules
69 Committee. The Bankruptcy Rules incorporate Rule 56. The Bankruptcy Rules Committee is
70 concerned to stay connected to the Rule 56 project, particularly to assess the impact on contested
71 matters.

72 Judge Marilyn Huff, Southern District of California, is a member of the Standing Committee.

73 Chris Kitchel defends employment actions.

74 Jocelyn Larkin is involved in employment discrimination litigation on the plaintiff's side.
75 She also engages in training lawyers on litigation. She is particularly interested in the impact of the
76 rules on lawyers who must litigate with minimal resources but want access to federal courts for
77 complex cases.

78 Ted Hirt has worked in the Department of Justice for approximately 30 years, and is regularly
79 engaged in the work of the Civil Rules Committee.

80 Judge Vaughn Walker, Northern District of California, has had experience with the adoption
81 of a local rule that resembles some of the changes incorporated in the proposed Rule 56 and with the
82 subsequent abandonment of the local rule.

83 Robert Heim, a member of the Civil Rules Committee, chairs the litigation department at the
84 Dechert firm. His experience includes representing both plaintiffs and defendants.

85 Anton Valukas is chair of Jenner & Block, engaged in defense of major civil litigation and
86 white-collar criminal defense. He has served as United States Attorney for the Northern District of
87 Illinois.

88 Judge Hagy, Northern District of Georgia, noted that he is assigned to write reports on about
89 60 Rule 56 motions every year.

90 Jack Balagia was in private litigation practice for 20 years before moving to ExxonMobil.

91 Steven Zipperstein is general counsel for Verizon Wireless. Verizon is involved in litigation
92 both as plaintiff and as defendant. He has had several years of experience as a chief assistant United
93 States Attorney.

94 Thomas Gottschalk is of counsel at Kirkland & Ellis. He practiced with the firm for many
95 years, then spent 13 years as general counsel at General Motors. He has had mostly defense
96 experience. He is aware of Rule 56 misuses by defendants, with motions made for delay or "to
97 educate the judge." But from a business perspective, "cost and predictability are key; Rule 56 is
98 central."

99 Alfred Cortese represents defense groups, including Lawyers for Civil Justice, and is a
100 regular observer of the rules committees.

101 Hunter Hughes practices employment law at Rogers & Hardin in Atlanta, "mostly but not
102 entirely defense." His practice extends around the country; it would be good to have more
103 uniformity in local rules. He also works frequently as an arbitrator, and finds that the "Rule 56"
104 motions hide the issues in the papers.

105 Judge Baylson then asked Joe Cecil to present the current phase of the Federal Judicial
106 Center Rule 56 study. One part of the study explores whether differences in local rules affect the
107 frequency of Rule 56 motions, the rates of granting motions in whole or in part, and so on.

108 Joe Cecil began by saying that the FJC study is looking for variations that might help predict
109 how proposed Rule 56(c) would work. The draft requires both a detailed statement of facts to
110 support the motion, with citations to the record for each fact, and a counterpoint response. Twenty
111 districts have local rules that combine these features. Still more districts have local rules that require
112 the detailed statement to support the motion but do not require a counterpoint response. Some
113 districts have no similar provisions, and a few have no local summary-judgment rules at all.
114 Comparing these three groups generally showed there were not many differences in the frequency
115 of motions, even when broken down by case types, nor in the outcomes. But Table 5 shows that the
116 time to disposition is greater in districts that require both a statement of facts and a counterpoint
117 response. The difference was greater than was expected. But then it was found that these districts
118 also have a generally longer time to disposition in all cases, muddying the association between local
119 rules and disposition time. Table 12 suggests that there are more terminations of employment
120 discrimination cases by summary judgment in the districts requiring both statement and counterpoint
121 response.

122 Two cautions were noted about these results. Problems with the data from some districts,
123 including some large districts, required that those districts be excluded from the comparisons. An
124 effort will be made to clean up the data so these districts can be included. Second, a study conducted
125 by surveying docket entries does not support application of the arbitrary social-science conventions
126 that define significant differences. The judgment whether any differences found by the study are
127 meaningful must be made by the rules committees.

128 Dr. Cecil responded to questions by confirming that differences in local rules do not seem
129 to affect the frequency of Rule 56 motions or the frequency of grants. He also observed that it is
130 difficult to sort out the components of overall case disposition times — whether the time to consider
131 summary-judgment motions is responsible for the longer disposition times in districts that have

132 point-counterpoint rules, or whether the conditions that conduce to long overall disposition times
133 also cause the greater time to dispose of summary-judgment motions. Nor is there a basis for
134 comparing the costs of summary-judgment practice in the different local-rules groups. Docket data
135 do not reveal how much attorney time is spent on motions. RAND has managed to look at such data
136 in one study, but the work is difficult.

137 Another question asked why the data reveal so many cases in which there is no disposition
138 of a Rule 56 motion. Dr. Cecil responded that the cases may have settled. And "other things
139 happen."

140 Another question about the time to disposition in employment cases led to the observation
141 that "the more we look [in the FJC study], the more the employment discrimination cases seem to
142 raise questions beyond just Rule 56."

143 A judge noted that practice depends a lot on the circuit. Intent, motive, and like issues are
144 difficult to resolve on summary judgment. Dispositions may shift over time. In his district there was
145 a period when summary judgment was not granted. Then practice shifted and motions were granted
146 and were affirmed. More recently, the composition of the court of appeals has changed and the
147 district judges have become more wary of summary judgment. Partial summary judgment is frequent
148 in employment cases: the complaint "throws in the kitchen sink," partial summary judgment disposes
149 of unfounded issues, and then the parties settle.

150 The same judge also noted that a summary-judgment rule should not refer to "stipulations."
151 Concessions may be made only for purposes of summary judgment; they are not stipulations of fact,
152 and referring to them that way may cause confusion.

153 The benefits of partial summary judgment were noted by a practitioner who asked whether
154 the FJC study shows differences among the local-rule groups in the frequency of partial summary
155 judgment. Dr. Cecil responded that there were no differences in grants-in-part. But the employment
156 cases do show "a lot of stuff thrown in, and a lot of partial summary judgments."

157 A separate question asked whether it is possible to measure the differences among the local-
158 rule groups in dispositions on appeal, observing that there is no gain in efficiency if there are more
159 appeals, and a clear loss if there are more reversals. Looking only for trial-court grants is not a full
160 measure of efficiency.

161 The question of "significance" returned with the observation that the tables that seem to show
162 interesting differences "approach the 5%" standard used in social-science research. But this standard
163 does not apply to a study based on a population; "statistical significance" is not involved. It remains
164 possible to build models that control for case load and weighted case load, however, perhaps refining
165 the time-to-disposition question.

166 Judge Baylson then launched the general discussion by noting that the draft Rule 56 in the
167 agenda materials has evolved from many drafts over a 2-year period. Last spring the Advisory
168 Committee believed that it had developed a draft suitable to publish for comment. The Standing
169 Committee agenda was too crowded to be able to devote sufficient time to a topic so important,
170 however, and the chairs of the Advisory Committee and Standing Committee agreed that it would
171 be better to postpone presentation to the Standing Committee for initial consideration at the January
172 2008 meeting and then, if the work continues to progress satisfactorily, for consideration of a
173 publication draft at the June 2008 meeting. Meanwhile, this miniconference is an opportunity to take
174 advantage of the delay. The participants will provide a first and intensely focused sample of the
175 kinds of comments that emerge after publication. The Subcommittee will meet immediately after

176 the conference concludes to consider further changes in the agenda draft, and will report on both the
177 conference and possible changes to the Standing Committee tomorrow.

178 *Rule 56(a): Time*

179 The time provisions were published as part of the Time Computation Project package last
180 August, with changes designed only to fit them into the framework of Style Rule 56.

181 The time provisions are the only part of the draft rule that allows departure by local rule. The
182 first comment was that the Committee Note should emphasize that this is the only part of Rule 56
183 that can be changed by an inconsistent local rule. The next comment was that it is good to allow
184 change by order in a particular case, but that local rules can be bad. Local rules now may require that
185 court permission be obtained to file a motion, or that a motion cannot be filed before the Rule 26(f)
186 conference: "We should trust lawyers to move when it's sensible. Practice should be uniform." In
187 response to a question, this participant said that local rules on all topics generally are bad.

188 The local rule option was explained to rest on the view that variations in docket conditions
189 and practices may justify different treatment; this observation was turned into a question whether any
190 differences that exist are not sufficient to justify local rules. The response was that great experience
191 across districts would be required to address all possible local rules, but that it is difficult to imagine
192 local conditions that would justify a rule requiring the court's permission to file a motion.

193 A different observation was that local rules often impose page limits on motions and
194 responses that are inadequate for complex issues. The Committee Note should recognize that local
195 rules should account for this.

196 It also was observed that "standing orders" may take on all the effect of local rules. The rule
197 text should specify that departure by order should be by an order "in the case."

198 Another participant said that generally counsel work out the times, and allow more time than
199 the rule sets. They can get the court to "so order," but it should be made clear that this practice is
200 effective without need for a court order.

201 Noting that the time provisions are "default" provisions, and that it is anticipated that timing
202 will be governed in most cases by a scheduling order, it was asked how far local rules would be
203 preempted on such matters as briefing times. The response was that draft subdivision (c)(7)
204 expressly recognizes authority to modify briefing times by order in the case.

205 It also was noted that the provision recognizing local rules on motion, response, and reply
206 time rests on the belief that autonomy is needed to address docket conditions — such as
207 overwhelming criminal case loads — and traditional motion practices that require that Rule 56
208 motions be fit into the practice for other motions.

209 This observation was followed by a statement that the Southern District of California has an
210 extreme judicial emergency. There are many calendaring mechanisms that can help get to Rule 56
211 hearings. Local rules can help. "Local cultures can be important." Indeed, draft Rule 56(a) does not
212 interfere with scheduling the hearing or the time to decide — it addresses only the deadlines for the
213 motion, response, and reply. Even as to the deadlines, the rule is only a "default" that will operate
214 only in the likely small number of cases without a scheduling order.

215 Local rules were addressed in more general terms. They present "an endemic set of
216 questions." So for "local-local" rules established by "standing orders" or similar directives. "The
217 way cases are handled is the subject of many local rules, and very important." This is an important
218 reason for attempting to achieve greater national uniformity through the national rules.

219 But it was also noted that local rules can provide experiments that generate new and useful
220 practices. The effective practices gradually percolate around the country.

221 Discussion turned to subdivision (a)(1), which is the first explicit draft provision referring
222 to summary judgment "on an issue." The first observation was that it is important to give clear
223 guidance that not every issue, claim, or other part of a case deserves to be tried to a jury. The draft
224 "makes specific the impetus to partial summary-judgment rulings." This parallels the emphasis on
225 framing the issues through pretrial conferences. It will be important to avoid any implication that
226 Rule 56 is displacing the role of pretrial conferences in shaping the issues for trial. But it was
227 responded that pretrial conference shaping of the issues can be a problem. It is important to make
228 certain that the procedural protections and standards for disposition established by Rule 56 control
229 — that Rule 16 does not authorize the court to exclude from trial matters that could not be
230 dispatched by summary judgment.

231 A perennial question was raised by asking how a less-than-complete disposition can be
232 referred to as a "judgment." Rule 54(a) defines a "judgment" as "any order from which an appeal
233 lies." Most partial Rule 56 dispositions cannot be appealed; it is confusing to refer to them as partial
234 judgments. But, it was responded, it has become nearly universal to refer to "partial summary
235 judgment." The revised 1992 version of Rule 56 that failed in the Judicial Conference attempted to
236 distinguish between three concepts — "summary adjudication," which embraced both "summary
237 judgment" disposing of at least an entire claim, and "summary determination" disposing of a defense
238 or issue. An attempt to replace familiar phrases with new phrases could easily generate confusion,
239 and would serve little purpose other than linguistic purity. No one is confused now by the regular
240 reference to partial summary judgment.

241 This response was elaborated by noting that "this happens all the time. It is OK to embrace
242 reality." The reality in turn reflects the value of narrowing the issues for trial. In an antitrust action,
243 for example, it can be important to determine in advance of trial that "we're not dealing with that
244 product market."

245 It was suggested that it would be useful to offer examples of summary judgment on an issue,
246 or on part of an action, in the Committee Note.

247 And it was further suggested that all of this discussion more properly addresses the explicit
248 partial-summary-judgment provisions in draft subdivision (h). But further discussion was not
249 deterred.

250 The next observation was that focusing on disposition of an "issue" will lead to an
251 exponential increase in Rule 56 motions. Many examples are provided by employment cases. For
252 example, a motion might address the sufficiency of the evidence to show that the plaintiff was in a
253 position comparable to the favored employee. "It's great." This view was echoed by suggesting that
254 it is good that subdivision (a) parallel and be consistent with subdivision (h). Further discussion of
255 the overlap between summary judgment on an "issue" and on "part of a claim or defense" was
256 postponed for discussion of subdivision (h).

257 Another aspect of subdivision (a) is that it authorizes a motion "at any time until 30 days after
258 the close of all discovery." Rule 56 now establishes a starting time that delays a motion after filing.

259 The first comment was that both plaintiffs and defendants should favor the opportunity for
260 a motion filed with the complaint. This opportunity is so important that the rule should be drafted
261 to prevent defeat by local rule.

262 The next comment was that Judge Clark wanted a similar provision in original Rule 56, but
263 could not persuade others. A motion with the complaint is useful mostly in "collection cases." But
264 there is a risk of improvident motions. There should be a sanctions rule that will discourage
265 premature defense harassment, unless perhaps the Twombly decision on pleading standards changes
266 practice so that defense harassment is accomplished by motions on the pleadings rather than by
267 summary judgment.

268 The concern with premature defense motions was echoed by a plaintiff-side lawyer's
269 comment that he often encounters "very detailed" Rule 56 motions before discovery. The motions
270 are made by the defense as a tool for early discovery of what the plaintiff's facts are.

271 These concerns led back to the observation that as drafted, subdivision (a) would allow local
272 rules that impose waiting periods before a Rule 56 motion can be filed. And to the further
273 observation that allowing a summary-judgment with the motion in collection actions can be useful;
274 the risk of abuse is in complex cases.

275 Discussion turned to the deadline imposed by draft subdivision (a)(1) at 30 days after the
276 close of all discovery. The first suggestion was that the Committee Note should state that this really
277 means "all" discovery, including expert-witness discovery that often is scheduled to occur after
278 "merits" discovery.

279 The next suggestion was that here too, the deadline provision is so important that local rules
280 should not be allowed to impose a different rule — it would be source of great and unnecessary
281 expense, for example, to allow a local rule that does not allow a motion to be made until the close
282 of all discovery. A complaint may contain many issues that are completely unfounded, but that will
283 drive extensive and costly discovery.

284 The need for early summary-judgment motions was underscored by further comments. An
285 employment lawyer noted that there are many issues suitable for early resolution, particularly such
286 issues as res judicata, statutes of limitations, and contract interpretation. A judge suggested that
287 ADA cases are amenable to settlement — they do settle — but they are "fee-driven." It is harder to
288 settle after money has been spent on Rule 56 motions.

289 A concluding observation suggested that the 20-day buffer in the present rule can be useful.
290 Often the nonmovant needs an opportunity for discovery to oppose the motion. Perhaps the
291 Committee Note can give examples of circumstances that warrant a motion at the beginning of the
292 action.

293 Draft subdivision (a)(2) sets a 21-day period to respond to a Rule 56 motion. The first
294 observation, from the perspective of employment plaintiffs, was that this is not enough time. The
295 plaintiff's bar is often organized in solo practice or in small firms of 2 or 3 lawyers. These lawyers
296 are busy, and often in trial. 30 days would at least give parity with the time to move. Agreement
297 was expressed from another perspective: legal services organizations also have inadequate staff.
298 Preparing a response is "time intensive."

299 A response to the parity argument noted that the 30 days after the close of all discovery
300 period for making a motion often is not a full functional 30 days because deposition transcripts are
301 not available until some time into the period. The rejoinder was that the movant still knows —
302 usually well before the close of all discovery — that it will make a motion, and what the motion will
303 slay. A further observation was that there is little point in talking of "parity" in these circumstances,
304 but that it would be good to know whether extensions are frequently granted — if so, perhaps 30
305 days makes sense intrinsically. But a further observation suggested that it is futile for a Rule 56
306 movant to request that the response time be shortened; it is better to set a brief but reasonable period

307 in the rule and to rely on extensions where appropriate.

308 Draft subdivision (a)(3) says that a movant may file a reply within 14 days after the response
309 is served. In response to a question it was noted that this provision gives a right to respond. But the
310 next question was whether a local rule can eliminate the right to reply.

311 A final question asked whether the draft rule establishes a right to a hearing on a summary-
312 judgment motion. The response was that although the present and Style Rules set the time to file
313 opposing affidavits by reference to the hearing, Rule 56 motions ordinarily are decided without a
314 hearing.

315 The several comments asking whether local rules can end the right to file a motion for
316 summary judgment with the complaint, or eliminate the right to reply, or change other procedures
317 described in subdivision (a) may show the need for further drafting to make clear that the reference
318 to setting a different "time" is not intended to reach so far. What is contemplated is changing the
319 deadlines, at least as to local rules. But perhaps a court should be able to enter an order in a case
320 setting a waiting period before a motion can be made, or to order that there be no reply in a case
321 calling for prompt disposition of the motion.

322 *Subdivision (b): Affidavits*

323 Subdivision (b) on affidavits is meant to simplify the expression in Style Rule 56(e)(1)
324 without changing practice. The present requirement that papers be "attached" to the affidavit is
325 eliminated because draft subdivision (c) requires filing. The provision permitting opposition by
326 depositions, answers to interrogatories, or additional affidavits is deleted because it is both
327 incomplete and covered by draft subdivision (c).

328 The first suggestion was that the Committee Note should say that discovery materials can be
329 used to support or oppose a motion.

330 In addition, this suggestion noted that attorneys often submit "affidavits" to enumerate things
331 not contested. That practice should be preserved, whether or not these submissions are properly
332 labeled as affidavits.

333 It was asked why affidavits are picked out for separate treatment? This subdivision is
334 confusing in relation to the draft subdivision (c) list of the materials that can be used to support or
335 oppose a motion or response. It might be better to rearrange the subdivisions. The "substance" of
336 summary judgment practice could be set out first, to be followed by the procedure.

337 These comments led to the further comment that the draft does not make clear what a motion
338 "will look like." In the Southern District of New York there is a notice of motion; an affidavit by
339 the lawyer that summarizes the facts; then a statement of undisputed facts. Does subdivision (c)
340 intend a "notice of motion" that includes a summary and statement of undisputed facts? The
341 Southern District's "56.15 statement" is a clearer way to do it. If the draft is intended to cover such
342 matters, perhaps it should be revised to leave presentation to be governed by local rules.

343 This thread was brought back to subdivision (b) by suggesting that the provision for affidavits
344 should be moved elsewhere in the rule. "It creates a digression." Further support for relocating this
345 provision was offered.

346 In addition, it was suggested that the traditional requirement that the affidavit show the
347 affiant is competent to testify is a relic from the past. Almost all witnesses are competent. The
348 affidavit should say that the affiant is prepared to testify — that the affidavit statements can be
349 reduced to admissible evidence.

350 This observation in turn inspired a more general comment. "Rule 56 has never dealt clearly
351 with admissibility." The nonmovant may wish to dispute admissibility in the response, and for
352 tactical reasons prefer not to reveal its additional evidence at that time. Does it have to do both at
353 the same time?

354 Another suggestion was that perhaps there should be a form that illustrates these questions.

355 The requirement that an affidavit set out facts that would be admissible in evidence was
356 described as critical. Nothing in the draft subdivision (c) provisions for procedure refers to
357 admissibility. The issue arises often in employment cases. Motions to strike are the common
358 response. They take weeks to decide. It would be useful to say something explicit in the rule,
359 perhaps allowing a challenge to admissibility in the response without requiring a motion to strike.

360 A final observation asked why the subdivision on affidavits cannot also refer to declarations:
361 is this the "Style Monster" at work?

362 *Subdivision (c): Procedure*

363 Judge Baylson introduced subdivision (c) by stating that it is the centerpiece of the proposed
364 amendments. It increased the significance of the motion as compared to present practice. Under
365 present practice the motion may say no more than "see the brief." Now the allocation of
366 responsibilities among motion and brief is spelled out, requiring that the motion include a statement
367 of facts that are not in genuine dispute. Subdivision (c)(1) establishes that these procedures apply
368 only if they are not superseded by an order in the case. It is expected that in most cases a scheduling
369 order will either expressly adopt these procedures or depart from them. The ability to depart was an
370 important consideration in framing the draft. Thus the detailed format does not foreclose different
371 local practices, so long as they are enforced by case-specific orders.

372 Two questions were immediately addressed to subdivision (c)(2). In (B) it requires a
373 statement of "those material facts that the movant asserts are not genuinely in dispute." Do those
374 words adequately describe a "Celotex" motion that asserts the nonmovant has no admissible
375 evidence to support an asserted fact? And is it proper in (A) to refer to summary "judgment" when
376 dealing with only an "issue" — should that be referred to as a summary determination?

377 Two responses first asked whether this problem arises under local rules that require a
378 statement of "undisputed facts," and then observed that "This is not a problem. We know how to do
379 it." A further response was that draft (c)(5)(B)(ii) addresses the "Celotex no-evidence" motion. The
380 draft does contemplate a motion stating "there is no evidence the plaintiff was exposed to our
381 product." (This question was repeated later.)

382 The last of these responses led to questions about the (c)(5)(B)(ii) provision for supporting
383 a statement of fact by "a showing that * * * no material can be cited to support the fact." The
384 reference to "material" might be read to eliminate the requirement of admissibility. And "cited"
385 could be misread to refer to matter that could be cited but has not been — to override the
386 nonmovant's need to defeat summary judgment by coming forward to show evidence that would
387 carry it trial burden of production. In effect stating that "nothing can be cited" puts on a movant who
388 would not have the burden at trial a summary-judgment burden of showing there is nothing
389 anywhere, whether to the nonmovant or not, that would suffice to carry the nonmovant's trial burden.

390 The concern about admissibility led to a suggestion that perhaps the draft should say "no
391 evidentiary material" can be shown, or "no admissible evidence" can be shown.

392 Returning to draft (c)(2)(B), a deletion was suggested: "state * * * ~~only~~ those material facts
393 * * *." Lawyers will police themselves for most part. Adding "only" to rule text will invite motions
394 to strike or for sanctions. We do not need satellite motions. But it was immediately responded that
395 "only" plays an important role in restraining overblown motions.

396 The "issue" question came back in addressing the draft (c)(2)(A) direction that a motion
397 describe a claim, defense, "or issue" as to which summary judgment is sought. "I am concerned that
398 an unintended consequence will be to intensify a 'dice and slice' approach." These motions impose
399 considerable transaction costs, particularly on plaintiff employment and civil-rights lawyers. The
400 efficiency gains in narrowing the scope of trial are not clear. "Many issues can be addressed,
401 augmenting the work load."

402 A judge observed "from the trenches" that there is good reason to fear that defendants often
403 do not restrain themselves on summary judgment. "But the plaintiffs' bar is just as bad." A case
404 may be filed with 18 counts. It is clear that many of them are not supported and will not be
405 submitted to the jury. Rule 56 is necessary to enable the judge to do what the lawyers should do for
406 themselves. This is more work for the litigant, but it makes the trial process better.

407 Another judge noted that up to 1998 his district had a local rule requiring statements of
408 undisputed facts. The result was long lists and long responses. The rule was dropped. The process
409 has improved without the rule. Judges no longer have to waste time on lists of facts that are not
410 important. (Later, another judge whose district had a similar history said that the discussion was
411 leading him toward the view that the draft rule was sufficiently different from the abandoned local
412 rule to be perhaps appropriate.)

413 A lawyer spoke from the perspective of the plaintiffs' employment bar. The better lawyers
414 agree that focus and discipline are important. We could draft that there are no more than 10 material
415 facts per claim. "There can be too much." A recent statement of undisputed facts stated 250 facts;
416 it cost \$30,000 simply to prepare the response. "The Committee Note is not strong enough" to deter
417 such motions. The rule text should set a limit on the number of undisputed facts that can be asserted
418 as to any one claim. In addition, the rule text or the Committee Note should identify what is a
419 material fact.

420 Time was taken for a perspective on draft Rule 56(c). Rule 56 has not been modified in 40
421 years. Practice has changed in important ways. The question posed by (c) is what the default
422 practice should look like. Something like 55 districts now require a detailed statement of undisputed
423 facts, with supporting references. Something like 20 of those districts require a counterpoint
424 response. The point-counterpoint process seems attractive, but it may have unanticipated difficulties;
425 the fact that at least two districts have adopted local rules requiring something that resembles
426 subdivision (c) and then backed off is an important caution. The challenge is to see whether it is
427 possible to draft a procedure that minimizes the risks and realizes the benefits of statement and
428 counter-statement, recognizing that the risks are subject to control by case-specific orders. The
429 discipline imposed by a procedure like subdivision (c) could be important in avoiding the now-
430 common problem that motion and response are like "ships passing in the night."

431 This perspective was matched by recognition from a district judge whose court had
432 abandoned a similar practice that citations to the record are important. A second judge agreed that
433 citations to the record are an important help for the judge. This makes more work for the lawyers,
434 but it can help. The nonmovant's response shows there is an issue.

435 Two more judges endorsed the same propositions. The counterpoint response is important;
436 a side-by-side response is important. And it will deter over-long statements by movants — "the
437 response will humiliate." The structure and the discipline imposed by the structure will help. So

438 it was agreed that the procedure works and is very helpful — extraordinarily helpful — in complex
439 cases. And as convenient as it may be, a statement cannot be reduced to a maximum of 10 facts per
440 claim. That is true "even in some employment cases."

441 A practicing lawyer offered further support. The statement-counterpoint procedure makes
442 analysis easier for the court. The discipline, further, may show the lawyer that the motion should
443 not be made because a careful appraisal of the record shows that there are genuine disputes. The fact
444 statement also shows the court whether the motion is vexatious. The Committee Note can
445 appropriately say that in most cases 10 or 12 succinct statements should suffice. And the Note also
446 might refer to 28 U.S.C. § 1927 as a warning that statements of 200 facts should be approached
447 cautiously for fear of sanctions.

448 Still another judge urged caution. Separately numbered fact paragraphs can be a problem.
449 The Northern District of California required these statements and then abandoned them because they
450 multiplied proceedings. Some courts, on the other hand, find the practice helpful. Why not leave
451 this where it is now, a matter of local option, without seeking to impose a uniform procedure on all
452 courts? The rule could include a general statement of what a motion should include. The FJC study
453 time showing a longer time to disposition in districts that have a point-counterpoint procedure should
454 be a source of caution. The rule should not descend to this level of mechanical detail.

455 It was suggested in response that the procedure sketched by draft subdivision (c) will work
456 if lawyers and courts are informed that this procedure is not the practice reflected in all of the various
457 local rules. But the form should be revised. Three documents should be required: a motion that is
458 only a brief statement of what you're asking for. The statement of facts should be separate, standing
459 apart. The statement is the heart of the procedure. And it is not possible to set an arbitrary ceiling
460 on the number of material facts that can be stated. A judge later commented that the statement of
461 facts should be, as it is in her court, a document separate from the notion (called a "notice of
462 motion").

463 A like comment was that it suffices to limit the statement to "only those material facts." "The
464 drafting is there." This practice will be different from that encountered in many of the districts that
465 have inspired the model. And it was suggested, in a point to return to the conversation with the
466 sanctions provision in subdivision (i), that we can avoid vexatious use of the procedure — including
467 attempts to substitute a Rule 56 motion for Rule 36 requests to admit — by adopting cost-shifting
468 sanctions.

469 Further support for the draft was expressed by suggesting that the motion should be "a rifle
470 shot," limited to "truly material" facts. "As defendant I do not want to pay lawyers to prepare a 300-
471 fact statement." It should be made clear that the judge can reject an over-long motion as simply too
472 long.

473 A judge suggested caution in thinking about sanctions. "You can't draft a rule that prevents
474 unreasonable acts by unreasonable lawyers." Many judges will not look at the motion until the
475 response is in. This suggestion was met by urging that there should be a pre-response opportunity
476 to protest that the motion is overblown.

477 Sanctions were suggested again, urging that § 1927 is not up to the task because it requires
478 subjective bad faith. A specific cost-shifting Rule 56 provision would be a more appropriate means
479 of deterring over-long motions.

480 The problem of unnecessarily lengthy motions was explained from another perspective. The
481 problem in employment cases, at least, is that often it is an associate who drafts the motion, and who
482 approaches the task backward. First the brief is drafted, then the statement of facts that support the
483 brief. It is important to begin instead by identifying 10 or 12 crucial facts, then going to the brief.

484 Both a judge and a lawyer picked up these themes by suggesting that a motion to strike is
485 appropriate to protect against abusive motions.

486 Another lawyer urged wariness in approaching sanctions as a panacea. The problem is not
487 the number of alleged undisputed facts; it is the bad faith of alleging a lack of dispute. And a judge
488 may find genuine dispute in circumstances that do not show bad faith.

489 Cost-shifting provisions tailored to summary judgment were further supported. It is not a
490 matter of bad faith. And the sanctions should not be limited to "abusive" motions — the cost of
491 proving an issue might be imposed on a nonmovant who successfully asserted a genuine issue in
492 defeating summary judgment and then loses on the issue at trial.

493 It was suggested, however, that the problem of "ships that pass in the night" can arise not
494 from inept presentation but from differences in perceptions of what is relevant.

495 Another participant said that from the plaintiff's standpoint, it is important that the movant
496 both state undisputed facts and support them by record citations. Defendants, however, do use these
497 motions tactically. It would be useful to impose a limit on the number of facts that can be asserted
498 to be established beyond genuine dispute. The 7-hour limit on depositions works; lawyers fit their
499 questions in. A similar approach can work for limiting the number of facts. But a motion to strike
500 is a problem; is the time to respond suspended while the motion is pending?

501 This discussion prompted the suggestion that it is better to have a clear rule than to impose
502 sanctions for misusing an unclear rule or providing for motions to strike. But there is "a cognitive
503 problem with long statements of facts." This is very important from the plaintiff's perspective.
504 "Totality of circumstances" tests are common. The jury perspective on the total body of evidence
505 is quite different from a fractionalizing focus on minute specific facts one at a time.

506 A different view was suggested by a judge: "If the motion asserts 250 undisputed facts, why
507 should it ever be granted? So many facts are like quicksand."

508 A plaintiffs' lawyer then suggested that the proposed procedure seems biased against
509 plaintiffs. A judge and a plaintiffs' lawyer responded that the procedure favors plaintiffs, particularly
510 if it is possible to insist that the motion be short and concise.

511 These observations were tied back to the sanctions discussion by a judge who suggested that
512 "if you put in too many facts, you lose; that is the sanction." The satellite litigation spawned by
513 separate sanctions provisions would do more harm than good.

514 A retort was that absent sanctions, "the defendant wins by making a losing motion that
515 imposes crippling costs on the plaintiff." This risk is not offset by the prospect that in some kinds
516 of cases, such as employment cases, a plaintiff who succeeds at trial wins attorney fees — the
517 damage done by the need to respond to the motion will cripple trial preparation and reduce the
518 chance of prevailing on the merits.

519 The problem of limiting overlong statements of fact was approached from a different
520 perspective. What is a "fact" has a changing meaning. A judge may say that the motion can identify
521 only a limited number of undisputed facts, and insist that each fact be stated in a separate paragraph.
522 But "facts are very particular things. They are stated as evidentiary facts. Ultimate facts are key."

523 Intent to discriminate for example, is an ultimate fact that must be inferred from fact evidence. A
524 judge agreed that this question involves the feared "slicing and dicing" approach to the ultimate facts.
525 It is important that the rules not prevent the "holistic argument" that the court should stand back and
526 look at the complete fact set. Do the local point-counterpoint rules have this effect? Another judge
527 suggested that the brief, not the motion, is the place to look for arguments about the inferences to
528 be drawn from a pattern of direct facts.

529 A plaintiffs' lawyer said that experience with local rules has been bad in this respect.
530 Arguments for the holistic view and broadly based fact inferences are impeded by the fractionalizing
531 approach to fact statements.

532 A judge said that the advocates' concerns should be balanced by the judge's perspective.
533 There is a motion, long or short, and a supporting brief. Then there is a response that looks totally
534 different. The judge is cast in the role of truffle hunter. "We need structure and format." Making
535 it easier for the judge also will make it better for the parties.

536 A lawyer supported this view, based on practice both in courts that follow practices similar
537 to draft (c) and in courts that do not. The side-by-side presentation shows whether there are disputes.
538 When there is no such rule, "the other side does not meet me. They talk 'holistic.' The ships pass
539 in the night. You can address the whole, and inferences, in the brief."

540 A drafting suggestion was made to substitute a word in draft (c)(2)(A): "describe identify
541 each claim * * *." "Describe" may invite too much elaboration.

542 Another drafting suggestion was that draft (c)(2)(B) might be divided, so that (i) would state
543 the facts and (ii) would specify the judgment or order that the movant claims as a matter of law.

544 The allocation of functions among motion, statement of facts, and brief returned to the
545 discussion with the suggestion that "there should be a preamble." The motion should include a brief
546 summary of argument that sets the stage for the facts statement. "You need an outline of why the
547 facts matter." This view won further support from a judge working under a local rule much like this.
548 The movant states facts; the nonmovant states new facts; the movant replies. Then the arguments
549 are set out in the briefs. Later discussion renewed the suggestion that a three-paper procedure would
550 work better.

551 The response provisions of draft (c)(3)(B) allow a nonmovant to assert that the facts in the
552 movant's statement "do not support judgment as a matter of law." This is a Rule 56 equivalent of
553 a demurrer. It was urged that this is an argument of law that should be relegated to the brief. The
554 countering concern is that it could be useful to the court to learn from the response itself that the
555 nonmovant, even if disputing the facts, will argue that summary judgment is appropriate even if the
556 facts cannot be genuinely disputed. This function might be served better by adding a few words:
557 "those facts, even if accepted as true, do not support judgment." The response, offered by both a
558 judge and a lawyer, was that this "is a road map for the judge"; a brief signal can be helpful. But it
559 may not be easy to train lawyers to offer only the sense of direction; earlier drafts directed that
560 statements and responses be made "without argument," and these words were deleted as potentially
561 confusing. If draft (c) is read as a whole, including the provision for briefs, it should be clear that
562 this response is appropriately made in the brief. This led to the suggestion that (B) should be omitted.
563 The argument will always be made. The court should anticipate it, and look for it in the brief. There
564 is no need to clutter up the response with it.

565 In later discussion a lawyer repeated that there is no need for (B); "the ability to qualify is
566 enough." But another participant insisted that the distinction between "law" and "fact" is important.
567 The nonmovant needs to say "their law is wrong"; these facts are not material. (B) gives a chance
568 to say that. "We need to preserve this opportunity." A judge repeated that the judge should be able
569 to identify the parties' positions from the motion and response. The other side of the discussion also
570 was repeated. The nonmovant should do both — respond to the movant's statement of facts and
571 state the legal position. "It want it fully submitted. I will decide what the law is."

572 A related suggestion was that draft (c)(3)(B) should be made more general: "may state ~~that~~
573 whether those facts ~~do not~~ support judgment as a matter of law."

574 The responsibility of responding to the movant's statement of facts was addressed from a
575 different perspective by reflecting on the "no-evidence" motion. If the movant asserts only that the
576 nonmovant has no evidence to carry the nonmovant's trial burden, the nonmovant may be pressed
577 to do a great deal of work to show that it does have sufficient evidence. The nonmovant should be
578 able to respond that the movant is wrong in asserting that the law requires this proof without having
579 to show what the proof might be.

580 A further suggestion was that the response should not be limited to the context framed by the
581 movant's statement of facts. The nonmovant should be able to establish a broader context, to tell
582 the full story.

583 This discussion expanded to the more general point that it is important that the rule text
584 provide a clear set of directions as to what goes where. "Raw fact is OK, but inferences are
585 different." Are inferences to be presented in motion or response, in affidavit, or brief? The
586 practitioner must know where to put these things.

587 So too it is important to know where to set out the assertion that materials cited to support
588 a fact position are not admissible. To illustrate, a witness may say something at deposition that she
589 does not know of her own personal knowledge. This deposition passage is cited to support that
590 proposition. Is it proper to respond with "she said it, but it's not admissible"?

591 The question of admissibility ties to the draft (c)(3)(A) requirement that a response "accept,
592 qualify, or deny" the fact. Does it "qualify" the fact to assert that the evidence cited in support is not
593 admissible? Or does it qualify the fact to assert that even if true, it does not support summary
594 judgment? (One participant later observed that this meaning could be read into "qualify," but the
595 meaning is not obvious — the word seems to look only to qualification of a fact statement, not to
596 legal argument.) Or does an objection to admissibility lead to denial in the response, to be followed
597 by arguments on admissibility in the brief?

598 One suggestion was that it would be easier to illuminate these questions by providing an
599 official Form that includes specific examples.

600 Another aspect of draft (c)(3)(A) allows a party to accept, qualify, or deny "either generally
601 or for purposes of the motion only." It was suggested that this invites disputes.

602 Discussion returned to the question whether the response should include an argument that
603 the asserted facts, even if true, do not support summary judgment. One observation was that the (A)
604 and (C) provisions for responding to the movant's fact statements and for stating additional facts "are
605 pretty clear. The razzmatazz comes in the briefs." The entire package tells the story and provides
606 a road map for the judge.

607 The provision for stating additional facts that preclude summary judgment was addressed by
608 asking whether it also will support a statement of facts that entitle the nonmovant to summary
609 judgment. A more particular suggestion was that draft (c)(3)(C) should parallel (c)(2)(B): "may state
610 in separately numbered paragraphs additional material facts * * *."

611 It was protested again, however, that it is a struggle to separate fact from law. "Where do you
612 want to see the response: I'm entitled to an inference? Where does that go"?

613 The reply provision of draft (c)(4) was addressed briefly. The draft Committee Note adds
614 a word that might well be added to the text: "The movant may reply only to any additional fact stated
615 in the response * * *." It was asked whether the rule then allows the nonmovant to address the reply.

616 Draft subdivision (c)(5) describes "Citing Support for Positions." Subparagraph (B) reflects
617 the Celotex burdens as a supplement to Subparagraph (A). Standing alone, (A) seems to say that a
618 statement of fact must be supported by citing to specific materials. But a response or reply need not
619 do that — it suffices to say, as (B)(i) recognizes, that the materials cited to dispute or support a fact
620 do not establish a genuine dispute or the absence of a genuine dispute. And on one reading of the
621 Celotex opinion, a motion also need not do that. If the movant does not have the trial burden of
622 production, the motion may "show" that the nonmovant does not have sufficient evidence to carry
623 its burden of production. (B)(ii) attempts to state that proposition, but in neutral terms that do not
624 attempt to resolve the ambiguity in the Celotex reference to "showing" the nonmovant does not have
625 sufficient evidence.

626 The first suggestion was that the "no-evidence" motion might be described as showing that
627 there is no "record" material, or no "record evidence," to support a fact. But much discovery
628 information is not filed until it is "used," and affidavits or the like are even less likely to be in the
629 file.

630 The question was elaborated by asking how to address — where, as among motion, response,
631 reply, and brief — does a movant say: "(1) We did not make the telephone that the plaintiff claims
632 exploded; (2) it did not explode; and (3) the plaintiff was not injured by any explosion"?

633 A judge added the suggestion that the question of admissibility should be separated more
634 distinctly. "We're mushing together facts and evidence."

635 Another observation was that "showing implies argument."

636 And it was suggested that to refer to a "fact" is "off the 'no-evidence' point." If there is no
637 evidence, it is not a fact.

638 This comment led to the observation that "we're going to see a fudging of fact and law." But
639 the goal remains to establish a clear and fair procedure for making and deciding summary-judgment
640 motions. The concept remains "better and fairer." The structure should be the best that can be
641 devised for this purpose.

642 So the need for guidance was repeated: "Do we provide a motion to strike inadmissible
643 evidence? Just tell us." One response was that the Second Circuit rules that a motion to strike is the
644 only way to attack the admissibility of material submitted in a Rule 56 statement. Leading treatises
645 repeat the rule. But it is unnecessary, and is pernicious if it leads to forfeiture of the admissibility
646 argument. A lawyer suggested that admissibility might instead be addressed as part of the (c)(5)(A)
647 citations requirement.

648 Draft subdivision (c)(6) requires that materials cited in a motion, response, or reply be
649 attached if they are not already on file. As a drafting point, many participants agreed that it would
650 be better to require filing — attachment is not a good description: "A party must ~~attach to~~ file with
651 a motion * * *."

652 Discussion also picked up a theme addressed in the draft Committee Note. It was urged that,
653 as the Note says, a court should be able to require that a motion, response, or reply be accompanied
654 by an appendix that includes all the materials cited, even if the materials are already on file. The
655 convenience of this arrangement can be important. A related suggestion addressed the need to refile
656 from a different perspective. The fact that a document has already been filed does not always mean
657 that it is readily accessible to the court or other parties. A contested matter in a bankruptcy case, for
658 example, may involve a paper already on file — but in a case that has 1,000 pages of docket entries.

659 Draft subdivision (c)(7) says that a brief must be filed with the relevant motion, response, or
660 reply, but also recognizes that the court may order a different time. Discussion asked why the court
661 would want to direct a different time. All parts, for example, cited materials, and brief, should be
662 prepared at the same time. The response was twofold — it is important to retain flexibility, but this
663 reminder is redundant because draft (c)(1) allows the court to order departure from any subdivision
664 (c) procedure. One suggestion was to strike "or at a time the court orders." A more sweeping
665 discussion was to strike any reference to filing time: "A party must make its arguments of law and
666 fact in a separate brief ~~filed with the motion, response, or reply or at a time the court orders.~~"

667 *(d): Failure to Respond or Properly Respond*

668 Draft subdivision (d) addresses failure to respond to a summary-judgment motion and failure
669 to respond in the way required by subdivision (c). It recognizes that the court may provide an
670 opportunity to respond as required, or grant summary judgment if the motion and supporting
671 materials show that the movant is entitled to it, or issue any other appropriate order.

672 Judge Baylson introduced the discussion by noting two choices. The draft does not provide
673 for granting summary judgment by default without examining the motion and supporting materials.
674 Neither does it address the "deemed admitted" provision commonly found in local statement-
675 counterpoint rules. These rules say that a fact in the statement of undisputed facts is deemed
676 admitted when there is no response. The draft recognizes this approach only in a limited way by the
677 Committee Note suggestion that an "other appropriate order" might be an order stating that a fact
678 will be deemed admitted unless a proper response is made.

679 Discussion began with another reminder of the linguistic question whether disposition of less
680 than the entire action should be referred to as a summary "judgment." Rather than referring to a
681 grant of summary judgment, the rule should refer to summary "relief" or something of the sort.

682 A second suggestion was that paragraph (1) should refer to "a further opportunity to respond.
683 This would emphasize the belief that the first recourse should be to afford a second opportunity to
684 respond, both when there is no response (a particular problem with pro se litigants) and when an
685 attempted response does not comply with Rule 56(c) requirements. It is indeed a "further"
686 opportunity that is contemplated: the opportunity provided by Rule 56(c) was muffed. But it was
687 noted that affording a further opportunity to respond will create difficulties in disposing of Rule 56
688 motions within the 6-month-old motion report.

689 An argument was made that "deemed admitted" should be added to the rule text. This
690 approach is found in all the statement-counterpoint local rules.

691 It was noted that at least some courts of appeals require notice of the duty to respond and the
692 consequences of failure in "custodial pro se" cases. This notice might be provided after the initial
693 failure, as an "other appropriate order." It is important to provide this warning as a road map to the
694 pro se litigant.

695 (e): "Court Action"

696 Draft subdivision (e) includes two paragraphs. The second paragraph brings together a
697 number of practices that have evolved in the case law. After notice and a reasonable time to respond,
698 the court may grant summary judgment for a nonmovant; grant or deny a motion in whole or in part
699 on grounds not raised by the motion or response; or consider summary judgment on its own after
700 identifying for the parties material facts that may not be genuinely in dispute. The first paragraph
701 says that the court "may" grant or deny summary judgment." This part was added after discussion
702 of the second paragraph suggested that standing alone the second paragraph seemed incomplete —
703 that it also should recognize authority to act on the motion.

704 The first comment was that the statement that the court "may" do these things should be
705 changed to "shall," or "must" in the Style convention. Draft subdivision (g), carrying forward Style
706 Rule 56(c), says that summary judgment "should" be granted when the standard is met. But
707 summary judgment "is a right of the moving party."

708 This comment was supported by a statement that the Style Rule translation of "shall" in the
709 present rule to "should" is a big change.

710 It was noted that the Style Rule adopted "should" because that is the meaning of the present
711 rule — it is established that a court has discretion to deny summary judgment even though the
712 required showing for summary judgment has been made. But the present project is not bound, as
713 the Style Project was, to carry forward established meaning without change. If change to "must" is
714 desirable, the change can be made.

715 The search for the "better rule" was supported by a suggestion that not all circuits recognize
716 discretion to deny summary judgment. This participant later added that "must" is appropriate; it
717 saves client money.

718 The role of discretion was opened further by suggesting that summary judgment on an entire
719 action is different from partial disposition. The advantages of disposing of the entire action are great,
720 including sparing the movant from the burdens of proceeding toward a trial that is waste effort if
721 nothing new turns up. But if only part of the case can be dispatched, leaving a need for trial, the
722 advantages of granting summary judgment on other parts are diminished. When some issues need
723 to be tried, and often they will be issues that overlap the issues that might be summarily decided, it
724 may be better to seize the advantages of trial on all issues. One interesting question would be how
725 often summary judgment involves only partial disposition, followed by trial on remaining issues that
726 are closely related.

727 The lawyer who first argued for "must" said that trial on related questions can be held
728 available without making discretionary even the partial summary-judgment provisions in draft
729 subdivision (h). But "we're not finding too many partial summary judgments." So for this reason
730 it might be appropriate to use "should" in subdivision (h), recognizing that any expansion of the
731 issues open for trial will increase the burdens of preparation and trial.

732 The case for discretion was put differently. Legitimacy of the courts and their work depends
733 on acceptance. People accept better what a jury does, and what is done after trial, than they accept
734 what is done summarily without trial. A parallel comment observed that a partial summary judgment

735 has consequences for the admission of evidence at trial — it is important to be able to tell the full
736 story, without losing part of the evidence because it seems relevant only to issues resolved by
737 summary judgment.

738 A later comment focused on the draft Committee Note statement that the court has discretion
739 to deny summary judgment if evidence not admissible at trial shows a prospect that sufficient
740 evidence will be found in time for trial. This statement was defended by another participant on the
741 ground that it states what the law is now; it was rejoined that the statement "changes the burden."

742 This discussion was repeated with subdivisions (g) and (h). At the end of that discussion it
743 was suggested that one improvement would be to drop paragraph (1) from subdivision (e). It is a
744 redundant reflection of the authority established by (g), and it is confusing so long as it says the court
745 "may" grant summary judgment while (g) says it should.

746 *(f) When Facts are Unavailable*

747 Subdivision (f) carries forward Style Rule 56(f). The only change is explicit recognition that
748 the court may deny a Rule 56 motion because the nonmovant has not had sufficient opportunity to
749 prepare its opposition.

750 The first suggestion was that the Committee Note should say that ordinarily summary
751 judgment should not be granted before the plaintiff has had some opportunity for some discovery.

752 The next observation was that in the ordinary case, at least in most courts, there is a
753 scheduling order that directs a discovery period and schedules dispositive motions after the discovery
754 period. If the summary-judgment motion is made after the close of discovery, the court is not likely
755 to grant a nonmovant's request to reopen the discovery period.

756 But it was recalled that the draft allows a motion to be made at any time, even as early as the
757 commencement of the action. And the early motion may be encouraged. Such matters as official-
758 immunity should be resolved as soon as possible because of the underlying purpose to protect against
759 the burdens of trial preparation as well as the burdens of trial. Much the same can be said, although
760 from a different perspective, as to a limitations defense.

761 *(g) Granting Summary Judgment*

762 Draft subdivision (g) carries forward the heart of Style Rule 56(c), quoting the summary-
763 judgment standard without change apart from substituting "dispute" for "issue" and adding a
764 reference to admissible evidence: "Summary judgment should be granted if evidence that would be
765 admissible at trial shows that there is no genuine ~~issue~~ dispute as to any material fact * * *." This
766 drafting reflects a deliberate choice to carry forward without change the current summary-judgment
767 standard. Beyond the standard, subdivision (g) also directs that an order or memorandum granting
768 summary judgment should state the reasons.

769 The first suggestion was that drafting could be simplified throughout the rule if this
770 subdivision were moved up to become subdivision (a). Subsequent references to summary
771 judgment, to summary judgment on all or part of a claim or defense, to the standard, and so on, could
772 be shortened because they would not have to anticipate something that had not yet appeared in the
773 rule.

774 Rather than refer to "evidence * * * admissible at trial," it was suggested that the rule should
775 refer to "material capable of being reduced to admissible evidence." Affidavits are not admissible.
776 Depositions may be admissible, but also may not be admissible. But they clearly can establish
777 summary judgment.

778 It was urged that this draft no more captures the "no-evidence" motion than does Style Rule
779 56(c).

780 The statement of reasons was approached by suggesting that a statement also should be
781 provided when summary judgment is denied. The denial "is important to settlement." The judge's
782 identification of problems and non-problems can facilitate settlement. It was noted that draft (h)(3)
783 recognizes that when a court fails to grant summary judgment on the whole action it may "identify
784 material facts that are not genuinely in dispute." Another participant suggested that the draft expands
785 discretion to deny, making it important to recognize the value of stating issues that should be
786 precluded from relitigation at trial when the whole case is not disposed of by summary judgment.

787 On the other side, a lawyer suggested that the judge "probably knows why the judge denied
788 it. I would like to know why. The simple 'denied' does not advance the ball."

789 The question whether summary judgment "should" or "must" be granted returned with the
790 suggestion that there is a discontinuity between draft subdivisions (g) and (h). (h) says the court may
791 grant partial summary judgment; "should" is better. You should get partial summary judgment if you
792 ask for it and if you are right.

793 A further comment was that there is great "discretion" in determining whether there is a
794 genuine dispute. But once the court determines that there is no genuine dispute, there should be no
795 discretion to deny summary judgment as to matters not genuinely disputed. The existing standard
796 should not be changed.

797 Further discussion embraced a topic common to many subdivisions. Draft subdivision (a)
798 refers to a motion for summary judgment "on all or part of a claim or defense — or on an issue * *
799 *." "Issue" appears elsewhere, and "fact" appears in draft subdivision (h) as a suitable subject for
800 binding disposition. But why not refer only to "part of a claim or defense"? If the rule refers to
801 "issue," there is a risk that the practice "will degenerate into a motion in limine" to resolve matters
802 that are not dispositive. Another participant noted that "issue" does not appear in Style Rule 56. It
803 should not appear in the new rule, lest it encourage motions that are counter-productive.

804 It was argued in response that the "issue" whether a contract is ambiguous can be very
805 important. Early resolution can spare much unnecessary expense. "Part" of a claim or defense
806 "might do it, but the Committee Note should be explicit." A similar example was offered as the
807 "issue" whether payment was due in United States dollars or Swiss francs.

808 The need for some sorts of partial disposition was championed by noting that a determination
809 of liability does not resolve all of a claim, but only part. But it can be important in advancing the
810 action.

811 Further examples were offered, all with the thought that they could be characterized as "part"
812 of a claim: a single action might involve disability, gender, and age discrimination. All of those
813 theories are a single "claim" for res judicata purposes. But it can be important to resolve before trial,
814 where appropriate, whether the plaintiff is disabled, and so on. "Not disabled is part of the claim."
815 Market definition in an antitrust case is similar.

816 *(h) Granting Partial Summary Judgment*

817 Discussion of partial summary judgment was interwoven with discussion of the earlier draft
818 subdivisions. The provisions for identifying facts not genuinely dispute, and identifying those in
819 genuine dispute, prompted the question: "How much time are we going to exact from the judge to
820 help risk-averse lawyers and clients"?

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(i) Affidavit Submitted in Bad Faith

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Draft subdivision (i) is drawn from Style Rule 56(g), but the direction that the court "must" order payment of expenses if satisfied that an affidavit was submitted in bad faith is reduced to a statement that the court "may" order payment.

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The first suggestion was that if draft subdivision is retained "in a world that has seen the travails of Rule 11," it should be conformed to due process by adding provision for notice and opportunity to be heard.

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This suggestion was supplemented by the observation that this sanction provision is never used and should be dropped. It should be replaced by a cost-shifting or sanction provision akin to Rule 37. The idea would be similar to the Rule 37(c)(2) sanctions for refusing to admit in response to a Rule 36 request. A nonmovant should be protected against the costs of responding to a strategic and unsuccessful motion, and a movant should be protected against the costs of meeting an unfounded response. The sanction would be reasonable expenses, including attorney fees.

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Concern was expressed about cost shifting. Suppose the movant wins on 9 of 10 issues, but loses on 1; it should not be held responsible for the costs of the successful response on the one issue. A second comment asked whether the proposed sanction approach would run afoul of the rules used in measuring attorney-fee awards against an unsuccessful plaintiff in fee-shifting cases.

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Ambivalence was expressed by another participant. Cost-shifting can be valuable in deterring abusive motions. "We can send a useful message." This may balance off other concerns.

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A plaintiffs' employment lawyer agreed that sanctions are good. They would deter abusive motions at the beginning of the action.

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A question whether subdivision (i) should be retained to deter bad-faith affidavits was met by the response that "after-the-fact doesn't much help."

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A defense-side lawyer said that cost shifting can encourage people to pay attention to what is disputed. "It's like discovery." Judges do not like to make findings of "bad faith." A "reasonable justification" standard is a powerful mechanism to focus motions and responses.

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This discussion was expanded by the comment is that tactical use of summary-judgment motions has been discussed repeatedly. Motions may be made "to educate the judge" or to obtain cheap discovery. They may be made for worse motives. Fee shifting implies less: "It was not responsible. I expect more of you."

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Resistance then appeared. It was urged that it is inappropriate to shift the costs of an unsuccessful motion. And a plaintiffs' employment lawyer observed that summary judgment is granted in whole or in part on 77% of motions in employment cases, and on 70% of motions in civil rights cases. "It would be unfair to shift costs to a party who unsuccessfully resisted the motion."

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A judge urged that expanded sanctions should not be touched. "This is the kind of thing that can kill the Rule."

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A final comment was that sanctions could chill desirable motion. Most denials are not appealable. If sanctions incident to denial cannot be appealed, the sanction tool could become oppressive.

Summaries

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861 Participants were invited to summarize any suggestions they might think particularly
862 important in guiding continued work on the draft.

863 One suggestion emphasized the importance of requiring a statement of facts, a matching
864 response, and a separate brief.

865 A second suggestion agreed. It also urged that notice should be given about the
866 consequences of noncompliance; it is unrealistic to offer hope that the court will afford a second
867 opportunity to respond. The length of the papers can be reduced by not allowing a response to
868 "qualify" a fact.

869 The next participant suggested that it "runs up costs" to deny a motion that should be granted.
870 And the rule should address the obligation to rule on a motion once made.

871 Speaking for the defense bar, the next comment was that the draft amendments are good. But
872 the rule should provide for cost-shifting. "An objective standard deserves thought." And more
873 weight should be added to the "should" grant statement.

874 The structure of the motion and response provisions was approved. But the court should be
875 required to give some statement of reasons for denying a motion. And something should be done
876 to ensure that a pro se litigant is informed about the consequences of not responding.

877 An academic participant suggested that the FJC study showing greater times to disposition
878 calls into question the statement-counterpoint structure. These formal requirements impose costs
879 on litigants and lawyers. And there seems to be a problem in employment cases — summary
880 judgment has important effects there.

881 A plaintiffs' employment lawyer said that the plaintiff bar generally likes the requirement of
882 a statement of facts so long as it is short and concise, and recognizes the value of a counterpoint
883 response.

884 Another plaintiffs' lawyer said that the law draws strength from telling a story, from
885 narrative.

886 Further support was offered for a 3-paper structure of motion; separate statement of facts;
887 and brief. That is the more efficient way to do it.

888 Yet further support was offered for the "point-counterpoint" structure. Explanation of denials
889 is good. The rule should say that summary judgment must be granted when there is no genuine
890 dispute. Cost-shifting should not be added; Rule 11 and other deterrents are adequate.

891 A judge suggested that room should be allowed for local rules that limit the number of
892 motions. A local rule could properly require judge permission for the same party to make more than
893 one Rule 56 motion, unless — as with official immunity defenses — the law requires that more than
894 one be allowed. Without a limit, parties will avoid page limits by making multiple motions. And
895 successive motions may follow a partial grant.

896 A defense-side lawyer said that the draft "is a great piece of work." It should continue to
897 provide for statement of "only" those material facts not in genuine dispute. "Must" is the right word,
898 compelling summary judgment when the standard is satisfied; "you should not have to litigate over
899 nothing." Judges need cost-shifting as a tuning device; it will gradually teach lawyers how to
900 behave.

901 Another lawyer found the statement-counterpoint response a good structure. But cost-
902 shifting is a bad idea. It will discourage valid motions.

903 An academic suggested that the Committee should "step back. This will increase costs and
904 impede access to justice." The FJC study shows a high grant rate in civil rights and employment
905 cases. The discussion and draft are moving forward, but there is still a deep concern about
906 reinforcing the trend away from public resolution of important matters.

907 The next summary began by stating that the draft "is better than the local rules." It will
908 reduce costs by discouraging prolix motions. Judges should be required to explain denial of a
909 motion. And the rule text should recognize the option to deem a fact admitted when there is no
910 proper response.

911 Another lawyer said that parties spend a lot on these motions, but meritorious motions are
912 often denied. The rule should make clear the importance of granting them. The rule on improper
913 responses should be expanded to include motions that do not conform to the requirements of
914 subdivision (c).

915 A judge suggested that the rule should address the parallels in bankruptcy practice. It should
916 be made clearer in addressing the admissibility of evidence offered to support or resist a motion.
917 And the discussion reveals confusion as to what is meant by recognizing a response that "qualifies"
918 a fact.

919 Another judge thought the draft "a great effort." "issue" should not be included in describing
920 partial summary judgment. Cost-shifting should not be added. And the 3-paper approach is better:
921 motion, statement of facts, and brief.

922 Still another judge urged that "may" grant is appropriate for partial summary judgment. A
923 grant is reviewed de novo. If it is reversed, there is a real loss of efficiency. If the determination
924 whether summary judgment standards are met is a close call, it may be better to go to trial.

925 An employment lawyer thought the statement-counterpoint approach "great." It would be
926 better to distinguish several things — the motion, the summary of facts, arguments about
927 admissibility, and argument in the brief.

928 A plaintiffs' employment lawyer thought the draft "generally good." It should provide for
929 a "short and concise statement of material facts." The "slice-and-dice" problem should be addressed.
930 Clear guidance should be provided as to the appropriate place to argue admissibility questions.

931 Another judge agreed with the underlying premise that practice has departed dramatically
932 from the text of Rule 56. "To establish uniformity we may need to cut back on the level of detail,
933 especially in subdivision (c). The FJC data call into question the desirability of requiring statement
934 and counterpoint response. The employment and civil rights bar call it into question. (c) may
935 generate opposition."

936 The conference concluded with expressions of appreciation by Subcommittee members and
937 chairs. A lot was learned. There was a rich conversation. The conference has been an important part
938 in a process that is designed to be deliberate, to take time. "That is essential." The wealth of
939 experience brought to bear today will guide the Advisory Committee as it develops a draft to present
940 for initial consideration by the Standing Committee in January, and as it continues to work toward
941 what may be a recommendation for publication to the June Standing Committee meeting. "We have
942 come a long way; this will help us to go still further." And it is telling that no one spoke to defend
the present rule as it is.

NOVEMBER 7, 2007 RULE 56 SUBCOMMITTEE MEETING

1 The Rule 56 Subcommittee met at the Administrative Office of the United States Courts
2 immediately following the conclusion of the miniconference held on November 7, 2007. Discussion
3 followed the order of the draft rule subdivisions.

4 (a)

5 The provision authorizing a departure from the time provisions in subdivision (a) unless "the
6 court orders otherwise" should be revised to say "orders otherwise in the case," or something similar.
7 We do not want to seem to legitimate "standing orders" that create miniature versions of local rules.

8 Draft subdivision (a)(1)'s reference to summary judgment "on an issue" anticipates
9 provisions later in the rule. The conference discussion showed reasons for deleting this reference.
10 But it is important to recognize at least three separate questions. One is whether the rule should refer
11 to summary judgment on less than an entire action. That question has repeatedly been answered by
12 approving a subdivision that addresses "partial summary judgment," building on subdivision (d) in
13 the present and Style Rules. A second question is how to refer to less than all of the case: "on all or
14 part of a claim or defense" may do the job in all subdivisions. And a third question is whether the
15 need for multiple invocations of the chosen phrase can be reduced by moving the fundamental
16 establishment of summary-judgment authority up to become subdivision (a).

17 One difficulty of making the first reference to summary judgment on part of a case part of
18 the subdivision (a) timing provisions is that this structure seems to authorize a local rule that rejects
19 partial summary judgment. That should not be.

20 If the basic summary-judgment authority is to become subdivision (a), the location of the
21 timing provisions will remain to be decided. There is much to be said for placing them either at the
22 beginning of the procedural provisions — they appear first in the present and Style Rules — or at
23 the end. They do not seem to fit as an interruption in the progress of the other provisions. But
24 another possible sequence would be: "what" — a brief statement of what you are asking for; "when";
25 "how"; and what the judge can do. Other sequences are possible. These issues should be discussed
26 with the Advisory Committee.

27 The question whether 30 days should be allowed for the response was discussed briefly. The
28 argument that parallelism requires the same time to respond as to move was rejected as inapposite.
29 One judge said that he routinely allows 14 days for the response, and that in routine cases that is
30 enough. There was no disposition to change.

31 (b)

32 The question whether the Style Subcommittee should be confronted about the use of
33 "declarations" led to the conclusion that "declarations" should be added everywhere the rule refers
34 to affidavits. It is useful to confirm for practitioners the statutory equivalence of declarations with
35 affidavits, and to address newer lawyers who are so familiar with declarations that affidavits will
36 seem foreign creatures.

37 The provisions on affidavits do not seem to fit well anywhere in the progress of the rule as
38 an independent subdivision. It was agreed that this part should be incorporated with the subdivision
39 (c) paragraph that addresses the materials used to support or oppose summary judgment.

40 (c)

41 Subdivision (c)(1) authorizes the court to order different procedures. This was approved
42 without further discussion.

43 It was asked whether (c)(2) should have an introduction: "The procedure for summary
44 judgment includes motion, response, reply, supporting materials, and a brief." This suggestion met
45 a tepid reception. A different approach would be to prescribe a motion stating the relief requested,
46 with a statement of undisputed material facts supported as required by paragraph [(5)]; then a
47 separate concise statement of facts. The same structure could be adopted for the response. The brief
48 would be kept separate.

49 Support was expressed again for "writing it out: These are the things the movant must file;
50 these are the things the nonmovant must file; this is what a reply may do."

51 It was agreed that the argument should not be allowed to blend into the statement of facts.

52 The 3-paper approach was championed: there should be a motion separate from the statement
53 of facts.

54 Further discussion blended into the form of the response, taken up next.

55 It was agreed that the statement should state "only" those material facts. And that the final
56 words should be changed to avoid duplication with the subdivision stating the standard: "are not
57 genuinely in dispute and entitle the movant to summary judgment as a matter of law."

58 Subdivision (c)(3) on response was anticipated in the earlier discussion of the motion. One
59 question is where arguments about the admissibility of evidence should be located. They might
60 belong in a "no evidence" motion asserting that a party who bears the trial burden of production has
61 no admissible evidence to carry the burden. They can easily be fit into a response challenging the
62 admissibility of evidence offered to show there is no genuine issue, and into a reply. Some circuits
63 now rule that the only way to challenge admissibility is by a motion to strike, enforced by imposing
64 waiver if the motion is not made. The motion seems an unnecessary proliferation of papers, and the
65 forfeiture seems untoward.

66 Discussion then addressed the provision in (c)(3)(A) that a response may "qualify" a fact.
67 This word was supported by observing that a "fact" may be complex thing, including more than one
68 proposition. As with pleading, it may be important to provide that part can be accepted, and part
69 disputed. Lawyers need some way to make this position clear. To be sure, a sophisticated movant
70 will manage to confine each paragraph of the statement to a single fact. But often several facts are
71 crammed into one paragraph. It is important to enable denial of part because that makes it easier to
72 admit the rest rather than deny it all. It is no help to the judge if the rule allows only "accept or deny"
73 and a denial does not illuminate a party's more nuanced position.

74 It was suggested that there is no need to spell out in (c)(3) the means of responding to the
75 statement of facts. Why not provide simply that the response must "address" each statement of facts?

76 Subdivision (c)(3)(B) allows a response to state that the facts in the movant's statement "do
77 not support judgment as a matter of law." Arguments have been made throughout the day that this
78 is a matter of argument that should be included in the brief, not in the response. A counter-argument
79 has been made that it is useful to have a brief statement of this position in the response as a marker
80 for the judge of an argument to be made in the brief. But this "road map" function may not be
81 important. Many judges begin consideration of the motion by reading the briefs. That is important
82 to establish the full context in which the fact statements and responses are approached. All that we
83 need in the parts that address the facts is the point-counterpoint. It might be possible to add the
84 "demurrer" function to the paragraph that describes briefs. But it was urged that (B) should simply
85 be discarded.

86 It was agreed that draft (c)(3)(C) should be revised as suggested at the conference: "(~~B~~) may
87 state in separately numbered paragraphs additional material facts that preclude summary judgment."

88 Draft (c)(5)(B)(ii) was considered: Should it be "no ~~material~~ admissible evidence ~~can be cited~~
89 to support~~s~~ the fact?" Or "can be produced to support the fact"?

90 The filing direction in (c)(6) will be changed to reflect the consensus at the conference — "A
91 party must ~~attach to~~ file with a motion * * * the cited part of any factual materials that have not
92 already been filed."

93 Further thought will be given to the suggestion to delete the redundant provision in the
94 paragraph on briefs that repeats the general subdivision (c) authority to change the time for filing a
95 brief.

96 (d)

97 The first suggestion was that in dealing with a failure to respond as required subdivision (d)
98 should list last the order to afford an opportunity to respond as required. The first order described
99 should be the order that a fact is deemed admitted for failure to respond properly. This direction
100 should be made explicit in the rule text: "issue any appropriate order, including an order that a fact
101 is deemed admitted."

102 The deemed-admitted approach was questioned by asking whether the rule text should make
103 clear that the deemed admission is made only for purposes of deciding the summary-judgment
104 motion. "We surely do not want it admitted for any other purpose." If the deemed admission were
105 extended to trial, for example, the result would be many motions to be relieved of the deemed
106 admission, and for that matter far less willingness to order a fact deemed admitted. A proponent of
107 the agreed-admitted approach agreed that the deemed admission should be limited to use in deciding
108 the motion. What we want is something like "a fact is not controverted for purposes of summary
109 judgment."

110 Further defense of the "deemed admitted" approach was expressed by saying that "I've never
111 heard anyone say 'I got caught.' They don't have it." Failure to respond is deliberate because there
112 is no effective response.

113 It was agreed that the next draft should include something like an order "determining that the
114 fact is not controverted for summary-judgment purposes."

115 (e)

116 Several questions were left open. The present title, "Court Action," seems inadequate.
117 Whatever the title, the description of the court's power to act beyond the motion or without a motion
118 may fit better at a different place in the sequence of subdivisions. And if the fundamental summary-
119 judgment authority becomes subdivision (a), it may be appropriate to delete paragraph (1) as a
120 redundant duplication.

121 (f)

122 The first suggestion was that the Committee Note should say that the court can deny time for
123 additional discovery on the ground that a scheduling order's discovery period has closed.

124 It was asked whether the rule text should address the question whether the time to respond
125 continues to run while a motion for time for additional investigation or discovery is pending. This
126 subject has been considered in the past. One judge noted that he assumes the time to respond is
127 deferred.

128

(g)

129 The first question picked upon the suggestion that it is misleading to refer to "evidence that
130 would be admissible at trial." Affidavits ordinarily are not admissible. Depositions often are not
131 admissible. But they can be used to support or oppose summary judgment. Perhaps it should be
132 "material capable of being reduced to evidence admissible at trial"? The first response was a
133 question — do we need to refer at all to admissibility? Present and Style Rules 56(c) do not. The
134 failed 1992 Rule 56 proposal was more elaborate than the current drafts. The law is clearly
135 understood now. Perhaps we do not need any such reference. One alternative might be "If the
136 summary-judgment record shows that there is no genuine dispute." The Committee Note could
137 explain what the summary-judgment record is.

138 One member suggested that the Style Rule's reduction to a direction that summary judgment
139 "should" be granted "is Alice in Wonderland." It should be "must."

140 It was urged that the rule should say that an order granting or denying summary judgment
141 should state the reasons. It was protested that it should suffice to state reasons orally on the
142 transcript. It was agreed that a statement on the record would satisfy the A stronger suggestion was
143 that any requirement, even if softened to "should," "could be a mouse trap for the judge."

144 A tentative conclusion was to say: "The court should state on the record reasons for granting
145 or denying summary judgment."

146

(i)

147 It was agreed that the next draft should include, at least for further consideration, provisions
148 for notice and response: "the court may, after giving notice and a reasonable time to respond, order
149 the submitting party to pay * * *" reasonable expenses incurred as a result of a bad-faith affidavit
150 or declaration.

MEMORANDUM

DATE: February 19, 2008

TO: Judge Mark Kravitz

FROM: Andrea Thomson

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

SUBJECT: Discretion to Deny Summary Judgment

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

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

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

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

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

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

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

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

II. Cases Recognizing Discretion to Deny Motions for Summary Judgment

A. Circuit Court Opinions

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

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

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

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

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

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

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

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

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

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

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

B. District Court Opinions

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

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

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

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

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

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

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

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

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

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

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

III. Cases Limiting Discretion to Deny Motions for Summary Judgment

A. Circuit Court Opinions

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

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

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

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

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

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

B. District Court Opinions

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

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

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

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

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

C. Letter Asserting Lack of Discretion to Deny Summary Judgment

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Conclusion

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

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

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

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

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

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

ORAL REPORT ON

TWOMBLY V. BELL ATLANTIC, 127 S.Ct. 1955 (2007)

MEMORANDUM

TO: Advisory Committee

FROM: Dave Campbell, Chair of the Discovery Subcommittee

DATE: March 12, 2008

RE: Proposed Amendments to Expert Disclosure and Discovery Provisions
of Rule 26

For some time, the Discovery Subcommittee has been considering possible amendments to the expert disclosure and discovery provisions of Rule 26. We have now reached agreement on proposed amendments. This memorandum will provide a brief explanation.

Before 1993, only very limited discovery was provided regarding the expected testimony of expert witnesses. A party had a right by interrogatory to require other parties to identify such witnesses and provide a general description of the testimony they would offer. The court could thereafter order further discovery, often by deposition, but there was no right to such discovery.

In 1993, major rule changes were made regarding expert discovery. The former expert-witness interrogatory provision was removed. Rule 26(a)(2) was added requiring disclosure – without the need for a discovery request – of the expert witnesses who would testify. All such witnesses who were retained or specially employed, and any employee of a party whose duties regularly included giving expert testimony, were required to provide an extensive report. Rule 26(b)(4)(A) was amended at the same time to provide each party the right to take the deposition of another party's expert witness. Rule 37(c)(1) was added to preclude testimony at trial on matters not properly disclosed before trial. Our proposed amendments retain these 1993 provisions, and add a disclosure obligation for expert witnesses who are not required to provide expert reports.

One aspect of the 1993 amendments has produced problems that these amendments seek to cure. Under Rule 26(a)(2)(B), an expert report was required to include “the data or other information considered by the witness in forming the opinions.” This provision has been widely interpreted to call for disclosure of all communications between counsel and expert witnesses required to provide reports, and to require production of drafts of expert reports. The Advisory Committee has been repeatedly informed that these features of practice under the 1993 amendments have produced considerable costs without corresponding benefits. Parties spend considerable time and money pursuing draft reports and attorney-expert communications in discovery, and yet rarely find

information that affects the outcome of the case. Parties retaining experts often engage in artificial and costly procedures to avoid the creation of draft reports or other documents reflecting attorney-expert communications. Many parties retain a second set of experts to permit free consultation without the risk of discovery. These substantial costs are incurred with little corresponding benefit. To address these inefficiencies, the American Bar Association adopted a resolution urging that Rule 26 and corresponding state rules be changed to protect against the discovery of draft expert reports and attorney-expert communications. New Jersey has adopted such a rule, and its lawyer express uniform enthusiasm for the change.

The Subcommittee held mini-conferences in Arizona and New Jersey, conferred with experienced counsel around the country, completed research memoranda on related topics, held three discussions at full meetings of the Advisory Committee, held a preliminary discussion at the Standing Committee, and held numerous phone conferences. The proposed amendments that have resulted from this process include (1) amending Rule 26(a)(2)(A) to require that lawyers provide summary disclosures of expert testimony to be provided by witnesses who are not required to produce expert reports; (2) amending the report requirement in Rule 26(a)(2)(B) to require disclosure of “facts or data” considered by the expert, rather than “facts or other information” considered; (3) adding Rule 26(b)(4)(A)(ii) to afford work-product protection to draft expert reports and disclosures; and (4) adding Rule 26(b)(4)(A)(iii) to afford work-product protection to attorney-expert communications, with three specific exceptions. Our proposed rule changes are followed by a draft committee note that explains the changes.

The Subcommittee will be prepared to provide a more complete explanation of our proposals at the California meeting of the Advisory Committee. We have also included the following materials generated since the November meeting of the Committee:

1. Notes on March 10, 2008 conference call (pp. 118-122);
2. Notes on February 28, 2008 meeting (pp. 123-144);
3. Notes on January 18, 2008 conference call (pp. 145-148);
4. Notes on December 11, 2007 conference call (pp. 149-153);
5. Memorandum dated December 7, 2007, from Monica Fennell and Jeffrey Barr on the temporal scope of work product protection in subsequent litigation (pp. 154-166);
6. Memorandum dated December 3, 2007 from Andrea Thomson on protection of attorney-expert communications at trial (pp. 167-190); and
7. Notes on November 21, 2007 conference call (pp. 191-196).

We look forward to discussing these matters with you in California.

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**Rule 26. Duty to Disclose:
General Provisions Governing Discovery**

(a) **Required Disclosures**

* * *

(2) **Disclosure of Expert Testimony**

(2) *Disclosure of Expert Testimony*

(A) *In General; Disclosure Regarding Testimony of Certain Witnesses.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. For any such witness who is not required to provide a report under Rule 26(a)(2)(B), this disclosure must also state:

- (i) the subject matter on which the witness is expected to provide evidence under Federal Rule of Evidence 702, 703, or 705; and
- (ii) a summary of the facts and opinions to which the witness is expected to testify.

(B) *Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report -- prepared and signed by the witness -- if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data or other information considered by the witness in forming them.
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous ten years;
- (v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

* * * * *

54 (b) Discovery Scope and Limits
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57 (4) Trial Preparation; Experts.
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59 (A) *Expert Who May Testify.*
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61 (i) Deposition of expert witness. A party may depose any person who
62 has been identified as an expert whose opinions may be presented at trial.
63 If Rule 26(a)(2)(B) requires a report from the expert, the deposition may
64 be conducted only after the report is provided.
65

66 (ii) Protection for draft disclosures or reports. Rules 26(b)(3)(A) and
67 (B) protect drafts in any form of any disclosure or report required under
68 Rule 26(a)(2)¹.
69

70 (iii) Protection for communications between expert witnesses and
71 retaining counsel. Rules 26(b)(3)(A) and (B) protect communications in
72 any form between an expert and retaining counsel except those²:
73

74 ● Regarding any compensation for the expert's³ study or
75 testimony; or
76

77 ● Identifying any facts or data that counsel provided to the expert
78 and that the expert considered in forming the opinions to be
79 expressed; or
80

81 ● Identifying any assumptions or conclusions that counsel
82 suggested to the expert and that the expert relied upon in forming
83 the opinions to be expressed.
84

85 * * * * *
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¹ The draft considered by the Subcommittee included Rule 26(e) at this point to make reassurance doubly sure: "any disclosure or report required under Rule 26(a)(2) or Rule 26(e)." Since then Rule 26(a)(2)(D) has come to mind: "The parties must supplement these disclosures when required under Rule 26(e)." Deletion seems safe.

² A longer form was adopted in the Subcommittee discussion: "but a party may obtain discovery of communications between the expert and retaining counsel," and thus into the three exceptions designated by the bullets. But that form might leave the way open for an argument that the rule only means that discovery of the three bullet items can be had on making the showings of need and hardship required by Rule 26(b)(3)(A). A full statement would be: "but a party may, without the showing required by Rule 26(b)(3)(A), obtain discovery * * *." It seems clearer to say that these three matters are excepted from the Rule 26(b)(3) protections.

³ "[E]xpert's" was added after the Subcommittee discussion. The Committee Note makes clear that this includes compensation paid to an organization affiliated with the expert.

⁴ The Subcommittee considered, but decided not to recommend, an additional bullet concerning the terms or scope of the assignment the lawyer gave to the expert. The concern that

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DRAFT COMMITTEE NOTE

Rule 26: Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony from those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than "data or other information," as in the current rule) considered by the witness. Rule 26(b)(4)(A) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and -- with narrow exceptions -- communications between expert witnesses and counsel. Together, these changes provide

led a majority of the Subcommittee to decide against including this exception was that it would be too difficult to confine within appropriate limits, and that as a result it could permit undue intrusion into the lawyer-expert interaction.

Such a fourth bullet could provide:

- Defining the scope of the assignment counsel gave to the expert regarding the opinions to be expressed

The goal of adding such a fourth bullet would be to get at instructions like "Only do a comparable sales evaluation," or "Do Test No. 37, and don't do Tests No. 1 through 36." Otherwise, there might be difficulty demonstrating that the testifying expert was directed to the line of inquiry or analysis that the lawyer had previously (perhaps using consulting experts) determined to be the only way to reach the result the lawyer wanted. It might be that this bullet comes closest to permitting the questioner to demonstrate the extent to which the opinions being offered by the expert really are the lawyer's handiwork more than the work of the expert.

The problem with adding such a fourth bullet is that it would create a line-drawing problem and tend to intrude far into the interaction between the lawyer and the expert. Limiting the bullet to directions "regarding the opinions to be expressed" may confine it somewhat. At least that protects somewhat against inquiry about entirely unrelated topics. But the evolving interaction between the lawyer and the expert -- particularly one who was first retained as a consulting expert with regard to many matters and only later designated to testify about one of them -- may not have been focused in a way that would make this distinction readily applicable.

One way of illustrating the potential problem is to compare the objective of proposed Rule 26(b)(4)(A)(ii) -- to guard against discovery of draft reports absent the showing required to discover work product. With this bullet added, there could be an argument that any interactions between counsel and the expert about what went into the report involved directions from counsel about the opinions to be expressed. Thus, adding this bullet might nullify something else this package of amendments is trying to do.

And the need for inquiry into attorney-expert communications (the only thing dealt with in this rule provision) is not clear. Counsel can inquire fully into all analyses or testing done or considered by the expert. Counsel can elicit from the expert the recognition that various alternative methods are acceptable, reliable, and widely recognized. Counsel can emphasize that the expert nevertheless did not use these available and well-known analyses or tests (which presumably were employed by counsel's expert). Given the manifold methods for inquiry of this sort, and the troubling risk of relatively unbounded inquiry into the full range of expert-attorney interaction, the drawbacks of adding this bullet seemed to outweigh the benefits.

97 broadened disclosure regarding some expert testimony and require justifications for disclosure
98 and discovery that have proven counterproductive.
99

100 The rules first addressed discovery as to trial-witness experts when Rule 26(b)(4) was
101 added in 1970. In 1993, Rule 26(b)(4) was revised and Rule 26(a)(2) was added to provide
102 disclosure, including -- for many experts -- an extensive report. Influenced by the Committee
103 Note to Rule 26(a)(2), many courts read the provision for disclosure in the report of "data or
104 other information considered by the expert in forming the opinions" to call for disclosure or
105 discovery of all communications between counsel and expert witnesses and all draft reports.
106

107 The Committee has been told repeatedly that routine discovery into attorney-expert
108 communications and regarding draft reports has had undesirable effects. Costs have risen.
109 Attorneys may employ two sets of experts -- one for purposes of consultation and another to
110 testify at trial -- because disclosure of their collaborative interactions with expert consultants
111 would reveal their most sensitive and confidential case analyses, often called "core" or "opinion"
112 work product. The cost of retaining a second set of experts gives an advantage to those litigants
113 who can afford this practice over those who cannot. At the same time, attorneys often feel
114 compelled to adopt an excessively guarded attitude toward their interaction with testifying
115 experts that impedes effective communication. Experts might adopt strategies that protect
116 against discovery but also interfere with their effective work, such as not taking any notes, never
117 preparing draft reports, or using sophisticated software to scrub their computers' memories of all
118 remnants of such drafts. In some instances, outstanding potential expert witnesses may simply
119 refuse to be involved because they would have to operate under these constraints.
120

121 Discovery or cross-examination focused on the details of attorney-expert
122 communications, or on minor variations between draft reports and final reports, can consume
123 much time without producing corresponding benefits. Only rarely does such discovery
124 contribute significantly to a court's decision whether to admit proposed expert testimony under
125 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 1993, 509 U.S. 579, or to a jury's decision
126 whether to accept or reject the expert's testimony at trial. Much more often, inquiry into these
127 matters has proved to be a waste of time and money.
128

129 Recognizing these drawbacks, experienced attorneys often stipulate to forgo disclosure or
130 discovery regarding attorney-expert communications beyond the facts or data considered by the
131 expert, and to forgo discovery of draft reports. At least one state -- New Jersey -- has amended
132 its discovery rules to insulate against such discovery. See N.J. R. 4:10-2(d)(1). The Committee
133 has been informed that the New Jersey rule change was well-received by the bar, and that it has
134 worked well in practice.
135

136 Rule 26(a)(2)(B) is therefore amended to specify that disclosure is only required
137 regarding "facts or data" considered by the expert witness, deleting the "or other information"
138 phrase that has caused difficulties. Rule 26(b)(4)(A) is amended to provide work-product
139 protection for draft reports and attorney-expert communications, although discovery about such
140 communications is allowed regarding three specified topics.
141

142 Rule 26(a)(2)(A). Rule 26(a)(2)(A) is amended to mandate disclosures regarding the
143 opinions to be offered by expert witnesses who are not required to provide reports under Rule
144 26(a)(2)(B). Before 1993, an interrogatory seeking the identity of expert witnesses permitted
145 inquiry about the opinions to be offered by all such witnesses. The expert report requirement of
146 Rule 26(a)(2)(B) -- added in 1993 -- calls for much more extensive information, but that rule
147 exempted certain expert witnesses from providing a report at the same time the former

148 interrogatory practice was eliminated. This amendment adds disclosure requirements regarding
 149 those exempted witnesses in Rule 26(a)(2)(A)(i) and (ii).
 150

151 These new provisions require disclosure of information that before 1993 could be
 152 obtained by interrogatory. Under Rule 26(b)(4)(A), the depositions of these expert witnesses
 153 may be taken, using the information provided by this disclosure. The goal is to ensure fair notice
 154 of the expected expert testimony. One hope is that, given these disclosures, parties may find
 155 depositions unnecessary in some cases.
 156

157 The new disclosure requirements should not, however, be unduly burdensome, for they
 158 require only that a party disclose the subject matter on which the witness is expected to offer
 159 expert evidence and provide a summary of the facts and opinions to which the witness is
 160 expected to testify. This disclosure is considerably more circumscribed than the report required
 161 by Rule 26(b)(2)(B). Courts must take care against imposing undue disclosure burdens, keeping
 162 in mind that these witnesses have not been specially retained and may not be as responsive to
 163 counsel as those who have.
 164

165 This amendment resolves a tension that has sometimes prompted courts to require reports
 166 under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. Reasoning
 167 that having a report before the deposition or trial testimony of all expert witnesses is desirable,
 168 these courts have disregarded the limitations on who must prepare a report under Rule
 169 26(b)(2)(B). See Mickum & Hajek, *Guise, Contrivance, or Artful Dodging?: The Discovery*
 170 *Rules Governing Testifying Employee Experts*, 24 *Review of Litigation* 301-369 (Spring 2005).⁵
 171 But with the addition of this disclosure requirement to provide advance information about the
 172 opinions of such witnesses, courts should no longer be tempted to overlook Rule 26(a)(2)(B)'s
 173 limitations on the full report requirement.
 174

175 Sometimes the person who will offer expert testimony also will be a "fact" witness --
 176 often called a "hybrid expert." A frequent example is a treating physician or other health care
 177 professional. Another recurrent example is an employee of a party who does not regularly
 178 provide expert testimony. Often such witnesses provide not only testimony about strictly
 179 historical facts but also evidence under Fed. R. Evid. 702, 703, or 705. Parties must identify
 180 such witnesses under Rule 26(a)(1)(A) and provide the required disclosure with regard to such
 181 opinions. Failure to recognize this duty may lead to requests to exclude evidence under Rule
 182 37(c)(1).
 183

184 Rule 26(a)(2)(B): Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all
 185 "facts or data considered by the witness in forming" the opinions to be offered. This amendment
 186 deletes the phrase "or other information" included in 1993, which has been one ground for
 187 decisions requiring disclosure of all attorney-expert communications and draft reports. This
 188 amendment to Rule 26(a)(2)(B) is intended to alter the outcome in such cases by changing the
 189 rule, and the amendments to Rule 26(b)(4)(A) provide work-product protection against discovery
 190 regarding draft disclosures and reports or attorney-expert communications.
 191

192 The refocus of disclosure on "facts or data" is meant to limit the disclosure requirement to
 193 material of a factual nature, as opposed to theories or mental impressions of counsel. At the
 194 same time, the intention is that "facts or data" be interpreted broadly to require disclosure of any
 195 material received by the expert, from whatever source, that contains factual ingredients. The

⁵ This citation is provided as a place-holder pending a final decision whether to provide any
 citation and whether, if so, it should be to cases on both sides.

196 disclosure obligation extends to any facts or data "considered" by the expert, not only those relied
197 upon by the expert. In this way, the important advantages of the 1993 amendments can be
198 preserved while the excessive costs and intrusion into attorney-expert communications
199 experienced in some cases under the 1993 version of the rule can be curtailed. Moreover, under
200 amended Rule 26(b)(4)(A) a party may obtain discovery of attorney-expert communications or
201 draft disclosures or reports if it can make the showing required to justify discovery of work
202 product under Rule 26(b)(3).
203

204 Rule 26(b)(4)(A): Rule 26(b)(4)(A)(ii) is added to provide work-product protection
205 under Rule 26(b)(3)(A) and (B) for drafts of expert disclosures or reports and for attorney-expert
206 communications. This protection applies to all witnesses identified under Rule 26(a)(2)(A),
207 whether or not they are required to provide reports under Rule 26(b)(2)(B). It applies to all drafts
208 "in any form," whether oral, written, electronic, or otherwise. It also applies to drafts of any
209 supplementation under Rule 26(e).
210

211 Rule 26(b)(4)(A)(iii) is added to provide comparable work-product protection for
212 attorney-expert communications in any form, whether oral, written, electronic, or otherwise. In
213 thus guarding against discovery regarding attorney-expert interactions, these amendments
214 recognize that the expert witness is affiliated with the retaining party and different from a court-
215 appointed expert under Fed. R. Evid. 706. Exchanges between lawyer and expert may often
216 reveal, implicitly or explicitly, the lawyer's work product. For consulting experts, Rule
217 26(b)(4)(B) provides vigorous protection against discovery regarding such interactions, but
218 requiring the retention of a separate set of consulting experts is one of the costly practices the
219 current amendments are designed to minimize. The addition of Rule 26(b)(4)(A)(iii) is designed
220 to protect counsel's work product and ensure that lawyers may interact with the experts they
221 retain without fear of routine wholesale discovery.
222

223 Rules 26(b)(4)(A)(ii) and (iii) apply to all discovery regarding the work of expert
224 witnesses. The most frequent method is by deposition of the expert, as authorized by Rule
225 26(b)(4)(A)(i), but the protections of (A)(ii) and (iii) apply to all forms of discovery.
226

227 Rules 26(b)(4)(A)(ii) and (iii) do not significantly impede discovery about the opinions to
228 be offered by expert witnesses. The disclosures and reports required under Rule 26(a)(2)(A) and
229 (B) are designed to ensure that all parties receive information about the opinions to be expressed
230 by these witnesses. Counsel are not impeded in inquiring in deposition or at trial about the
231 development, foundation, or basis of any testifying expert's opinion. For example, the expert's
232 testing of material involved in litigation, and notes of any such testing, would not be exempted
233 from discovery by this rule. Similarly, inquiry about communications the expert had with anyone
234 other than retaining counsel⁶ about the opinions expressed is unaffected by the rule. Counsel are
235 also free to question expert witnesses about alternative analyses, testing methods, or approaches
236 to the issues on which they are testifying, whether or not the expert considered them in forming
237 the opinions expressed. Given this panoply of discovery options, the protections of the amended
238 rule do not significantly limit parties' ability to challenge the expert testimony.
239

⁶ Do we need to rephrase this to include other counsel "on the same side"? See the next paragraph on "retaining" counsel.

240 The stringent protection for communications is limited to communications between the
241 expert witness and “retaining” counsel. The difficulties that the Committee has learned about
242 arise from the relationship between lawyers handling litigation and expert witnesses they retain
243 to assist in the litigation, including by providing testimony. The protection is limited to that
244 situation. But a realistic approach should be taken in defining the contours of “retaining”
245 counsel. For example, it may happen that a party is involved in a number of suits about a given
246 product or service, and that a particular expert witness is employed to testify on that party’s
247 behalf in several of the cases. In such a situation, a court should recognize that “retaining”
248 counsel should include all lawyers acting on behalf of the client in relation to the related actions,
249 not only the first one who retained the expert. Or coparties may cooperate in working with an
250 expert witness who has been retained by counsel for only one party. Other situations as well may
251 justify a pragmatic application of the concept.⁷
252

253 Although attorney-expert communications are generally protected by Rule
254 26(b)(4)(A)(iii), the rule has three exceptions that permit discovery about attorney-expert
255 communications on three topics. In applying the exceptions it is important to remember that a
256 single “communication” between attorney and expert witness may cover many subjects, some of
257 them within one of the exceptions and others falling outside any of the exceptions. The parts of
258 the communication that fall within an exception are freely discoverable. Other parts are covered
259 by the basic Rule 26(b)(4)(A)(iii) protection.⁸
260

261 First, attorney-expert communications regarding any compensation for the expert's study
262 or testimony may be the subject of discovery. This discovery parallels the disclosure requirement
263 in Rule 26(a)(2)(B)(vi), but it may go beyond in some cases. It is not limited to compensation for
264 work forming the opinions to be expressed, but extends to all compensation for the study and
265 testimony provided in relation to the action. Any communications about additional benefits to
266 the expert, such as further work in the event of a successful result of the present case, would be
267 included. The compensation involved includes that for work done by the expert witness
268 personally or by another person associated with the expert in providing study or testimony in
269 relation to the action. Compensation paid to an organization affiliated with the expert is included
270 as compensation for the expert’s study or testimony.⁹ The objective is to permit full inquiry into
271 such potential sources of bias.
272

273 Second, consistent with Rule 26(a)(2)(B)(ii), attorney-expert communications in which
274 counsel provided facts or data that the expert considered in forming the opinions to be expressed
275 may be inquired into. The report requires disclosure of all facts or data the expert received from
276 any source. Because Rule 26(b)(4)(A)(iii) would otherwise bar inquiry about facts or data
277 provided by counsel, this exception was included. In applying this exception, courts should
278 recognize that the word “considered” is a broad one, but this exception to the protection for
279 attorney-expert communications is limited to those facts or data that bear on the opinions the
280 expert will be expressing, not all topics that may have been discussed by the expert and counsel.
281 And the exception applies only to communications “identifying” the facts or data provided by
282 counsel; further communications about the potential relevance of the facts or data are protected.
283

⁷ This paragraph was before the Subcommittee as a possible addition but was not acted on. It is included to support further discussion.

⁸ These three sentences rework the draft considered by the Subcommittee.

⁹ This sentence is added to reflect addition of “expert” to the rule text.

284 Third, discovery regarding attorney-expert communications is permitted to identify any
285 assumptions or conclusions that counsel suggested to the expert and that the expert relied upon in
286 forming the opinions to be expressed. For example, lawyers may tell experts to assume certain
287 testimony or evidence is true, or that certain facts are true, for purposes of forming the opinions
288 they will express. Similarly, they may direct an expert witness to accept the conclusions of
289 another expert in forming opinions to be expressed. This exception is limited to those
290 assumptions or conclusions that the expert actually did rely upon in forming the opinions to be
291 expressed. More general attorney-expert discussions about hypotheticals, or exploring
292 possibilities based on hypothetical facts, are outside this exception.
293

294 The amended rule does not absolutely prohibit discovery regarding attorney-expert
295 communications on subjects outside the three exceptions in Rule 26(a)(4)(A)(iii), or regarding
296 draft expert disclosures or reports. But such discovery is permitted regarding attorney-expert
297 communications or draft reports only in limited circumstances and by court order. No such
298 discovery may be obtained unless the party seeking it can make the showing specified in Rule
299 26(b)(3)(A)(ii) -- that the party has a substantial need for the discovery and cannot obtain the
300 substantial equivalent without undue hardship. It will be rare for a party to be able to make such
301 a showing with regard to expert-attorney communications or draft expert disclosures or reports,
302 given the broad disclosure and discovery allowed regarding expert testimony.
303

304 A party that believes full disclosure or discovery has not been provided may present that
305 contention to the court under Rule 37, but such a contention is not a ground for broaching the
306 protection against inquiry into attorney-expert communications or draft reports. To the contrary,
307 the assumption of the rule is that the broad disclosure Rule 26(a)(2)(B) requires -- coupled with
308 the latitude permitted in deposition -- should sufficiently empower the interrogating lawyer.
309 Against this background, it is not enough for a party to suggest that further discovery might yield
310 additional information useful in cross-examination.
311

312 In the rare case in which a party does make a showing of such a substantial need for
313 further discovery and undue hardship, the court must protect against disclosure of the attorney's
314 mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this
315 protection does not extend to the expert's own development of the opinions to be presented; those
316 are subject to probing in deposition or at trial.
317

318 Rules 26(a)(4)(A)(ii) and (iii) focus only on discovery. But because they are designed to
319 protect the lawyer's work product, and in light of the manifold disclosure and discovery
320 opportunities available for challenging the testimony of adverse expert witnesses, it is expected
321 that the same limitations will ordinarily be honored at trial. Cf. *United States v. Nobles*, 422
322 U.S. 225, 238-39 (1975) (work-product protection applies at trial as well as during pretrial
323 discovery).

DISCOVERY SUBCOMMITTEE CONFERENCE CALL: 10 MARCH 2008

The Discovery Subcommittee met by conference call on March 10, 2008. All members — Campbell, Girard, Valukas, and Varner — participated. Other participants included Judge Rosenthal and Judge Kravitz, as well as Richard Marcus, John Rabiej, Andrea Thomson, and Edward Cooper.

Judge Kravitz congratulated the Subcommittee for the "terrific product" that had emerged from the February Subcommittee meeting as proof of the benefits of making the effort to have a face-to-face working session.

Judge Campbell divided the discussion into three parts: the draft rule text; disposition of the footnotes that discuss the rule text; and the draft Committee Note.

Rule Text

Rule 26(a)(2)(A): All agreed to approve the draft establishing attorney disclosure with respect to an expert witness who is not required to provide a Rule 26(a)(2)(B) disclosure report. The disclosure will state the subject matter of the expected evidence and a summary of the facts and opinions to which the witness is expected to testify.

Rule 26(a)(2)(B)(ii): All agreed to approve the draft revision providing that the disclosure report must contain "(ii) the facts or data or ~~other information~~ considered by the expert * * *."

Rule 26(b)(4)(A)(ii): This provision applies work-product protection to discovery of drafts of any disclosure or report required under Rule 26(a)(2). A drafting difficulty arises from the 1970 drafting choice to limit Rule 26(b)(3) to protecting "documents or tangible things," leaving only "common-law" work-product protection for discovery of information in other forms. The drafting goal is clear: the "substantial need" and "undue hardship" test of Rule 26(b)(3) should apply to discovery of drafts of the disclosure or report in any form. The initial draft applied this protection "regardless of whether they are contained in documents or other tangible things." An alternative suggestion would protect "oral, written, or electronic" drafts. This approach drew some support: An unadorned reference to a "draft" might imply a written or electronic form because few people think of oral conversations as drafts. But what about voice-mail messages? It was recognized that the messages and many conversations are more likely to be protected as communications under (iii). Still, "electronic" is used in the rules only as "electronically stored information" — is it clear enough that it will work here? Without worrying about technical quibbles about the magnetic nature of most computer memory devices?

An alternative gained favor. "a draft in any form," with examples in the Note specifying oral, written, or electronic forms, does the job. "* * * protect drafts in any form of any disclosure or report * * *."

The draft rule protects draft disclosures or reports "required under Rule 26(a)(2) or Rule 26(e)." It was readily agreed that the protection should include drafts of supplements required by 26(e). The only question was whether the supplements are adequately protected without referring to 26(e) because they are required under 26(a)(2). This is a point at which the possible elegance of compact drafting seems less important than the advantage of eliminating the inevitable arguments that drafts of supplemental disclosures or reports are not protected. Unless someone discovers a serious incongruity arising from express reference to Rule 26(e) here, the reference will remain. (It was noted that Rule 37(c)(1) refers to both Rule 26(a) and Rule 26(e).)

Rule 26(b)(4)(A)(iii): This provision provides work-product protection to discovery of attorney-expert communications, with three stated exceptions. The tag line in the draft is "Protection for communications * * *." It was asked whether this should be "protection for certain

communications." The rule both protects some communications and expressly denies protection to three specific categories of communications. But the purpose is to protect all communications, subject to three clearly defined and rather narrow exceptions. It was agreed that "certain" will not be added.

The draft says a party "may obtain discovery about" the three categories of communications enumerated as exceptions. The suggestion that it would be more direct to say "may discover" met some favor, but was rejected. Rule 26(b)(1) begins: "Parties may obtain discovery regarding * * *." Although "regarding" seems too broad in describing discovery of attorney-expert communications, as explored further in drafting the exceptions, it is useful to adhere closely to the phrases recently adopted in the Style Project. But "about" may be subject to some of the same concerns as "regarding" — it may reach not only the initial communication, but later discussion of the things communicated. It was agreed to substitute "of": "may obtain discovery of communications * * *."

All three exceptions are introduced in the draft by "regarding": "may obtain discovery of communications between the expert and retaining counsel regarding" these subjects. One concern in choosing "regarding" was that the rule must not imply that discovery of communications on these subjects allows discovery of the entire exchange, including discussion of topics not within any of the exceptions. But "regarding" can be read broadly. The attorney may, for example, identify in one conversation facts or data to be considered by the expert. A later conversation may discuss the expert's consideration of those facts: in a real sense, the later conversation regards the facts or data. But the exception is not intended to include the second conversation. Everyone agreed that each exception applies only to the part of the communication directly addressed by the exception; other parts remain protected. The word appropriate to define the scope of each exception may be different for each, but should be consistent with this narrow role.

Discovery as to the expert's compensation should be sweeping. Here, "regarding" does seem appropriate. And it is too narrow to focus on compensation "to be paid," or compensation for study and testimony "in the case." Compensation may be paid in whole or in part to an organization, not directly to the witness. The rewards may include anticipated compensation for testimony in other cases. So the exception will be something like: "regarding any compensation for study or testimony." (It was not clear whether discovery extends to all compensation for a witness who is compensated both as a trial witness and as a "consultant," but the rule text seems to say yes and likely this is the intended answer.)

As to communications about facts or data considered by the expert, several introductory words were considered — "describing," "providing," and "identifying." "Identifying" was chosen.

Discovery of facts or data is limited to those considered in forming the opinions "to be expressed." The witness may be working on a variety of tasks, some involving testimony and some not. One of the purposes is to enable use of the same person both as a witness, subject to (b)(4)(A) discovery, and as a nontestifying expert, protected by (b)(4)(B). So discovery does not extend to all facts or data provided to the expert.

A choice was presented between facts or data considered in "developing" or in "forming" the opinions to be expressed. "Forming" was chosen. "Developing" seems too indistinct. "Forming" is used in Rule 26(a)(2)(B)(ii).

The structure of the protection and exception was reviewed. Discovery extends to all facts or data considered by the expert. Having decided to protect attorney-expert communications, an exception became necessary to ensure discovery of facts or data identified by the attorney to the expert. If the attorney tells the expert to get facts, data, conclusions, or other assumptions on the expert's own, or from other experts, the facts, data, conclusions, or assumptions are subject to

discovery. The Note should state that if the attorney provides facts or data to the witness's colleagues or assistants, to be considered by the expert, discovery is proper. (Although discovery extends to all facts or data considered, it was further observed that any expert who testifies will explain the source of facts or data relied on and will testify to having verified them.)

It was agreed that rather than focus on "the opinions the witness will express," the text should refer to "the opinions to be expressed by the expert."

The third exception allows discovery of assumptions used in forming the expert's opinions. "Identifying" was again chosen as the operating word, in part to be parallel to the facts or data exception. One alternative described assumptions that counsel directed the expert to accept and that the expert did accept, but further reflection by the proponent diminished the allure of this formulation. It was agreed that assumptions underlying the opinions should be discoverable, no matter what the source. We need to know what the lawyer told the expert not to look into independently, to assume without verifying. But what if the expert did not use the assumption in forming the opinions? Here too there may be reason to protect against discovery of assumptions that are not connected to the testimony but instead to nontestimonial functions of the expert. Discovery is needed for the assumptions relied on, not all those considered.

With that, it was agreed that this exception would read: "identifying any assumptions or conclusions that counsel suggested to the expert and that the expert relied upon in forming the opinions to be expressed."

Omitted Exception: Scope of Assignment

Discussion at the January Standing Committee meeting suggested that discovery might be proper as to attorney-expert communications on the scope of the expert's engagement. The Subcommittee discussed this suggestion at the February meeting and concluded that it would be difficult to confine within appropriate limits any exception aimed at this topic.

The draft included a footnote that illustrated this possibility. As revised in discussion, it might read: "defining the scope of the assignment counsel gave to the expert regarding the opinions to be expressed." The Subcommittee continues to fear that an exception of this sort could become too broad. But it was agreed that the question is sufficiently important to warrant presentation to the Advisory Committee for discussion.

Draft Footnotes

It was agreed that the footnotes to the discussion draft were useful for framing the conference call, but that they need not be carried forward for Advisory Committee discussion. Only footnote 6, illustrating a possible "scope of assignment" exception to the protection for attorney-expert communications, will be carried forward.

Committee Note

[The line references used to locate the changes described below are taken from the portable document format version of the materials Professor Marcus prepared for the conference call. The nature of the changes does not warrant more cumbersome descriptions.]

The broadest suggestion for the Committee Note was that the five very useful paragraphs describing the evolution of expert witness discovery should be transferred from the Note to introductory materials, including the materials that will be used on publishing the final proposal for comment. These paragraphs run from lines 121 through 172 in the draft. But it also was agreed that

it would be useful to summarize them in a single paragraph that provides a bridge to discussing the results of the 1993 amendments:

The rules first addressed discovery as to trial-witness experts when Rule 26(b)(4) was added in 1970. Rule 26(b)(4) was revised in 1993, and Rule 26(a)(2) was added to provide disclosure, including — for many experts — an extensive disclosure report. Influenced by the Committee Note, the provision for disclosure in the report of "data or other information considered by the expert in forming the opinions" was widely interpreted to call for disclosure of all drafts and all communications between counsel and expert witnesses.

Other detailed changes were agreed upon:

line 198: "Only rarely—~~if at all~~— does such discovery * * *."

Lines 277-278: "Failure to ~~do so~~ recognize this duty may lead to * * *."

Lines 340-341: " * * * apply to all forms of discovery ~~by interrogatory, document request, or subpoena.~~"

Lines 361-363: " * * * ability to challenge the expert testimony. ~~to be offered against them. And permitting effective cross-examination is the only ground for allowing this discovery.~~"

Lines 388-393: Discussion concluded that it is useful to retain these sentences explaining the rule text reference to facts or data identified in an attorney-expert communication and "considered" by the expert. Earlier discussion underscores the value of drawing a line that facilitates communications, including those that identify facts or data, on topics that are not considered by the expert witness in forming the opinions to be expressed as a witness. The dual-role expert should be recognized.

Lines 397, 405: Discovery should be had, as the rule text reflects, as to both assumptions and "conclusions" identified by the attorney: "with regard to any assumptions [for conclusions] * * *," and " * * * is limited to those assumptions or conclusions."

Line 410: a comma is added: "based on hypothetical facts, are * * *."

Lines 421-423: The statement that it will be rare for a party to be able to show the substantial need and undue hardship required to overcome Rule 26(b)(3) protection will be retained. It is important to emphasize the judgment underlying this project that discovery of draft reports or disclosures, and discovery of attorney-expert communications, is seldom useful outside the categories of communications expressly taken out of the protection. But the intensifier will be deleted: "It will be ~~extremely~~ rare for a party * * *."

Line 444: The intensifier is removed: "should ~~abundantly~~ empower * * *."

Line 448, 449: Delete an intensifier and add an inadvertently omitted phrase: "In the rare case in which a party does ~~nonetheless~~ make a showing of such a substantial need for further discovery and undue hardship, * * *."

Lines 452-456: It was noted that Rule 26(b)(3) protects work product by non-lawyer agents of a party, and asked whether these lines, emphasizing the desire to protect "the attorney's work product," are focused too narrowly. It was accepted that the focus is on protecting the attorney's role in the process — that this is not an effort to make the expert witness's work itself a subject of work-

product-like protection. We do want complete discovery of the processes by which the expert formed the opinions to be expressed.

Line 463 plus: Although there were "no strong feelings" on the subject, it was agreed that a citation should be added at the end of line 463: "See U.S. v. Nobles (work product protected at trial)."

Editorial prerogative: It was agreed that Professor Marcus retains authority to further polish the Committee Note for submission to the Advisory Committee.

Notes of Meeting
Discovery Subcommittee
Advisory Committee on Civil Rules
Paradise Valley, Arizona
Feb. 28, 2008

On Feb. 28, 2008, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a meeting in Paradise Valley, Arizona. Participating were Judge David Campbell (Chair), Chilton Varner (by phone), Daniel Girard, Anthony Valukas, Prof. Edward Cooper (Reporter of the Advisory Committee), Prof. Richard Marcus (Reporter of the Discovery Subcommittee), and John Rabiej (Admin. Office of the U.S. Courts). Judge Mark Kravitz (Chair of the Advisory Committee) was unable to attend but conveyed initial views in advance of the meeting that were relayed to the others during the meeting.

Judge Campbell opened the meeting by explaining that the goal was to choose an appropriate approach to the issues raised by protection of attorney-expert communications. Prof. Marcus had drafted a number of alternatives that should provide a starting point for discussions. Details would need to be filled in later, and a Committee Note drafted, but at least these various drafting approaches set the scene for making a choice of the best way to proceed. (For convenience, the various approaches discussed during the meeting are included as an Appendix to these Notes). Judge Campbell suggested that a sensible starting point would be to determine which approach each person would favor, and then determine whether there was a consensus on which approach to use. If so, the next thing would be to hone in on specifics for that approach.

Views on alternative approaches

The first set of views began with the idea the "Lawyers want us to save them from themselves. As a result of the changes made by amendments in 1993, lawyers have aggressively used the new discovery opportunities to an extent that has produced harmful consequences. But unless there is a rule change to deter that lawyer behavior, it will continue. And making a change to improve the situation is a good idea." Protecting attorney-expert communications would be desirable.

This starting point led to the related conclusion that it would be undesirable to make a change if the new rule provisions invited disputes about application. We need to be careful to avoid a solution that will generate more litigation. So rules that use such terms as "collaborative process" or "core work product" should probably be avoided since those terms invite litigation about application.

Those views together lead to the conclusion that it is important to do more than protecting drafts alone. Alternative 2 is therefore not sufficient. At the same time, a total ban on discovery of all lawyer-expert communications is too strict, and Alternative 1 would therefore be undesirable. Among the "in between" alternatives, Alternative 3B seemed the best approach because it generally forbids inquiry into lawyer-expert communications but permits such an inquiry on certain limited subjects. Those permitted subjects of inquiry would have to be carefully designed, and the various possibilities listed in Alternatives 3B1 and 3B2 seem to include a number that are open-ended in a way that might undercut the basic protection and also invite litigation. As a starting point, the following might be an appropriate set of topics on which inquiry would be permitted into attorney-expert communications:

The terms of the retention: This would focus largely on the financial arrangements and be pertinent due to issues of bias

The scope of the assignment to the expert: This would focus largely on what the expert was told to do and what the expert was told not to do. Thus, if the lawyer told the expert to do only one specified test, or to use only one particular method of valuation, that sort of instruction should be open to discovery.

Facts or data: Any facts or data provided to the expert by the lawyer should be open to inquiry.

Assumptions: Any assumptions that the lawyer told the expert to make should be open to inquiry.

In sum, it would not suffice to protect only drafts, and the basic thrust should be forbid inquiries into attorney-expert communications with relatively narrow exceptions to that protection.

The second set of views came from a participant who had reread all the materials the Subcommittee had generated in its study of this problem, not only the ones circulated for this meeting. This review strengthened the conclusion that we need to do something to respond to the widespread concern in the bar about these issues. It is not often for all constituencies to agree that there is a problem. In this instance, moreover, it seems that the problem exists in large measure because of prior rulemaking. We should find a way to respond constructively to this broad-based concern in the bar.

Protecting draft reports (Alternative 2) is not enough, but a total ban in discovery about all attorney-expert communications (Alternative 1) is too much. The goal is to find an in-between solution. So the goal should be generally to prohibit inquiry into communications, but to allow inquiry regarding a specified and limited set of topics. This would build on the model of Alternative 3B. Of those two alternatives, Alternative 3B2 seems preferable to 3B1, but the basic goal is to arrive at a list of permitted topics of inquiry that affords the cross-examiner sufficient latitude for discovery while generally insulating against the sort of omnibus inquiry that characterizes current practice. If it is not possible to devise such a list, the fallback position would be a total ban on discovery of communications (Alternative 1), but the preferable route would be to identify those subjects on which discovery is warranted in a way that generally provides protection against intrusion into the relationship between the expert and the lawyer. At the same time, it is important not to write a rule that reads like a set of instructions for taking the deposition of an expert -- "Here is what you should ask about in the deposition." Alternative 3B1 has that flavor to it.

The third set of views came from another participant who had reread all the materials and came down in much the same place as the first two sets of views. This participant had just retained an expert from a leading university who is not a "professional witness." The expert had inquired about what he should expect. "I know that every communication I send him will be the subject of 15 minutes at his deposition." With the professional witness who knows the game, this is not an issue, but with this sort of witness it illustrates the intrusiveness of the current regime. And it seems backwards to have a system that favors retaining the professional witness over the university professor.

What we need is to protect against routine or broad-based discovery of communications, but to carve out a list of exceptions from that protection. The way to do that is to proceed on the model of Alternative 3B. In the real world, this is the way lawyers handle such issues, as evidenced by various stipulations we have heard about. On this subject, this participant is between Alternatives 3B1 and 3B2, perhaps drawing from each to devise a list of exceptions to the protection.

The fourth set of views began with the observation that this comes down to wanting to preserve the ability to inquire into things that go to bias and protect the legitimate collaborative process between lawyer and expert. So there should be a way to inquire into the terms of the retention, the amount of compensation, whether similar work was promised, whether there is a social relationship between the lawyer and the expert, etc. At the same time, the "collaborative process" need not be within the scope of discovery.

Given these views, protecting only draft reports (Alternative 2) does not go far enough. Alternatives 3B1 and 3B2 seem to be pointers on how to take a deposition, which is not what rule should be. Alternative 3A seems preferable, as it guards against inquiry into matters other than developing the opinions to be expressed at trial.

The fifth set of views began with the recognition that "I keep bouncing from one view to another on how to design protections." The most promising way of doing so is along the lines of Alternative 3B, but a major concern there is to avoid vague or elastic terms. Thus, references to "developing the opinions" or "reflecting mental impressions" seem like invitations to litigation and trouble.

As a starting point, a list of topics to be excepted from protection would include communications about the terms of retention, the scope of retention, and what the expert was told not to go into.

A sixth set of views emphasized that the main argument against protecting against routine inquiry into lawyer-expert communications seemed to be to embrace of the vision of the "independent" expert. Although that is an attractive vision, it does not seem to be the way in which the American litigation system works. In other countries, courts may be accustomed to taking the lead in selection of truly independent experts, but American judges (cf. use of Fed. R. Evid. 706) are not comfortable with such a responsibility. The alternative is party-selected experts who will almost inevitably be identified with the party. Surely there is a great range in the amount of that identification, and much reason to favor more independent experts.

Against this background, the widespread view of the practicing bar that the current rules produce waste and bizarre incentives is very persuasive. As an abstract matter, allowing inquiry into the role of the lawyer in fashioning the opinions the expert will express sounds very sensible. But the operating reality of lawyers living under the regime put in place by the 1993 amendments suggests that it actually produces very limited benefits and very large costs. That is a question that must be evaluated based on experience, not on the basis of abstract notions of "independent" experts. The broad consensus among lawyers that this is a matter of great concern argues strongly for a rule change. Even some lawyers who espouse the "independence" rationale themselves stipulate around the rules, at least on occasion. What has developed under the 1993 amendments is probably not what the drafters then sought or even expected.

At the same time, it is important to realize that no set of protections for lawyer-expert communications will entirely remove the possible incentive to hire a second set of experts. If a lawyer wants somebody to find the testing method that leads to the "correct" result so that the testifying expert can be instructed to do that test and no other, there is probably no way to avoid that temptation. We must live in the world of the possible. Treating a rule-based solution as inadequate unless it eliminates all vestiges of temptation to hire "shadow" experts, etc., asks more than we can provide in a rule amendment. The realistic goal should be to minimize such temptations while appreciating that we cannot banish them altogether.

The final set of views offered the bottom-line conclusion that the potential drawbacks of the various alternatives seemed much smaller than the reported drawbacks of the current reality. To explain these conclusions, one could think through the various issues.

First, on the role of the expert, in effect in this country the role is the same under the current regime and under any of the alternatives -- the expert is effectively an advocate for the retaining party, and is subject to influence by counsel.

Regarding draft reports, all the alternatives would make it very difficult to obtain them, requiring a Rule 26(b)(3) showing. Although in the abstract the majority view of courts that the 1993 amendments make discovery possible because drafts contain "other information" considered by the expert in reaching the opinions to be expressed at trial, the reality is that they are almost never actually produced. Production would probably occur only when counsel (or the expert) is inexperienced, or the court orders retention of drafts. Otherwise, there are no drafts to be produced. The effort required to ensure that there are no drafts is considerable, so making them off limits could result in a savings in many cases. And under the current regime in 98% of the cases there will be no drafts because the costs necessary to avoid creating them are borne. Protecting draft reports therefore offers the promise of considerable cost avoidance without any significant loss of discovery.

Regarding attorney-expert communications in general, the reality under the majority judicial attitude about the effect of the 1993 amendments is that there is free inquiry. But the additional reality is that actual discovery is rare. For one thing, many experienced counsel stipulate that there will be no discovery regarding such communications. For another, as the Subcommittee has heard repeatedly, most experienced lawyers (and all "professional" witnesses) know how to avoid making a record and thereby effectively put these matters beyond discovery. There will be no written record. So the current regime imposes costs of avoidance behavior and provides discovery only when counsel are inexperienced or unable to bear the costs of avoidance.

The various alternatives therefore do not make discovery of communications much less likely than it now is. Alternative 2 would leave things largely unchanged, protecting only draft reports, so the avoidance behavior and related costs would likely continue. As a result, there would not be a significant increase in access through discovery of communications. Alternatives 1, 3A, and 3B permit discovery only if the party seeking it makes the showing of need specified in Rule 26(b)(3). That would rarely be possible. Yet because adopting one of those alternatives may reduce the costly avoidance behavior, they might make actual discovery more possible in those cases where the court finds that it is warranted by the specific circumstances of the case. That could be viewed as a benefit compared to the current regime in which such discovery is available only when counsel (or the expert) is inexperienced or the costs of avoidance behavior are too high. Having discovery where it is really needed rather than making it available based on those criteria seems sensible.

In terms of discovery about topics that seem to provide legitimate grounds for inquiry, the various alternatives seem relatively similar to the current regime. A reality to keep in mind is that -- except for questions about lawyer-expert communications -- there is no limitation on inquiry of the expert during a deposition on a variety of topics. Thus, under all the regimes discovery would be allowed regarding facts or data considered, expert work papers, and the expert's development of the opinions to be expressed. The only significant difference on this score is that under Alternative 1 discovery regarding the scope of the assignment to the expert would seem to be off bounds, since that comes only from the communication from the lawyer. Thus, a shift from the current regime seems unlikely to constrict discovery about these topics significantly.

Turning to the costs that exist under the various regimes, the current regime produces at least four categories that can be recognized -- draft report avoidance and inefficient communications between lawyer and expert, retention of duplicate experts, much deposition time spent on communications and drafts, and occasional fights over drafts. The various alternatives would avoid some of these costs of the current regime. All of them would avoid the problem of draft report avoidance. Alternatives 2 and 3A would produce similar costs of inefficient communications because they do not provide protection for communications. Alternative 2 would not ameliorate the problem of duplicate experts, but Alternatives 1 and 3B would make it less frequently true that attorneys would retain a set of "shadow" experts. Alternative 3A would not so significantly reduce the use of duplicative experts.

Shifting to one of the alternatives would sometimes produce some costs of lost discovery compared to the current regime. Under the current regime, on occasion the production of draft reports occurs and provides useful information. Except to the extent that discovery would continue under the Rule 26(b)(3) showing requirement, there would be a loss under all the alternatives because they protect drafts. Similarly, in rare cases discovery of attorney-expert communications occurs and is useful, and under all but Alternative 2 there would be a loss in that discovery to the extent it would not be available due to the need to make the Rule 26(b)(3) showing. But it is important to keep in mind with regard to these costs of providing protection that avoidance behavior minimizes the occasions on which actual discovery occurs, and that where such discovery occurs it seems very rarely to produce information of use. So these costs seem very small.

Finally, another set of considerations has to do with rulemaking problems. On this score, at least Alternative 3A presents difficulties in determining what is "core work product" or how to define that concept in an amended rule.

In sum, this analysis suggests that the real cost of making a change is quite limited because the current (costly) avoidance behavior means that effective discovery actually is rarely possible with regard to the matters we seek to protect with the work-product standard. At the same time, to the extent we can insulate against routine discovery we may be able to change the behaviors that have produced such costs under the current regimes. If we were to take the route suggested by Alternative 3B2, therefore, we would not actually cause significant costs in reduced discovery and could produce significant benefits in reduced costly avoidance behavior.

Another participant mentioned another possible cost of shifting from the current regime - relaxing the discipline imposed by the ostensible availability of broad discovery on counsel. Knowing that every interaction is subject to discovery may constrain counsel who might more overtly seek to control the expert. Lawyers now have to be circumspect. The problem with this argument, however, is that in the real world of American litigation the expert is an advocate and

this concern is not strong. If the expert is led along by the lawyer, that will come out in questioning of the expert about the opinions -- whether or not it is permissible to question about communications with the lawyer -- so the loss of this discovery probably is not a major cost.

Another participant observed that, purely as a drafting point, there could be benefits to using Alternative 3A rather than 3B2 because it provides a protected area rather than identifying areas of permitted discovery. 3B2 might simply invite lawyers to fashion questions so they seem to fit within the requirements of the rule. Alternative 3A, on the other hand, affirmatively protects against inquiry into any communications about aspects of the litigation other than developing the opinions to be expressed at trial.

Judge Campbell tried to sum up the various views. First, nobody preferred retaining the current system unchanged. Second, nobody dissented from protecting draft reports. Third, everyone favored devising protection for attorney-expert communications. Finally, all but one felt that the best approach to that was to protect all communications except for specified topics on which discovery of communications would be allowed, and for those the most promising approach was Alternative 3B2. The most productive way to proceed was to focus on Alternative 3B2.

Refining Alternative 3B2

An initial observation was that the tag line for 3B2 was too broad -- "Permissible subjects of discovery from expert witnesses." The focus of this provision is only on discovery regarding attorney-expert communications, not discovery more generally. That produced the further suggestion that the two bullets in Alternative 3B2 should be separated; (ii) should be about draft reports, and (iii) about attorney-expert communications. This met with consensus support, leading to a revision somewhat as follows:

(ii) *Protection for draft disclosures or reports.* Rules 26(b)(3)(A) and (B) protect drafts of any disclosure or report required under Rule 26(a)(2), regardless of whether they are contained in documents or other tangible things.

(iii) *Protection for communications between expert witnesses and retaining counsel.* Rules 26(b)(3)(A) and (B) protect communications between the expert and retaining counsel, but a party may obtain discovery regarding:

The next question related to the inclusion in one of the bullets of the draft of inquiry about assumptions the expert was directed to make by a party as well as by counsel. Do we want to get into protecting communications between an expert and a party?

The explanation for inclusion of this party feature was that at least one of the various stipulations the Subcommittee had received covered such communications as well. Whether this would be desirable is highly debatable. Saying it is seems to suggest there is protection for "expert work product." Our discussion of expert work papers (leading to the conclusion that these should not be protected) suggests that there is not. The goal of the current amendment effort is to address difficulties arising in communications between lawyers and experts and to protect against intrusion into attorney work product, not expert work product. We have not been told that there is a similar concern with communications between parties and experts. Indeed, promoting such communication might be dubious. In some instances, as with the in-house expert, it may be unavoidable, but it seems this was the sort of protection that the Advisory Committee was rejecting in 1970, when its Advisory Committee Note said that it would not favoring an expert work product doctrine. These proposals are not trying to do what the Committee abjured in 1970.

The need for such a protection was further questioned on the ground that most lawyers would not promote such interaction between the expert and the party. Lawyers interact with both, possibly at the same time. When all three are involved in communications, the starting point should be that the attorney-client privilege applies. Whether the presence of the expert should be viewed as not broaching the confidentiality of such a communication could be debated. A paralegal or legal secretary present during the attorney-client interview surely does not. Would an expert fall in the same category? There is certainly some basis for treating disclosures to experts as abrogating privilege protection. That stems from the attitude (fortified by the 1993 amendment) that anything given or revealed to the expert is subject to disclosure even if privileged. Would the same rule apply to preclude application of the attorney-client privilege to communications among the lawyer, the client, and the expert? Perhaps that would depend on whether the expert is serving as a testifying expert or a consulting expert.

But the basic point, it was observed, is that we are here dealing with work product, not the attorney-client privilege. It is the thoughts of the lawyer that we seek to protect. Work product is not lost as easily by inclusion of somebody outside the charmed circle of lawyer and client; the protection may continue so long as there is a shared interest among the various parties to the communication.

At the same time, the entire area of party interaction with the expert is beyond the scope of this project. The resolution was that a proposed amendment not attempt to deal with party communications.

Looking to possible grounds for discovery of communications, the initial attitude was expressed as avoiding broad language; "draft these as narrowly as possible." On that score, it was observed that the first bullet in Alternative 3B2 -- "the bases for the opinions the expert will offer at trial" -- was too broad. This prompted the reaction that it would probably be best for the group to try to work up a list of what should be permitted grounds for inquiry into lawyer-expert communications, looking to the bullets in Alternative 3B but not feeling constrained by them.

Another participant suggested three items to be included: (1) terms of retention, such as the promise of future work, (2) the scope of the assignment, including any restraints the lawyer placed on the work of the expert, and (3) the facts of data considered by the expert.

One background point was that these items are only pertinent to inquiries about attorney-expert communications. Any other inquiry of the expert except a question about communications with the lawyer would be unaffected by this proposed rule.

Terms of retention: The focus turned first to the terms of the retention. One question was whether this meant such things as "Make sure the value is at least \$375,000." The response was that this inquiry is more about bias aspects -- what is the payoff for the expert for providing the testimony offered in this case? Does this mean an inquiry into whether the lawyer told the expert to do tests a certain way, or to forgo a certain line of analysis? The answer was that was a separate topic. This topic goes to bias. Would this include questions about additional work that the expert could expect due to offering favorable opinions? The answer was yes; at trial it is often permitted to inquire about additional work for purposes of bias. If this witness has been making \$500,000 per year testifying for this party, that is properly before the jury.

As focused, it seemed that this inquiry about lawyer-expert communications would be parallel to the disclosure required in the expert's report by Rule 26(a)(2)(B)(vi) -- "a statement of the compensation to be paid for the study and testimony in the case." Accordingly, subject to drafting refinement, the bullet point for new Rule 26(b)(4)(A)(iii) would be something like:

- [The] {Any} compensation to be paid for the study and testimony in the case

Committee Note language could recognize that questioning about future work that could follow from successful testimony in this case would be included in the questioning allowed about lawyer-expert communications. It might therefore be better to say "any" compensation rather than "the" compensation. It might also be worth noting that more general inquiry about the witness's overall revenue from testifying for that party or lawyer who retained the expert in this case would be permissible in many cases. That would not precisely involve the question that this bullet point addressed since there would be no need to inquire into lawyer-expert communications to address this question. It would simply be a general bias question.

Facts or data: This provision would follow up on the proposed revision of Rule 26(a)(2)(B)(ii), which would be revised to require disclosure of "the facts or data considered by the witness in forming [the opinions the witness will express]." But the focus should be on those facts or data the lawyer had provided to the expert; broader inquiry into what the expert told the lawyer, for example, would be beyond this authorization. At the same time, inquiry about what the expert considered would be unlimited by proposed Rule 26(b)(4)(A)(iii), except that the questioner could ask about communications with the lawyer only regarding facts or data the lawyer provided to the expert. If the party provided facts or data to the expert, or the expert told the party about facts or data, inquiry about that would not be limited.

There was discussion about the way in which this would affect experts who performed both a consulting and testifying role. What if an expert consulted with the lawyer about topics A, B, and C, and was then designated to testify only with regard to Topic A? Could the other side inquire about all lawyer-expert communications about all three topics or just topic A? One answer would be that this would depend on how separate those topics might be. But the basic idea would be to permit inquiry about communications only to the extent the facts or data conveyed by the lawyer bore on the opinions the expert would offer on topic A. If A, B, and C are closely intertwined, it may be impossible to say where the facts pertinent to one stop and those pertinent to another pick up. But in many instances there would be a meaningful demarcation.

An initial formulation (subject to drafting refinement) could be modeled on Rule 26(a)(2)(B)(i) and (ii) somewhat along the following lines:

- Any facts or data provided to the expert by counsel that the witness considered in connection with developing the opinions the witness will express.

A Committee Note could explore the limits that this places on inquiry into the communications so that not all communications about factual material relevant to the case, but not to the matter on which the expert will opine, are necessarily proper topics of inquiry under this bullet.

Another point was that this might be limited to facts or data that the expert considered in developing the opinions to be expressed in the report. The response to this was that Rule 26(a)(2)(B)(i) refers to the "opinions the witness will express" not just the opinions in the report. If the witness develops further or different opinions after the report is submitted, Rule 26(e)

require supplementation, and it could be that a court would refuse to allow belated supplementation or testimony beyond the opinions in the report. But so far as this protection of communications is concerned, it would be odd to forbid inquiry about later-developed opinions that will be offered at trial on the ground they were not included in the report. Indeed, it might be important for the Committee Note to say that such later-developed opinions were fair ground for discovery of communications on this ground.

At the same time, there could sometimes be uncertainty in situations in which the expert witness has also acted as a consultant on a broader array of topics than he or she will address in testimony. It is likely that there is no overall rule on how such situations should be resolved; as with the topic A, B, and C discussion above, it will be necessary for courts to make case-specific determinations.

One member observed that when the witness has served as a consulting expert for a long time, parsing the situation may prove very difficult. There will be uneasiness about this which could lead to the hiring of additional experts to avoid possible inquiries. A response to this was that inevitably we will be unable to provide absolute security or remove entirely the temptation to hire shadow experts.

Another member asked whether there is any situation in which "facts or data" could be considered too narrow. For example, in a groundwater contamination case, suppose the lawyer tells the expert "We have a long-time employee who thinks that our tanks leak. We've never tried to find out whether that's true, and have no basis for thinking this employee is right." The reaction was that this information should fall within the ambit of "facts or data considered."

Assumptions by the expert: Assumptions are somewhat different from facts or data. For example, the lawyer might tell the expert "Assume that the jury accepts my client's testimony about how the accident happened." Alternatively, the lawyer might tell Expert B: "Expert A has analyzed the tensile strength of the steel in the tower that collapsed. Assume that analysis was correct." These are not really facts or data, and therefore should be addressed separately. Subject to refinement through drafting, this could be addressed somewhat as follows:

- Any assumptions or conclusions that retaining counsel [directed] {instructed} the expert to [accept] {adopt} that the expert used [considered] {relied upon} in [forming] {rendering} the opinions the witness will express

As above, this focuses on the opinions that the witness will offer at trial; to the extent the witness worked on other topics the same sort of overlap problem may arise as in the topic A, B, and C example mentioned above. It also may be worth saying in a Committee Note that there is no limit on inquiry about discussion of assumptions with anyone but counsel and the representatives of counsel. Thus, if the expert communicated with the party or another expert about these topics, Rule 26(b)(4)(A)(iii) would not apply because the protection is limited to attorney-expert communications.

Further discussion focused on the formulation of this exception. Should it be limited to those assumptions that the expert actually relied upon in reaching the opinions to be offered at trial. What if the lawyer said assume facts 1 through 10, and the expert later concluded that facts 9 and 10 didn't matter. Should the lawyer's communication with regard to those be open for inquiry?

One view was that this should be limited to the facts relied upon. The expert and the lawyer may discuss a wide variety of things, and the lawyer may tell the expert to assume many things during those discussions. As the expert's role evolves, much of that material may turn out to be unimportant. It would not be desirable to open the door to discovery regarding all discussions about assumptions that occurred, whether or not they formed the basis for the opinion ultimately developed.

A differing view was that there will be "howls of anguish" at this limitation. Experts will carefully say they did not rely on any assumptions they got from the lawyer. This is the same sort of problem that prompted the Subcommittee to adopt "considered" in relation for facts or data.

Scope of assignment: This topic appeared as an exception in some stipulations we have seen generally forbidding inquiry into lawyer-expert communications. The first reaction to this topic was that it is more problematical than the first three discussed. It raises the possibility of intruding into the area we are trying to protect. The lawyer may often interact with the expert with a string of "what ifs." To the extent that interaction affects the expert's eventual testimony or the topics on which the expert is designated to testify, getting into communications about the scope of the assignment (and the topics not included in the assignment) is troubling.

Another response was that "It's all highly dependent on how you ask the question. How about 'Were you given a broader assignment?'" Another participant suggested similarly the question "Did your assignment change due to the work you did?"

Yet another response was that this inquiry could affect the handling of the situation in which the expert initially consulted about topics A, B, and C, but was ultimately designed as an expert only with regard to topic A. Is that included within the "scope of the assignment" topic? Can one ask about all work done for the lawyer on the case? What about the protections of Rule 26(b)(4)(B) with regard to opinions not to be offered at trial?

A contrast was drawn to compensation. Can the questioner ask about the compensation that the witness received for work on the case, whether on topic A, B, or C. The answer was yes; that clearly goes to bias. Should the answer be the same as to the content of the work done on all topics?

Another example was the situation in which the expert is asked to do a valuation on two methods -- say the comparative sales and the income methods -- and then told to testify only about the comparative sales results. Would "terms of assignment" include that directive?

One response to this example was that of course the questioner can inquire into alternative testing methods. But a response to that point was that the issue here is slightly different because it's about communications with counsel, not what work the expert did. Rule 26(b)(4)(A)(iii) would not limit inquiries about the analyses prepared by the expert, considered by the expert, or possibly done by the expert even if not employed in reaching the ultimate conclusions to be offered. The witness can be asked whether various other methods are valid methods or widely-recognized methods of producing conclusions like valuation of property. The specific question here is whether the questioner can ask whether the lawyer gave directions about what methods to use.

A related example would be the 37 test example that we have considered frequently. If the lawyer tells the testifying expert to use only test no. 37 because no. 1 through 36 did not produce "helpful" results, can the questioner inquire about that communication?

A response was to ask how much this fourth topic of communications adds to the three already discussed. Already we have discussed permitting inquiry into any communications about compensation of any sort (including future employment) for the expert, any facts or data the lawyer gave the expert, and any assumptions the lawyer told the expert to make. And because the protection applies only with regard to communications between the expert and the lawyer, there is no limitation placed on inquiries about any testing done by the expert, any modes of analyses done or not done by the expert, whether alternative methods are valid or widely-used, etc. How much value is there to get further into lawyer-expert communications?

A reaction was that adding this exception raises difficult line-drawing problems. Another was that adding it does little to enlarge the permissible inquiries about what the witness thought or did. A response was that if this exception were not included it would be important in the Committee Note to point out that inquiries about these topics would be allowable except with regard to attorney-expert communications. Eventually it was concluded that this fourth exception does not stand on as secure a footing as the other three.

One major potential problem is that most situations are not as clear as the comparative sales v. income valuation method example. Instead, the iterative interaction of the lawyer and the expert likely involves much interchange that might be characterized as dealing with the "scope of the assignment." That would often emerge only after an extended interaction involving consideration of a variety of possibilities and hypotheticals. If all of these interactions can be pursued, the protection will protect very little. As one member put it, the only reason an inquiry should be allowed is because it bears on the opinions the expert actually will express; inquiries about communications regarding opinions the expert will not express are of a different character. Another member added "Why add lawyer communications to the list of things subject to discovery? There are plenty of ways to get at alternative methods, etc., without questioning about lawyer communications."

A response was that this is one of the important places where one can show the attorney's fingerprints on the opinions that the expert will be offering. If the lawyer says "Don't do the comparative sales analysis" that's valuable additional information. You can ask whether the comparative sales analysis is a reliable, widely-accepted method of valuation. You can ask whether the expert did such an analysis, considered such an analysis, had ever done such an analysis on similar properties. Can't you ask why she did not use it this time? Is the answer "The lawyer told me not to"? Can that question be objected to?

A reaction was that opinions are final opinions, not overall interactions. Unless we are limited to those opinions, there is no stopping point on inquiry into lawyer-expert interactions.

Eventually it was decided that the fourth possible exception should be carried forward to the full Advisory Committee, either as a bracketed item or a footnote discussion item. One member favored including it in the rule, and the others felt that it would dilute the protection and produce problems that outweigh its value. The eventual conclusion was to flag this issue for further discussion in the rulemaking process. There has already been some discussion at the Standing Committee on this topic, at least some stipulations we have seen include the provision, and it would be desirable to bring the issue to the attention of the full Advisory Committee so that any further discussion that is needed can occur. The preferred way to do so would be in a footnote, as a bracketed textual entry might suggest stronger support than the Subcommittee has for including this item.

Another question was about an additional possible idea in Alternative 3B2 -- permitting inquiry into communications about "any matter identified in Rule 26(b)(2)(B)." This was raised because it might initially be thought that anything that is a topic which must be included in the expert's report should also be a legitimate subject of inquiry about lawyer-expert communications. But the issues are really distinct. Rule 26(a)(2)(B) ultimately calls for a report from the expert, not the lawyer, although the lawyer may provide assistance to the expert in preparing the report. And permitting free inquiry into communications between the lawyer and the expert about anything within Rule 26(a)(2)(B)(i) -- "all opinions the witness will express and the basis and reasons for them" -- would seem to nullify much of the protection we are trying to provide.

It was agreed that there is no need to tie proposed Rule 26(b)(4)(A)(iii) to Rule 26(a)(2)(B) in this way.

Rule 26(a)(2)(B) changes

Discussion shifted to whether to change Rule 26(a)(2)(B) in light of the changes now contemplated in Rule 26(b)(4)(A). One view was that the rule of unintended consequences argues against making changes unless they are necessary. Having provided in new Rule 26(b)(4)(A)(ii) and (iii) for protection against discovery regarding draft reports and lawyer-expert communications, we should not tamper with Rule 26(b)(2)(B).

One response was to note that the word "final" initially proposed to be added to Rule 26(a)(2)(B) -- "a written final report" -- no longer seemed useful. It was agreed that this change should be dropped.

The other change, however, is different. In Rule 26(b)(2)(B)(ii), the proposed amendment is:

(ii) the facts or data ~~or other information~~ considered by the witness in forming [the opinions the witness will express]

The words "or other information" formed the basis for the majority of cases holding that draft reports and attorney-expert communications could be discovered. It is not clear that was the purpose of the amendment in 1993, but it is clear that is what has happened. The goal of the amendment is to provide a basis in rule changes to say that this majority attitude is no longer correct. Without a change to this rule, there is no easy way to say that these words now are to be interpreted differently.

Another argument was that "or other information" is inherently a "soft" term, subject to expansion. Using "facts or data" is superior as rule language. Using "or other information" seems to provide a rule-based ground for requiring production of drafts; it is easy to argue that the expert considered the drafts in developing the ultimate conclusions in the report that was served.

In addition, it was noted that the discussion of the evolving Rule 26(b)(2)(A)(iii) proposal was to use "facts or data" rather than "data or other information." It would be odd to continue using the other term in the report provision. That might be taken to invite continued reliance on the cases whose result we seek to change. And it might also preserve the anomaly that inquiry would differ for those witnesses required to make a report and those not so required.

The resolution was to carry forward the proposed change from "data or other information" to "facts or data" in Rule 26(a)(2)(B)(ii), but one member reserved the view that this change is unnecessary and should not be made.

Rule 26(a)(2)(A)

During the Standing Committee discussion of the proposed addition of a disclosure requirement with regard to experts not required to provide a report, concern was expressed that the draft calling for disclosure of "the substance" of the facts and opinions could be too demanding. When the witness is a treating doctor, in particular, this may be difficult for counsel to obtain from the doctor. We have heard about the difficulties sometimes encountered by plaintiff lawyers in getting information from doctors; particularly in lower value cases we should not impose requirements that drive up the cost of litigation. The goal is only to assure that the other side has enough information to decide whether to take a deposition.

One alternative would be to ask for "a summary" rather than "the substance" of the facts or opinions. This somewhat reduces the burden on lawyers. It also is somewhat parallel to the requirements of Fed. R. Crim. P. 16 regarding discovery in criminal cases, although that is a different situation. The concern would be that such a summary might be too delphic or brief. The goal is give fair notice of what the witness will be testifying about. But on the other hand nothing in the rule says that the most delphic description must be used. Good lawyers may appreciate that providing more information can reduce the likelihood of a deposition. (They may also be able to persuade the doctor to be helpful on that ground.)

The conclusion was that a good summary should suffice. It was agreed that the draft should be changed:

- (ii) a summary of the facts and opinions to which the witness is expected to testify.

Points for Committee Note

Much discussion had suggested things to include in the Committee Note. Beyond that, several items were mentioned:

- (1) Regarding the treating doctor, it is important to make it clear that the doctor should be identified, that the goal of the disclosure requirement is fair notice, and that it should not be interpreted in so demanding a way as to pose an unfair obstacle to counsel.
- (2) Regarding the showing needed to justify discovery of draft reports or attorney-expert communications, it is important to state that it is not sufficient for counsel to argue that discovery is needed for effective cross-examination. The requirements of Rule 26(b)(3) require more.
- (3) The assumption is that the inquiry allowed under these revisions should suffice at trial also; judges should be encouraged to respect these limitations during trial examination.
- (4) Regarding the new disclosure requirement to be added to Rule 26(a)(2)(A), it should be clear that this is not nearly as demanding as the report requirement under Rule 26(a)(2)(B).

Further efforts

The Subcommittee will have a conference call on Monday, March 10, at 7:30 a.m. California time. Before that call, a draft of agenda materials should be circulated. Those materials should contain the proposed rule language and Committee Note language. In addition, they should try to identify discussion items, either in footnotes or in a Reporter's Notes section. Ideally, that draft should be circulated well in advance of March 10. Final agenda materials will be due shortly after March 10.

APPENDIX

The following sets forth the alternatives considered during the Feb. 28 meeting.

Alternative 1

(4) Trial Preparation; Experts.**(A) *Expert Who May Testify.***

(i) Deposition of expert witnesses. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(ii) Protection for draft disclosures or reports and for certain communications between expert witnesses and retaining counsel. Rules 26(b)(3)(A) and (B) protect the following as trial preparation material, regardless of whether they are contained in documents or other tangible things:

- drafts of any disclosure or report required under Rule 26(a)(2); and
- communications between the expert and retaining counsel, [except communications regarding facts or data considered by the expert in developing the opinions to be expressed by the expert at trial].

This is the "hard line" proposal. It is modeled largely on the ABA's resolution, which recommended that rules be amended as follows:

- (1) an expert's draft reports should not be required to be produced to an opposing party;
- (2) communications, including notes reflecting communications, between an expert and that attorney who has retained the expert should not be discoverable except on a showing of exceptional circumstances;
- (3) nothing in the preceding paragraph should preclude opposing counsel from obtaining any facts or data the expert is relying upon in forming his or her opinion, including that coming from counsel, or from otherwise inquiring fully of an expert into what facts or data the expert considered, whether the expert considered alternative approaches or into the validity of the expert's opinions.

I believe we have decided that Rule 26(b)(3) protection is to be used, rather than the "exceptional circumstances" language of 26(b)(4)(B), and it is used here.

The "hard line" assumes that item (3) on the ABA list is not really meant to open the door to discovery about attorney-expert communications even though it could be interpreted to qualify the protection recommended in the ABA's item (2). But the bracketed option regarding facts or data considered by the expert in developing the opinions could soften the hard line some without opening the door very much. For that reason, it is included here.

Although this is the "hard line" on discovery regarding attorney-expert communications, it would certainly be consistent (and probably desirable) for a Committee Note accompanying such a rule to enumerate the kinds of topics that are appropriately pursued during the expert's deposition. Examples include all testing or analysis done by the expert, whether the expert considered alternative approaches to the issues presented, any assumptions made by the expert, etc. At most, this protection forbids inquiry about attorney-expert communications; it does not otherwise limit thorough questioning of the expert about the opinions to be offered at trial.

Another matter that probably would deserve mention in a Committee Note is the expectation that questioning at trial would respect this limitation on discovery before trial. We have discussed this topic, and it may involve some delicacy, but deserves note here.

One slight drafting modification from what has been circulated before deserves mention - - modifying the first provision so it applies to drafts of disclosures or reports required under Rule 26(a)(2), not just a draft report under (B). The goal is to make it clear that no discovery is allowed regarding drafts of disclosures required under our intended amendment to Rule 26(b)(2)(A) (see Appendix). It is likely that counsel will sometimes communicate with the experts about what to say in such disclosures and work up drafts of them. So the same protection seems useful for such materials. This could be addressed in a Committee Note instead, making clear what should be clear -- that any advance work on this disclosure is no more discoverable than work preparing disclosures under Rules 26(a)(1) or (a)(3). This is already in the Maledon stipulation, and seems warranted here. The same thing recurs in the other alternatives below.

Alternative 2A

(4) Trial Preparation; Experts.

(A) *Expert Who May Testify.*

(i) *Deposition of expert witnesses.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(ii) *Protection for draft disclosures or reports.* Rules 26(b)(3)(A) and (B) protect the following as trial preparation material, regardless of whether they are contained in documents or other tangible things:

- drafts of any report or disclosure required under Rule 26(a)(2); and
- communications between the expert and retaining counsel regarding [the nature or content of] any such draft.

Alternative 2B

(4) Trial Preparation; Experts.**(A) *Expert Who May Testify.***

(i) Deposition of expert witnesses. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(ii) Protection for draft disclosures or reports. Rules 26(b)(3)(A) and (B) protect all drafts of any report or disclosure required under Rule 26(a)(2) as trial preparation material, regardless of whether they are contained in documents or other tangible things.

These are the "soft line" alternatives. The thrust of these alternatives is to provide protection only for draft reports or disclosures. Alternative 2A assumes that protection cannot be complete unless there is a rule against inquiring into attorney-expert communications about the drafts. The Maledon stipulation, for example, says that communications "relating solely to the nature or content of that expert's report or that expert's disclosure statement" should not be the subject of discovery. For purposes of presentation, that language is included in brackets. It does not seem necessary, since a prohibition on inquiry about the communications should suffice if they are identified as regarding a draft report or disclosure.

Alternative 2B provides protection only for the drafts, and not with regard to communications. Regarding it, one question would be whether the protection will prove illusory in a deposition when counsel begins inquiring about communications with counsel about the content of the report that was served, including examination of the conclusions and analyses included in that final report. Is there really a problem with questions like "Did you make any modifications in your position on this topic after discussing it with counsel?" Maybe it is sufficient to say that discovery about drafts is off limits, and Alternative 2A goes too far.

In-Between options

If Alternatives 1 and 2 bracket the range of possible responses, there are many intermediate possibilities. This section outlines them as varying Alternatives no. 3, for proponents of the Third Way.

Alternative 3A

(4) Trial Preparation; Experts.**(A) *Expert Who May Testify.***

(i) Deposition of expert witnesses. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(ii) Protection for draft disclosures or reports and for certain communications between expert witnesses and retaining counsel. Rules 26(b)(3)(A) and (B) protect the following as trial preparation material, regardless of whether they are contained in documents or other tangible things:

● drafts of any disclosure or report required under Rule 26(a)(2); and

[● communications between the expert and retaining counsel that reflect retaining counsel's mental impressions, conclusions, opinions, or legal theories concerning the litigation; and]

● communications between the expert and retaining counsel regarding aspects of the litigation other than developing the opinions to be expressed by the expert at trial.

This draft is based on discussions during our conference calls since the November Advisory Committee meeting. The basic goal is to provide protection for attorney-expert communications about other topics unless the showing required for discovery of work product is made, but to ensure that attorney-expert communications about the opinions the expert will offer at trial are discoverable without that showing. In that sense, it differs from the next alternative because it presumes attorney-expert communications are generally subject to discovery unless that is explicitly precluded (because they are not about the development of the opinions to be offered at trial). The bracketed material in the middle could be removed. It protects "core" attorney work product even though the attorney-expert communications dealt with the opinions the expert would offer at trial.

It is perhaps worth noting that the word "developing" was added to the final provision of the protective provisions. This is not the same as referring (as in the New Jersey rule) to the "collaborative" activity of the lawyer and the expert, but may broaden the protection by narrowing the permitted focus of inquiry -- limited to communications about developing the opinion to be expressed at trial.

A Committee Note to this sort of amendment might usefully list things that are not intended to be included and those that are. Among those that are subject to discovery without the required showing could be:

1. Any testing that was done or would be done in preparation of the opinions to be offered
2. Any discussions of the payment the expert would receive, including the possibility of future employment by the lawyer
3. Facts or data considered by the expert in forming the opinions to be offered at trial

Similarly, a Note could list things that would not be discoverable without the required showing for work product could be:

1. Any analysis of the report or opinions of another party's expert, unless that analysis led to a revision of the opinions to be offered by this expert
2. Any analysis of the overall strengths or weaknesses of the retaining counsel's case
3. Any preparation for examination of the expert witness of another party, or of any other witness [of another party]
4. Any communications about the examination of any other expert to be presented by the party calling this one. (It occurs to me that we might want to protect this or to expose it, but that it seems to me a prime possible area for the sort of "core" work product communications we wish to guard against disclosure).

Alternative 3B

(4) Trial Preparation; Experts.

(A) *Expert Who May Testify.*

(i) *Deposition of expert witnesses.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(ii) *Protection for draft disclosures or reports and for certain communications between expert witnesses and retaining counsel.* Rules 26(b)(3)(A) and (B) protect the following as trial preparation material, regardless of whether they are contained in documents or other tangible things:

- drafts of any disclosure or report required under Rule 26(a)(2); and
- communications between the expert and retaining counsel.

Alternative 3B1

(iii) *Permissible subjects of discovery from expert witnesses.* Notwithstanding Rule 26(b)(4)(A)(ii), a party may during the deposition of an expert witness inquire concerning communications between the expert and retaining counsel regarding:

- any facts or data the witness considered in developing the opinions to be offered at trial; and
- whether the expert considered alternative approaches; and
- the validity of the expert's opinions.]

Alternative 3B2

(iii) Permissible subjects of discovery from expert witnesses. Notwithstanding Rule 26(b)(4)(A)(ii), a party may during the deposition of an expert witness inquire concerning communications between the expert and retaining counsel regarding:

- the bases for the opinions the expert will offer at trial; and
- any information or materials [relied upon] {considered by} by the expert in developing those opinions; and
- any factual information supplied to the expert; and
- any assumptions or conclusions made by the expert, including those the expert was directed to make by a party or the party's attorney; and
- any payments to be made for the expert's services; [and
- any matter identified in Rule 26(b)(2)(B)].

Alternative 3B1 is modeled on the ABA proposal (quoted above in Alternative 1), treating the matters it listed in its paragraph (3) as intended to be exceptions to the general protection regarding attorney-expert communications. The ABA proposal did say that "nothing in the preceding paragraph [about protecting attorney-expert communications] should preclude opposing counsel from obtaining any facts" about the listed subjects. Alternative 3B1 would accomplish that purpose.

Frankly, adding (iii) would seem very considerably to weaken the protections provided by (ii) regarding attorney/expert communications. It may be that the ABA did not focus on this tension, and that the ABA resolution therefore is not a strong endorsement of limiting protecting attorney-expert communications even though they fall within (iii).

Alternative 3B2 is modeled on the stipulation supplied by Standing Committee member Maledon and seems consonant with what we have heard is the view of Standing Committee member Beck. As with Alternative 3B1, it might swallow the protection provided in proposed 26(b)(4)(ii).

Special note should be made of the last item listed in (iii) in Alternative 3B2 -- items identified in Rule 26(b)(2)(B). At first blush, it would seem essential to allow full inquiry into the very things that must be included in the report (and presumably to allow similar inquiry for expert witnesses not required to provide a report). The last item does so, which may be what one of the provisions in the New Jersey rule means as well (although that is not entirely clear).

But the matters to be included in the report include:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data or other information considered by the witness in forming them;

If we mean to allow questioning about any attorney-expert communications about (i), that may open a very wide door. Perhaps that door has to be opened, for it may be odd to say that disclosure must include that but discovery is not allowed. However, it would make sense to say that the report provision is broad in a way that need not lead to the additional step of deposition questioning about all lawyer-expert communications regarding anything within (i). If so, saying that discovery is allowed regarding any communication on a topic listed in 26(a)(2)(B) may be unwise.

Alternative 3C

(A) *Expert Who May Testify.*

(i) *Deposition of expert witnesses.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(ii) *Protection for draft disclosures or reports and for certain communications between expert witnesses and retaining counsel. Rules 26(b)(3)(A) and (B) protect the following as trial preparation material, regardless of whether they are contained in documents or other tangible things:*

- drafts of any disclosure or report required under Rule 26(a)(2); and
- communications between the expert and retaining counsel constituting their collaborative process in developing the opinions to be expressed by the expert at trial, [except communications regarding facts or data considered by the expert in developing the opinions to be expressed by the expert at trial].

Alternative 3C is an attempt to capture what seems to be the content of the New Jersey rule as written. The rule as written may not correspond to the explanation of it we received from the New Jersey lawyers last April. Because of uncertainties about what exactly the New Jersey rule does, some details may be helpful.

The New Jersey provision is as follows:

Discovery of communications between an attorney and any expert retained or specially employed by that attorney occurring before service of an expert's report is limited to facts and data considered by the expert in rendering the report. Except as otherwise expressly provided by [another rule that enumerates the contents of an expert's report], all other communications between counsel and the expert constituting the collaborative process in preparation of the report, including all preliminary or draft reports produced during this process, shall be deemed trial preparation materials discoverable only [upon the showing required for discovery of work product]

The New Jersey lawyers told us that the limitation of the protection to communications before service of the report had proven unwise in their view, and it is not included in Alternative 3C.

The New Jersey provision also includes the phrase "constituting the collaborative process in preparation of the report." As the provision is written, this seems to be a limitation on the protection provided; it means that anything that is not part of the collaboration in preparation of the report is not protected. That cast of the protection probably explains why the protection is cut off upon service of the report; that would be the time when the collaborative process of preparing it would have to end. The draft above is focused on the opinions to be offered at trial. That seems consistent with the notion that the report is not the main event, but rather it is a device to acquaint the other parties with what the opinions will be and the basis for them. The proper focus is on those opinions themselves, and that focus goes farther than preparation of the report.

Another problem with the collaboration language in the New Jersey rule is that what we have been discussing is protecting attorney-expert communications that relate to something other than collaboration about the opinions to be expressed at trial. Thus, Alternative 3A is largely designed to protect communications about what the other parties' experts say, or otherwise about the case, and to guard the opportunity to probe the opinions that will be offered. It seems odd to protect the collaboration about the opinions to be offered, but not on unrelated topics.

The use of the collaboration language might also be objected to on the ground that we should not so explicitly write into the rule the notion that the expert witness is a collaborator in the presentation of the retaining party's case. Frankly, this notion seems implicit in the offering of the protection that we are proposing.

Yet another issue raised by the New Jersey rule is whether to authorize discovery regarding any topic to be included in the draft report. That seems to be the consequence of the "Except as otherwise expressly provided" language that precedes the protection for communications. A similar issue was discussed in regard to Alternative 3B2, regarding the bracketed language there permitting discovery of attorney-expert communications about any matter identified in Rule 26(a)(2)(B). That is not included in the above draft. For one thing, it raises perplexing questions about differing protection with regard to witnesses who must prepare reports and those who don't have to. Maybe that can be solved by simply saying that discovery is allowed as to any expert witness about any matter that would be required to be covered in a report, whether or not the expert had to prepare one.

Beyond that, I find the New Jersey provision excluding the topics covered in the expert's report hard to follow. Maybe it only means that a report is not subject to these limitations and must cover all the required bases. But if that's so, I don't see why it is needed here, since the provision says that all other communications constituting the collaborative process in preparing the report are protected. How exactly are there communications about the collaborative process of preparing the report that are not about the topics that have to be covered in the report? Then it would seem that they are not a part of the collaborative process of preparing the report and accordingly not covered. And if inquiry is allowed into any matter that must be included in the report, I find it perplexing that the first sentence allowing discovery regarding the facts or data considered by the expert discoverable. If that's one of the things that must be in the report (as in Rule 26(a)(2)(B)), the second sentence covers this topic. So this was left out both because it might gut the protection and because it seems difficult to make sense of it.

Notes of Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules
Jan. 18, 2008

On Jan. 18, 2008, the Discovery Subcommittee of the Advisory Committee on Civil Rules met by conference call. Judge David Campbell (Chair of the Subcommittee), Daniel Girard, and Chilton Varner participated in the call. Also participating were Judge Mark Kravitz (Chair of the Advisory Committee), Prof. Edward Cooper (Reporter of the Advisory Committee), Monica Finnell and Jeff Barr of the Administrative Office, Andrea Thomson (rules law clerk to Judge Lee Rosenthal), and Prof. Richard Marcus (Special Reporter of the Discovery Subcommittee). Anthony Valukas was unable to participate.

The conference began with a report on the discussion of expert discovery during the Standing Committee meeting on Jan. 14-15. About an hour was spent on these issues, so the Standing Committee was unable to delve as deeply as the Discovery Subcommittee has over the course of its discussions.

Standing Committee discussions began with the "uncontroversial" ideas the Subcommittee has developed about adding disclosure to Rule 26(a)(2)(A) regarding testimony of expert witnesses who don't have to provide a full report under Rule 26(a)(2)(B), and used up about half the time allotted to expert discovery. There was concern about whether lawyers pay sufficient attention to the role of "hybrid" experts -- those with percipient witness knowledge who also express opinions within Fed. R. Evid. 702. Standing Committee members also focused on the dividing line between Fed. R. Evid. 701 and 702, and the question whether there should be some disclosure requirement for opinions within 701 arose. Although there were no specific suggestions to change the draft developed by the Subcommittee, there was concern about burdens on attorneys that would result from adding the disclosure requirement.

One view of the concerns of the Standing Committee members on this disclosure idea is that bringing clarity to the rules would be desirable. At the same time, it would be important to focus on the ways in which fact witnesses become expert witnesses. That may happen quite frequently, and a requirement that attorneys provide disclosure of the substance of the facts or opinions to be offered may be asking too much. Maybe it would be better to require only a "summary of the facts or opinions." But at the same time, there is a concern that an abbreviated disclosure requirement could fail to achieve the notice purpose for which it is intended. It would not suffice for the disclosure to be, in its entirety: "The treating physician will testify on treatment, prognosis, and likely further expense."

This discussion elicited the response that these are fair points. The Subcommittee will need to take care about the amount of disclosure it is proposing to require. The stronger the disclosure requirement, the greater the likelihood of arguments to exclude expert testimony on the ground that the disclosure was not detailed enough. The thrust should be to make clear that the goal is to provide notice so the other side can pursue details with a deposition, not to invite motions to exclude. One alternative might be to say that one must "identify" any opinions that will be offered.

Another approach might be to elaborate in the Note about the contrast between the new disclosure requirement and the report required by Rule 26(a)(2)(B). It may be that retooling the wording of an amendment to Rule 26(a)(2)(A) would make this clearer. Perhaps avoiding reference in the rule to disclosing "facts" that would be covered by the expert witness would be helpful. At least Note language could be focused on these concerns.

Turning to the attorney-expert communications on which the Subcommittee has been working, the initial point from the Standing Committee was that most of the lawyers on that committee usually stipulated out of extensive discovery as authorized by the predominant interpretations of the current federal rule. It would be good to get some examples of their stipulations to see how they phrase their more limited discovery undertakings. As a starting point, these lawyers supported the idea of this project to revise the rules to provide for discovery rules limited along the same lines.

But there was also concern about inquiry into attorney-expert communications at trial. At least, it seemed important to allow inquiry into what the attorney told the expert to do or not to do. So, to use a common example, one should be able to inquire into the 36 tests that did not turn out the "right" way, and any attorney directions not to do certain tests. Somewhat at tension with this attitude, there was support for insulating attorney-expert communications during discovery.

On other topics, the Standing Committee seemed to accept the idea that discovery of drafts should be handled under the work product approach, and that there should not be such protection for expert "work papers." The difficult area was attorney-expert communications.

The Standing Committee discussion of attorney-expert communications emphasized that there is a particular need for clarity in this area. One concern is that unless protection is airtight and clear there will be endless litigation about what is protected. One Standing Committee member urged that the model of the Prussian state could be adopted -- everything is forbidden unless specifically permitted. Thus, all inquiries into attorney-expert communications could be protected as work product, with a list of specific exceptions. Examples of such exceptions might include who hired the expert, what were the terms of that retention, what payment will the expert receive, what was the expert asked to do, what was the expert told not to do. Everything else could be declared out of bounds. Perhaps this could be modeled on the disclosure provisions; it might be difficult to treat as off limits inquiries about attorney-expert communications about matters as to which many experts must make full disclosure.

Overall, the Standing Committee discussion brought home the difficulty of the issues are regarding attorney-expert communications. The fundamental tension is that one cannot forbid all inquiries, but "once the camel's nose is in the tent" it becomes difficult to define a stopping point. The list of permitted topics might be superior to an effort to exclude inquiry about certain things, such as forbidding inquiry into "core" work product or communications about topics other than the opinions to be offered at trial.

Overall there was support for the expert witness project. One member of the Standing Committee expressed misgivings. This attorney had a background in criminal litigation, and regarded anything the Government told an expert witness as fair game at trial. So limiting discovery into similar matters seemed inappropriate.

An initial reaction to this report on the Standing Committee discussion was that the Discovery Subcommittee's discussions had been pitched not at a theoretical level but instead focused on the very practical problem we have heard about repeatedly -- the artificial and costly practices that the current regime has produced in civil cases. If similar problems exist in criminal cases, we have not heard about them.

Focusing only on civil cases, however, a further reaction was that it is very unlikely we can craft rule language that everyone understands. The best we will be able to do is to use language that seems suitable and flesh out the intended meaning in the Note in ways to provide guidance. That would almost entail a list of the things that are discoverable and those that are not discoverable.

This reaction prompted the suggestion that one could picture a Note saying "Ordinarily, relevant inquiries will focus on"

Another reaction was that it would seem odd for a rule to say that lawyer-expert communications are ordinarily work product, except that it is permissible to inquire into the following topics.

A different reaction was that relevance is a good method of defining the focus for the "exceptions." The idea is to delineate the things that would be proper for testing the opinions to be offered at trial. This would include the facts considered, the scope of the assignment, the activities that led to the development of the opinion. And using this approach would be a good way of insulating work done by the expert in assisting the lawyer on other aspects of the case, such as preparing cross-examination or analyzing settlement proposals.

A hypothetical explored this approach: How about the lawyer's activity in preparing the expert for testimony at trial or at a deposition? The response was that inquiry about that activity should be allowed. The reaction was that it is hard to see how distinct the other activities really are. How, for example, should a deposition be handled if the question is "Have you ever done any analysis of my expert's analysis of the case?" In general, it would seem that such inquiry would be permitted. Indeed, even if the answer is no, it might be permissible for the questioner to pursue the topic and ask for reactions on the spot to the other side's theories. "Would you agree that Dr. X's approach is also a valid way of analyzing the problem?" And wouldn't the exercise of carefully deconstructing the other expert's analysis almost unavoidably affect the expert's view of her own analysis, even if it actually strengthened the expert's commitment to that analysis? Is there really any way to separate work on the expert's own analysis from analysis of the other side's analysis?

Another member agreed that it may be impossible to distinguish in actual cases between work on "our" analysis and work on "their" analysis.

A different reaction was that the focus should be on the merits of the opinion, not a minute examination of the interactions with the lawyer. That might be partly accomplished by saying that lawyer-expert communications are not discoverable, except as to facts or data considered, the scope of the assignment, compensation and possibly a few other matters. A response to this idea was that there would be endless litigation about what's legitimately discoverable or shielded. Maybe the best we can do is to insulate draft reports. Otherwise we will have a sinkhole of litigation about the exceptions.

Another member volunteered that the discussion so far produced uneasiness about whether we have really moved the ball. Maybe a rule framed as a blanket prohibition with narrow specific exceptions could work. A reaction was that this will almost inevitably become a morass. The choice may end up being all or nothing -- a solid wall forbidding any inquiry at all, or the present system. A similar reaction was that fear about whether protection would be found will prompt the very sort of behaviors that we seek to make unnecessary.

The problem of questioning at trial further muddies the waters. Putting aside the difficulties of coming up with a bright line, a bright line will alter behavior only if it applies at trial also. One reaction to this is that actually trials are so rare that this contingency is not important. And barring discovery may in effect preclude inquiry at trial because it's too risky to ask questions in front of the jury without knowing what the answer will be. So barring discovery will, as a practical matter, take care of the problem of inquiry at trial. But it was objected that this turns the general attitude of discovery on its head. The idea of federal discovery was to avoid surprise at trial. So we allowed people to use discovery to find out before trial what the answers to the questions would be. Now the argument seems to be that we should rely on fear of surprise at trial to deter people from asking the questions. That's retrograde.

A reaction was that the big problem here is not what happens at trial but what happens in discovery. There is the seven-hour deposition of the expert in which six hours are spent on the lawyer-expert communications and one hour on the substance of the expert's opinion. That is what we need to worry about.

Perhaps the more fundamental problem is that 99% of the things we might consider protecting might reasonably be said to affect testimony at trial and therefore be legitimate subjects for questioning.

One alternative to trying to write a rule about discovery of lawyer-expert communications would be to adopt a rule insulating drafts from discovery and then, in the Note, explain that ordinarily the court should not permit discovery of lawyer-expert communications either. This would solve 85% of the problem. But it was objected that a Note should not be used to "promulgate" provisions that are not actually in the rule.

Regarding trial, it was pointed out that New Jersey must have solved this problem. The New Jersey lawyers mentioned no problem with opening things up at trial that were closed by the New Jersey rule during discovery.

The discussion turned to where to go next. The Advisory Committee meets in early April. Final agenda materials should be submitted by mid-March. There's a bit less than two months before that for further consideration. After discussion, the most promising way to proceed seemed to try to draft up alternative proposals. One would generally forbid discovery but enumerate exceptions to that general prohibition. The other would continue the "focused protection" approach discussed during the Dec. 11 conference call. Ideally, these alternative drafts will be accompanied with draft Note language, which can provide an indication about what more could be illuminated through a Note.

The next conference call is to be on Tuesday, Feb. 19, at 7:00 a.m. Pacific time. The new drafts should be circulated during the week of Feb. 11.

Notes of Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules
Dec. 11, 2007

On Dec. 11, 2007, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Judge David Campbell (Chair of the Subcommittee), Daniel Girard, and Anthony Valukas participated in the call. Judge Mark Kravitz (Chair of the Advisory Committee) and Chilton Varner were unable to participate. Also participating were Prof. Edward Cooper (Reporter of the Advisory Committee), Monica Finnell and Jeff Barr of the Administrative Office, Andrea Thomson (rules law clerk to Judge Lee Rosenthal), and Prof. Richard Marcus (Special Reporter of the Discovery Subcommittee).

Research on protection at trial
and in other litigation

Judge Campbell opened the discussion by calling attention to the memoranda from Andrea Thomson on application of work product protection at trial and from Monica Finnell and Jeff Barr on protection of work product in other litigation. Discussion considered the insights provided by this research. The memoranda show that there is some room for debate about the scope of protection of work product. Indeed, there seem to be some murky areas that explain the conclusion of both memos that certainty is not possible on these issues.

But in significant ways, the research is reassuring. Regarding protection in later litigation, for example, even though the protection may not apply in entirely unrelated litigation not involving the parties or lawyers for whom the work product was initially developed, those concerns do not seem significant for the current work. Lawyers are unlikely to take account of these possibilities in deciding whether to engage a second set of experts or adopt other strategies to protect against inquiry into communications with expert witnesses. The protection that would be afforded for related litigation is the significant thing.

The research on use at trial raises somewhat more significant questions. As a starting point, the Supreme Court's treatment of work product as applying at trial of a criminal case offers reassurance. But the "waiver" notion used by the Court could be unnerving. It was asked whether the situations in which questioning was allowed differed from the sort of questioning that would be allowed under an amended rule that permitted inquiry into facts or data considered by the expert in reaching the opinions being expressed, and the answer was that the cases upholding inquiry seemed to focus on that sort of material. So the discovery revisions under consideration seem to allow questioning parallel to what has been allowed at trial under the "waiver" notion.

Nonetheless, the Advisory Committee's Note in connection with the 1970 amendment adding Rule 26(b)(4) said that its provisions "repudiate the few decisions that have held an expert's information privileged simply because of his status as an expert. They also reject as ill-considered the decisions which have sought to bring expert information within the work-product doctrine." This comment suggests that the protections now being contemplated may significantly change the handling of what was put in place in 1970, not only the changes made to that regime in 1993. Indeed, pre-1993 cases are not uniform in denying discovery, although it may be that the majority view was that the materials now sought to be protected were not available through discovery.

A reaction about the 1970 amendment was that it addressed a very different situation from the one now presented. The question then was whether any discovery at all was to be allowed; arguably the only inquiry might be at trial, which would be both inefficient and unfair. And the 1970 solution was not to authorize the sort of broad-ranging discovery that has become commonplace since the 1993 amendments. Rather, the only guaranteed discovery was a rather succinct interrogatory response that resembles what we are presently considering requiring of experts who don't have to prepare a report under Rule 26(a)(2)(B). The broad report requirement now applicable to most expert witnesses goes far beyond what was considered in 1970, and is augmented by the right (not provided in 1970) to take the deposition of the expert witness.

There was also discussion of the implications of 28 U.S.C. § 2074(b), which was adopted as a part of the legislation enacting the Federal Rules of Evidence, and which provides that rules modifying evidentiary privileges become effective only when affirmatively enacted by Congress. There has long been some uncertainty about whether work product is a "privilege" in the sense that it must be respected at trial. From that perspective (bolstered by caselaw discussed in the memorandum from Andrea Thomson), one could argue that what was done in 1993 was not consistent with § 2074(b) because it changed protections without an affirmative act of Congress. But no such challenge has ever actually been made to the rule; the only point is that a change back toward the situation that prevailed before 1993 should no more involve §2074(b) issues than the 1993 change itself did.

The appropriate reaction to these issues appears to be to address the handling of protections provided in the rule at trial or in other litigations in the Committee Note. One approach might be to state specifically there that it is hoped that the protection accorded during discovery would be respected at trial, perhaps with a citation to cases embodying the general inclination to protect at trial.

An alternative or additional approach would be to emphasize that the disclosure requirement with regard to facts or data considered by the expert in reaching the opinions to be presented at trial would suffice for exactly the sorts of things that courts might allow to be pursued through questioning at trial. In that sense, then, the change being considered for Rule 26(b)(4)(B), narrowing the disclosure obligation, would fit in with a statement in the Committee Note that matters falling outside the scope of that disclosure requirement would not normally be suitable topics for inquiry at trial. The pretrial and trial provisions would therefore be parallel, and (as discussed further below), the authorization for inquiry during depositions would encompass materials beyond those covered by the disclosure requirement. "It looks like the thrust of the cases regarding inquiry at trial is on facts or data considered by the expert. That's what we're trying to do with discovery."

These issues are important, and the research efforts have illuminated them in significant ways. Some mention of them should be included in the report to be submitted to the Standing Committee for its January, 2008, meeting.

Location of protections

Discussion turned to the location of protections. Judge Campbell had circulated a revised provision for Rule 26(b)(4)(A). Professor Marcus had attempted a provision for Rule 26(b)(3)(A) to supply somewhat parallel protections there.

The possibility of including protections in Rule 26(b)(3) was explained as responding in part to a concern that dealing with the issue of use at trial and protection in other litigation might be eased by including the new provisions in that portion of the rule. Rule 26(b)(3) has come to

be known as the "work product" provision in the rules even though it nowhere uses the phrase. Moreover, it is clearly narrower than the protection afforded under *Hickman v. Taylor* since it applies only to documents and tangible things.

An important question, therefore, is whether there would be a benefit in putting provisions in Rule 26(b)(3). The question was asked whether the cases uncovered during the research that has been done indicated that the placement would be important. Some cases invoke (b)(3) and some refer to (b)(4), but it is not clear whether that is because the only place "work product" provisions now appear is in (b)(4). From the perspective of this research, the conclusion was that it might be that placement in (b)(3) would be helpful, but this does not seem a significant consideration.

Other considerations were advanced for including protections in (b)(4) instead of (b)(3). First, in 1970 the scheme was to put provisions about experts in (b)(4), not (b)(3). Second, trying to fit provisions into (b)(3) looks like a shoehorn effort. They really don't fit in (b)(3)(A). It might be that a new subsection of (b)(3) would be a better way to go, but the suggested location does not flow.

A reaction was that saying in (b)(4) that protections are "under (b)(3)" is awkward since (b)(3) is limited to documents and tangible things.

Another reaction was that (b)(4) is preferable. That is where lawyers would expect to find provisions about expert discovery. Another reaction was that if there were a focus group of practicing lawyers they would favor (b)(4) is the logical place.

The consensus appeared to be that (b)(4) was the preferable location.

Content of the protections

Before the call, Judge Campbell had circulated a revised possible amendment for Rule 26(b)(4)(A):

(4) Trial Preparation; Experts.

(A) *Expert Who May Testify.*

(i) *Deposition of expert witnesses.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(ii) *Protection for draft reports and certain communications between expert witnesses and retaining counsel.* The following are protected as trial preparation materials under Rule 26(b)(3)(A) and (B), regardless of whether they are contained in documents or other tangible things: drafts of the report required by Rule 26(a)(2)(B); communications between the expert and retaining counsel that reflect retaining counsel's mental impressions, conclusions, opinions, or legal theories concerning the litigation; communications between the expert and retaining counsel regarding aspects of the litigation other than the opinions to be expressed by the expert at trial.

As a starting point, it seemed generally accepted that draft reports should be protected, and that the protection should correspond to what is provided in Rule 26(b)(3)(A) and (B). That is the first feature of this proposal. The second is to provide protection for counsel's "core" work product even though included in communications between the expert and counsel. The third is to forbid inquiry into communications between counsel and the expert that are unrelated to the opinions to be expressed during trial. This provision, in particular, is designed to deal with the possible temptation to engage in behavior we wish to minimize, particularly hiring parallel sets of experts.

An initial suggestion was that the introductory material could be reworded: "Rule 26(b)(3)(A) and (B) protect as trial preparation material . . ." This revision found support.

Discussion turned to the second protection -- for opinion work product. How, it was asked, could that function fairly with regard to communications with the expert not covered by the third protection? Does it mean that if I say to my expert "The biggest problem with this case is the following aspect; can you find a way to present your opinion that gets around that problem?" Would that be covered? Wouldn't that be included among the things that we should allow to be pursued through discovery, even if it's not facts or data considered by the expert?

A reaction was that this is the hardest part of the package to adopt. Counsel might begin their interactions with experts by giving them counsel's memo ruminating about the issues raised in the case to acquaint the expert with the issues raised. Counsel could tell the expert "Keep this separate from everything else you do on the case," and guard against disclosure of it on the ground it contains mental impressions of counsel.

Another reaction was that there is always some weakness in a case that the lawyer is trying to work around. Talking to the expert about that issue is likely to be at the heart of lawyer-expert interaction. So "This will be at the heart of every close call." Moreover, such a standard might regularly require judges to review stacks of documents to determine whether they contain mental impressions of counsel. If that's what will occur if this provision is included, it might not serve a useful purpose because lawyers will nonetheless continue to engage in the tactics they presently use to avoid discovery of expert materials.

Responses included reminders of comments we have heard in the past. One was the suggestion during the Advisory Committee's November meeting that taking "or other information" out of current Rule 26(b)(2)(B) will solve many of the problems, perhaps even 80% of them, and that making this additional change might not add much. Another was that we keep coming back to an underlying choice between ensuring the broad discovery that the 1993 amendment endorsed and recognizing that very substantial costs that has actually entailed. In all likelihood this tension will never be entirely eliminated. On top of that, we will inevitably have fuzzy lines that must be applied to individual cases and can be fought over.

An alternative approach would be to go forward with only the first and third protections. This would avoid much of the difficulty produced by the "core" work product protection and might afford important benefits nonetheless. One advantage of such an approach would be that it could be viewed as a limitation on the scope of discovery, and would not need to get into questions of protection at trial or in connection with other litigation. This would be much cleaner.

A reaction concerning the third protection was that it seemed to be nothing more than an inversion of what had been discussed regarding facts and data considered. The response was that this provision was meant to permit discovery beyond the facts and data considered, although it would of course include such discovery. Rule 26(a)(2)(B) requires disclosure of all such matters. This provision provides protection only for communications "regarding aspects of the litigation other than the opinions to be expressed by the expert at trial." That would not, seemingly, include such hypothetical communications to the expert as "We'll break your arms unless you support our position" or "Find a way to increase the valuation by \$500,000." Among other things, it would permit inquiry into facts going to bias. Rather than forbidding any discovery about communications beyond facts and data considered in forming the opinion (the approach discussed during the last conference call), this approach contains a topical limitation on the protection. Nonetheless, it is still "half a loaf." Lawyers would still have an incentive to use tactics that guard against certain information coming to the attention of the expert.

A question was raised whether it would be sensible now to abandon efforts to protect "core" work product. This prompted a caution that it might be odd that only with regard to experts is such protection (afforded otherwise by Rule 26(b)(3)(B)) not available. In addition, not all members of the Subcommittee have yet been heard on this idea. For present purposes, the topic should be retained.

At the same time, this provision seems not to present an insoluble drafting problem without the "core" work product protections. With both the second and the third protections, one is left with overlapping protections, which can be a source of confusion. In addition, without the second protection, the concerns about use at trial abate. Still, a Committee Note could advert to issues of use at trial.

One drafting idea was to add "developing" to the formulation: "aspects of the litigation other than developing the opinions to be expressed."

With this discussion, the conclusion was to leave in the possibility of providing the second protection in a report to the Standing Committee, although the enthusiasm for the first and third protections is much firmer. Therefore, the Standing Committee report should be revised to include reference to the research work on use at trial and protection in other litigation, and the refinements of the drafting orientation during this call.

A further conference call was scheduled for Friday, Jan. 18, 2008, at 7:00 a.m. Pacific time.

TO: Professor Richard Marcus
CC: John Rabiej
FROM: Monica Fennell
Jeffrey Barr
DATE: December 7, 2007
RE: Temporal Scope of Work Product Protection in Subsequent Litigation

Work Product Protection Applies in Subsequent Litigation

In *Federal Trade Commission v. Grolier Inc.*, 462 U.S. 19, 28 (1983), the United States Supreme Court held that, under a Freedom of Information Act exemption similar to the work product protection in discovery under the Federal Rules of Civil Procedure, attorney work-product is exempt from mandatory disclosure without regard to the status of the litigation for which it was prepared. The Court noted that “Rule 26(b)(3) does not in so many words address the temporal scope of the work-product immunity....” *Id.* at 25. The “literal language of the Rule [26(b)(3)] protects materials prepared for *any* litigation or trial as long as they were prepared by or for a party to the subsequent litigation.” *Id.* At the time that the case came to the Court of Appeals, all of the courts of appeals that had decided the issue under Rule 26(b)(3) had determined that work product protection applied to subsequent litigation. *Id.* at 26. Justice Brennan’s concurring opinion in *Grolier* supports the policy argument that work product is a protection designed to foster preparation in a given case but that the protection should not expire

when the litigation ends, particularly in the context of related litigation about related topics. *See Grolier*, 462 U.S. at 31 (Brennan, J., concurring) (“[a]ny litigants who face litigation of a commonly recurring type—liability insurers, manufacturers of consumer products or machinery, large-scale employers, securities brokers, regulated industries, civil rights or civil liberties organizations, and so on—have an acute interest in keeping private the manner in which they conduct and settle their recurring legal disputes.”)

The Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Tenth Circuits have held that work product protection extends to subsequent litigation: *Hobley v. Burge*, 433 F.3d 946, 949 (7th Cir. 2006); *Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 703 (10th Cir. 1998) (“every circuit to address the issue has concluded that, at least to some degree, the work product doctrine does extend to subsequent litigation”); *In re Grand Jury Proceedings*, 43 F.3d 966, 971 (5th Cir. 1994); *U.S. v. Leggett & Platt, Inc.*, 542 F.2d 655, 659-60 (6th Cir. 1976); *In re Grand Jury Subpoena Dated November 8, 1979*, 622 F.2d 933, 935 (6th Cir. 1980); *In re Grand Jury Proceedings*, 604 F.2d 798, 803-4 (3d Cir. 1979); *In re Murphy*, 560 F.2d 326, 334-35 (8th Cir. 1977); *Duplan Corp. v. Moulinage et Retordie de Chavanoz*, 509 F.2d 730, 735-36 (4th Cir. 1974); *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 557 (2d Cir. 1967) (before Rule 26(b)(3)).

Numerous district courts have affirmed the “emerging majority view” that the work product privilege does extend to subsequent litigation and that the privilege endures after termination of the proceedings for which the documents were created. *See, e.g., Lawrence E. Jaffe Pension Plan v. Household Internat’l, Inc.*, 237 F.R.D. 176, 182 (N.D. Ill. 2006); *Jackson*

v. City of Chicago, No. 03 C 8289, 2006 WL 2224052, at *6 (N.D. Ill. July 31, 2006); *In re Grand Jury Subpoena*, 220 F.R.D. 130, 149-50 (D. Mass. 2004); *Winton v. Board of Comm'rs of Tulsa County, OK*, 188 F.R.D. 398, 401 (N.D. Okla. 1999); *Chem-Nuclear Sys.s, Inc. v. Arivec Chemicals, Inc.*, 978 F.Supp. 1105, 1107 (N.D.Ga. 1997); *Colonial Gas Co. v. Aetna Cas. & Sur. Co.*, 139 F.R.D. 269, 275 (D. Mass. 1991); *Macario v. Pratt & Whitney Canada, Inc.*, No. 90-3906, 1991 WL 1004, at *5 (E.D. Penn. Jan. 2, 1991); *Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp.*, 125 F.R.D. 578, 586-87 (N.D.N.Y. 1989); *United States v. O.K. Tire & Rubber Co.*, 71 F.R.D. 465, 468 n.7 (D. Idaho 1976); *cf. Religious Technology Center v. F.A.C.T.Net, Inc.*, 945 F.Supp. 1470, 1480-81 (D. Col. 1996).

Subsequent Litigation Usually Needs To Be Related For Work Product Protection To Apply

“A majority of courts have held...that the privilege endures after termination of the proceedings for which the documents were created, especially if the old and new matters were related...” *Hobley*, 433 F.3d at 949; *see also Niagara Mohawk*, 125 F.R.D. at 586-87 (documents prepared at direction of nuclear power plant owners or their attorneys in anticipation of litigation before New York Public Service Commission to determine prudence of costs for power plant were work product in suit by owners to recover for allegedly faulty design and construction of plant by field fabrication and piping contractors and construction manager which also served as architectural engineering firm; suit by owners was closely related to prudence proceeding). In *Employer's Reins. Corp. v. Clarendon Nat'l Ins. Co.*, 213 F.R.D. 422, 425 (D. Kan. 2003), the court held that discovery limitations protecting a non-testifying consulting expert engaged by an

insurer in its prior suit against a managing general agent extended to subsequent closely related lawsuit brought against the insurer by the reinsurer (under Rule 26(b)(4) examining “language that is virtually identical to that of Rule 26(b)(3)). *Cf. FDIC v. Cherry, Bekaert & Holland*, 131 F.R.D. 596, 604-605 (M.D.Fla. 1990).

The court in *Universal City Dev. Partners, Ltd. v. Ride & Show Eng'g, Inc.*, 230 F.R.D. 688, 691-92 nn.3-5 (M.D. Fla. 2005), noted a split among the circuits as to whether subsequent litigation must involve issues that are closely related to the case for which the documents were prepared initially or whether protection extends to all subsequent litigation. The court declined to decide between the two theories because the document was covered as work product under either theory. *Id.* at 693. Other courts have either declined to address this split or decided without addressing it. *See, e.g., Frontier* at 703 (work product protection extends to subsequent litigation but court did not need to decide whether subsequent litigation must be closely related).

Some courts require that, in order for work product prepared in earlier litigation to be protected from disclosure in subsequent litigation, there must be a close connection in parties or subject matter between the two matters. *See, e.g., Leonen v. Johns-Manville*, 135 F.R.D. 94, 97 (D.N.J. 1990); *see also In re Megan-Racine Associates, Inc.*, 189 B.R. 562, 574-75 (Bkrcty. N.D.N.Y. 1995) (“documents prepared for one litigation, which were or would have been shielded [as work product], have the same protection in a second litigation if the two litigations are *closely related* in parties or subject matter”); *see also Hercules, Inc. v. Exxon Corp.*, 434 F.Supp. 136, 153 (D.Del. 1977); *see also Midland Inv. Co. v. Van Alstyne, Noel & Co.*, 59 F.R.D. 134, 138 (S.D.N.Y. 1973) (“materials prepared for a prior litigation should not be discoverable in

a later case where the two actions are closely related”). In *Jumper v. Yellow Corp.*, 176 F.R.D. 282, 286 (N.D.Ill. 1997), the court stated that work product protection covered certain materials where there was “close time proximity between the two adversarial proceedings [arbitration and federal litigation] as well as the connected factual relationship between the proceedings.”

Some courts do not require such a close connection for the work product protection to apply in subsequent litigation. *See, e.g., Bituminous Cas. Corp. v. Tonka Corp.*, 140 F.R.D. 381, 388 (D. Minn. 1992) (in order for the work product doctrine to apply, the previous litigation does not need to be related to the case for which discovery is sought); *see also In re Grand Jury Subpoena*, 220 F.R.D. at 149-50; *see also Republican Party of North Carolina v. Martin*, 136 F.R.D. 421, 430 (E.D.N.C. 1991). The Eighth Circuit in *In re Murphy*, 560 F.2d at 335, asserted that work product documents prepared in terminated litigation are protected even if they do not discuss issues closely related to the issues in the pending litigation. “If work product is protected in related, but not unrelated future cases, an attorney would be hesitant to assemble extensive work product materials because of the concern that the materials will not be protected in later, unrelated litigation.” *Id.*

Work Product Protection May Be Invoked By The Client Or The Attorney

There is general agreement in the case law that work-product protection “may be invoked by either the client or the attorney,” *Hobley v. Burge*, 433 F.3d 946, 949 (7th Cir. 2006); *In re Grand Jury Proceedings*, 43 F.3d 966, 972 (5th Cir. 1994); *In re Grand Jury Proceedings*, 33 F.3d 342, 348 (4th Cir. 1994); *Rhone-Poulenc Rorer Inc. v. Home Indemnity Co.*, 32 F.3d 851, 866 (3rd Cir. 1994); *In re Sealed Case*, 29 F.3d 715, 718 (D.C. Cir. 1994); *In re Special September 1978*

Grand Jury, 640 F.2d 49, 62 (7th Cir. 1980); In re Grand Jury Proceedings, 604 F.2d 798, 801 (3rd Cir. 1979). See United States v. Smith, 502 F.3d 680, 689 (7th Cir. 2007). Jeff found no case to the contrary.

Parties and their representatives

In all of the above-cited cases as to who may invoke work product protection, the “client” – who it is agreed may assert the protection – is a party to the case in which discovery of allegedly protected materials is sought. Similarly, the “attorney” – who it is agreed may assert the protection – is counsel for a party to the case in which discovery of allegedly protected materials is sought. This reflects the language of Rule 26(b)(3), “Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative . . .” (emphasis added).

The power of the attorney to invoke work-product protection independently of the client recognizes that “[a]n attorney has an independent interest in privacy, even when the client has waived his own claim, as long as invoking the privilege would not harm the client’s interests.” Hobley, supra, 433 F.3d at 949. Thus, the attorney may invoke the protection, even when the client has not invoked it or has waived it, as long as invoking the protection will not harm the client’s interests.

In addition, some courts have held that if the client waives work-product protection, the attorney may invoke it only as to “core work product,” i.e., the attorney’s “mental impressions, conclusions, opinions, or legal theories,” protected by Rule 26(b)(3)(B). Buck v. Aetna Life & Casualty Co., 1992 WL 130024, at 2 (E.D. Pa. 1992); Catino v. Travelers Insur. Co., 136 FRD

534, 539 (D. Mass. 1991). See Rhone-Poulenc Rorer Inc., supra, , 32 F.3d at 866.

Jeff did not come across any case addressing the question whether work-product protection can be invoked by a “representative” of a party to the case in which discovery is sought other than the party’s attorney, i.e., a party’s “consultant, surety, indemnitor, insurer, or agent,” Rule 26(b)(3)(A). Perhaps this issue is unlikely to arise because when the potential objector is a “representative” of a party to the very case in which discovery is sought, the party and its attorney are present in the case to raise the issue of work-product protection. Perhaps the issue is more likely to arise in connection with a subpoena seeking allegedly protected materials from someone who is not a party to the case.

Non-parties

Courts are in general agreement that work-product protection can be invoked under Rule 26(b)(3) – as distinguished from under common law or under any other provision of the Federal Rules – only by a party, or a representative of a party, to the case in which the discovery is sought. In re Subpoena Served on the California Public Utilities Comm’n, 892 F.2d 778, 780-81 (9th Cir. 1989); Ramsey v. NYP Holdings, Inc., 2002 WL 1402055 (S.D.N.Y. 2002) (collecting cases); In re Polypropylene Carpet Antitrust Litigation, 181 FRD 680, 691 (N.D. Ga. 1998); Loustalet v. Refco, Inc., 154 FRD 243, 246-47 (C.D. Cal. 1993). Courts routinely conclude that the explicit terms of Rule 26(b)(3) leave no alternative.

As the court noted in *Doubleday v. Ruh*, 149 F.R.D. 601, 605-06 (E.D. Cal. 1993), there is “disconcerting language in *Grolier* that requires the potentially protectable work product prepared in previous litigation to have been prepared for a *party* in the subsequent litigation in

order to retain its protected status, [which] appears to disrupt somewhat the commonly accepted law that the work product privilege equally belongs to the attorney who prepared it, and not just the party for whom it was prepared.” *Id.* at 607 n.6. The *Doubleday* court held that the county could not avail itself of work product protection because the work product was never prepared for it, and the deputy district attorneys who prosecuted the prior criminal action could not assert work product protection in a later civil suit with respect to their files in the prior criminal action because they were not parties to the later case and because they were not representatives of a party in the later case for whom the work was prepared. *Id.* at 605-6. The court noted that the “potential economic vice of a less diligent attorney raiding the file of a previously diligent attorney is lacking in the context of a former criminal defendant, now plaintiff, seeking information from criminal files of a previous prosecution.” *Id.* at 607.

Moreover, in a recent series of decisions, a California district court ordered discovery regarding an expert’s work as a consultant on a related topic in a previous case. *Nidec Corp. v. Victor Co. of Japan*, No. C-05-0686 SBA (EMC), 2007 WL 2349323, at *1 (N.D. Cal. Aug. 14, 2007); *Nidec Corp. v. Victor Co. of Japan*, No. 4:05-CV-00686-SBA, Order Re IMS’s Letter of August 23, 2007, Doc. 774 (N.D. Cal. Aug. 28, 2007)(PACER). The court held that, even though work product protection can extend to subsequent litigation, there was no work product protection here because the materials were not prepared by or for a party to the subsequent litigation. *Id.* The third party who retained the expert in the prior litigation was not a party to the current litigation but objected to the discovery of the expert’s work for the previous case. *Id.* The *Nidec* court cited to *In re Cal. Pub. Util. Comm’n, to San Francisco Bay Area Rapid Transit*

Dist. v. Spencer, No. C 04-04632 SI, 2006 WL 2734284, at *2 (N.D. Cal. Sept. 25, 2006), and to *Boyd v. City and County of San Francisco*, No. C-04-5459 MMC (JCS), 2006 WL 1141251, at *4 (N.D. Cal. 2006). Nonetheless, another court in the same district recently affirmed the Seventh Circuit's assertion in *Hobley* that work product protection endures after the termination of the proceedings for which the document was created and that an attorney has an independent right to claim work product protection. See *Memry Corp. v. Kentucky Oil Technology, N.V.*, No. C04-03843 RMW (HRL), 2007 WL 832937, at *2 (N.D. Cal. March 19, 2007)(not for citation).

The 9th Circuit in *In re Subpoena*, *supra*, 892 F.2d 778, noted the argument that denying protection to a non-party “would defeat the key purpose of the rule, which is to safeguard the attorney-client relationship by enabling attorneys to record their thoughts and advice candidly and completely. But even if [this] correctly characterizes the policy of the rule, the language of the rule makes clear that only parties and their representatives may invoke its protection. We are not free to suspend the requirement.” *In re Subpoena*, *supra*, 892 F.2d at 781.

If this statement were the last word – i.e., if protection were available only under rule 26(b)(3) – then it would seem that work-product protection could be invoked only in the discovery context, and not by a non-party to the case from whom materials have been subpoenaed. Such a harsh doctrine surely would create a loophole through which work-product protections, however carefully crafted to protect attorney-expert communications, could sometimes disappear.

Many courts, however, have rejected any such conclusion. These courts agree that Rule 26(b)(3) itself does not apply outside the discovery context, but they recognize common-law

work product protection that exists separate and independent of the precise terms of Rule 26(b)(3). Thus a non-party to the case can invoke work-product protection on the basis of common law, even though such protection is unavailable under Rule 26(b)(3). Abdell v. City of New York, 2006 WL 2664313, at 3 (S.D.N.Y. 2006) (collecting cases). See In re Sealed Case, 856 F.2d 268, 273 (D.C. Cir. 1988); Hobley, supra, 433 F.3d at 949 (assuming that materials subpoenaed from a non-party law firm were potentially subject to work product protection); Carnes v. Crete Carrier Corp., 244 FRD 694, 697, 699 (N.D. Ga. 2007); In re Student Finance Corp., 2006 WL 3484387, at 7, 9 (E.D. Pa. 2006).

In *Federal Election Comm'n v. Christian Coalition*, 179 F.R.D. 22, 24 (D.D.C. 1998), the court stated that “[t]he more considered view appears to be that work product protection applies (1) to materials prepared for any litigation...and that (2) because the rule applies equally to one-time litigants and repeat players, the protection survives the termination of the litigation for which it was prepared...and that under the rationale of *Hickman*, non-parties should be able to assert work product privilege claims even though Rule 26(b)(3) is phrased only in terms of the parties.”

The court in Abdell, 2006 WL 2664313, at 3, analogized the common-law protection of non-party work product to the common-law protection of intangible work product: “[T]he work product doctrine as articulated in Hickman v. Taylor, 329 U.S. 495 (1947), is broader than Rule 26(b)(3). This is exemplified by the treatment of intangible work product. While Rule 26(b)(3) protects only ‘documents and tangible things,’ the cases uniformly hold that disclosure of an attorney’s mental processes – even if those thoughts have not been reduced to writing – generally

cannot be compelled.” (citations omitted).

These cases, however, rely on the inapplicability to common-law work product protection of the specific limiting language of Rule 26(b)(3), specifically Rule 26(b)(3)’s limitation to a party or a party’s representative. Other cases, as discussed above, have imported into their analysis of the common law protection the same requirement that only a party or a party’s representative can invoke the protection. Doubleday, supra, 149 FRD 601. The court in Nidec, supra, 2007 WL 2349323, does not state whether it is analyzing protection under Rule 26(b)(3), under common law, or both. One is left to wonder whether the specific language of Rule 26(b)(3), never intended to fully reflect and capture the broader scope of common law protection under Hickman, is nevertheless seeping into some courts’ analysis of common law protection, even when it arguably does not fit there.

A number of courts also have filled this gap by using Rule 26(c), which permits a court to issue a protective order “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense” Courts have reasoned that permitting disclosure of otherwise protected materials, certainly from a non-party who might in the future become a party to that case or to a related case, would impose an “undue burden” on the person from whom disclosure was sought. In re Subpoena, supra, 892 F.2d at 781 (“[t]o the extent that disclosure causes hardship to [a non-party], it is free to seek a protective order under Rule 26(c)"); Carnes, supra, 244 FRD at 697-99; In re Student Finance Corp., supra, 2006 WL 3484387, at 9-11; Ramsey, supra, 2002 WL 1402055 at 7; In re Polypropylene Carpet Antitrust Litigation, supra, 181 FRD at 692 (issuing a Rule 26(c) protective order to protect documents sought from a third

party that “would constitute attorney work product as defined by Rule 26(b)(3) if [the third party] was a party to this litigation”); M.F. Bank Restoration Co. v. Elliott, Bray & Riley, 1994 WL 719731, at 7 (E.D. Pa. 1994); Doubleday, supra, 149 FRD 601 at 607 n. 6; Basinger v. Glacier Carriers, Inc., 107 FRD 771, 772-73 (M.D. Pa. 1985).

The court in In re Student Finance Corp., *supra*, 2006 WL 3484387, at 11, also relied on Rule 45 to accord protection to subpoenaed third-party work product materials. The court explained, “Rule 45 expressly provides that the court from which a subpoena has issued shall quash or modify the subpoena if it ‘requires disclosure of privileged or other protected matter and no exception or waiver applies.’ . . . Rule 45 does not define what privileges and protections are to be enforced under its terms, but the language is broad enough to include protection against discovery of third-party work product in appropriate cases. Nothing in Rule 45’s history or text indicates that it was intended to incorporate Rule 26(b)(3)’s restriction of work product to parties. The Advisory Committee Notes to the 1991 revisions to the rule indicate that the authority to issue protective orders under Rule 45 was intended to track the general protective order provisions of Rule 26(c), but do not mention the work product provisions of Rule 26(b).” In re Student Finance Corp., *supra*, 2006 WL 3484387, at 11. Carnes, supra, 244 FRD at 697-99, stated its agreement with this reasoning.

But Rule 45 presumably would be merely a procedural vehicle for vindicating common law work product protection. It does not seem that Rule 45 would be of much use if common law protection were deemed so narrow as not to encompass third-party work product.

In one case the court did permit invocation of work product protection by a subpoenaed

third-party who was not an attorney. In Basinger, supra, 107 FRD 771, the court held that it would issue an appropriate protective order, sought not by an attorney but by an insurance company and its assistant claims manager, to protect work product protected materials prepared in anticipation of litigation by the insurance company and the assistant claims manager. Jeff did not find any other cases addressing that issue.

The case law on third-party work product protection, in conclusion, is fundamentally inconsistent and seemingly impossible to harmonize. Many cases recognize protection for third parties, others (like Nidec, supra, 2007 WL 2349323) do not. Whether or not Nidec is correctly decided, the Nidec court's statement that "there is no dispute [in the law] that only the party for whom the product was prepared may assert the privilege in subsequent litigation," 2007 WL 2349323, at 1, is plainly incorrect.

MEMORANDUM

DATE: December 3, 2007
TO: Professor Richard Marcus
FROM: Andrea Thomson
CC: Judge Lee H. Rosenthal
SUBJECT: Protection of attorney-expert communications at trial

This memorandum addresses certain research questions that arose during the November 2007 Civil Rules Advisory Committee meeting with respect to potential changes to rules governing disclosure of attorneys' communications with testifying experts. The primary issue that has been the focus of my research thus far deals with the application of work product protection at trial. In particular, when discussing potential protections to attorney-expert communications, the question arose as to whether any such protection in Rule 26 could extend to trial because a protection that did not endure through the trial may not effectively deter the behaviors that such protections would be designed to avoid (*i.e.*, the retention of multiple experts and the artificial means of communicating with experts to avoid creating discoverable documents). In 1975, the Supreme Court dealt with the issue of protection of attorney work product and expert work product at trial in *United States v. Nobles*. However, as noted in your email and memorandum, a lot has happened since that case was decided, including the adoption of the Federal Rules of Evidence and the possible pertinence of Rule 612(2) of those rules. Your memo regarding the application of work product protections at trial identified outstanding questions on this issue, including: (a) whether *Nobles* has been followed, (b) whether a revision to Rule 26(b)(3) would also apply at trial (versus *Hickman v. Taylor* itself), (c) whether interactions with an expert should be regarded as protected by *Hickman* itself, and (d)

whether there are any cases involving invocation of work product protection at trial to limit questioning of an expert witness. This memo provides an overview of the results of my initial research on these issues, and a discussion of some of the case law I have found that may provide some guidance on these issues is described below.

I. Whether *Nobles* Has Been Followed

In *U.S. v. Nobles*, 422 U.S. 225 (1975), the Supreme Court recognized that work product protection extends to trial. In that case, the defense had hired an investigator who interviewed the prosecution's key witnesses. The investigator created a report, which was largely inaccessible to the government's attorneys. The defense called the investigator as a witness, and the court ordered that the report be produced to the prosecution. *Id.* at 229. The defense refused to produce the report, and the court then refused to permit testimony from the investigator regarding his interviews with the prosecution's witnesses. *Id.* Regarding the protection of work product at trial, the court stated:

Moreover, the concerns reflected in the work-product doctrine do not disappear once trial has begun. Disclosure of an attorney's efforts at trial, as surely as disclosure during pretrial discovery, could disrupt the orderly development and presentation of the case. We need not, however, undertake here to delineate the scope of the doctrine at trial, for in this instance it is clear that the defense waived such right as may have existed to invoke its protections.

Id. at 239. On the waiver issue, the court found that “[r]espondent, by electing to present the investigator as a witness, waived the privilege with respect to matters covered in his testimony.”¹

¹ On this point, it has been noted that while testimonial use of privileged information may waive an evidentiary privilege, it is not proper to refer to the waiver as a waiver of work product protection. See Jeff A. Anderson et al., *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 889 (1983). Anderson suggests that waiver of work product should not occur when a party discloses work product materials. *Id.*

In a case where a party makes testimonial use of work product materials, a court would still hold that the party has waived protection of the documents involved, but only as to an evidentiary privilege, not as to work product immunity. The distinction is significant. The inherent unfairness associated with

Id. Justice White concurred, but wrote separately to express his view that *Hickman v. Taylor* had been viewed as a limit on the ability to obtain pretrial discovery, but not as a limit on the discretion of a judge to enter evidence at trial. *Id.* at 244, 246.

While the concurrence's strong disagreement in *Nobles* with the proposition that work product protection is available at trial may be enough to give at least some pause as to the doctrine's continued applicability at trial, at least some courts have subsequently followed the majority's view that work product protection extends beyond pre-trial discovery. For example, in *Nichols v. Bell*, 440 F. Supp. 2d 730 (E.D. Tenn. 2006), the court acknowledged that *Nobles* had recognized that work product protection extends to trial, but noted that no Supreme Court cases have since determined its scope at trial. *Id.* at 815. The *Nichols* court found that requiring disclosure of the memoranda prepared by the defendant's testifying medical expert was not a violation of the attorney work-product doctrine because the expert had testified on behalf of the habeas petitioner during the sentencing phase of trial. The court found: "Applying the principles of *Nobles* to the instant case, the state court's conclusion preventing petitioner from arguing the work-product doctrine to sustain a unilateral testimonial use of work product was not contrary to, nor an unreasonable application, of federal law." *Id.* at 816. Thus, in addition to approving of *Nobles*'s holding that work product protection extends to trial, the court also seemed to approve of the *Nobles* holding that testimonial use of work product at trial will waive any protection. In this case, the "testimonial use" seemed to involve testimony at trial regarding the expert's examination of the petitioner and interviews with

'testimonial use' of privileged materials that necessitates waiver of evidentiary privilege is not present when disclosures are made to third parties in the course of trial preparation. Calling such a waiver of evidentiary privilege a waiver of work product immunity is a misnomer.

Id.

others. In light of this testimonial use, the court found it appropriate to require disclosure of memoranda prepared by the expert in connection with the litigation. The issue in the *Nichols* case was whether the memoranda prepared by the expert were discoverable when the expert was to take the stand, so that court did not delve into the question of how far questioning could extend at trial with respect to the expert's communications with the retaining attorney or what other documents created by the expert, if any, might still be covered by work product protection.

In addition to finding no violation of work product protection by the disclosure of the memoranda, the *Nichols* court also approved of the state court's requirement that the petitioner turn over memoranda prepared by the testifying expert regarding his interviews with witnesses on the basis that the expert had failed to prepare a report and that the petitioner had failed to notify the prosecution that he intended to call a psychologist until after trial had begun. *Id.* at 816–17. The court found that the prosecutor had a substantial need for the material because he was prevented from rebutting the expert's testimony by retaining his own expert and that the state court had authority to impose a sanction. *Id.* at 817.

Other courts have likewise appeared to follow the *Nobles* holding that work product extends through trial, although some have done so simply by recognizing that testimony would waive any work product protection, rather than by explicitly stating that work product extends through trial. For example, in *Holder v. Gold Fields Mining Corp.*, 239 F.R.D. 652 (N.D. Okla. 2005), the defendant's consulting expert was listed as a potential testifying *fact* witness, and the opposing party sought to discover any documents related to the expert's proposed testimony. The defendants claimed that the requested documents were protected by the work product doctrine and that they would not know if and how the expert would testify at trial until after the plaintiffs had completed

their case-in-chief. *Id.* at 657. The court held that the documents were not *yet* discoverable because there would be no waiver *until the witness took the stand*. *See id.* at 659. The court concluded, however, that once the witness testified, documents he relied on in forming his opinion would become discoverable. The court stated that “clearly a witness cannot offer testimony based on documents that he simultaneously claims are protected work-product.” *Id.* (citing *Nobles*, 422 U.S. at 239–40). The court held that “[i]f a witness testifies in reliance on work-product documents, a waiver of work product will be found.” *Id.* However, the court concluded that simply listing the expert as a witness was not sufficient to find waiver, seeming to rely on the fact that until there was testimony, there was no disclosure of the work product such that it placed at issue all documents relating to the same subject matter. *Id.* at 659–60. The court seemed to imply that the result might have been different if the consultant had been listed as a proposed testifying expert witness (rather than a testifying fact witness) because under Rule 26(a)(2) all documents he considered in forming his opinion would be discoverable. *See Holder*, 239 F.R.D. at 660. The court concluded that if there was any doubt as to whether the witness was acting as a consultant or expert when he considered particular documents, it would be resolved in favor of discovery. *Id.* Thus, the court seemed to recognize that work product protection extended to trial, but that there could be a waiver through testimonial use of work product. The court seemed to believe that with respect to testifying expert witnesses, that waiver would extend to anything considered in forming the opinion,² but with respect to fact witnesses, the waiver might extend to documents related to the subject matter of the testimony.

² Because the court relied on Rule 26(a)(2) in reaching this conclusion, it is not clear that the result would be the same in the absence of the language in that rule providing for broad discovery of testifying expert witnesses.

In another analogous case, the court distinguished *Nobles* on the grounds that the expert in the case at bar did not testify at trial. See *John Doe Co. v. United States*, 350 F.3d 299 (2d Cir. 2003). In that case, the government filed a motion to compel the production of notes taken by the attorneys for the company being investigated by the grand jury during meetings with officials from the Bureau of Alcohol, Tobacco, and Firearms (“ATF”). See *id.* at 300. After the investigation began, the company’s attorneys submitted a letter to the U.S. Attorney’s Office, arguing that the company had proceeded in good faith and that it had relied on statements made by ATF officials. *Id.* at 301. The government argued that this letter constituted a waiver of any privilege attaching to attorney notes made in connection with meetings with ATF officials. *Id.* The court held that there was no unfairness in preventing discovery because unlike in the scenario where the witness is providing testimony that needs to be rebutted, the government was not prejudiced when the company submitted its letter to the U.S. Attorney’s office. *Id.* at 304. The court distinguished *Nobles* because the company had not offered testimony *as part of its defense at trial*, and held that telling the U.S. Attorney of its position was not sufficient to waive any privilege. *Id.* at 304–05. Although the *John Doe Co.* case did not address waiver of work product with respect to a testifying expert, its holding that there was no waiver of the attorney’s work product here because there was no testimony at trial regarding the work product seems to reinforce the *Nobles* holding that work product protection does in fact extend through trial absent waiver (which can be accomplished by testimonial use of the work product, among other things).

In sum, it would appear that several courts have followed the holding in *Nobles* that work product protection extends past discovery and into trial, although the scope of the protection at trial remains unclear. The courts that recognize that work product protection extends to trial also seem

to acknowledge that “testimonial use” of work product will waive the protection. However, it is not entirely clear exactly what “testimonial use” entails and how broad the waiver will be when there is “testimonial use.” For example, it may be that there is no waiver until the expert actually testifies (as opposed to when he is identified as a potential witness). As another example, it is not clear if putting an expert witness on the stand will open cross-examination up to anything and everything that the expert knows or whether it is simply with respect to material “regarding the same subject matter” as the testimony, or otherwise limited to facts and data considered by the expert.

One difficulty lies in the fact that courts tend to protect the right to cross-examine an expert witness to determine how he arrived at his opinion, and such cross-examination would not necessarily be limited to the facts and data considered. For example, a cross-examiner might inquire into the extent of the retaining attorney’s involvement in developing the expert’s opinion or suggestions made by the retaining attorney, arguing that these issues are relevant to bias and/or the credibility and validity of the expert’s opinion. It seems unlikely that all courts would limit this type of cross-examination on an objection based on work product, because most courts are likely to find that any work product protection that extended to trial was waived by putting the expert on the stand, at least with respect to any inquiries into the credibility/validity of the opinion. Given the freedom that courts grant counsel in cross-examination of an expert witness, it seems unlikely that a court will allow the party presenting the witness much latitude in claiming work product when the witness is on the stand if the testimony has any relation to the work product. Even if a court were to limit cross-examination to questions regarding the facts and data considered by the expert, such a line of questioning might impinge on the expert’s communications with counsel, and it is difficult to estimate where a court might draw the line in a particular case. For example, in a scenario discussed

during the November 21, 2007 call, in which the attorney directs the expert to conduct tests to be used in cross-examining the other side's expert, the permissible cross-examination of the expert conducting the tests might include inquiry into the tests directed by the attorney, even though they were not part of the expert's opinion for his testimony. It may be difficult to draw the line regarding what information was considered for the testimony and what was considered for other consulting purposes.

Yet another difficulty arises in that it is complicated to determine the impact of the 1993 amendments to Federal Rule of Civil Procedure 26 with respect to discovery of expert materials/communications. Given the report requirement in the rule and the statement that opposing parties are entitled to "data or other information considered by the witness in forming the opinions," it is unclear if decisions in the last 14 years permit broad discovery of testifying experts because of the language in the amended rule alone or if the same result would occur based on the common law regarding work product and waiver. As a result, it is useful to examine cases decided before the 1993 amendments to determine whether courts permitted discovery of attorney-expert communications or expert work papers prior to the addition of the report requirement. A circuit opinion addressing this issue prior to 1993 that contains useful analysis is *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3d Cir. 1984). In that case, the Third Circuit held that core work product is not discoverable simply because an attorney shows it to a testifying expert. The court held that the possibility of discovering in cross-examination that the expert's opinion originated with an attorney's thoughts was not sufficient to justify ordering disclosure of documents containing core attorney work product. *See id.* at 595 ("Even if examination into the lawyer's role is permissible, an issue not before us, the marginal value in the revelation on cross-examination that the expert's view may have

originated with an attorney's opinion or theory does not warrant overriding the strong policy against disclosure of documents consisting of core attorney's work product."'). The court did find that if the documents contained facts and data, a party could not avoid production simply by co-mingling the facts and data with an attorney's core work product. *See id.* In such a situation, the party would be required to redact any core work product and produce the remainder of the document revealing facts or data considered. *Id.* Judge Becker dissented, disagreeing with the majority's position that discovering whether the expert's view originated with an attorney is only of "marginal" value. *Id.* at 598. Judge Becker thought that even the majority's view would permit cross-examination regarding the attorney's role in shaping the expert's opinion, but that the issue was whether extrinsic evidence could be used to impeach the expert who denies that his opinion was shaped by an attorney. *Id.* Judge Becker felt that the majority's almost exclusive ban on extrinsic evidence containing core work product that was considered by the expert was contrary to other authority and to FED. R. EVID. 612. *Bogosian*, 738 F.2d at 599. Specifically, Judge Becker pointed to the opinion in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613 (S.D.N.Y. 1977), where it was held that core work product shown by counsel to a witness waived the work product protection. *Id.*

The Northern District of California took a view similar to that of Judge Becker's in *Bogosian* in *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384 (N.D. Cal. 1991). In that case, the court held that communications between an attorney and a testifying expert were discoverable. The case involved a deposition of the expert (rather than testimony at trial), and the opposing party had sought to compel answers and documents related to the expert's communications with counsel. *Id.* at 385. The court found that after weighing the potential increased efficiency produced by precluding disclosure against reducing the risk of compromising the independence of experts, the choice was

easily in favor of disclosure of such communications, even if disclosure would reveal work product. *See id.* at 394. The court determined that there was much to be gained by finding out if the attorney shaped the expert's opinion, *see id.* at 396, a holding that would likely permit cross-examination regarding more than "facts or data considered" by the expert.

In another pre-1993 case, the Western District of Missouri found that a testifying expert's communications with counsel were discoverable. *See William Penn Life Assurance Co. of Am. v. Brown Transfer and Storage Co.*, 141 F.R.D. 142 (W.D. Mo. 1990). In that case, third-party defendants sought to compel the plaintiff's expert to answer deposition questions regarding the content of the expert's communications with plaintiff or plaintiff's counsel regarding the expert's opinion of the conduct of one of the third-party defendants. *Id.* at 142. The court agreed with the dissent in *Bogosian* and found that the third-party defendants were entitled to "explore the effect those communications [between plaintiff's counsel and the expert] had on the expert's formation of his opinion." *Id.* at 143.

Similarly, in *Inspiration Consol. Copper Co. v. Lumbermens Mut. Cas. Co.*, 60 F.R.D. 205 (S.D.N.Y. 1973), the court permitted discovery of documents created by the expert with respect to claims on which it had been indicated that he might be called to testify. In that case, an accountant wore three different hats in the litigation: (1) as a longtime auditor; (2) as an expert employed specifically for the litigation and who would not testify with respect to certain claims; and (3) as an expert who might testify at trial regarding claims that might be made in the alternative. *Id.* at 208–09. The court held that "for purposes of Rule 26(b)(4)(B) an independent accountant may wear two hats, that of a general auditor subject to normal discovery, and that of an expert specially retained for litigation, in which case discovery respecting preparation of the claim is limited by Rule

26(b)(4)(B) if he is *not* to be a witness at trial.” *Id.* at 210 (emphasis in original). The court concluded that discovery was prohibited with respect to documents or opinions prepared in connection with the claim on which the expert would not testify. *Id.* However, the court stated that its holding was “not to be construed . . . as an anticipatory ruling on the scope of cross examination of Mr. Smith or of any other Price Waterhouse person who appears as a witness.” *Id.* With respect to the alternative claim on which the expert might be called to testify, the court permitted discovery, but again emphasized that it was not ruling on admissibility or the scope of cross examination at trial. *Id.* at 211.

In addition, another pre-1993 case in the Northern District of California permitted discovery of all documents that were given to a testifying expert. *See Mushroom Assocs. v. Monterey Mushrooms, Inc.*, 1992 WL 442898 (N.D. Cal. 1992). In that patent suit, one of the co-inventors was designated as a testifying expert, and the defendants sought to discover all documents to which he had access, regardless of whether they were used in formulating his expert opinion. *Id.* The court ordered disclosure of all documents that the expert considered, whether they were rejected or relied upon, and noted that “considered” meant that the expert had reviewed the documents in preparation for his expert testimony. *Id.* The court declined to grant access to all documents he saw during the life of the patent (*i.e.*, in his role as co-inventor rather than his role as testifying expert) that he did not consider in forming his expert opinion. *Id.*

Finally, yet another pre-1993 district court case determined that an expert’s documents were not protected under the work product doctrine. *See United States v. Real Property Known and Numbered as 2847 Chartiers Ave., Pittsburgh, PA*, 142 F.R.D. 431 (W.D. Pa. 1992). In that case, the government retained an expert to examine alleged gambling machines, and the expert prepared

a report that contained facts known and opinions held by the expert in connection with his examination of the machines. *Id.* at 432. The government contended that the report was not discoverable because it was work product prepared in connection with litigation and was thus protected under *Hickman*, as codified in Rule 26(b)(3). *Id.* at 433. The court held that *Nobles*'s holding that attorney work product extends to material prepared by agents for the attorney did not mean that an expert's knowledge and opinions become attorney work product simply because the expert is retained by an attorney in anticipation of litigation. *Id.* The court ruled that expert discovery was governed by Rule 26(b)(4) rather than 26(b)(3) and that most authority recognized that 26(b)(3) "work-product privilege" does not apply to discovery of experts' material. *Id.* at 434. The court also noted that materials prepared by an expert in anticipation of litigation were not protected even prior to the 1970 amendment adopting sub-section 26(b)(4). *Id.* (citations omitted).

Overall, it appears that the majority of pre-1993 cases permit discovery of expert communications with counsel and expert-created documents once the expert testifies at trial. This may mean that the 1993 amendments to Rule 26 regarding expert disclosures are not the sole reason for courts' unwillingness to shield attorney-expert communications or other documents shared with experts from discovery. It appears that the trend before 1993 was to allow access to these materials and communications, so it may be that the 1993 amendments codified the common law practice of allowing access to these documents. The relevance of investigating the effect of the 1993 amendments is that if the practice prior to those amendments was to shield certain expert materials or communications, and the effect of the 1993 amendments was to remove that shield, then the authority to replace the shield is more apparent. That is, if common law regarding work product applied to protect expert materials prior to the 1993 amendments, then the Committee should be able

to codify that common law. If the Rules Committee had the authority in 1993 to create a rule that in effect removed certain protections for expert documents and communications, then the Committee ought to have the authority to undo the effect of that amendment and return practice regarding experts to its pre-1993 state. However, an initial review of some of the pre-1993 case law on this topic reveals that it is not clear that removing the effect of the 1993 amendments would be to deny access to expert materials and communications.

II. Whether Rule 26(b)(3) or *Hickman* Would Apply to Work Product Protection at Trial

Another issue relevant to the analysis of potential amendments to rules governing expert discovery is, assuming work product protection does in fact extend through trial, whether a revised version of Rule 26(b)(3) could provide that protection at trial or whether *Hickman* itself would apply. A protection found solely in Rule 26 would appear to apply to discovery matters, not trial, particularly given the current title of that rule: “General Provisions Governing Discovery; Duty of Disclosure.” Thus, absent further explanation, a protection for expert communications placed in Rule 26 would not necessarily apply through trial based solely on the text of the rule. On the other hand, to the extent that *Hickman* provides work product protection through trial, it is possible that Rule 26 could be read to include that same protection, given some courts’ language stating that Rule 26 incorporates *Hickman*. See *Seal v. Univ. of Pittsburgh*, 135 F.R.D. 113, 114 (W.D. Pa. 1990) (“[T]he protection of work product arising from the case of *Hickman v. Taylor* . . . has been supplanted by Rule 26(b)(3) of the Federal Rules of Civil Procedure” (emphasis added)); *Airheart v. Chicago and N.W. Transport. Co.*, 128 F.R.D. 669, 671 (D.S.D. 1989) (“The work product doctrine had its genesis in *Hickman v. Taylor* and is now fully expressed in Rule 26(b)(3) of the Federal Rules of Civil Procedure” (emphasis added)); but see Gregory P. Joseph,

Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure, 164 F.R.D. 97, 106 n.18 (1996) (“Rule 26(b)(3) does not fully codify the work-product protection recognized in *Hickman*.” (citing MOORE’S FEDERAL PRACTICE ¶ 26.15 at 26-292, 26-293 (1995))). However, if it is really true that *Hickman* has been fully codified in Rule 26, it might be argued that there is no protection for work product at trial because Rule 26 may govern only discovery and its replacement of *Hickman* may leave no protection remaining for work product at trial. Nonetheless, given that many courts appear to have approved of the *Nobles* holding that work product protection applies at trial, it is likely that some protection remains through trial.

At least one court has recognized that while Rule 26(b)(3) only protects work product in discovery, *Hickman* applies to protect work product at trial. See *Stansberry v. Schaad Prop.*, 1991 WL 11015266 (W.D. Va. 1991). In that case, the court confronted the question of whether an expert who was consulted by the plaintiffs but not ultimately retained could be called at trial by the defendants without violating the work product doctrine. *Id.* at *1. The court found that allowing the defendants to call the expert at trial would not be a *per se* violation of the work product doctrine, but held that the court would prevent against disclosure of work product at trial. *Id.* The court recognized that *Hickman* was “codified, in part, for pretrial discovery of documents and tangible objects by Federal Rule of Civil Procedure 26(b)(3)” *Id.* at *2. The court then cited *Nobles* for the proposition that work product protection exists at trial. *Id.* (citing *Nobles*, 422 U.S. at 239). The court concluded: “Thus, although Rule 26 is generally inapplicable at trial, the work-product doctrine as developed at common law controls.” *Id.* This 1991 holding shows that, at least prior to the 1993 amendments, work product protection was recognized at trial for communications with experts under the common law. Even if the 1993 amendments have been interpreted to remove much of the

protection for the attorney-expert communications, both before and during trial, if the common law protected those communications before the amendments, then presumably additional amendments to the rules could recapture that protection both during discovery and at trial.³ However, it also appears that the rule may not be able to do all the heavy lifting itself because it may only apply to pre-trial discovery. As discussed in the November 21, 2007 conference call, the amended rule could potentially provide discovery protection for attorney-expert communications, and encourage (via committee note) the courts to follow suit with respect to protecting those communications at trial as well.

Another reason that Rule 26(b) may not be able to officially protect work product at trial on its own is that an exclusion of relevant testimony at trial would appear to be an evidentiary exclusion rather than a limit on discovery. The relevant statutory scheme provides: “Any . . . rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.” 28 U.S.C. § 2074(b). While it is not clear exactly what constitutes an “evidentiary privilege,” a rule directed to the exclusion of otherwise relevant evidence at trial is likely to fall into the category of modifying an evidentiary privilege. *See* 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5423 (1980).

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

³ As noted earlier in this memo, this appears to be a protection that is waivable by calling the expert as a testifying expert at trial, although the extent of waiver remains unclear.

Id. (citing *Nobles*, 422 U.S. 225). Thus, if the revised rule does not specify that it applies at trial, it is not clear that it would automatically apply at trial, and if the rule does specify that it applies at trial, then it might be subject to criticism for avoiding the procedure required by section 2074(b) for creating or modifying a privilege. See Gregory P. Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 106 (1996) (Under some interpretations, “Rule 26(a)(2)(B), alone or in conjunction with Rules 26(b)(3)-(4), makes waiver of core work-product an unavoidable cost of putting an expert forward to testify. If core work-product is an ‘evidentiary privilege,’ and if mandating the waiver of this ‘evidentiary privilege’ constitutes ‘abolishing or modifying’ it, § 2074(b) has to that extent been contravened and Rule 26(a)(2)(B) is to that extent invalid. Because § 2074(b) has not been construed, the meaning of these operative phrases is not settled.”).

III. Whether Interaction With Experts Should Be Regarded as Protected by *Hickman* Itself

The question has also been raised as to whether interaction with experts should be regarded as protected by *Hickman*. If so, then it may be easier to overcome challenges to a proposed amendment because the amendment would essentially be a codification of an already existing doctrine. The committee notes to the 1970 amendments to Rule 26, which substantially codified *Hickman*, indicate that *Hickman* left open the issue of whether the work product doctrine extends to the preparatory work only of lawyers. FED. R. CIV. P. 26 advisory committee’s note (1970 Amendment). The post-1970 case law does not clarify this issue because once Rule 26 substantially codified *Hickman*, courts largely relied on the rule itself to determine the scope of expert discovery, not on *Hickman*, making it difficult to determine if *Hickman* itself provides protection for these communications and interactions. See, e.g., *United States v. Real Property Known and Numbered*

as 2847 Chartiers Ave., Pittsburgh, PA, 142 F.R.D. 431 (W.D. Pa. 1992) (“Chartiers”) (noting that the *Hickman* principles have been codified in Rule 26(b)(3) and that expert discovery is governed by Rule 26(b)(4) rather than 26(b)(3)). In *Chartiers*, the court noted that the advisory committee note to Rule 26 “expressly states that the committee ‘reject[ed] as ill-considered the decisions which have sought to bring expert information within the work product doctrine.’” *Id.* at 433 (citing FED. R. CIV. P., West’s 1991 Revised Edition at 87). There is other language in the committee note that indicates that there were very few decisions before the 1970 amendments that protected expert information from discovery. *See* FED. R. CIV. P. 26 advisory committee notes (1970 Amendments) (“These new provisions of subdivision (b)(4) repudiate the few decisions that have held an expert’s information privileged simply because of his status as an expert.”) (citing *Am. Oil Co. v. Penn. Petroleum Prods. Co.*, 23 F.R.D. 680, 685–86 (D.R.I. 1959)). The fact that *Hickman* was largely codified in Rule 26, coupled with the fact that the committee notes disapproved of strong discovery protections for expert materials, make it difficult to assess whether *Hickman* actually provided that protection and the amended rule then reduced it,⁴ or if strong protection for expert materials never truly existed.

IV. Case Law Involving Invocation of Work Product At Trial to Limit Questioning of an Expert Witness

I have not encountered any cases directly involving invocation of the work product doctrine at trial to limit questioning of an expert witness. Most of the relevant case law focuses on obtaining testifying experts’ documents and draft reports, which seem to be generally discoverable under the

⁴ Clearly, some protection of certain expert materials did survive the amendments. *See, e.g., Krisa v. Equitable Life Assurance Soc.*, 196 F.R.D. 254, 259 (M.D. Pa. 2000) (“The policy reasons supporting the ‘bright-line’ rule in favor of disclosure of materials disclosed to an expert are not compelling and ignore the policy considerations that compel protection of core work product.”).

current version of the rule. Of the cases I have seen thus far, the one most relevant to this issue is *New Mex. Tech. Research Found. v. Ciba-Geigy Corp.*, 1997 WL 576389 (D.R.I. 1997), which involved inquiry into work product during the deposition of a testifying expert. In *Ciba-Geigy*, the plaintiff's testifying expert was deposed and opposing counsel inquired into whether the plaintiff's counsel had expressed to him their views on the case and on infringement of the patent-in-suit, and whether they had discussed their interpretation of relevant claim terms used in the patent. *Id.* at *1. The questions called for only a "yes" or "no" answer, but the plaintiff's counsel objected on the basis of work product. *Id.* The parties agreed that follow-up questions would have gotten into work product, but apparently disagreed regarding the initial questions. *See id.* In addition to objecting to questioning, the plaintiff's counsel withheld several documents, including: (1) several authored by the expert having notes made by the expert during conversations about the case with plaintiff's counsel; (2) a document authored by the expert and the plaintiff's counsel, described as a "draft supplemental expert report reflecting mental impressions of counsel; and (3) a document authored by the plaintiff's counsel with a copy sent to the expert described as "notes reflecting mental impressions of counsel." *Id.* at *2. The defendants took the position, relying on *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384 (N.D. Cal. 1991), that any communications, written or oral, given by counsel to a testifying witness, are discoverable, even if they would ordinarily be protected by the work product doctrine. *See Ciba-Geigy*, 1997 WL 576389, at *3. The court rejected this approach, finding more compelling the reasoning in *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289 (W.D. Mich. 1995), which would protect an attorney's core work product. *Ciba-Geigy*, 1997 WL 576389, at *5. However, the court noted that even the *Haworth* analysis "does not eliminate discovery of the bases for the expert's opinions or the source of the facts on which the expert relies,"

and that “the expert is not insulated from all discovery.” *Id.* The court quoted *Haworth* regarding how to determine whether a question posed to an expert is proper:

“Whether a question is improper depends upon the question. If the question regards mechanical advice on the preparation of the expert report, the question is not objectionable. If the question tests whether certain facts had not been provided the expert for his consideration, the question would be proper as well. Opposing counsel may test whether the witness’s report accurately reflects all the facts actually considered. Opinion work product protection is not triggered unless ‘disclosure creates a real, nonspeculative danger of revealing the lawyer’s mental impressions’ and the attorney had ‘a justifiable expectation that the mental impressions revealed by the materials will remain private.’”

Id. (quoting *Haworth*, 162 F.R.D. at 296 (quoting *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1015–16 (1st Cir. 1988))). The court held that the questions posed at the deposition would require revealing counsel’s opinions about the case, whether there had been infringement of the patent, and counsel’s interpretation of terms in the patent, and that they were therefore objectionable. *Id.* at *6. The court likewise denied access to the documents. *Id.*

It may also be possible to analogize cases regarding the discoverability of documents provided to testifying experts to the scenario where the expert is questioned on the stand regarding information claimed to be subject to work product immunity. Presumably, if courts will limit discovery of certain categories of work product even after it is shown to a testifying expert, then it seems likely that courts would also limit questioning at trial regarding the same categories. And the converse is likely true as well—if the court will permit pre-trial discovery of work product shown to an expert, surely it would permit inquiry into work product at trial. As to this line of cases, there appears to be a split of authority as to whether to protect core work product once it is shown to a testifying expert.

Those cases holding that core work product is discoverable if given to a testifying expert seem to focus on the theory that if the attorney is going to shape the expert's view, then the opponent is entitled to inquire into the attorney's participation, and on the fact that the attorney has control over the amount of work product given to an expert, if any. These cases hold that if the attorney is concerned about discoverability, the attorney can simply be careful about giving core work product to the expert.⁵ For example, in *Elm Grove Coal Co. v. Director, Office of Workers' Comp. Programs*, 480 F.3d 278 (4th Cir. 2007), the court heard an administrative law action governed by administrative law rules of procedure containing a provision that matched federal Rule 26(b)(3), with the exception of the 1993 amendment regarding expert disclosures. *See id.* at 300. The court determined that the expert could not be properly and fully cross-examined in the absence of draft reports and attorney-expert communications. *Id.* at 301. The court found that "other courts, under both pre- and post-amendment Rule 26, have mandated the production of similar draft reports and attorney-expert communications with respect to testifying experts," *id.* at 301, but noted a split of authority: "We recognize that certain courts, both before and after the 1993 amendments to Rule 26, have determined that draft reports provided to testifying experts and attorney-expert communications are entitled to varying degrees of work product protection," *id.* at 302 n.24 (citing *Bogosian*, 738 F.2d 387; *Nexus Prods. Co. v. CVS N.Y., Inc.*, 188 F.R.D. 7, 10–11 (D. Mass. 1999)). The court continued: "We are unpersuaded by this line of decisions [protecting draft reports shown to testifying experts and attorney-expert communications as work product] and, as discussed herein, believe that the vastly superior view is, consistent with the 1993 amendments to Rule 26, that such attorney-

⁵ This theory runs into the very problem that an amendment to the rule would be aimed at solving – the use of two sets of experts so that the attorney has one set that she can discuss theories with and another set that will testify.

expert communications are not entitled to protection under the work product doctrine.” *Elm Grove Coal*, 480 F.3d at 302 n.24. The court concluded: “In sum, draft expert reports prepared by counsel and provided to testifying experts, and attorney-expert communications that explain the lawyer’s concept of the underlying facts, or his view of the opinions expected from such experts, are not entitled to protection under the work product doctrine.” *Id.* at 303.

Similarly, in *Energy Capital Corp. v. United States*, 45 Fed. Cl. 481 (Ct. Fed. Cl. 2000), the case was governed by the rules of procedure for the Court of Federal Claims, which contained a rule governing expert discovery that matched federal Rule 26 before the 1993 amendments. 45 Fed. Cl. at 493. The court stated, “All cases of which this court is aware have required that the production of factual information given by an attorney to an expert must be produced. In addition, courts also require the production of the information and opinion provided by an expert to the attorney.” *Id.* at 493–94 (internal citations omitted). However, on the issue of whether the party must produce documents that reveal opinion work product, the court found that other courts had reached varying results. *Id.* at 494. The court concluded:

[T]his Court finds that the policy arguments favor the production of all materials given to experts. Complete disclosure promotes the discovery of the true source of the expert’s opinions and the detection of any influence by the attorney in forming the opinion of the expert. In addition, the attorneys can minimize how much the other side learns of their opinion work product by monitoring what information is provided to the expert. . . . Lastly, a clear line is easier to administer and a predictable result helps litigants plan their strategy.

Id.

In yet another case, the Eastern District of New York found all documents “considered” by the expert to be discoverable, but focused its reasoning on the 1993 amendments to the federal rules. *See Weil v. Long Island Sav. Bank FSB*, 206 F.R.D. 38, 39–40 (E.D.N.Y. 2001) (collecting cases that

have held that the 1993 amendments require that anything disclosed to a testifying expert must be produced to opposing counsel, whether or not the expert relies on the disclosed material). The court noted a split of authority on the issue of the protection of core work product given to an expert. *Id.* at 40. The court concluded that even core work product is discoverable if given to a testifying expert because such discovery would lead to more effective cross-examination and would reveal counsel's involvement in forming the expert's opinion. *Id.* at 41. The court also focused on the attorney's ability to decide whether to provide the expert with work product material. *Id.* at 42.

In contrast to those cases permitting discovery of core work product, those courts finding that core work product is not discoverable after disclosure to a testifying expert have focused on the fact that Rule 26(b)(3) is subject to Rule 26(b)(4), which grants broad discovery of expert witnesses, but that nothing in either section suggests that core work product is discoverable under (b)(4). For example, in *Krisa v. Equitable Life Assurance Soc.*, 196 F.R.D. 254 (M.D. Pa. 2000), the court rejected a bright-line rule that materials given to a testifying expert are automatically discoverable, and exempted core work product from discovery. The *Krisa* court determined that a bright-line rule in favor of requiring production of attorney work product shown to a testifying expert would “abridge[] the attorney work product privilege without specific authority to do so.” 196 F.R.D. at 260. A pre-1993 example of a case finding that core work product is not discoverable after showing it to an expert is *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 594 (3d Cir. 1984) (finding that the proviso in the first sentence of Rule 26(b)(3) beginning “[s]ubject to the provisions of subdivision (b)(4) . . .,” does not limit the second sentence of Rule 26(b)(3), which restricts disclosure of work product revealing “mental impressions” and “legal theories”).

In sum, my research so far has not uncovered case law involving the situation where an

expert took the stand at trial and there was an objection based on inquiry into work product. As noted, however, this may be the result of the broad expert discovery permitted by the 1993 amendments and the corresponding committee notes. While it may be possible to analogize cases regarding the discoverability of materials given to an expert or attorney-expert communications to the situation of questioning an expert witness on the stand, even that analogy does not add much clarity because it appears that there has been a split of authority, both before and after the 1993 amendments, as to whether core work product will be shielded from discovery when shared with a testifying expert.

V. Conclusion

Overall, it appears that the majority of authority holds that work product protection does in fact extend through the trial. Thus, the concern that a rule amendment would not actually deter parties from retaining a second set of experts if the protection would simply disappear at trial may be somewhat alleviated by the general acceptance of the proposition that work product protection extends through trial. However, under the current regime, it also appears that there is a strong risk of waiver of work product protection when an expert who has been exposed to work product is put on the stand. The extent of the waiver is unclear, and it is difficult to remove the impact of the 1993 amendments to determine whether the common law would provide protection for work product shared with testifying experts absent the contrary implication of the 1993 amendments. Even prior to the 1993 amendments, the case law was unclear as to the extent of protection for work product shared with a testifying expert. Thus, although work product immunity may extend through trial as a general proposition, the interest in permitting effective cross-examination may remove that protection, at least to some extent, for testifying experts. Because the extent of work product waiver

that may be found with respect to a testifying expert is unclear, and because it may be difficult for Rule 26 to officially provide protection through trial without modifying a privilege, it may be difficult to fully prevent the cautious party with sufficient resources from hiring two sets of experts and avoiding written communications with testifying experts. Nonetheless, as discussed in the November 21, 2007 conference call, it may be that a limit on discovery of expert materials in Rule 26, coupled with an advisory committee note encouraging courts to maintain the protection through trial, will go a substantial distance in preventing the undesired behaviors.

NOTES ON CONFERENCE CALL
DISCOVERY SUBCOMMITTEE
Nov. 21, 2007

On Nov. 21, 2007, the Discovery Subcommittee of the Advisory Committee of Civil Rules held a conference call. Participants included Judge David Campbell (Chair, Discovery Subcommittee), Judge Mark Kravitz (Chair, Advisory Committee), Chilton Varner, Daniel Girard, Anton Valukas, Prof. Edward Cooper (Reporter of the Advisory Committee), Jeffrey Barr of the Administrative Office, Monica Finnell (Judicial Fellow at the A.O.), Andrea Thomson (rules law clerk for Judge Lee Rosenthal), and Prof. Richard Marcus (Special Reporter to Discovery Subcommittee).

Judge Campbell introduced the call by referring to a Nov. 17 memo circulated by Prof. Marcus outlining some possible approaches to drafting a new provision as Rule 26(b)(4)(A)(ii) to deal with attorney-expert communications and draft reports, and a memo circulated by Daniel Girard on Nov. 20 containing some additional drafting suggestions. For convenience, copies of these items are attached as an Appendix to this set of notes.

The Marcus memo was introduced as involving first an effort to separate the current provisions of 26(b)(4)(A) regarding depositions of expert witnesses (to be known as (i)) and new provisions that would be different and apply to all discovery. The memo offered two basic approaches, and two alternatives of each. One set of choices had to do with whether the rule would say only that discovery of covered material is permitted only in the circumstances described in Rule 26(b)(3)(A)(i) and (ii) and (B), or if the rule would say the covered material is "protected as trial preparation material under Rule 26(b)(3)." The latter formulation might be desirable to strengthen an argument for application of protection at trial or in other litigation. But it would raise potential issues about the interrelation of (b)(3) and (b)(4), particularly since (b)(3) says that discovery it regulates is "subject to (b)(4)," and also by the limitation of (b)(3)'s protection to "documents and tangible things." The other dividing line between drafts was whether they protected only the mental impressions of the lawyer or also required a showing of substantial need and the inability to obtain the substantial equivalent to obtain any discovery of protected materials. Again, there might be an argument that the opinion work product protection might be found more worthy of protection at trial and in other litigation.

The Girard draft was introduced as designed to raise basic issues about location and content of a possible rule amendment, subject to fine tuning through drafting. It could be used as a platform for refinements. One effort is to address troubling aspects of the existing first sentence of Rule 26(b)(4)(A). The idea is for the first sentence of the redraft to "open the door" by specifying what can be done, the second sentence identifies the scope of what can be pursued through such discovery, and the third sentence seeks to prevent the gratuitous forays that currently take the form of simply pursuing the communications between the lawyer and the expert. Another goal is to make the amendments as short as possible. This platform seems to work conceptually better than others that have been considered. Having the protection in (b)(4)(A) seems easier conceptually, and rewriting the first sentence of the existing rule seems useful to set things up right.

A reaction was that there seem to be three sorts of questions: (1) the location for any protection, (2) line-drawing on what is and is not allowed, and (3) what kind of discovery to authorize. Perhaps it is best to start with the line-drawing issues.

A question was raised about protection at trial. Would the research being done now on protection at trial and in other litigation bear on these choices? Perhaps it will be important for that purpose to say that the protected materials are "work product" so that the protection work product affords will certainly apply. Otherwise, simply saying that discovery is not allowed may

not prompt respect at trial. These questions prompted a reaction that "This was one of my concerns." The goal here is to set things out of bounds both during discovery and at trial or in other litigation. Unless that can be done, there will still be a temptation to employ two sets of experts and engage in the various other avoidance behaviors we are trying to make unnecessary. The response was that, whatever line we draw, we should be concerned to make sure that we have maximized the chances of protection at trial.

This set of reactions prompted the response that using the word "protected" may be important. Work product is sometimes said to be a "protection" rather than a "privilege." The Nobles and Hickman cases are sources of that protection. It is inherent in the adversary system, and the Supreme Court has recognized that the resulting protection applies in both civil and criminal cases. Another reaction was that it is unclear presently how much rule changes can affect the extent or application of these protections. When it announced its decision in Hickman, the Supreme Court had before it a proposed rule amendment creating protection for work product and it decided to act by decision rather than rule. In Nobles, it was dealing with something not governed by a rule (Fed. R. Evid. 612 did not apply at the trial in the case), and nonetheless held that protections applied. Whether the adoption in 1970 of Rule 26(b)(3) produced additional protections at trial is not presently clear. So there may be limits to how much we can change that result. It may be that Committee Note commentary about the expected protection at trial would be useful, even if rule language itself (in a discovery rule) might not certainly produce that effect).

A different question about the Girard draft was the use of the phrase "facts or other relevant information known or opinions held." The scope of that language could prove troublesome, particularly in connection with the reported consequences of use of "or other information" in current Rule 26(a)(2)(B). That could produce problems in an amendment to (b)(4). It was explained as being designed to focus on what you can get through discovery and not what must be disclosed. That prompted the reaction that one instinct was to be drawn toward leaving what is in current (b)(4)(A) alone in a newly-designated (i). Then it could be made clear in a new (ii) that it applied to all discovery.

Discussion shifted to the choice between (b)(3) and (b)(4) as locations for the new protection. One set of concerns was that the Committee can't adopt privileges out of whole cloth, and at the same time that it would be desirable to have whatever protections we determine are desirable apply at trial as well as during discovery. Maybe the solution is to say this is "work product" and rely on Hickman rather than the rules as the source of protection. If that's so, maybe it needs to be in (b)(3) because that's the work product provision.

This prompted the reaction that it's not so clear that (b)(3) is the source of protections. Consider the Nobles case. There the Court was dealing with protections not emanating from any rule. Whether (b)(3) actually created protections that apply at trial is not entirely clear right now. Moreover, it doesn't actually say "work product." Yet use of the phrase it does use -- "trial preparation materials" -- is one feature of Alternatives 2A and 2B in the Marcus drafts that were circulated before the conference call. A reason for using that approach would be to invoke that talismanic phrase in expectation that it could have significance during trial or in connection with other litigations. At the same time, the waiver analysis of the Court in Nobles is quite troubling. In Nobles, the Court seemed to be saying that because the investigator was taking the stand the report must be disclosed. An expert witness is intended to take the stand; would that mean that all protections would evaporate as soon as that happened? Should they be respected until trial if that is what happens at trial?

On the Nobles decision, some limiting factors were noted. The report that was the focus of the decision covered what the witnesses told the investigator. That might be likened to the "facts or data considered by" discovery we are preserving. This also might be more like "work papers" of the expert -- something that must be open for discovery. A response to this point is that actually the investigator was supposed to be testifying about what the witnesses said; in that sense the report is not the same as work papers. It is not a matter considered; it's just a memorialization of the recollection of the investigator. Thus, the analysis looks more like what's called for now under Fed. R. Evid. 612 to the extent that the investigator has used the report to refresh recollection. Another reaction was that with work product, we have that advantage that waiver cases are much narrower than with the attorney-client privilege. When the attorney-client privilege is waived, the waiver applies to the whole world, and to any material on the same subject matter. With work product, disclosure to some may not be a waiver as to others, and the waiver is more often limited to the actual materials disclosed.

The discussion returned to whether it would make a difference in relation to these concerns whether the protection were in (b)(3) or (b)(4). That prompted that idea that maybe something similar to the current proposed drafting ideas for (b)(4) could be worked into (b)(3)(A). Perhaps that could be revised to offer a provision for what we now seek to protect parallel to the existing protection for "documents and tangible things" and afford protection that applies to all types of discovery and to nontangible items.

In order to get a feel for further drafting, it was asked whether currently any on the call feel strongly that (b)(3) or (b)(4) is the preferable location. None spoke up as strongly favoring one or the other location.

Discussion turned to the scope of protection. One drafting approach currently under consideration would permit discovery beyond the "facts or data considered" limitation only upon a showing that the party seeking discovery has a "substantial need" for the discovery and that this party is unable without undue hardship to obtain the "substantial equivalent" of what it seeks through discovery. Even then, the court is to protect all mental impressions, etc., of the attorney in ordering production of protected materials. Another alternative would limit the protection to that second step -- forbidding discovery only to the extent that it would disclose the mental impressions of counsel. Limiting protection to the second level -- attorney mental impressions -- might be more consistent with the idea that this protection should be shielded at trial under Hickman and Nobles. Would that be sufficient?

One response was that it was not sufficient. A stronger and more extensive protection would be needed to end the sorts of avoidance tactics we are trying to make unnecessary. Moreover, it would invite a line-by-line review of everything that would be very time-consuming and costly. Lawyers confronting that risk would likely simply continue to have two sets of experts.

Another participant reported being split on the question. On the one hand, the line-by-line inquiry looks incredibly wasteful. On the other hand, if we are trying to gain respect for work product protection we must be wary of protecting attorney/expert communications about the baseball season, etc.

One question was whether there were examples of the sort of things that would cause problems if more limited protection were adopted. Examples offered in response included the expert's thoughts on how to cross-examine the other side's expert and overall evaluation of the strength of the case or tactics for approaching presentation of the case. The goal is a practical solution, and to get something like the reality we were told prevails under the New Jersey rule,

where the lawyers are comfortable with their interaction with their own experts and with their ability to get the information they need to cross-examine the other side's experts. At the same time, it is important to ensure that there is no limitation about allowing discovery of all testing done (e.g., the 36 unfavorable test results before the one favorable outcome). The essential thing must be to ensure free and open communication between lawyers and experts.

One suggestion was to focus drafting on assuring protection for essentially three sorts of things:

- (1) Draft reports
- (2) Communications between the lawyer and the expert that reveal the attorney's mental impressions, etc. ("core" work product)
- (3) Communications between the expert and the lawyer that relate to the collaboration between the two on matters other than the opinions the expert would present at trial. One element of this third feature might be chronological -- the protections would apply to communications after the "final" report is supplied to the other side so long as the expert's opinions at trial remain the ones conveyed in the "final" report. (If the expert revises those opinions in reaction to the views of the other side's expert, that would be a ground for allowing discovery, and might often call for a supplemental report.)

This idea prompted that reaction that this approach could be valuable in distinguishing between the use of the opinions the expert initially determines to present and evaluation of the ones that the other side presents through its expert. The goal is to keep open the door for discovery about what the expert witness will be saying to the jury but close the door (absent a hard-to-make showing to justify discovery) on interaction between the lawyer and the expert on other subjects.

Another reaction was that it would very useful for the Committee Note to flesh out with examples what was protected or not protected. For example, the Note could make clear that compensation arrangements are not protected from discovery, and that the expert's work papers with regard to the opinions to be expressed at trial are not protected.

Another participant agreed that it is important to get at what is and is not protected. "All agree that the 33 tests that did not work should not be protected." This prompted the question "What if the lawyer asks the expert to run some numbers for me to use in cross examination of the other side's expert. These are facts or data, but they are essentially about the opinions to be expressed by the other side's expert. Should they be protected?" One reaction was that, if the analysis prompts a change in the proposed testimony of the expert who ran the calculations originally for use in cross-examination, the modification of the opinions to be offered by our expert means that these are facts or data considered by our expert in reaching the opinions to be expressed at trial. Another was that whatever line we draw there will be gamesmanship. So the conclusion was that if the expert runs the tests only for purposes of cross, discovery is not allowed. But if the expert's reaction to the testing is "Whoops! I need to review what I said," that would be different. Indeed, that ordinarily would lead to the need for a supplemental report, and this testing would seem unavoidably to be facts or data considered in reaching the opinions provided in the supplemental report.

Another reaction was that lawyers will structure their retention of experts with an eye to keeping things protected. "We want to retain you for assistance in evaluating certain issues raised in this litigation," one might begin, and be quite circumspect about what is included then. That prompted the recollection that before 1993 it was commonplace to hire experts first as consultants and only later decide whether to use them as testifying experts. From the time that later decision was made, we would treat them differently, but we would not take the position that what happened before that designation was open to discovery because eventually the expert was chosen to testify at trial.

It was noted that, any way a line might be drawn, there will be potential costs. For example, to add protections under heading (3) above and protect strategic advice creates a risk that interactions that will strongly affect the testimony of the expert will nevertheless be cloaked. But it is worth taking this idea to the next step.

At this point, it seemed clear that there would be a need for a further conference call. Dec. 11 at 7:00 a.m. Pacific Time was selected. Materials for the Standing Committee meeting are to be due by the following weekend.

APPENDIX

The following drafting sketches were discussed during the conference call:

Marcus drafts:

(A) *Expert Who May Testify.*

- (i)** *Deposition of expert witness.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

Alternative 1A

- (ii)** *Protection for communications between expert and counsel and for draft expert reports.* A party may obtain discovery regarding communications between a person who has been identified under Rule 26(b)(2)(A) and [retaining] {a party's} counsel -- or regarding a draft report prepared by such a person -- only with regard to facts or data considered by the expert in forming the opinions the expert will express. The court may order further discovery only on a showing that satisfies Rule 26(b)(3)(A)(i) and (ii). If the court orders further discovery, the protection of Rule 26(b)(3)(B) applies [to counsel's mental impressions, conclusions, opinions, or legal theories].

Alternative 1B

- (ii) Protection for communications between expert and counsel and for draft expert reports. A party may obtain discovery regarding communications between a person who has been identified under Rule 26(b)(2)(A) and [retaining] {a party's} counsel -- or regarding a draft report prepared by such a person -- only with regard to facts or data considered by the expert in forming the opinions the expert will express. In ordering such discovery, the court must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of counsel.

Alternative 2A

- (ii) Protection for communications between expert and counsel and for draft expert reports. All communications between [retaining] {a party's} counsel and a person who has been identified as an expert witness under Rule 26(a)(2)(A) -- and any draft report prepared by such a person -- are protected as trial preparation material under Rule 26(b)(3)(A) and (B), except that disclosure and discovery are allowed with regard to facts or data considered by the expert in forming opinions the witness will express.

Alternative 2B

- (ii) Protection for communications between expert and counsel and for draft expert reports. All communications between [retaining] {a party's} counsel and a person who has been identified as an expert witness under Rule 26(a)(2)(A) -- and any draft report prepared by such a person -- are protected as trial preparation material under Rule 26(b)(3)(B) to the extent they reveal counsel's mental impressions, conclusions, opinions, or legal theories.

Girard draft of new 26(b)(4)(A):

A party may, through interrogatories or by deposition, discover facts or other relevant information known and opinions held by any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the discovery shall not be conducted until after the report is provided. Communications between a party's counsel and a person who has been identified as an expert whose opinions may be presented at trial are protected as trial preparation material under Rule 26(b)(3)(B) to the extent they reveal counsel's mental impressions, conclusions, opinions, or legal theories.

ORAL REPORT ON
STANDING COMMITTEE SEALING SUBCOMMITTEE MEETING
JANUARY 12, 2008, PASADENA, CA

TIME COMPUTATION

The Time Computation Project proposals published last August present two discrete packets of issues. The first part addresses the proposals jointly developed for all advisory committees through the Time-Computation Subcommittee. Vigorous efforts have been made to adopt provisions that are as nearly uniform as possible across the different sets of rules. The second part includes all of the specific Civil Rules proposals made to adjust for the new methods of computation and to improve a few time periods for independent reasons. The two packets are presented in different forms.

Joint Topics: Subcommittee Report

The Time-Computation Subcommittee proposals are presented in the Subcommittee memorandum. The advisory committees should each grapple with the questions that need to be resolved, recognizing that the final resolution must be coordinated by the Subcommittee for presentation to the Standing Committee. Three issues seem most prominent: Whether to persist with the project; how to integrate the effective date of the project amendments with possible statutory amendments; and what to do with state holidays that might affect “backward-counting periods.” The first two are obviously important. The third is designed for those who delight in intricate rulesmithing.

Going Forward: The consensus remains. The Project should go forward despite the transitional costs incurred as courts and lawyers learn the new system, despite the need to rework local court rules, and despite the problems of statutory time periods noted below. Public comments were mixed on this score; it may be most telling that there were not many comments on either side.

Statutory Time Periods: From the beginning in 1938, Civil Rule 6(a) has applied to computing time periods set by statute. The 1938 version excluded intermediate Sundays and holidays (but not half holidays) in computing periods less than 7 days. The current version excludes intermediate Saturdays, Sundays, and legal holidays in computing periods less than 11 days. The proposal to count all days has the effect of shortening the real time allowed for periods less than 11 days — the very common 10-day periods, for example, were at least 14 calendar days. This effect has been offset by increasing most of the Civil Rules periods now set at less than 11 days. But it has been agreed from the beginning that no attempt should be made to exercise the supersession authority to amend and extend statutory periods. It also has been agreed that it would be the worst of all possible alternatives to adopt different computation methods for statutory and rule time periods.

The importance of the new computing rules for statutory periods may vary among the different sets of rules. The Bankruptcy Rules Committee has to deal with many periods that seem integral to bankruptcy practice. The Criminal Rules Committee has confronted a long list of statutes the Department of Justice believes require amendment. For the Civil Rules, the list always has been short; only one statute, governing review of magistrate judge recommendations, presents a compelling need for amendment. The practical circumstances confronting the other rules sets may counsel a different resolution than would be reached if only the Civil Rules were involved. (It is not likely that a decision will be reached to sever the Civil Rules from the other rules, although it is possible that different computing methods for the Civil Rules alone could achieve benefits outweighing the costs of potential confusion as practitioners forget to switch reflexes in moving between the two methods. The Appellate Rules govern appeals taken in cases of all types, making it more difficult to sever them from the Bankruptcy and Criminal rules.)

Two approaches to integrating with statutory amendments have been considered. The simpler is to defer the effective date of the project, perhaps by one year, to allow more time for Congress to act. On the present schedule the amendments could take effect on December 1, 2009. If they were submitted to the Judicial Conference in 2009 rather than 2008, the Supreme Court could transmit them to Congress by May 1, 2010, to take effect on December 1, 2010.

Deferring the effective date does not ensure that Congress will act. Greater assurance could be achieved by attempting direct coordination: the rules would be transmitted to Congress to take effect when Congress has made the appropriate statutory changes.

These alternatives are explored in the Subcommittee memorandum and should be considered carefully by each advisory committee. Something will depend on the length of the lists of statutes proposed for amendment.

Backward-Counted Periods and State Holidays

The Subcommittee Memorandum addresses this question admirably. The problem is easily identified. Suppose a paper is to be filed 14 days before a specified event, say trial. The 14th day is a state holiday. Under the approach taken to backward-counting periods, the filing is due 15 days before the specified event. The fear is that lawyers may fail to account for obscure state holidays and believe they can file 14 days before. The Subcommittee considered a draft that would omit state holidays only when a state holiday is the last day of a forward-counted period (e.g., a Rule 59 motion must be filed 30 days after judgment is entered). Opinions were divided. The present proposal treats state holidays the same as federal holidays for all purposes.

Statutes To Amend: Civil Rules Concerns

The Committee has not spent much time considering the statutes that might be proposed for amendment. The table of statutes amassed by Professor Struve, acting as Reporter for the Subcommittee, is daunting and almost certainly not complete. The lists that have been included in earlier agendas have been short. This approach has reflected several concerns. First is recognition that when Congress sets time periods at less than 11 days, Congress has a strong sense that prompt action is important. It may be wise to defer to that sense. Second is doubt whether Congress has routinely relied on the computation method established by the Civil Rules as they have varied over time and as they have varied from the other sets of rules. Certainly Congress did not rely on Rule 6 when, in 1932, it adopted the Norris-LaGuardia Act limits on the duration of temporary restraining orders. It does not seem likely that it has kept close watch on such changes as the addition of Saturdays to the set of excluded intermediate days, or the change of the exclusion from periods less than 7 days to periods less than 11 days. Third is doubt whether the practicing bar or even courts have always been alert to the impact of Rule 6(a) and willing to rely on it. It would be difficult to develop comprehensive data on the actual practices of lawyers who specialize in each area affected by a particular statute — much less on those who occasionally enter each area — but some measure of doubt seems reasonable.

Action on specific recommendations is requested at this meeting. The materials set out in the April 2007 agenda book are repeated below as the framework for discussion.

There is one clear recommendation: 28 U.S.C. § 636(b) sets 10 days as the time to seek review of magistrate-judge recommendations. Proposed Rule 72 sets the time at 14 days. The question involves a matter of procedure internal to the district courts. The Rule 6(a) computation method has applied to both § 636(b) and Rule 72, converting the nominal 10-day period now set by § 636(b) into a computed period of at least 14 calendar days, and more if legal holidays intervene. Section 636(b) should be amended to set the same 14-day period as amended Rule 72. It is important to maintain consistency between rule and statute. This is a purely technical amendment that should not encounter any resistance.

Two other time periods seem ripe for revision, but not because of anything accomplished by the Time Computation Project. 28 U.S.C. § 144 sets the time for filing an affidavit that a judge is biased or prejudiced from the beginning of the district-court term, but district courts no longer have terms. The Class Action Fairness Act includes a scrivener's error that sets the time to apply for permission to appeal a remand order at "not less than 7 days after entry of the order," 28 U.S.C. § 1453(c)(1); the gaffe is notorious and embarrassing, but again is not affected by the Time Computation amendments. If any recommendations are to be made with respect to these time periods, they should be made outside the Time-Computation Project recommendations.

Time Project: Statutory Time Limits

The Time Project has been divided into three main parts. The first part is the template rule for computing time periods. Civil Rule 6(a) has been used to illustrate the template, but each of the other rules is to conform as near as may be to the same model. The second is reconsideration of all of the time periods designated in the Civil Rules. That part was substantially completed at the September meeting. The results are reflected in the September draft Minutes and in these materials. The third part involves study of statutory time periods.

Rule 6(a) establishes the method for computing statutory time periods that apply to civil actions. At least on the face of things, a statutory time period of less than 11 days will be shortened by the proposed revision of Rule 6(a). The former rule excluded intermediate Saturdays, Sundays, and legal holidays. A 10-day time period, for example, was always at least 14 calendar days. The proposed rule expressly includes intermediate Saturdays, Sundays, and legal holidays. Ten days will mean ten days. This effect has been addressed for periods set in the Civil Rules by reconsidering each period. The result has been to recommend extending most 10-day periods to 14 days. Civil Rules amendments cannot, however, directly revise statutory time periods.

Many participants in the Time Project have worried deeply about the effect of changing the computation method for statutory time periods. Several alternatives have been considered. One is to revise Rule 6 so that it no longer applies to computing statutory time periods that apply to civil actions. That approach would leave no sense of direction at all, leaving the question to a common-law process of statutory interpretation. The common-law process might seek a consistent approach by gravitating toward a second alternative. This approach would carry forward the method of present Rule 6(a), excluding intermediate Saturdays, Sundays, and legal holidays. The benefit of continuity in statutory time periods, however, would be offset by the confusion engendered by using two different counting methods. The confusion could be compounded if a statute and rule address the same issue, such as the duration of a temporary restraining order.

A third approach has been chosen. Professor Struve, Reporter for the Time-Project Subcommittee as well as the Appellate Rules Committee, has compiled a comprehensive list of brief statutory time periods. The complete list is posted at www.uscourts.gov/rules/proposed0807/07_7_27_table_for_AO.pdf. Each Advisory Committee is to review these statutes to determine whether the new computation method warrants a new statutory period. A full set of these recommendations will be compiled for submission to Congress.

There is no immediate need to compile a final list of statutory recommendations at the April 2007 meeting. It remains possible to parcel the list of statutes out to the time-computation subcommittees for study and recommendations. This memorandum is designed to facilitate the decision whether the task can be accomplished by Advisory Committee deliberations or whether instead the subcommittees should be recalled to action.

The need for subcommittee study will depend in part on the approach taken. One approach would be to attempt a careful study of real-world needs based on experience with each of the many statutes that have been identified. Experience may be readily available in some areas. Temporary

restraining orders are a clear example. Experience will be difficult to come by in many of the more exotic substantive areas. And experience may be clouded by the relative obscurity of present Rule 6(a)'s impact on statutory time periods. Many participants in the time-computation project have ruefully admitted that recognition of this impact came only after many years of experience. There is a real prospect that many of these statutory time periods have often been applied on a calendar-day basis — experience may show confused practice, and a real prospect that the new Rule 6(a) calendar-day method conforms as closely to present practice as the present weekdays-only method. There is a real prospect that diligent study will identify many unanswerable questions.

A more relaxed approach would begin with a sense of deference to Congress. Statutory time periods of less than 11 days are likely to reflect a judgment that the particular issue deserves prompt action. There is at least some reason to suspect that many of these periods have been set without any reliance on the present Rule 6(a) computation method. On this approach, statutory amendments should be recommended only when there is strong reason to believe that too little time will be allowed by a calendar-day approach.

These notes adopt the relaxed approach. The result is to recommend a small number of statutes as worthy candidates for amendment. Some of these statutes may be suitable for amendment even apart from revision of Civil Rule 6(a) to adopt a calendar-days counting rule.

The second part identifies some statutes that limit the duration of temporary restraining orders. The suggestion will be that none of them is a suitable candidate for amendment.

The third part identifies a few odd provisions without any thought that they might be candidates for amendment.

The underlying assumption is that Rule 6(a) will continue to govern computation of statutory time periods that become involved in a civil action or proceeding in a district court. The effect of changing computation methods does not justify the costs entailed by casting the subject adrift. It is further assumed that Rule 6(a) will use the same method for computing statutory time periods and time periods set by other authority such as a court rule, local rule, or order.

I. Amendment Candidates

This list was compiled without reviewing Title 11 — the Bankruptcy title — at all.

The approach is to recommend amendment only when a statute presents a serious problem and is not obviously a matter for sensitive political judgment. The list is further constrained by complete ignorance as to the underlying substantive law and experience in administering it. There may be areas of practice that rely heavily on the Rule 6(a) approach that excludes intermediate Saturdays, Sundays, and legal holidays in counting periods less than 11 days. Nothing of the sort is reflected here.

28 U.S.C. § 144. This statute requires filing of an affidavit that a judge is biased or prejudiced “not less than ten days before the beginning of the term at which the proceeding is to be heard,” unless good cause is shown for failure to meet the deadline. 28 U.S.C. § 138 provides: “The district court shall not hold formal terms.” Section 144 should be amended to provide a workable set of deadlines. That it should be amended does not lead ineluctably to the conclusion that the Judicial Conference should recommend amendment. The subject is highly sensitive.

28 U.S.C. § 158 note: This is for the Appellate Rules Committee. The statute provides a transitional rule governing the time to petition for permission to appeal after a bankruptcy judge, district court, or bankruptcy appellate panel has certified an appeal directly to the court of appeals. The question has an obvious parallel to § 1292(b) and (d).

28 U.S.C. § 636(b): We propose to amend Civil Rule 72 to establish 14-day time limits on district-court review of magistrate judge acts. This is the most important proposed change; statute and rule should be uniform.

28 U.S.C. § 754: This statute sets a 10-day limit after appointment for a receiver to file in every district where property that the appointment puts into the receiver's control is located. Quite apart from whatever effect present Rule 6(a) may have had, is 10 days — or for that matter 14 days — enough?

28 U.S.C. § 1292(b), (d): As with § 158 above, the Appellate Rules Committee has primary responsibility for the time period to petition for leave to appeal after the trial court certifies a question for immediate appeal.

28 U.S.C. § 2107(c): Clearly for the Appellate Rules Committee — this is an integration of the statute with Appellate Rule 4. Is there a better way to achieve integration, perhaps by a statute that simply refers to the Appellate Rules without attempting to achieve synchronization with every new Appellate Rule?

28 U.S.C. § 2243: Rule 4 of the § 2254 Rules supersedes not only the time period but the procedure. See the 1976 (original) Committee Note. Under Rule 1, this supersession extends to habeas proceedings not under § 2243 when the court orders it. This is for the Criminal Rules Committee, but it looks as if the statute should be amended.

II TRO Provisions

The recommendation is to amend Civil Rule 65(b) to provide an initial 14 days for a no-notice TRO, followed by extension for no more than 14 additional days unless the parties consent to a greater extension.

The question whether to recommend amendment of statutes that set 10-day or shorter periods begins with the unanswered question whether courts or parties often recognize the apparent effect of present Rule 6(a) in extending these periods. It also must face the delicate political sensitivities stirred by at least some settings, most notably labor injunctions. The list that follows notes quirks about one statute or another, but does not recommend that any of them be considered for amendment.

There are obvious sources for comment on present practice and real-world needs on many of these provisions. The labor agencies, Department of Justice (asset forfeiture), agency designated by the statute, and so on. We must decide whether we need pursue these inquiries.

15 U.S.C. § 2319(c)(1): The statute provides for an action by the Attorney General or by the “Commission” [I think the FTC]. The court may issue a TRO or preliminary injunction. If the action is brought by the Commission, the court is to set a period not exceeding 10 days after issuance of the order for the Commission to file a complaint under 15 U.S.C. § 45. If the complaint is not timely filed, “the order or injunction shall be dissolved by the court * * *.”

18 U.S.C. § 983(i)(3): A no-notice TRO with respect to property subject to civil forfeiture “shall expire not more than 10 days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period.” Note that there is no apparent limit on an extension granted for good cause.

18 U.S.C. § 1514(a)(2)(C): A TRO prohibiting harassment of a victim or witness in a federal criminal case “shall expire at such time, not to exceed 10 days from its issuance, as the court directs.” The order may be extended for good cause “for up to 10 days or for such longer period agreed to by the adverse party.” Unlike § 983(i)(3), the 10-day limit is set for an unconsented extension.

18 U.S.C. § 1514(a)(2)(E): Sets 2-day notice for a motion to dissolve or modify the TRO described above. This comports with the recommendation to retain the 2-day notice period in Rule 65(b).

18 U.S.C. § 1963(d)(2): A no-notice TRO to preserve the availability of property for RICO forfeiture “shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown * * *.” This again appears to be a statute that does not set a 10-day limit on the extension.

21 U.S.C. § 853(e)(2): Another no-notice TRO to preserve property “when an information or indictment has not yet been filed with respect to the property.” Again, there is a 10-day limit, subject to extension for good cause without setting a time limit on the extension.

29 U.S.C. § 107: Prohibits no-notice TROs. After hearing testimony in open court a TRO “shall be effective for no longer than five days and shall become void at the expiration of said five days.” This is the Norris-LaGuardia Act, predating Civil Rule 6(a). Whatever may have been made of the 5-day period after the advent of Rule 6(a), there is no reason to suggest amendment. Remember that present Rule 65(e) provides: “These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee * * *.”

29 U.S.C. § 160(l): On petition by the NLRB to restrain specified unfair labor practices, a TRO — the statute is poorly drafted, but seems to be limited to a no-notice TRO — “shall be effective for no longer than five days and will become void at the expiration of such period * * *.” Again, there is little reason to argue that Congress should extend this period.

29 U.S.C. § 662(b): On petition by “the Secretary” (apparently of Labor) to restrain practices in a place of employment that may cause death or serious physical harm, “[t]he proceeding shall be as provided by Rule 65 * * * except that no restraining order issued without notice shall be effective for longer than five days.” This conscious decision to depart from Rule 65 speaks volumes.

30 U.S.C. § 818(b): A temporary restraining order to protect miners “shall be issued in accordance with rule 65 * * *, except that the time limit in such orders, when issued without notice, shall be seven days from the date of entry.” Like 29 U.S.C. § 662(b) above, though it is 7 days rather than 5.

46 U.S.C. App. § 1710(b): In connection with an investigation, the “Commission,” or a person who has filed a complaint with the Commission, may win a TRO after notice “for a period not to exceed 10 days after the Commission has issued an order disposing of the complaint.” This period is likely to run far longer than 10 days after the TRO issues. Still, it might be subject to present Rule 6(a).

III Odd Illustrations

The following statutes provide illustrations of some of the more unusual questions that would arise from application of present Rule 6(a) to a statutory time period. They do not include the many statutes in the spreadsheet that probably are outside present Rule 6(a) because they apply to situations that do not — at least not yet — involve a civil action or proceeding in a district court.

Ambiguous Relations Among Rules: 2 U.S.C. § 922(e) provides for direct appeal to the Supreme Court “by a notice of appeal filed within 10 days after such order is entered.” Supreme Court Rule 18.1 directs that a notice of appeal be filed in the district court “within the time provided by law after entry of the judgment sought to be reviewed.” Is Rule 6(a) included within “the time provided by law”? If yes, the Rule 6(a) change apparently will make a difference. We will need advice from a Supreme Court practitioner — or perhaps the Clerk. (The times for appealing most district-court decisions to the Supreme Court are established by 28 U.S.C. § 2101. All are 30 days or longer.)

Hybrid: Related Provisions Tied and (probably) Not Tied to Court Proceedings: 10 U.S.C. § 7726(c): This draws from a related statute that requires that proceedings be stayed when the Secretary of the Navy certifies that prosecution of the suit would tend to endanger the security of Navy operations in time of war. 7726(b) requires the Secretary to hold a secret meeting with a claimant or party within 10 days after service of a notice that the stay harms the person giving notice. Because this provision is directed to the Secretary's act, not a court act, it probably falls outside Rule 6(a). But 7726(c) requires the Secretary to file a new certificate with the court within 10 days after the "hearing" [evidently meaning the secret meeting]. This one presumably falls within Rule 6(a). If those guesses are right, the result is that seemingly identical 10-day provisions in successive subsections of the same statute have different meanings if Rule 6(a) is applied to the court-related action.

Could Not Have Contemplated Use of Rule 6(a): 12 U.S.C. § 3405(3) requires notice to the customer of an administrative subpoena or summons to obtain financial records. The government may obtain the records if "ten days have expired from the date of service of the notice or fourteen days have expired from the date of mailing the notice to the customer" and the customer has not challenged the demand within that period. It seems apparent that the drafters believed that the 10-day period was shorter than the 14-day period. But under Rule 6(a) it is never shorter, and is often longer. (12 U.S.C. § 3407(3) is similar.)

Bizarre Possibilities: 15 U.S.C. § 6606(c)(4) — part of the Y2K Act — establishes a presumption that a notice is received 7 days after it is sent. A presumption that it is received not 7 but 9, 11, or some other number of days later according to application of Rule 6(a) is simply bizarre.

Impossible Directions: 15 U.S.C. 1116(d)(10)(A), directs the court to hold a hearing on the date set in the order of seizure, which "shall be not sooner than ten days after the order is issued and not later than fifteen days after the order is issued * * *." All those who have the true spirit of Rule 6(a) will recognize that in some circumstances this could be an impossible direction to follow — if it is set at 10 days, the period can run beyond the 15th day with the right combination of intervening days. If on December 22 you set a hearing "10 days from today," Rule 6(a) would set it at January 9, more than 15 days from December 22. So you have to be wary of Rule 6(a) in entering the order: if inclined to set the hearing at 10 days, check the calendar to make sure the period will not run beyond 15 days. Or reinterpret the statute in conjunction with rule 6(a): Even if the court on December 22 says "ten days from today," that should be construed to set the date on January 2, a date certain that does not require calculation.

Inscrutable Applications — A Statutory "Week": 46 U.S.C. § 10706 directs the master or owner of a vessel to deliver money, property, or wages due a seaman who dies in the United States to a district court "within one week of the seaman's death." If death occurs at sea, the week runs from the vessel's arrival at the first port of call after the death — then delivery is to be made either to a district court or to a consular office. Rule 6(a) might apply when delivery is to a district court — although the statute says "week," that is a period less than 11 days. It is more difficult to apply Rule 6(a) when delivery is to a consular office. For that matter, looking only to the face of this section it is not clear whether the consular office in a foreign port is a United States consular office or an office of the seaman's country.

It seems convenient to present in one package the comments on the specific Civil Rules proposals, interspersing recommended responses, rule-by-rule:

Rule 6. Computing and Extending Time; Time for Motion Papers

- 1 ~~(a) Computing Time.~~ The following rules apply in
2 computing any time period specified in these rules or in
3 any local rule, court order, or statute:
- 4 ~~(1) Day of the Event Excluded.~~ Exclude the day of the
5 act, event, or default that begins the period:
- 6 ~~(2) Exclusions from Brief Periods.~~ Exclude
7 intermediate Saturdays, Sundays, and legal
8 holidays when the period is less than 11 days:
- 9 ~~(3) Last Day.~~ Include the last day of the period unless
10 it is a Saturday, Sunday, legal holiday, or — if the
11 act to be done is filing a paper in court — a day on
12 which weather or other conditions make the clerk’s
13 office inaccessible. When the last day is excluded,
14 the period runs until the end of the next day that is
15 not a Saturday, Sunday, legal holiday, or day when
16 the clerk’s office is inaccessible.
- 17 ~~(4) “Legal Holiday” Defined.~~ As used in these rules,
18 “legal holiday” means:

19 ~~(A) the day set aside by statute for observing New~~
20 ~~Year's Day, Martin Luther King Jr.'s~~
21 ~~Birthday, Washington's Birthday, Memorial~~
22 ~~Day, Independence Day, Labor Day,~~
23 ~~Columbus Day, Veterans' Day, Thanksgiving~~
24 ~~Day, or Christmas Day; and~~

25 ~~(B) any other day declared a holiday by the~~
26 ~~President, Congress, or the state where the~~
27 ~~district court is located.~~

28 **(a) Computing Time.** The following rules apply in
29 computing any time period specified in these rules, in
30 any local rule or court order, or in any statute that does
31 not specify a method of computing time.

32 **(1) Period Stated in Days or a Longer Unit.** When
33 the period is stated in days or a longer unit of time:

34 **(A) exclude the day of the event that triggers the**
35 **period;**

36 **(B) count every day, including intermediate**
37 **Saturdays, Sundays, and legal holidays; and**

38 **(C) include the last day of the period, but if the**
39 **last day is a Saturday, Sunday, or legal**
40 **holiday, the period continues to run until the**
41 **end of the next day that is not a Saturday,**
42 **Sunday, or legal holiday.**

43 (2) Period Stated in Hours. When the period is stated
44 in hours:

45 (A) begin counting immediately on the
46 occurrence of the event that triggers the
47 period;

48 (B) count every hour, including hours during
49 intermediate Saturdays, Sundays, and legal
50 holidays; and

51 (C) if the period would end on a Saturday,
52 Sunday, or legal holiday, the period continues
53 to run until the same time on the next day that
54 is not a Saturday, Sunday, or legal holiday.

55 (3) Inaccessibility of the Clerk's Office. Unless the
56 court orders otherwise, if the clerk's office is
57 inaccessible:

58 (A) on the last day for filing under Rule 6(a)(1),
59 then the time for filing is extended to the first
60 accessible day that is not a Saturday, Sunday,
61 or legal holiday; or

62 (B) during the last hour for filing under Rule
63 6(a)(2), then the time for filing is extended to
64 the same time on the first accessible day that
65 is not a Saturday, Sunday, or legal holiday.

88 United States commonwealth, territory, or
89 possession.)]¹

90 **(b) Extending Time.**

91 * * * * *

92 **(2) *Exceptions.*** A court must not extend the time to
93 act under Rules 50(b) and (d), 52(b), 59(b), (d), and
94 (e), and 60(b), ~~except as those rules allow.~~

95 **(c) Motions, Notices of Hearing, and Affidavits.**

96 **(1) *In General.*** A written motion and notice of the
97 hearing must be served at least 5 14 days before the
98 time specified for the hearing, with the following
99 exceptions:

100 **(A)** when the motion may be heard ex parte;

101 **(B)** when these rules set a different time; or

102 **(C)** when a court order — which a party may, for
103 good cause, apply for ex parte — sets a
104 different time.

105 **(2) *Supporting Affidavit.*** Any affidavit supporting a
106 motion must be served with the motion. Except as
107 Rule 59(c) provides otherwise, any opposing
108 affidavit must be served at least ~~+~~ 7 days before the

¹ This sentence will not be adopted if the proposed amendment of Rule 81(d) is adopted.

109 hearing, unless the court permits service at another
110 time.

111 * * * * *

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time. In accordance with Rule 83(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) “does not apply to situations where the court has established a specific calendar day as a deadline”), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). If, for example, the date for filing is “no later than November 1, 2007,” subdivision (a) does not govern. But if a filing is required to be made “within 10 days” or “within 72 hours,” subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. See, e.g., 2 U.S.C. § 394 (specifying method for computing time periods prescribed by certain statutory provisions relating to contested elections to the House of Representatives).

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. See, e.g., Rule 60(b). Subdivision (a)(1)(B)’s directive to “count every day” is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually

ended on the same day — and the 10-day period not infrequently ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int'l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the “act, event, or default” that triggers the deadline, new subdivision (a) refers simply to the “event” that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. *See, e.g.*, Rule 14(a)(1).

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were generally retained without change.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be

“rounded up” to the next whole hour. Subdivision (a)(3) addresses situations when the clerk’s office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk’s office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk’s office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday, or day when the clerk’s office is inaccessible.

Subdivision (a)(3)’s extensions apply “[u]nless the court orders otherwise.” In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to “weather or other conditions” as the reason for the inaccessibility of the clerk’s office. The reference to “weather” was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk’s office. The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g.*, William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition, many local provisions address inaccessibility for purposes of electronic filing, *see, e.g.*, D. Kan. Rule 5.4.11 (“A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.”).

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may, for example, address the problems that might arise if a single district has clerk’s offices in different time zones, or provide that papers filed in a drop box after the normal hours of the clerk’s office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that “[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders.” A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g., Casaldue v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

Subdivision (a)(5). New subdivision (a)(5) defines the “next” day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e.g.,* Rule 59(b) (motion for new trial “must be filed no later than 30 days after entry of the judgment”). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.,* Rule 26(f) (parties must hold Rule 26(f) conference “as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)”). In determining what is the “next” day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 30 days *after* an event, and the thirtieth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 21 days *before* an event, and the twenty-first day falls on Saturday, September 1, then the filing is due on Friday, August 31. If the clerk’s office is inaccessible on August 31, then subdivision (a)(3) extends the filing deadline forward to the next accessible day that is not a Saturday, Sunday, or legal holiday — no later than Tuesday, September 4.

Subdivision (a)(6). New subdivision (a)(6) defines “legal holiday” for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivision (a). Subdivision (a)(6) continues to include within the definition of “legal holiday” days that are “declared a holiday by the President.” For two cases that applied this provision to find a legal holiday on days when the President ordered the government closed for purposes of celebration or commemoration, see *Hart v. Sheahan*, 396 F.3d 887, 891 (7th Cir. 2005) (President included December 26, 2003 within scope of executive order specifying pay for executive department and independent agency employees on legal holidays), and *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1098 (D.C. Cir. 2003) (executive order provided that “[a]ll executive branch departments and agencies of the Federal Government shall be closed and their employees excused from duty on Monday,

December 24, 2001"). Subdivision (a)(6)(B) includes certain state holidays within the definition of legal holidays, and defines the term "state" — for purposes of subdivision (a)(6) — to include the District of Columbia and any commonwealth, territory or possession of the United States. Thus, for purposes of subdivision (a)(6)'s definition of "legal holiday," "state" includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

Subdivision (b). None of the rules listed in former Rule 6(b) allow the court to extend the times to act set in those rules. The purported exception for extensions allowed by those rules is deleted as meaningless. The times allowed for motions under Rules 50, 52, and 59, however, are extended to 30 days.

Subdivision (c). The time provided by former Rule 6(c) to serve a motion and notice of hearing has been expanded from 5 days to 14 days before the time specified for the hearing, without changing the exceptions. The 14-day period sets a more realistic time for other parties to respond and for the court to consider the motion. The time to serve an opposing affidavit is expanded from 1 day before the hearing to 7 days before the hearing. Even if actual delivery is accomplished 1 day before the hearing, a single day is not sufficient time to consider and prepare a response.

Summary of Comments²

RULE 6(A)(5): BACKWARD COUNTING

07-CV-002: The E.D.N.Y. Committee on Civil Litigation suggests the Civil Rules should be amended to eliminate backward counting periods. The time-computation amendments, by continuing to count backward when the last day of a period is an excluded day, exacerbate the bad effects of the proposals by shortening response periods still further. And the rules have no provision for extra days when service is by mail — "Nor is it clear how a workable rule could be drafted that would do this." Rule 6(c) is the most important of the backward-counting rules. E.D. & S.D.N.Y. Local Civil Rule 6.1 illustrates a way to eliminate backward counting. (It does this by not setting any time for serving a motion; it sets times only for opposing and for replying to the opposition.)

Recommendation: This proposal seems too complicated to be acted upon as part of the Time-Computation Project. Even if the project is deferred to coordinate statutory amendments, this question should be put on a separate track. Other backward-counting periods include disclosure

² This is a partial summary of the comments on the Civil Rules Time-Computation Proposals published in August 2007. In the report for the Time-Computation Subcommittee Professor Struve has summarized the comments addressed to the general computation methods and questions shared by the several sets of rules. This summary addresses the comments that particularly concern specific Civil Rules proposals.

periods set in days before trial; the Rule 26(f) conference set before the scheduling conference or order; notice before hearing on a default judgment; and Rule 68, noted below.

07-CV-013: Alexander J. Manners, Esq., notes that Rule 6(d) does not extend time when time is measured backward from an event. Rule 6(c)(1) will allow a motion to be served by any means at least 14 days before the time specified for the hearing. The motion can be served by mail, and intervening weekends or holidays may mean that delivery is even more than 3 days after service. There is less effective time to respond. One cure would be to set different times for service by any means other than in-hand service. He does not specify drafting language. The idea might be expressed in Rule 6(c)(1) like this: “A written motion and notice of the hearing must be served at least 14 days before the time specified for the hearing, or at least 17 days before that time if service is made under Rule 5(b)(2)(C), (D), (E), or (F), with the following exceptions * * *.” A more general approach might be to revise Rule 6(d), perhaps by designating the present subdivision as paragraph (1) and adding a new paragraph (2): “(2) When a party must make service within a specified time before a particular event and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added to the specified time.” [This general approach would include such lengthy periods as the Rule 26(a)(2)(C) period for serving disclosures of expert testimony — 90 days before the date set for trial.]

Recommendation: The “3-day” rule is likely to be reconsidered, at least for electronic service. It may be better to consider this question together with Rule 6(d).

RULE 6(C): LENGTHENED TIMES

07-CV-002: The E.D.N.Y. Committee on Civil Litigation supports lengthening the time periods for moving and responding papers in Rule 6(c)(1) and (2). But it suggests that it might be better to set longer periods of substantive motions than for discovery motions. It points to E.D. & S.D.N.Y. Local Civil Rule 6.1. Rule 6.1 does not set times for moving; it does set times for opposing and for replying to the opposition.

07-CV-013: Alexander J. Manners, Esq.: Proposes revision of the 6(c)(1)(C) provision that allows a court to set a different time by order and addition of an authorization for local rules: “(C) When a court order — which a party may, for good cause, apply for ex parte — sets a different time is set by local rule or court order.”

He also suggests a revision to account for backward-counting periods; see the Rule 6(a)(5) notes above.

Recommendation: Express authorization of local rules is little more attractive here than in many other settings. Distinction between substantive motions and discovery motions may merit consideration, but not because of the new computation method.

RULE 6(D): “3 DAYS ARE ADDED”

07-CV-008: Robert J. Newmeyer, Administrative Law Clerk, suggests that the “3 extra days” provision be “given a state funeral.” It spawns confusion, debate, and needless motions. Three extra days are not needed after electronic service. (This comment also offers an illustration based on the Rule 6(c) backward-counting period for an affidavit opposing a motion; that period is not measured by service.)

Recommendation: This topic may move to the active agenda because of doubts about adding 3 days for service by electronic means. That will provide suitable occasion for reviewing service by other means.

RULE 30(d)(1): 1 DAY OF 7 HOURS

07-CV-018: The Seventh Circuit Bar Association Committee on Rules of Practice & Procedure suggests that some means should be found to state clearly whether the “hours-are-hours” approach supersedes the Committee Note to Rule 30(d)(1), which states that the 7 hours for a deposition is calculated by actual time taken, not including breaks. Some members suggested that if break time continues to be excluded, the Committee should consider revising Rule 30(d)(1) because it is difficult to fit 7 hours of actual deposition time into one day when breaks are excluded.

Recommendation: This is a puzzle. It would be possible to add a comment to the Committee Note for new Rule 6, but that encounters the general aversion to using the Notes for practical advice. Unless a real problem emerges, this concern does not seem to warrant further complication in Rule 6(a)(2) or Rule 30(d)(1).

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

1 **(a) Time to Serve a Responsive Pleading.**

2 **(1) In General.** Unless another time is specified by
3 this rule or a federal statute, the time for serving a
4 responsive pleading is as follows:

5 **(A)** A defendant must serve an answer:

6 **(i)** within ~~20~~ 21 days after being served with
7 the summons and complaint; or

8 **(ii)** if it has timely waived service under
9 Rule 4(d), within 60 days after the
10 request for a waiver was sent, or within
11 90 days after it was sent to the defendant
12 outside any judicial district of the United
13 States.

14 (B) A party must serve an answer to a
15 counterclaim or crossclaim within ~~20~~ 21 days
16 after being served with the pleading that states
17 the counterclaim or crossclaim.

18 (C) A party must serve a reply to an answer within
19 ~~20~~ 21 days after being served with an order to
20 reply, unless the order specifies a different
21 time.

22 * * * * *

23 (4) *Effect of a Motion.* Unless the court sets a
24 different time, serving a motion under this rule
25 alters these periods as follows:

26 (A) if the court denies the motion or postpones its
27 disposition until trial, the responsive pleading
28 must be served within ~~10~~ 14 days after notice
29 of the court's action; or

30 (B) if the court grants a motion for a more definite
31 statement, the responsive pleading must be
32 served within ~~10~~ 14 days after the more
33 definite statement is served.

34 * * * * *

35 (e) **Motion for a More Definite Statement.** A party may
36 move for a more definite statement of a pleading to
37 which a responsive pleading is allowed but which is so

38 vague or ambiguous that the party cannot reasonably
39 prepare a response. The motion must be made before
40 filing a responsive pleading and must point out the
41 defects complained of and the details desired. If the
42 court orders a more definite statement and the order is
43 not obeyed within ~~10~~ 14 days after notice of the order or
44 within the time the court sets, the court may strike the
45 pleading or issue any other appropriate order.

46 **(f) Motion to Strike.** The court may strike from a pleading
47 an insufficient defense or any redundant, immaterial,
48 impertinent, or scandalous matter. The court may act:

49 **(1)** on its own; or

50 **(2)** on motion made by a party either before responding
51 to the pleading or, if a response is not allowed,
52 within ~~20~~ 21 days after being served with the
53 pleading.

54 * * * * *

Committee Note

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Note to Rule 6.

Rule 14. Third-Party Practice

1 **(a) When a Defending Party May Bring in a Third Party.**

2 **(1) *Timing of the Summons and Complaint.*** A
3 defending party may, as third-party plaintiff, serve

4 a summons and complaint on a nonparty who is or
5 may be liable to it for all or part of the claim against
6 it. But the third-party plaintiff must, by motion,
7 obtain the court's leave if it files the third-party
8 complaint more than ~~10~~ 14 days after serving its
9 original answer.

10 * * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

Rule 15. Amended and Supplemental Pleadings

1 **(a) Amendments Before Trial.**

2 **(1) *Amending as a Matter of Course.*** A party may
3 amend its pleading once as a matter of course:

4 **(A)** before being served with a responsive
5 pleading; or

6 **(B)** within ~~20~~ 21 days after serving the pleading
7 if a responsive pleading is not allowed and
8 the action is not yet on the trial calendar.

9 **(2) *Other Amendments.*** In all other cases, a party
10 may amend its pleading only with the opposing
11 party's written consent or the court's leave. The
12 court should freely give leave when justice so
13 requires.

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

Rule 27. Depositions to Perpetuate Testimony

1 (a) Before an Action Is Filed.

2 * * * * *

3 (2) *Notice and Service.* At least ~~20~~ 21 days before the
4 hearing date, the petitioner must serve each
5 expected adverse party with a copy of the petition
6 and a notice stating the time and place of the
7 hearing. The notice may be served either inside or
8 outside the district or state in the manner provided
9 in Rule 4. If that service cannot be made with
10 reasonable diligence on an expected adverse party,
11 the court may order service by publication or
12 otherwise. The court must appoint an attorney to
13 represent persons not served in the manner
14 provided in Rule 4 and to cross-examine the
15 deponent if an unserved person is not otherwise
16 represented. If any expected adverse party is a
17 minor or is incompetent, Rule 17(c) applies.

18 * * * * *

Committee Note

The time set in the former rule at 20 days has been revised to 21 days. See the Note to Rule 6.

Rule 32. Using Depositions in Court Proceedings

1 (a) Using Depositions.

2 * * * * *

3 (5) *Limitations on Use.*

4 (A) *Deposition Taken on Short Notice.* A
5 deposition must not be used against a party
6 who, having received less than ~~11~~ 14 days'
7 notice of the deposition, promptly moved for
8 a protective order under Rule 26(c)(1)(B)
9 requesting that it not be taken or be taken at
10 a different time or place — and this motion
11 was still pending when the deposition was
12 taken.

13 * * * * *

14 (d) Waiver of Objections.

15 * * * * *

16 (3) *To the Taking of the Deposition.*

17 * * * * *

18 (C) *Objection to a Written Question.* An
19 objection to the form of a written question

20 under Rule 31 is waived if not served in
21 writing on the party submitting the question
22 within the time for serving responsive
23 questions or, if the question is a
24 recross-question, within 5 7 days after being
25 served with it.

26 * * * * *

Committee Note

The times set in the former rule at less than 11 days and within 5 days have been revised to 14 days and 7 days. See the Note to Rule 6.

Rule 38. Right to a Jury Trial; Demand

1 * * * * *

2 (b) **Demand.** On any issue triable of right by a jury, a party
3 may demand a jury trial by:

4 (1) serving the other parties with a written demand —
5 which may be included in a pleading — no later
6 than ~~10~~ 14 days after the last pleading directed to
7 the issue is served; and

8 (2) filing the demand in accordance with Rule 5(d).

9 (c) **Specifying Issues.** In its demand, a party may specify
10 the issues that it wishes to have tried by a jury;
11 otherwise, it is considered to have demanded a jury trial
12 on all the issues so triable. If the party has demanded a

13 jury trial on only some issues, any other party may —
14 within ~~10~~ 14 days after being served with the demand or
15 within a shorter time ordered by the court — serve a
16 demand for a jury trial on any other or all factual issues
17 triable by jury.

18 * * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 6.

Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

1 * * * * *

2 **(b) Renewing the Motion After Trial; Alternative**
3 **Motion for a New Trial.** If the court does not grant a
4 motion for judgment as a matter of law made under Rule
5 50(a), the court is considered to have submitted the
6 action to the jury subject to the court's later deciding the
7 legal questions raised by the motion. No later than ~~10~~
8 30 days after the entry of judgment — or if the motion
9 addresses a jury issue not decided by a verdict, no later
10 than ~~10~~ 30 days after the jury was discharged — the
11 movant may file a renewed motion for judgment as a
12 matter of law and may include an alternative or joint
13 request for a new trial under Rule 59. In ruling on the
14 renewed motion, the court may:

15

* * * * *

16

(d) Time for a Losing Party's New-Trial Motion. Any

17

motion for a new trial under Rule 59 by a party against

18

whom judgment as a matter of law is rendered must be

19

filed no later than ~~10~~ 30 days after the entry of the

20

judgment.

21

* * * * *

Committee Note

Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 30 days. Rule 6(b) continues to prohibit expansion of the 30-day period.

Summary of Comments

RULES 50, 52, 59: CHANGE TO 30 DAYS

07-CV-002: The E.D.N.Y. Committee on Civil Litigation supports lengthening the time for post-trial motions under Civil Rules 50, 52, and 59 from 10 days to 30. “[T]his is a more realistic time period.”

07-CV-005: Patrick W. Allen, Esq., thinks that the proposed change to 30 days will lead to unnecessary delay; a party should be able to decide within 10 days. (The comment apparently assumes continuation of the present rule that Saturdays, Sundays, and legal holidays are not counted in measuring 10 days.)

07-CV-010: Public Citizen Litigation Group, by Brian Wolfman, suggests that the period should be 21 days, not 30. (1) “Although the current 10-day period is tight, we have never found it unmanageable. We acknowledge, however, that the current deadline may make it difficult to file some post-trial motions, particularly those under Rule 50 and 52. Nevertheless, we are concerned that a 30-day period will unnecessarily delay the proceedings and may even encourage litigants to file unwarranted post-judgment motions.” (2) 30 days is undesirable because that is the appeal time limit for most civil actions. The result will be many notices of appeal filed prematurely, and suspended, “significantly increas[ing] the number of instances in which appeals and post-judgment Civil Rules April 7-8, 2008

motions are pending simultaneously. At the very least, circuit clerks will have to send out forms to litigants prematurely, and litigants will have to fill them out prematurely.” (This comment underscores the need to consider this question in tandem with the Appellate Rules Committee.)

07-CV-014: The New York City Bar Committee on Bankruptcy notes a problem of integration with the Bankruptcy Rules appeal period, now 10 days and proposed to become 14 days: simple incorporation of Rules 52 and 59 would set the time to move for reconsideration long after expiration of the appeal period. The Bankruptcy Rules incorporating Rules 52 and 59 should be amended to limit the time periods to correspond to the appeal period in Bankruptcy Rule 8002.

07-CV-019: The National Bankruptcy Conference also notes that continuing incorporation of Civil Rule 59 into the Bankruptcy Rules would defer finality until expiration of the 30-day period for seeking a “new trial.” This would severely impair the need for prompt finality and implementation of many forward-looking bankruptcy orders. This comment attaches and endorses a parallel comment by Professor Alan N. Resnick, former Reporter and member of the Bankruptcy Rules Committee.

Email from Professor Struve to Professor Cooper regarding Appellate Rules Deadlines Subcommittee conference call (March 5, 2008):

To: “Edward H. Cooper” <coopere@umich.edu>
cc: “Carl Stewart@ca5.uscourts.gov” <Carl_Stewart@ca5.uscourts.gov>, Mark Kravitz@ctd.uscourts.gov, Jeffrey Sutton@ca6.uscourts.gov, “Douglas.Letter@usdoj.gov” <Douglas.Letter@usdoj.gov>, MAUREEN.MAHONEY@LW.com, “Levy, Mark” <MLevy@kilpatrickstockton.com>

Subject: Appellate Rules Deadlines Subcommittee views on Civil Rules deadlines for tolling motions

Dear Ed,

The Appellate Rules Deadlines Subcommittee held a conference call today and discussed, among other issues, the questions raised during the comment period concerning the Civil Rules Committee's proposal to extend to 30 days the deadlines for renewed motions for judgment as a matter of law under Rule 50(b), motions for a new trial under Rules 50(d) and 59(b), motions for amended or additional findings under Rule 52(b), and motions to amend or alter a judgment under Rule 59(e). I write to summarize the views expressed during our call; these views, of course, are only those of members of the Deadlines Subcommittee, and not the views of the Appellate Rules Committee as a whole. I trust that the Subcommittee members (who are cc'd on this email) will correct any misstatements!

Deadlines Subcommittee members are very sympathetic to the concern that setting the deadline for these motions at 30 days will prevent a potential appellant from knowing (at the time the notice of appeal is to be filed) whether another party will make a motion that will toll the time for appeal and suspend the effectiveness of a previously-filed notice of appeal. Though the group did not arrive at a concrete

suggestion, the following views were expressed and may be useful as the Civil Rules Committee considers the question:

--The Subcommittee would be uncomfortable with a regime in which the tolling motion deadlines are set at 30 days. It seems problematic for a potential appellant to have to file the notice of appeal without knowing whether a tolling motion will be filed.

--Even though the issue will only arise when more than one party is dissatisfied with a judgment, that situation is not all that rare, given the many cases in which there are more than just two parties. (The issue will not arise, though, in cases where FRAP 4(a)(1)(B) and Section 2107 provide a 60-day appeal deadline because the United States or its officer or agency is a party.)

--It was felt that in a number of cases 21 days would suffice to prepare post-judgment motions. On the other hand, members noted that often 21 days will not be enough. The federal government, for example, almost always would want more time than 21 days to prepare such a motion.

--Members discussed the fact that Civil has concluded that the current Civil Rules do not permit extensions of these motion deadlines, and that the proposed amendment to Civil Rule 6(b) underscores the fact that no extensions to those deadlines are permitted. Members recounted their experience that lawyers often feel that they need more time than the current Rules provide to prepare post-judgment motions, and recalled that one way in which district judges finesse the issue is to permit a barebones motion within the required time period, followed by a more detailed brief at a later point. (I noted that some district courts also might delay the entry of judgment as a way of finessing the point.)

--Members wondered whether, if the motion deadline were set at 21 days, it would be possible for the Rules to authorize the court to extend that deadline in a particular case. We discussed the fact that this question would be particularly fraught given the motions' function as tolling motions under Appellate Rule 4(a)(4). We noted the Ninth Circuit's recent conclusion that to the extent post-judgment motions function as tolling motions for purposes of civil appeal time, the deadlines for those motions are jurisdictional. See *U.S. v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1100 -01 (9th Cir. 2008). Would a court in the Ninth Circuit find that a barebones motion within the deadline, later followed by more detailed briefing, qualified as "timely" for purposes of tolling under Rule 4(a)(4)?

--In the light of the concerns that might arise (post-Bowles) when rules authorize a court to extend a deadline that is considered jurisdictional, it would seem optimal for the Civil Rules to set a livable deadline for post-judgment motions so that extensions would not ordinarily be necessary. Perhaps this justifies departing from the 7-day-increment presumption and setting the deadline at something a bit longer than 21 days. Members noted that setting the deadline at 28 days might allow a would-be

appellant to know whether a motion has been made before filing the notice of appeal (at least when CM/ECF is used) but did not advocate 28 days since that would in effect encourage appellants to wait to the next-to-last day to file their notice of appeal -- an undesirable practice. Perhaps 25 days might strike a middle point? No consensus was reached on this issue.

I hope that this is helpful!

Best regards,

Cathie

Recommendation: The Bankruptcy Rules problem is better addressed by the Bankruptcy Rules. The 30-day period was deliberately chosen to allow sufficient time to prepare well-framed motions in complex cases; more time at the beginning may well mean less time over all, courts will be freed from the need to devise expedients (most commonly deferring entry of judgment) to offset the inability to extend this time; and more time for reflection may be as likely to discourage weak motions as to encourage them. The problem of integration with Appellate Rule 4, however, is one that requires joint consideration with the Appellate Rules Committee.

Given the tentative reactions of the Appellate Rules Deadlines Subcommittee, it seems best to pick a period somewhat short of 30 days. The most likely choices are 21 days or 28 days. 28 days has two advantages: it allows more time in the most complex cases that will benefit from extending the present 10-day limit, and it fits the 7-day increment model. It has two disadvantages: it still comes close to the 30-day appeal deadline, and it is anomalous (30-day periods occur throughout the rules). 21 days fits the overall pattern, but may not be as much time as we would wish. Either choice seems reasonable.

**Rule 52. Findings and Conclusions by the Court;
Judgment on Partial Findings**

1 * * * * *

2 **(b) Amended or Additional Findings.** On a party's
3 motion filed no later than ~~10~~ 30 days after the entry of
4 judgment, the court may amend its findings — or make
5 additional findings — and may amend the judgment
6 accordingly. The motion may accompany a motion for
7 a new trial under Rule 59.

8 * * * * *

Committee Note

Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 30 days. Rule 6(b) continues to prohibit expansion of the 30-day period.

Rule 53. Masters

1 * * * * *

2 (f) Action on the Master's Order, Report, or
3 Recommendations.

4 * * * * *

5 (2) *Time to Object or Move to Adopt or Modify.* A
6 party may file objections to — or a motion to
7 adopt or modify — the master's order, report, or
8 recommendations no later than ~~20~~ 21 days after a
9 copy is served, unless the court sets a different
10 time.

11 * * * * *

Committee Note

The time set in the former rule at 20 days has been revised to 21 days. See the Note to Rule 6.

Rule 54. Judgment; Costs

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(d) Costs; Attorney's Fees.

(1) *Costs Other Than Attorney's Fees.* Unless a federal statute, these rules, or a court order provides otherwise, costs — other than attorney's fees — should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on ~~1~~ day's 14 days' notice. On motion served within the next ~~5~~ 7 days, the court may review the clerk's action.

* * * * *

Committee Note

Former Rule 54(d)(1) provided that the clerk may tax costs on 1 day's notice. That period was unrealistically short. The new 14-day period provides a better opportunity to prepare and present a response. The former 5-day period to serve a motion to review the clerk's action is extended to 7 days to reflect the change in the Rule 6(a) method for computing periods of less than 11 days.

Rule 55. Default; Default Judgment

1 * * * * *

2 **(b) Entering a Default Judgment.**

3 * * * * *

4 **(2) *By the Court.*** In all other cases, the party must
5 apply to the court for a default judgment. A
6 default judgment may be entered against a minor
7 or incompetent person only if represented by a
8 general guardian, conservator, or other like
9 fiduciary who has appeared. If the party against
10 whom a default judgment is sought has appeared
11 personally or by a representative, that party or its
12 representative must be served with written notice
13 of the application at least ~~3~~ 7 days before the
14 hearing. The court may conduct hearings or make
15 referrals — preserving any federal statutory right
16 to a jury trial — when, to enter or effectuate
17 judgment, it needs to:

18 * * * * *

Committee Note

The time set in the former rule at 3 days has been revised to 7 days. See the Note to Rule 6.

Rule 56. Summary Judgment

1 (a) **By a Claiming Party.** A party claiming relief may move,
2 with or without supporting affidavits, for summary
3 judgment on all or part of the claim. ~~The motion may be~~
4 ~~filed at any time after:~~

5 ~~(1) 20 days have passed from commencement of the~~
6 ~~action; or~~

7 ~~(2) the opposing party serves a motion for summary~~
8 ~~judgment.~~

9 (b) **By a Defending Party.** A party against whom relief is
10 sought may move ~~at any time~~, with or without supporting
11 affidavits, for summary judgment on all or part of the
12 claim.

13 (c) **Serving the Time for a Motion, Response, and Reply;**
14 **Proceedings.** ~~The motion must be served at least 10~~
15 ~~days before the day set for the hearing. An opposing~~
16 ~~party may serve opposing affidavits before the hearing~~
17 ~~day.~~

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

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

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

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

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

34 * * * * *

Committee Note

The timing provisions for summary judgment are outmoded. They are consolidated and substantially revised in new subdivision (c)(1). The new rule allows a party to move for summary judgment at any time, even as early as the commencement of the action. If the motion seems premature both subdivision (c)(1) and Rule 6(b) allow the court to extend the time to respond. The rule does set a presumptive deadline at 30 days after the close of all discovery.

The presumptive timing rules are default provisions that may be altered by an order in the case or by local rule. Scheduling orders are likely to supersede the rule provisions in most cases, deferring summary-judgment motions until a stated time or establishing different deadlines. Scheduling orders tailored to the needs of the specific case, perhaps adjusted as it progresses, are likely to work better than default rules. A scheduling order may be adjusted to adopt the parties' agreement on timing, or may require that discovery and motions occur in stages — including separation of expert-witness discovery from other discovery.

Local rules may prove useful when local docket conditions or practices are incompatible with the general Rule 56 timing provisions.

If a motion for summary judgment is filed before a responsive pleading is due from a party affected by the motion, the time for responding to the motion is 21 days after the responsive pleading is due.

Rule 59. New Trial; Altering or Amending a Judgment

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(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than ~~10~~ 30 days after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has ~~10~~ 14 days after being served to file opposing affidavits; ~~but that period may be extended for up to 20 days, either by the court for good cause or by the parties' stipulation.~~ The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than ~~10~~ 30 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the

19 motion. In either event, the court must specify the
20 reasons in its order.

21 (e) **Motion to Alter or Amend a Judgment.** A motion to
22 alter or amend a judgment must be filed no later than ~~10~~
23 30 days after the entry of the judgment.

Committee Note

Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 30 days. Rule 6(b) continues to prohibit expansion of the 30-day period.

Former Rule 59(c) set a 10-day period after being served with a motion for new trial to file opposing affidavits. It also provided that the period could be extended for up to 20 days for good cause or by stipulation. The apparent 20-day limit on extending the time to file opposing affidavits seemed to conflict with the Rule 6(b) authority to extend time without any specific limit. This tension between the two rules may have been inadvertent. It is resolved by deleting the former Rule 59(c) limit. Rule 6(b) governs. The underlying 10-day period was extended to 14 days to reflect the change in the Rule 6(a) method for computing periods of less than 11 days.

Rule 62. Stay of Proceedings to Enforce a Judgment

1 (a) **Automatic Stay; Exceptions for Injunctions,**
2 **Receiverships, and Patent Accountings.** Except as
3 stated in this rule, no execution may issue on a
4 judgment, nor may proceedings be taken to enforce it,
5 until ~~10~~ 14 days have passed after its entry. But unless
6 the court orders otherwise, the following are not stayed
7 after being entered, even if an appeal is taken:

8 * * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

Rule 65. Injunctions and Restraining Orders

1 * * * * *

2 (b) **Temporary Restraining Order.**

3 * * * * *

4 (2) **Contents; Expiration.** Every temporary
5 restraining order issued without notice must state
6 the date and hour it was issued; describe the injury
7 and state why it is irreparable; state why the order
8 was issued without notice; and be promptly filed in
9 the clerk's office and entered in the record. The

10 order expires at the time after entry — not to
11 exceed ~~10~~ 14 days — that the court sets, unless
12 before that time the court, for good cause, extends
13 it for a like period or the adverse party consents to
14 a longer extension. The reasons for an extension
15 must be entered in the record.

16 * * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

Rule 68. Offer of Judgment

1 (a) **Making an Offer; Judgment on an Accepted Offer.**
2 ~~More than 10~~ At least 14 days before the date set for
3 trial begins, a party defending against a claim may serve
4 on an opposing party an offer to allow judgment on
5 specified terms, with the costs then accrued. If, within
6 ~~10~~ 14 days after being served, the opposing party serves
7 written notice accepting the offer, either party may then
8 file the offer and notice of acceptance, plus proof of
9 service. The clerk must then enter judgment.

10 * * * * *

11 (c) **Offer After Liability is Determined.** When one
12 party's liability to another has been determined but the

13 extent of liability remains to be determined by further
14 proceedings; the party held liable may make an offer of
15 judgment. It must be served within a reasonable time —
16 but at least ~~10~~ 14 days — before the date set for a
17 hearing to determine the extent of liability.

18 * * * * *

Committee Note

Former Rule 68 allowed service of an offer of judgment more than 10 days before the trial begins, or — if liability has been determined — at least 10 days before a hearing to determine the extent of liability. It may be difficult to know in advance when trial will begin or when a hearing will be held. The time is now measured from the date set for trial or hearing; resetting the date establishes a new time for serving the offer.

The former 10-day periods are extended to 14 days to reflect the change in the Rule 6(a) method for computing periods less than 11 days.

Summary of Comments

RULE 68

07-CV-013: Alexander J. Manners, Esq., points to a problem that exists in current Rule 68 equally with the proposed time revisions. The evident purpose of the rule is to require a decision whether to accept a Rule 68 offer of judgment before trial starts. But there is a loophole. Using the proposed times to illustrate, the offer may be served “at least 14 days before the date set for trial * * *. If, within 14 days after being served, the opposing party” accepts, it is accepted. But if service is made by any means other than in-hand, Rule 6(d) adds 3 days after the period expires. That could be during or even after trial. This question could be addressed in Rule 68: “If, within by the earlier of 14 days after being served or the start of trial, the opposing party serves written notice accepting the offer * * *.”

Recommendation: This one is tempting. But no one has suggested a practical problem. Perhaps the question should be carried forward with the general question of backward-counting periods.

Rule 71.1. Condemning Real or Personal Property

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(d) Process.

(2) Contents of the Notice.

(A) Main Contents. Each notice must name the court, the title of the action, and the defendant to whom it is directed. It must describe the property sufficiently to identify it, but need not describe any property other than that to be taken from the named defendant. The notice must also state:

- (i)** that the action is to condemn property;
- (ii)** the interest to be taken;
- (iii)** the authority for the taking;
- (iv)** the uses for which the property is to be taken;
- (v)** that the defendant may serve an answer on the plaintiff's attorney within ~~20~~ 21 days after being served with the notice;
- (vi)** that the failure to so serve an answer constitutes consent to the taking and to

22 the court's authority to proceed with the
23 action and fix the compensation; and
24 (vii) that a defendant who does not serve an
25 answer may file a notice of appearance.

26 * * * * *

27 (e) **Appearance or Answer.**

28 * * * * *

29 (2) **Answer.** A defendant that has an objection or
30 defense to the taking must serve an answer within
31 ~~20~~ 21 days after being served with the notice. The
32 answer must:

33 * * * * *

Committee Note

The times set in the former rule at 20 days have been revised to 21 days. See the Note to Rule 6.

Rule 72. Magistrate Judges: Pretrial Order

1 (a) **Nondispositive Matters.** When a pretrial matter not
2 dispositive of a party's claim or defense is referred to a
3 magistrate judge to hear and decide, the magistrate
4 judge must promptly conduct the required proceedings
5 and, when appropriate, issue a written order stating the
6 decision. A party may serve and file objections to the

7 order within ~~10~~ 14 days after being served with a copy.
8 A party may not assign as error a defect in the order not
9 timely objected to. The district judge in the case must
10 consider timely objections and modify or set aside any
11 part of the order that is clearly erroneous or is contrary
12 to law.

13 **(b) Dispositive Motions and Prisoner Petitions.**

14 * * * * *

15 **(2) *Objections.*** Within ~~10~~ 14 days after being served
16 with a copy of the recommended disposition, a
17 party may serve and file specific written objections
18 to the proposed findings and recommendations. A
19 party may respond to another party's objections
20 within ~~10~~ 14 days after being served with a copy.
21 Unless the district judge orders otherwise, the
22 objecting party must promptly arrange for
23 transcribing the record, or whatever portions of it
24 the parties agree to or the magistrate judge
25 considers sufficient.

26 * * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 6.

Summary of Comments

RULE 72

07-CV-008: Robert J. Newmeyer, Administrative Law Clerk, urges that 28 U.S.C. § 636(b)(1) must be amended to agree with the 14-day periods set by proposed Rule 72. He also suggests that 14 days is too short for objections to recommended disposition of a dispositive matter — the time should be 28 days, or 30.

Recommendation: Amendment of § 636(b) is the one statutory recommendation firmly set for the Civil Rules list.

Rule 81. Applicability of the Rules in General; Removed Actions

1 * * * * *

2 (c) **Removed Actions.**

3 * * * * *

4 (2) *Further Pleading.* After removal, repleading is
5 unnecessary unless the court orders it. A
6 defendant who did not answer before removal
7 must answer or present other defenses or
8 objections under these rules within the longest of
9 these periods:

10 (A) ~~20~~ 21 days after receiving — through service
11 or otherwise — a copy of the initial pleading
12 stating the claim for relief;

13 (B) ~~20~~ 21 days after being served with the
14 summons for an initial pleading on file at the
15 time of service; or

16 (C) 5 ~~7~~ days after the notice of removal is filed.

Rule B. In Personam Actions: Attachment and Garnishment

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(3) Answer.

(a) By Garnishee. The garnishee shall serve an answer, together with answers to any interrogatories served with the complaint, within ~~20~~ 21 days after service of process upon the garnishee. Interrogatories to the garnishee may be served with the complaint without leave of court. If the garnishee refuses or neglects to answer on oath as to the debts, credits, or effects of the defendant in the garnishee's hands, or any interrogatories concerning such debts, credits, and effects that may be propounded by the plaintiff, the court may award compulsory process against the garnishee. If the garnishee admits any debts, credits, or effects, they shall be held in the garnishee's hands or paid into the registry of the court, and shall be held in either case subject to the further order of the court.

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Committee Note

The time set in the former rule at 20 days has been revised to 21 days. See the Note to Rule 6.

Rule C. In Rem Actions: Special Provisions

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(4) Notice. No notice other than execution of process is required when the property that is the subject of the action has been released under Rule E(5). If the property is not released within ~~10~~ 14 days after execution, the plaintiff must promptly — or within the time that the court allows — give public notice of the action and arrest in a newspaper designated by court order and having general circulation in the district, but publication may be terminated if the property is released before publication is completed. The notice must specify the time under Rule C(6) to file a statement of interest in or right against the seized property and to answer. This rule does not affect the notice requirements in an action to foreclose a preferred ship mortgage under 46 U.S.C. §§ 31301 et seq., as amended.

* * * * *

(6) Responsive Pleading; Interrogatories.

(a) Maritime Arrests and Other Proceedings.³

³A technical revision of Supplemental Rule C(6)(a) has been proposed for adoption without publication to take effect on December 1, 2008. That revision has no effect on the proposal to amend subparagraph (A) to extend the time to file from 10 days to 14 days.

- 20 **(i)** a person who asserts a right of possession or
21 any ownership interest in the property that is
22 the subject of the action must file a verified
23 statement of right or interest:
- 24 **(A)** within ~~10~~ 14 days after the execution of
25 process, or
- 26 **(B)** within the time that the court allows;
- 27 **(ii)** the statement of right or interest must describe
28 the interest in the property that supports the
29 person's demand for its restitution or right to
30 defend the action;
- 31 **(iii)** an agent, bailee, or attorney must state the
32 authority to file a statement of right or interest
33 on behalf of another; and
- 34 **(iv)** a person who asserts a right of possession or
35 any ownership interest must serve an answer
36 within ~~20~~ 21 days after filing the statement of
37 interest or right.

38 * * * * *

Committee Note

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Note to Rule 6.

Rule G. Forfeiture Actions In Rem

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(4) Notice.

(b) Notice to Known Potential Claimants.

- (i) Direct Notice Required.** The government must send notice of the action and a copy of the complaint to any person who reasonably appears to be a potential claimant on the facts known to the government before the end of the time for filing a claim under Rule G(5)(a)(ii)(B).
- (ii) Content of the Notice.** The notice must state:
 - (A)** the date when the notice is sent;
 - (B)** a deadline for filing a claim, at least 35 days after the notice is sent;
 - (C)** that an answer or a motion under Rule 12 must be filed no later than ~~20~~ 21 days after filing the claim; and
 - (D)** the name of the government attorney to be served with the claim and answer.

22

* * * * *

23 **(5) Responsive Pleadings.**

24

* * * * *

25 **(b) Answer.** A claimant must serve and file an answer
26 to the complaint or a motion under Rule 12 within
27 20 21 days after filing the claim. A claimant
28 waives an objection to in rem jurisdiction or to
29 venue if the objection is not made by motion or
30 stated in the answer.

31 **(6) Special Interrogatories.**

32 **(a) Time and Scope.** The government may serve
33 special interrogatories limited to the claimant's
34 identity and relationship to the defendant property
35 without the court's leave at any time after the
36 claim is filed and before discovery is closed. But
37 if the claimant serves a motion to dismiss the
38 action, the government must serve the
39 interrogatories within 20 21 days after the motion
40 is served.

41 **(b) Answers or Objections.** Answers or objections to
42 these interrogatories must be served within 20 21
43 days after the interrogatories are served.

44 **(c) Government's Response Deferred.** The
45 government need not respond to a claimant's

46 motion to dismiss the action under Rule G(8)(b)
47 until ~~20~~ 21 days after the claimant has answered
48 these interrogatories.

49 * * * * *

Committee Note

The times set in the former rule at 20 days have been revised to 21 days. See the Note to Rule 6.

Form 3. Summons.

(Caption — See Form 1.)

To *name the defendant*:

A lawsuit has been filed against you.

Within ~~20~~ 21 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure.

* * * * *

Summary of Comments

FORM 3

07-CV-016: FDIC Legal Division, offers an observation generated by the form of publication. The August publication uses asterisks to indicate that not all of Form 3 was published. The omitted part includes the very advice the FDIC thinks should be there — that the period is 60 days, not 21 days, if the defendant is the United States, a United States agency, etc.

Recommendation: None needed.

Form 4. Summons on a Third-Party Complaint.

(Caption — See Form 1.)

To name the third-party defendant:

A lawsuit has been filed against defendant _____, who as third-party plaintiff is making this claim against you to pay part or all of what [he] may owe to the plaintiff _____.

Within ~~20~~ 21 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff and on the defendant an answer to the attached third-party complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure.

* * * * *

Form 60. Notice of Condemnation.

(Caption — See Form 1.)

* * * * *

4. If you want to object or present any defense to the taking you must serve an answer on the plaintiff's attorney within ~~20~~ 21 days [after being served with this notice][from (insert the date of the last publication of notice)]. Send your answer to this address _____.

* * * * *

MEMORANDUM

DATE: March 13, 2008

TO: Judge Lee H. Rosenthal
Standing Committee on Rules of Practice and Procedure
Reporters and Advisory Committee Chairs

CC: John K. Rabiej

FROM: Judge Marilyn L. Huff
Catherine T. Struve

RE: Time-Computation Project

We write on behalf of the Time-Computation Subcommittee to summarize the Subcommittee's reactions to the comments submitted concerning the proposed time-computation amendments.

Part I of this memo summarizes the Time-Computation Subcommittee's recommendations and requests. Part II summarizes developments in the Project since the Standing Committee's June 2007 meeting. Part III provides more detail concerning the Subcommittee's views on each outstanding issue.¹ Part IV lists and summarizes the comments submitted on the time-computation project.² Part IV includes not only the issues highlighted in Part III, but also a number of comments that seem more properly directed to a particular Advisory Committee than to this Subcommittee.

¹ Part III omits discussion of comments that seem more appropriate for consideration by one or more of the Advisory Committees outside the context of the time-computation project than for consideration at this time by the Subcommittee. (Such comments concern, inter alia, proposals to change the "three-day rule"; proposals to eliminate backward-counted deadlines; and criticisms of particular deadlines or proposed changes to deadlines within a given set of Rules.) Part III is organized thematically.

² In the interest of brevity, Part IV does not list comments directed solely to the bankruptcy appeal deadlines contained in Bankruptcy Rule 8002, because such comments are numerous and are more properly addressed by the Bankruptcy Rules Committee than by the Time-Computation Subcommittee.

I. Summary of recommendations

The Subcommittee makes the following recommendations, the reasons for which are discussed in Part III of this memo. As explained in Part III, the Subcommittee also discussed at length two possible changes to the proposed text and note of the time-computation rules.³ Because each of those possible changes ultimately failed to gain the support of a majority of Subcommittee members, the Subcommittee recommends no change in the language of the proposals as published.

Approval and timing of project. The Subcommittee recommends that the Advisory Committees move forward to finalize the proposed time-computation rules. As discussed in Part III.B, questions have been raised about the timing of the project, and it may be the case that in the future the Standing Committee should consider the possibility of delaying the project's progress or the effective date of the proposed amendments. But for the moment, the Subcommittee recommends proceeding on the assumption that the project will continue on track to take effect December 1, 2009.

Compilation of list of statutory deadlines for amendment. The Subcommittee asks each Advisory Committee to compile – and approve at its spring meeting – a list of the statutory time periods that fall within its area of expertise and that should be lengthened in order to offset the shift in time-computation approach.⁴ The project's timing will depend in part on how soon

³ Those two possible changes can be summed up as follows:

Note to subdivision (a). The Subcommittee discussed whether to recommend adding the following sentences to the first paragraph of the Note to subdivision (a) of the time-computation rules:

Thus, for example, a local rule should not set a time period in “business days,” because subdivision (a) directs that one “count every day, including intermediate Saturdays, Sundays, and legal holidays.” A local rule providing that “[r]eply papers shall be filed and served at least three business days before the return date” should be amended. Until then, it should be applied, under subdivision (a), as though it refers to “three days” instead of “three business days.”

New language for subdivision (a)(6). The Subcommittee discussed whether to recommend splitting subdivision (a)(6)(B) into two provisions as follows:

(B) any other day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state [etc.]

⁴ Some participants in the Subcommittee's conference calls are of the view that the goal should be to make a short list of those statutory time periods which are most in need of such

the Advisory Committees are able to compile those lists. In particular, there is a pressing need to obtain the list of provisions affecting criminal practice, in order to seek input from affected groups.

II. Recent developments in the time-computation project

As you know, the Time-Computation Subcommittee is tasked with examining the time-computation provisions found in the Appellate, Bankruptcy, Civil, and Criminal Rules, with a view to simplifying those provisions and eliminating inconsistencies among them. The Subcommittee, in consultation with the Advisory Committees and the Standing Committee, drafted a proposed template for an amended time-computation rule. The template's principal simplifying innovation is its adoption of a "days-are-days" approach to computing all periods of time, including short time periods.

Versions of the template rule were published for comment as proposed amendments to Appellate Rule 26(a), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a). Also published for comment were proposed amendments to numerous deadlines set by the Appellate, Bankruptcy, Civil and Criminal Rules; the goal of those amendments is to offset the effect of the change in time-counting approach by lengthening most short rule-based deadlines.

In publishing the time-computation proposals for comment, we drew the attention of the bench and bar to three issues in particular. First, we solicited input on the proposed time-computation rules. Second, we noted that the shift to a days-are-days approach will be almost entirely offset – as to rule-based periods – by amendments that lengthen most short rule-based deadlines. Third, we pointed out that the new time-computation rules will govern a number of statutory deadlines that do not themselves provide a method for computing time, and we solicited input concerning key statutory deadlines that the Standing Committee should recommend that Congress lengthen in order to offset the change in time-computation approach.

We received a total of some 22 comments that are relevant to the time-computation project as a whole. Those comments are summarized in Part IV of this memo. The public comment period closed February 15, 2008. The Time-Computation Subcommittee held two conference calls in February 2008 to discuss the comments. As to a few issues (such as those discussed in Part III.C.1) the Subcommittee continued its deliberations by email.

III. Discussion of Subcommittee recommendations

This Part discusses issues raised by the comments on the time-computation project, and summarizes the Subcommittee's reactions to those issues.

amendment. But one Subcommittee member has suggested that the goal should be to amend *all* affected statutory deadlines (unless they are controversial and therefore might derail or delay the entire project).

A. Overall advisability of project

The following commentators commented favorably on the time-computation project overall:

- Chief Judge Frank H. Easterbrook.
- Walter W. Bussart.
- Jack E. Horsley.
- Public Citizen Litigation Group.
- The State Bar of California's Committee on Appellate Courts.

The following commentators commented unfavorably.

- The Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York ("EDNY Committee").
- The Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York ("ABCNY Bankruptcy Committee").
 - The Committee focuses its opposition on the time-computation proposal for Bankruptcy Rule 9006. With respect to the time-computation proposals for the other sets of Rules, the Committee cites with approval the comments of the EDNY Committee.
- Professor Alan N. Resnick opposes adoption of a days-are-days time-computation approach in Bankruptcy Rule 9006.
- Richard Levin writes on behalf of the National Bankruptcy Conference ("NBC"), which "strongly endorses and supports" the comments submitted by Professor Alan Resnick.⁵

Commentators who oppose the project predict that the proposed change in time-computation approach will cause disruption, given the great number of affected deadlines that are contained in statutes, local rules, and standard forms. They believe that the current time-counting

⁵ The NBC also warns that the proposed changes to various bankruptcy-relevant time periods could result in unintended consequences; it thus suggests "that the Advisory Committee delay incorporation of the 7, 14, 21, and 28 day time period changes into the Bankruptcy Rules until the impact of those changes [is] studied further"

system works well.⁶ They note that as to short time periods set by the Rules, the proposed amendments mitigate the effect of no longer skipping weekends, but do not offset the fact that under the new approach holidays will no longer be skipped either.

Subcommittee members reviewed with care the arguments leveled against the time-computation proposals. Members observed, however, that these were the same objections that had been made – and rejected – during the Advisory Committees’ earlier consideration of the proposed template. The Subcommittee’s consensus was that it makes sense to proceed with the project, subject to the considerations discussed in Part III.B. below.

B. Statutory deadlines, local rules deadlines, and the timing of project’s implementation

Several commentators (1) urge strongly that statutory and local rules deadlines must be adjusted in order to offset the shift to a days-are-days approach, and (2) also urge that the new time-computation rules’ effective date must be delayed until those tasks are accomplished.⁷

1. Statutory and local rules deadlines

Craig S. Morford, Acting Deputy Attorney General, writes on behalf of the Department of Justice to express support for the goals of the time-computation project, but also to express strong concerns “about the interplay of the proposed amendment with both existing statutory periods and local rules.” The DOJ argues that “changes should be addressed in relevant statutory and local rule provisions before a new time-computation rule is made applicable.” Otherwise, the DOJ fears that the purposes of some statutes “may be frustrated.” The DOJ argues that exempting statutory time periods from the new time-counting approach would be an undesirable solution since it would create “confusion and uncertainty” to have two different time-counting regimes (one for rules and one for statutes). Mr. Morford does not specifically state the DOJ’s position on which of the statutory time periods should be lengthened to offset the change in time-computation approach. His letter does refer to the Committee’s identification of “some 168 statutes ... that contain deadlines that would require lengthening.”

⁶ To the extent that some litigants have difficulty computing time under the current approach, the EDNY Committee suggests that one could build into the electronic case filing software a program that could perform the necessary computations.

⁷ Alexander J. Manners proffers several suggestions for guiding the local rules amendment process. He suggests that the district courts be given “an implementation guide and timeline for district courts to follow in order to ensure their local and judges’ rules are amended correctly and in time to coincide with the adoption of the new Federal Rules.” That guide should, he argues, encourage local rulemakers to lengthen affected short time periods (taking account, *inter alia*, of any relevant state holidays) and to use multiples of 7 days (where possible) when doing so.

The EDNY Committee argues strongly that if the new time-counting approach is to be adopted then Congress must be asked to lengthen all affected statutory time periods. Likewise, the EDNY Committee notes that steps must be taken to lengthen all affected time periods set by local rules, standing orders, and standard-form orders.

The Subcommittee takes seriously the comments that stress the necessity for changes in periods set by statute or by local rule. The Subcommittee asks each Advisory Committee to compile and approve a list of the statutory time periods that will require amendment. Subcommittee members did not reach complete consensus on the approach that should be taken in compiling the list. At least one Subcommittee member stressed the importance of including all affected statutory time periods (except for any that might be deemed controversial). Other participants in the conference call, however, took the view that the goal should be to compile a relatively short list of the provisions that are most likely to cause problems if not lengthened to offset the shift in time-computation approach.

2. Timing of project's implementation

As noted above, the DOJ urges that the time-computation amendments not be allowed to take effect unless and until (1) Congress enacts legislation to lengthen all relevant statutory periods, (2) the local rulemaking bodies have had the opportunity to amend relevant local-rule deadlines, and (3) the bench and bar have had time to learn about the new time-counting rules. Likewise, Robert M. Steptoe, Jr., a partner at Steptoe & Johnson, urges that the time-computation proposals "not be implemented unless and until the Standing Committee is sure that it will receive the necessary cooperation from Congress and the local rules committees to meet the desired objective of simplification." Similarly, Alex Luchenitser of Americans United for Separation of Church and State urges that "local district and appellate courts should be given a specific time frame to adopt revisions to their rules after the new federal rules are approved. And the new federal rules should not go into effect until after the deadline for local courts to adopt changes to their rules passes."

The Subcommittee agrees that the effective date of the Rules should be chosen so as to allow time for the necessary statutory and local rules changes.

3. Timing possibilities

The Subcommittee discussed possible ways to adjust the time-computation project's timing to address these concerns. The further progress of the package of time-computation amendments depends upon the understanding that Congress will pass legislation lengthening a number of statutory deadlines. If the time-computation project were to go forward as planned, the Rules amendments would be on track to take effect December 1, 2009. Because the ability to stay on the December 1, 2009 track depends in part on events that have not yet occurred (including the need to compile and obtain input on the list of short statutory time periods that require amendment), the Subcommittee discussed two alternate possibilities. One would be to ask the Standing Committee to hold the package of time-computation amendments until June

2009. Another would be to include effective date provisions that make the time-computation rule amendments not effective until some time after Congress passes appropriate legislation or until December 1, 2010 (so as to afford more time for conforming legislation and local rule changes).

The Supreme Court's orders customarily provide that amendments "shall take effect on December 1, [year], and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending." See, e.g., Order of April 12, 2006, 234 F.R.D. 221. But that pattern is not required by statute. As to the Civil, Criminal, and Appellate Rules, 28 U.S.C. § 2074 provides:

The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law. The Supreme Court may fix the extent such rule shall apply to proceedings then pending, except that the Supreme Court shall not require the application of such rule to further proceedings then pending to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies.

Section 2075, concerning the Bankruptcy Rules, provides simply that "[t]he Supreme Court shall transmit to Congress not later than May 1 of the year in which a rule prescribed under this section is to become effective a copy of the proposed rule. The rule shall take effect no earlier than December 1 of the year in which it is transmitted to Congress unless otherwise provided by law." 28 U.S.C. § 2075.

The Subcommittee did not discuss the alternative timing options in detail. (For example, the Subcommittee did not discuss the extent to which the Enabling Act provisions would permit the use of an effective date in a later year than the year when the proposed amendments are transmitted to Congress.⁸) Instead, the Subcommittee concluded that the best approach, for the

⁸ One interpretation of Section 2074 might be that the effective date must be within the year in which the rules were transmitted to Congress (though of course no earlier than December 1 of that year). That interpretation takes account of the first sentence of Section 2074, which prescribes that the rules must be transmitted to Congress "not later than May 1 of the year in which" the rules will become effective. One reason for such a reading can be illustrated with a hypothetical: If the Court transmitted a rule to Congress on November 1, 2009, and set the rule's effective date at January 1, 2010, this would run counter to the statute's seven-month waiting period requirement – yet as a technical matter it might be claimed that there had been compliance because the transmittal occurred before May 1, 2010 (complying with the first sentence of 2074(a)) and the effective date was no earlier than December 1, 2009 (complying with the second sentence). To prevent such a misreading of the statute, one might conclude that the transmittal and effective date must take place within the same calendar year.

moment, is to move ahead on the assumption that the project will stay on track to take effect December 1, 2009.

C. Substantive issues relating to the project's implementation

As noted above, the Subcommittee recommends no changes to the language of the proposals as published. Before reaching that conclusion, the Subcommittee discussed two possible changes which some members of the Subcommittee would have supported; those possible changes are discussed in Part III.C.1. Other suggestions made by commentators, and rejected by clear consensus of the Subcommittee, are discussed in Part III.C.2.

1. Possible changes discussed, but ultimately not adopted, by the Subcommittee

Alternate time-counting methods set by local rules. The EDNY Committee observes that some local rules contain periods counted in business days, and argues that any change in the time-counting rules should be tailored so as not to change such periods to calendar days. The Subcommittee disagrees with the EDNY Committee's recommendation, and believes that the national time-computation rules should trump contrary time-computation approaches in the local rules.

The ABCNY Bankruptcy Committee suggests, among other problems, that "some local courts might decide to retain the present computational approach through the promulgation of local rules," which would compound the resulting confusion. The Subcommittee's discussion of this comment underscored participants' view that it is important that the Committee Note make clear the national rules' effect on local time-counting provisions.

One possible response, however, might be that the statute should be construed in the light of its purpose, which was to have "the proposed rules 'lay over' for a period of at least seven months," H.R. Rep. 99-422, at 26 – a purpose which is not thwarted in instances where transmittal occurs by May 1, 2009 and the effective date is set for 2010 or later (but which would foreclose the misinterpretation described in the preceding paragraph – transmittal 11/1/09, effective date 1/1/10).

Admittedly, research has disclosed no precedent for the rulemakers' setting a delayed effective date (though there are instances in which Congress delayed the effective date). But it does not seem clear that the statute bars such a delayed effective date. Indeed, to the extent that one of the aspects of post-1988 rulemaking is caution (on the part of the rulemakers) concerning the use of the supersession authority, and to the extent that the time-computation rules package might affect some aspects of statutory deadlines through that supersession authority, it might be thought salutary to tie the effective date of the rules package to the effective date of the legislation.

The Note already states that local rules “may not direct that a deadline be computed in a manner inconsistent with” the national time-computation rules. The Subcommittee discussed whether it would be useful to provide further clarification. At least one Subcommittee member feels that such clarification would be useful. However, the Subcommittee was not able to formulate clarifying language that would not itself raise additional problems. The language first considered by the Subcommittee is shown below (new material is underlined; Appellate Rule 26(a) is used here for illustrative purposes):

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a statute that does not specify a method of computing time, a Federal Rule of Appellate Procedure, a local rule, or a court order. In accordance with Rule 47(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a). Thus, for example, a local rule should not set a time period in “business days,” because subdivision (a) directs that one “count every day, including intermediate Saturdays, Sundays, and legal holidays.” A local rule providing that “[r]epley papers shall be filed and served at least three business days before the return date” should be amended. Until then, it should be applied, under subdivision (a), as though it refers to “three days” instead of “three business days.”

During the Subcommittee’s discussion of this possible addition, a participant voiced unease with the proposed change. He noted that “[t]he new sentences target a transitional problem that should be eliminated soon,” and that “Committee Notes are permanent and do not ordinarily refer to transitional problems, whose permanent status might only confuse a future reader when all the local rules have been amended.” He cautioned:

[M]y major concern with the three additional sentences is the implication that the rules committees have the authority to construe a local rule in a certain way, e.g., until the local rules are changed they should be read to mean “three days.” The rules committees have no authority to interpret local rules. The circuit judicial councils determine whether a local rule is consistent with the federal rules (28 U.S.C. section 331(d)(4).) When we renumbered the rules, we faced a similar issue with requiring parallel local rules. But in that case, we amended the rule directly to provide that local rules must conform with the renumbering system. We could do that here, but I believe that is unnecessary as the courts will amend their local rules to comply with the law.

The last sentence of the original Committee Note seems clear and sufficient to me. “In accordance with Rule 47(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a).” I do not believe that the next three sentences are necessary, particularly because we will send a notice to every court advising them of the new rule and their responsibility to amend the local rules consistent with the law. We will monitor their actions and send follow-up notices, if necessary. The added three sentences carry no more weight than these notices and may be viewed by some in the wrong light. If

we believe that the "business day" issue must be addressed, I would suggest adding something like the following in lieu of the three sentences: "The rule is intended to make clear that time periods cannot be counted using "business days," because subdivision (a) directs that "one count every day, including intermediate Saturdays, Sundays, and legal holidays." Even this revised sentence may not be necessary, because our notices to the courts will make the point clear.

In the light of this input, and because a majority of Subcommittee members failed to voice support for the proposed change to the note to subdivision (a)(1), the Subcommittee is not recommending such a change.

State holidays. Alexander Manners, a vice president of CompuLaw LLC, proposes that Civil Rule 6(a)(6)'s definition of the term "legal holiday" be changed so that (a)(6)(B) reads "any other day declared a holiday by the President, Congress, or the state where the district court is located and officially noticed as a legal holiday by the district court." He makes this suggestion out of concern that, otherwise, litigants will be confused as to whether a state holiday counts as a "legal holiday" for time-computation purposes in instances when the federal district court fails to close on that day, or when it closes only for some purposes, or when it closes but fails to give timely notice of the closure.

The fact that the federal courts do not always close on state holidays has been discussed in the Advisory Committees' consideration of the time-computation proposals; despite the fact that federal courts do not always close, it was deemed important to count state holidays as legal holidays, given that – among other things – state and local government offices (including those of state and local government lawyers) are likely to be closed on state holidays. Under the clear text of the proposed Rule (and also under the text of the current Rule), state holidays count as legal holidays.

The Subcommittee discussed the fact that with respect to forward-counted deadlines, including state holidays within the definition of "legal holiday" serves as a safe harbor: A party who assumes the state holiday *is* a legal holiday will be protected from missing a deadline, while the worst that happens to a party who doesn't know the state holiday counts as a legal holiday is that the party thinks their deadline is a day earlier than it really is.

However, the Subcommittee noted that with respect to backward-counted deadlines, the state-holiday provision as currently drafted could pose a trap for the unwary. Imagine a case in which the backward-counted period (e.g., a requirement that a litigant file or serve reply papers five days before a hearing) ends on a state holiday on which the federal courts do not close. In such an instance the unwary practitioner may file or serve on the state holiday, not realizing that because that day counts as a legal holiday for time-counting purposes, the backward-counted deadline actually fell the day *before* the state holiday. In the light of the arcane nature of some state holidays, the Subcommittee thought it might be worthwhile to eliminate this potential trap. The Subcommittee therefore discussed the possibility of amending subdivision (a)(6)'s definition of "legal holiday." The blacklined excerpt below shows the possible alteration compared to the published version (using Appellate Rule 26(a)(6) for illustrative purposes):

- (6) **“Legal Holiday” Defined.** “Legal holiday” means:
- (A) the day set aside by statute for observing New Year’s Day, Martin Luther King Jr.’s Birthday, Washington’s Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans’ Day, Thanksgiving Day, or Christmas Day; and
 - (B) any other day declared a holiday by the President; or Congress; ~~or~~ and
 - (C) for periods that are measured after an event, any other day declared a holiday by the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk’s principal office. (In this rule, ‘state’ includes the District of Columbia and any United States commonwealth, territory, or possession.)

The Note to subdivision (a)(6) would then be expanded to explain the significance of subdivision (a)(6)(C). The first attempt at drafting such an expanded Note is shown below:

Subdivision (a)(6). New subdivision (a)(6) defines “legal holiday” for purposes of the Federal Rules of Appellate Procedure, including the time-computation provisions of subdivision (a). Subdivision (a)(6) continues to include within the definition of “legal holiday” days that are “declared a holiday by the President.” For two cases that applied this provision to find a legal holiday on days when the President ordered the government closed for purposes of celebration or commemoration, *see Hart v. Sheahan*, 396 F.3d 887, 891 (7th Cir. 2005) (President included December 26, 2003 within scope of executive order specifying pay for executive department and independent agency employees on legal holidays), and *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1098 (D.C. Cir. 2003) (executive order provided that “[a]ll executive branch departments and agencies of the Federal Government shall be closed and their employees excused from duty on Monday, December 24, 2001”).

For forward-counted periods – i.e., periods that are measured after an event – subdivision (a)(6)(C) includes certain state holidays within the definition of legal holidays. However, state legal holidays are not recognized in computing backward-counted periods. Take, for example, Monday, April 21, 2008 (Patriots' Day in the relevant state). If a filing is due 10 days after an event, and the tenth day is April 21, then the filing is due on Tuesday, April 22 because Monday, April 21 counts as a legal holiday. But if a filing is due 10 days before an event, and the tenth day is April 21, the filing is due on Monday, April 21; the fact that April 21 is a state holiday does not make April 21 a legal holiday for purposes of computing this backward-counted deadline. But note that if the clerk's office is inaccessible on Monday, April 21, then subdivision (a)(3) extends the April 21 filing deadline forward to the next accessible day that is not a Saturday, Sunday or legal holiday -- no earlier than Tuesday, April 22.

Subdivision (a)(6)(C) defines the term “state” – for purposes of subdivision (a)(6) – to include the District of Columbia and any commonwealth, territory or possession of the United States. Thus, for purposes of subdivision (a)(6)’s definition of “legal holiday,” “state” includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

Two attorney members of the Subcommittee voiced unease with this approach. As one of them commented:

I appreciate the risk that, instead of being a safe harbor as it is for forward-counting rules, [the treatment of state holidays with respect to backward-counted deadlines] could be a trap for the unwary. But I wonder how often that will come up, especially because out-of-state lawyers probably will have local counsel who will be aware of the situation. And if it does, I wonder whether judges can take care of it on a case-by-case basis where a party seeks an extension nunc pro tunc On the other hand, I worry that the difference between state holidays for forward- and backward-counting rules will simply be, and appear to be, too complicated, particularly in the context where the whole concept of backward-counting time computations is new and has proven to be less than completely intuitive.

I'm reinforced in that concern by the proposed committee note [T]he example is that Patriot's Day "counts as a legal holiday" [for forward-looking rules], but "the fact that [Patriot's Day] is a state holiday does not make [it] a legal holiday for purposes of computing this backward-counting deadline." Huh? I think most people, and even most lawyers, would scratch their heads -- the same day either is or is not a legal holiday under the Rules. This complexity ... gives the appearance of a Rube Goldberg contraption.

Likewise, during a discussion of the time-computation project by the Appellate Rules Committee’s Deadlines Subcommittee, at least one member of that Subcommittee voiced strong agreement with these concerns about the complexity of this proposed change.

Notwithstanding these concerns, one Time-Computation Subcommittee member continues to feel that the change is worth attempting. As he explains:

[T]here is a good reason for distinguishing between forward-counting and backward counting in the treatment of non-federal holidays: avoiding traps for the unwary. By excluding the holiday if it falls on the last day of a forward-counted deadline, we give an extra day to the practitioner who may have thought that the federal courts were closed that day. By including the holiday in a backward-counted deadline, we allow a practitioner--knowing that the federal courts are in fact open on a state holiday--to file timely on the holiday itself rather than the day before. This rationale, which I find compelling, makes the counting rule as now proposed both consistent and intelligible.

This member suggested changing the proposed additional Note language to make this rationale more explicit, as follows:

For forward-counted periods--i.e., periods that are measured after an event--subdivision (a)(6)(C) includes certain state holidays within the definition of legal holidays. However, state legal holidays are not recognized in computing backward-counted periods. In each situation, the rule protects those who may be unsure of the effect of state holidays. For forward-counted deadlines, treating state holidays the same as federal holidays extends the deadline. Thus, someone who thought that the federal courts might be closed on a state holiday, would be safeguarded against an inadvertent late filing. In contrast, for backward-counted deadlines, not giving state holidays the treatment of federal holidays allows filing on the state holiday itself rather than the day before. Since the federal courts will indeed likely be open on state holidays, there is no reason to require the earlier filing.

In short, thoughtful considerations were voiced on both sides. But the net result of the discussion is that a majority of Subcommittee members failed to voice support for the proposed change to subdivision (a)(6). Accordingly, the Subcommittee is not recommending such a change.

2. Other comments as to which the Subcommittee recommends no change

End of “last day”: 11:59 p.m. versus 12:00 midnight. Stephen P. Stoltz argues that the time-counting rules should define the “last day” as ending “at 11:59:59 p.m.” rather than “at midnight.” He suggests this because “[m]ost people today would agree that a day begins at midnight and ends at 11:59:59 p.m. local time.” He warns that if the time-counting rules provide that the “last day” of a period ends “at midnight,” there will be confusion and courts may conclude that a “deadline is actually the day (or evening) before the particular day.”

Similarly, the ABCNY Bankruptcy Committee suggests that “[m]idnight” is often defined as 12:00 a.m., or the beginning of a given day.” Thus, the Committee “believes that the intent of the proposal was to permit filings up to and including 11:59 p.m., or the end of a given day.”

It is unclear whether these commentators are correct in assuming that most people believe that days begin at midnight and end at 11:59 p.m.⁹ – as opposed to believing that days begin at 12:01 a.m. and end at midnight. The Oxford Reference Dictionary of Weights, Measures, and Units does provide some support for the “11:59 p.m.” view; it defines “p.m.” as follows:

⁹ Mr. Stoltz advocates the use of the term “11:59:59 p.m.,” evidently to make the counting unit seconds rather than minutes. For purposes of simplicity, this memo will refer to “11:59 p.m.”

PM, p.m. [post meridian, i.e. after meridian] time Indicative of a time after noon, i.e. after the Sun has nominally crossed the meridian, so the time is after the meridian. Thus 12:30 p.m. identifies the moment 30 minutes after noon. Similarly 12:30 a.m. identifies the moment 30 minutes after midnight. Technically 12:00 can be neither a.m. nor p.m.; it should be qualified as midnight else as noon, when the number can be just 12. (The 24-hour clock avoids all qualification, whether by a.m. else p.m., or by noon else midnight. Its ambivalence is whether to have midnight as 24:00 in the day it ends, else 00:00 in the day it initiates; the latter is preferable.)¹⁰

On the other hand, a number of districts' local rules concerning electronic filing provide evidence for the contrary view, in the sense that they refer to requirements that filings be made "prior to [or before] midnight" *on the due date* – evincing a view that midnight on the due date means the middle-of-the-night hour that *concludes* (rather than *commences*) the day of the due date.

Subcommittee members considered the argument for changing "midnight" to "11:59:59 p.m.," and concluded that such a change is not worthwhile. To find subdivision (a)(4)'s references to "midnight" confusing, a reader would have to read subdivision (a)(4) as stating that (for electronic filers) the "last day" of a period ends at the very moment it begins – which would seem to be a facially absurd reading.

End of "last day": non-electronic filings. Judge Philip H. Brandt, a U.S. Bankruptcy Judge in the Western District of Washington, argues that proposed Bankruptcy Rule 9006(a)(4)'s definition of the end of the "last day" "would eliminate 'drop-box' filings, and would advantage electronic filers over debtors and other parties representing themselves, and over attorneys who practice infrequently in bankruptcy court and are not electronic filers." The root of his concern is that (a)(4) sets a default rule that the end of the day is midnight for e-filers, but sets a default rule that the end of the day falls at the scheduled closing of the clerk's office for non-e-filers. He urges that 9006(a)(4) be amended to state "simply ... that the time period 'ends at midnight in the court's time zone'" for all filers.

Both the text and Note of the proposed rule permit the adoption of local rules that permit the use of a drop-box up to midnight. Subcommittee members believe this adequately addresses the concern identified by Judge Brandt.

Exclusion of date-certain deadlines. Carol D. Bonifaci correctly observes that the proposed Committee Note makes clear that a deadline stated as a date certain (e.g., "no later than November 1, 2008") is not covered by the proposed time-computation rules. She suggests that this should also be stated in the text of the proposed Rules.

¹⁰ A Dictionary of Weights, Measures, and Units (Donald Fenna ed., Oxford University Press 2002) (emphasis added), available at <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t135.e1103>>.

The Subcommittee's view is that no change in the Rule text is needed. The proposed time-counting rules, like the existing time-counting rules, refer to "computing" periods of time, and no computation is needed if the court has set a date certain. Admittedly there is (as the proposed Committee Note observes) a circuit split on this question, but the circuit split is addressed (and laid to rest) in the Note.

Backward-counted deadlines. Ms. Bonifaci expresses confusion concerning the proposed time-computation rules' treatment of backward-counted and forward-counted deadlines. Ms. Bonifaci believes that if a backward-counted deadline falls on a weekend, the time-computation proposals would direct one to reverse direction and count *forward to Monday*; in actuality, the proposals direct that one continue counting in the same direction – i.e., *back to Friday*.

The Subcommittee's view is that Ms. Bonifaci's comment on backward-counted time periods does not require a change in the proposal.

Time periods counted in hours. Thomas J. Wiegand writes on behalf of the Seventh Circuit Bar Association's Rules and Practice Committee. He reports that the Bar Association sponsored a lunchtime discussion of the proposed Rules amendments this past December. One topic of discussion was whether the proposed time-computation rules' directive to "count every hour" when computing hour-based time periods will alter the application of Civil Rule 30(d)(2)'s presumptive seven-hour limit on the length of a deposition. He suggests that "the Committee might desire to make clear whether any change is intended for calculating the 7-hour period in Rule 30(d)(2)." The lunchtime participants evidently wondered whether the new time-counting provision might be read to change either the practice of not counting breaks as part of the seven hours or the practice under which the deposition takes place during a single day. He notes: "On the assumption that changing how to calculate the 7-hour period is outside of this year's proposed changes to the Civil Rules, some members believe that changing either the 7-hour duration in Rule 30(d)(2), or how to calculate it, should be considered by the Committee in the future."

The Subcommittee feels that these comments are best considered by the Civil Rules Committee rather than by the Time-Computation Subcommittee.¹¹

¹¹ It is not clear that the proposal for calculating hour-based periods would change the practice of presumptively limiting a deposition to a single day. Nor is it evident that the time-counting proposals would affect the practice of not counting breaks as part of the seven hours. As Mr. Wiegand notes, the 2000 Committee Note to Civil Rule 30 explains that the seven-hour limit "contemplates that there will be reasonable breaks during the day for lunch and other reasons, and that the only time to be counted is the time occupied by the actual deposition." Based on that Committee Note, one might reason that the time-counting rules apply only when counting the time that Rule 30's Note says is "to be counted" – i.e., only when counting non-break time.

IV. Listing and summary of time-computation comments

This section summarizes the comments we have received relating to the time-computation project.¹² This listing focuses on comments relevant to over-arching issues concerning the time-computation project; comments directed solely to a particular issue concerning a particular set of Rules, such as Bankruptcy Rule 8002, are generally not included.¹³

07-AP-001; 07-CV-001: Americans United for Separation of Church and State. Alex Luchenitser of Americans United for Separation of Church and State writes that Appellate Rule 26(c) should be amended so that its three-day rule tracks the three-day rule in Civil Rule 6(e). In fact, the package of Appellate Rules proposals currently out for comment includes a proposed amendment to Appellate Rule 26(c) intended to do what Mr. Luchenitser suggests.

In a follow-up comment, Mr. Luchenitser urges that “local district and appellate courts should be given a specific time frame to adopt revisions to their rules after the new federal rules are approved. And the new federal rules should not go into effect until after the deadline for local courts to adopt changes to their rules passes.”

07-AP-002; 07-BK-004; 07-CR-002; 07-CV-002: Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York (“EDNY Committee”). The EDNY Committee writes in general opposition to the time-computation proposals, but supports certain of the Civil Rules Committee’s proposals to lengthen specific Civil Rules deadlines.¹⁴ The EDNY Committee also makes some suggestions for improving the project if it goes forward.

- Overall cost/benefit analysis. The EDNY Committee predicts that the proposed change in time-computation approach will cause much disruption, given the great number of affected deadlines that are contained in statutes, local rules, and standard forms. The EDNY Committee believes that the current time-counting

¹² This section is organized by docket number: It first lists all the consecutively-numbered comments in the Appellate Rules comment docket; then all the comments in the Bankruptcy Rules comment docket not already listed above; and then all comments in the Civil Rules docket not already listed above. (All time-computation comments in the Criminal Rules docket are encompassed in those first three categories.)

¹³ The Bankruptcy Rules Committee specifically requested comment on whether the ten-day deadline for taking an appeal from a bankruptcy court to a district court or a BAP should be extended, either to 14 days or to 30 days. Many respondents opposed a 30-day period, and some also opposed any extension at all (even to 14 days). Some respondents, however, favor a 14-day period, while a handful favor a 30-day period. These comments seem directed toward matters within the particular expertise of the Bankruptcy Rules Committee rather than this Subcommittee.

¹⁴ This memo does not treat in detail the EDNY Committee’s views concerning the lengthening of specific Civil Rules deadlines, since that is a matter primarily for the Civil Rules Committee rather than the Time-Computation Subcommittee.

system works well. To the extent that some litigants have difficulty computing time under the current approach, the EDNY Committee suggests that one could build into the electronic case filing software a program that could perform the necessary computations.

- Incompleteness of offsetting changes. The EDNY Committee notes that as to short time periods set by the Rules, the proposed amendments mitigate the effect of no longer skipping weekends, but do not offset the fact that under the new approach holidays will no longer be skipped either. The EDNY Committee argues strongly that if the new time-counting approach is to be adopted then Congress must be asked to lengthen all affected statutory time periods. Likewise, the EDNY Committee notes that steps must be taken to lengthen all affected time periods set by local rules, standing orders, and standard-form orders.
- Business-day provisions in local rules. The EDNY Committee observes that some local rules contain periods counted in business days, and argues that any change in the time-counting rules should be tailored so as not to change such periods to calendar days.
- Backward-counted time periods. The EDNY Committee warns that the proposed amendments, by clarifying the way to compute backward-counted time periods, would effectively shorten the response time allowed under rules that count backwards. Moreover, the EDNY Committee notes that the proposed time-computation template (like the existing rules) does not provide for a longer response time when motion papers are served by mail. The EDNY Committee proposes that the best solution to the backward-counting problem is to eliminate backward-counted periods; as an example, the EDNY Committee points to the Local Civil Rule 6.1 which is in use in the Eastern and Southern Districts of New York.

07-AP-003; 07-BR-015; 07-CR-003; 07-CV-003: Chief Judge Frank H. Easterbrook. Chief Judge Easterbrook writes in support of the time-computation proposals. He suggests that in addition to the proposed changes, the three-day rule contained in Appellate Rule 26(c) should be abolished. He argues that the three-day rule is particularly incongruous for electronic service, and that adding three days to a period thwarts the goal served by our preference for setting periods in multiples of seven days.

07-AP-004; 07-BK-007; 07-BR-023; 07-CR-004; 07-CV-004: Walter W. Bussart. Mr. Bussart states generally that the proposed amendments are helpful and that he supports their adoption.

07-AP-005; 07-BK-008; 07-CR-006; 07-CV-006: Jack E. Horsley. Overall, Mr. Horsley views the proposed amendments with favor.

With respect to one or more of the time periods in Appellate Rule 4 which the proposed amendments would lengthen from 10 to 14 days, Mr. Horsley proposes a further lengthening so

that the period in question would be 21 days. This suggestion seems more appropriate for consideration in the first instance by the Appellate Rules Committee rather than the Time-Computation Subcommittee.

Mr. Horsley also suggests amending Appellate Rule 26(c) to clarify how the three-day rule works when the last day of a period falls on a weekend or holiday. This suggestion is already accounted for by another proposed amendment to FRAP 26(c) that is currently out for comment. Mr. Horsley's suggestion in this regard can thus be taken as providing general support for the latter proposal.

07-AP-006; 07-BK-010; 07-CR-007; 07-CV-007: Stephen P. Stoltz. Mr. Stoltz generally supports the time-computation proposals. He argues, however, that the time-counting rules should define the "last day" as ending "at 11:59:59 p.m." rather than "at midnight." He suggests this because "[m]ost people today would agree that a day begins at midnight and ends at 11:59:59 p.m. local time." He warns that if the time-counting rules provide that the "last day" of a period ends "at midnight," there will be confusion and courts may conclude that a "deadline is actually the day (or evening) before the particular day."

07-AP-007; 07-BK-011; 07-CR-008; 07-CV-008: Robert J. Newmeyer. Mr. Newmeyer is an administrative law clerk to Judge Roger T. Benitez of the U.S. District Court for the Southern District of California. Mr. Newmeyer stresses that the 10-day period set by 28 U.S.C. § 636(b)(1) must be lengthened to 14 days. This statute will presumably be on the list of statutory periods that Congress should be asked to lengthen, so this suggestion is in line with the Project's current scheme.

Mr. Newmeyer further suggests that it would be worthwhile to consider setting an even longer period for filing objections to case-dispositive rulings by magistrate judges. This suggestion seems to fall within the Civil Rules Committee's jurisdiction rather than that of the Time-Computation Project.

Mr. Newmeyer also expresses confusion as to whether the Civil Rule 6(a) time-computation proposals affect the "three-day rule." As you know, the time-computation project does not propose to change the three-day rule, and it seems unlikely that there will be confusion on this score in the event that the time-computation proposals are adopted (Mr. Newmeyer's confusion probably springs from the fact that the time-computation rules as published include only provisions in which a change is proposed, and thus omit Civil Rule 6(d)). In any event, Mr. Newmeyer suggests that the three-day rule should be deleted. This suggestion, like Chief Judge Easterbrook's suggestion, is one that the Advisory Committees may well wish to add to their agendas, but is not one that seems appropriate for resolution in connection with the time-computation project itself.

07-AP-008; 07-BK-012; 07-CR-009; 07-CV-009: Carol D. Bonifaci. Ms. Bonifaci, a paralegal at a Seattle law firm, expresses confusion concerning the proposed time-computation rules' treatment of backward-counted and forward-counted deadlines. Ms. Bonifaci believes that if a backward-counted deadline falls on a weekend, the time-computation proposals would direct one to reverse direction and count forward to Monday.

Ms. Bonifaci observes that the proposed Committee Note makes clear that a deadline stated as a date certain (e.g., “no later than November 1, 2008”) is not covered by the proposed time-computation rules, and she suggests that this should also be stated in the text of the proposed Rules.

07-AP-010; 07-CV-010: Public Citizen Litigation Group. Brian Wolfman writes on behalf of Public Citizen Litigation Group to express general support for the proposed days-are-days time-counting approach. Public Citizen suggests, however, that the deadlines for certain post-trial motions (and for the tolling effect – under Appellate Rule 4(a) – of Civil Rule 60 motions) be lengthened only to 21 rather than 30 days. Public Citizen argues that a 30-day period is unnecessarily long and will cause unwarranted delays. Public Citizen (like Howard Bashman) argues that it is awkward for the post-trial motion deadline to fall on the same day as the deadline for filing the notice of appeal. As noted below with respect to Mr. Bashman’s suggestion, this seems a matter better suited to consideration by the Civil Rules and Appellate Rules Committees than by the Time-Computation Subcommittee.

07-AP-012; 07-BK-014; 07-CR-011; 07-CV-011: Robert M. Steptoe, Jr. Mr. Steptoe, a partner at Steptoe & Johnson, expresses concern “that the proposed time-computation rules would govern a number of statutory deadlines that do not themselves provide a method for computing time,” and that the proposed rules “may cause hardship if short time periods set in local rules are not adjusted.” Therefore, he urges that the time-computation proposals “not be implemented unless and until the Standing Committee is sure that it will receive the necessary cooperation from Congress and the local rules committees to meet the desired objective of simplification.”

07-AP-015; 07-BK-018; 07-CR-014; 07-CV-016: FDIC. Richard J. Osterman, Jr., Acting Deputy General Counsel of the Litigation Branch of the Federal Deposit Insurance Corporation, writes to urge that Congress *not* be asked to amend the time periods set in certain provisions of the Federal Deposit Insurance Act. He explains that banking agencies such as the FDIC already “employ calendar days in their computations of time to respond to regulatory and enforcement decisions” – thus indicating that no adjustment is necessary or appropriate in connection with the time-computation project. Since no participant in the time-computation project has suggested that the FDIA provisions should be included on the list of statutory periods that Congress should be asked to change in light of the time-computation project, it seems fair to say that Mr. Osterman’s suggestion accords with the approach that the project is already taking.

Mr. Osterman also suggests that Civil Form 3 be amended to “include a paragraph that references federal defendants, who have a full 60 days to respond as opposed to the standard 21 days you are proposing. This language is absent from the current summons form.” This suggestion concerns the Civil Rules Committee rather than the Time-Computation Subcommittee. (The version of Form 3 that is currently in effect does include an italicized parenthetical that states: “(Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States allowed 60 days by Rule 12(a)(3).)”) ”

07-AP-016; 07-BK-019; 07-CR-015; 07-CV-017: DOJ. Craig S. Morford, Acting Deputy Attorney General, writes on behalf of the Department of Justice to express support for the

goals of the time-computation project, but also to express strong concerns “about the interplay of the proposed amendment with both existing statutory periods and local rules.” The DOJ argues that “changes should be addressed in relevant statutory and local rule provisions before a new time-computation rule is made applicable.” Otherwise, the DOJ fears that the purposes of some statutes “may be frustrated.” The DOJ argues that exempting statutory time periods from the new time-counting approach would be an undesirable solution since it would create “confusion and uncertainty” to have two different time-counting regimes (one for rules and one for statutes).

Mr. Morford does not specifically state the DOJ’s position on which of the statutory time periods should be lengthened to offset the change in time-computation approach. His letter does refer to the Committee’s identification of “some 168 statutes ... that contain deadlines that would require lengthening.”

The DOJ urges that the time-computation amendments not be allowed to take effect unless and until (1) Congress enacts legislation to lengthen all relevant statutory periods, (2) the local rulemaking bodies have had the opportunity to amend relevant local-rule deadlines, and (3) the bench and bar have had time to learn about the new time-counting rules.

07-AP-017: The State Bar of California – Committee on Appellate Courts. Blair W. Hoffman writes on behalf of the State Bar of California’s Committee on Appellate Courts to express support for the time-computation project. He states that the simplification of the time-counting rules is desirable.

07-AP-018; 07-BR-036; 07-CV-018: Rules and Practice Committee of the Seventh Circuit Bar Association. Thomas J. Wiegand writes on behalf of the Seventh Circuit Bar Association’s Rules and Practice Committee. He reports that the Bar Association sponsored a lunchtime discussion of the proposed Rules amendments this past December. One topic of discussion was whether the proposed time-computation rules’ directive to “count every hour” when computing hour-based time periods will alter the application of Civil Rule 30(d)(2)’s presumptive seven-hour limit on the length of a deposition. He suggests that “the Committee might desire to make clear whether any change is intended for calculating the 7-hour period in Rule 30(d)(2).” He also notes: “On the assumption that changing how to calculate the 7-hour period is outside of this year’s proposed changes to the Civil Rules, some members believe that changing either the 7-hour duration in Rule 30(d)(2), or how to calculate it, should be considered by the Committee in the future.”

07-BR-026; 07-BK-009: Alan N. Resnick. Professor Resnick previously served as first the Reporter to and then a member of the Bankruptcy Rules Committee. Of particular relevance to the overall Time-Computation Project, Professor Resnick opposes adoption of a days-are-days time-computation approach in Bankruptcy Rule 9006. He points out that a days-are-days approach would result in “the shortening of some state and federal statutory time periods.”

Professor Resnick raises additional points that are less closely tied to the overall Time-Computation Project and are thus more appropriate for initial consideration by the Bankruptcy Rules Committee. Professor Resnick stresses that if time periods set by the Bankruptcy Rules and the Civil Rules are altered, care must be taken to adjust the Bankruptcy Rules so that newly-

lengthened Civil Rules time periods are not inappropriately incorporated into the Bankruptcy Rules. In particular, Professor Resnick notes that the Bankruptcy Rules Committee should consider altering Bankruptcy Rule 9023's incorporation of Civil Rule 59's provisions if Civil Rule 59 is amended to change current 10-day time limits to 30 days. Professor Resnick also adds his voice to those that oppose the lengthening of Bankruptcy Rule 8002's ten-day appeal period. But if Rule 8002's ten-day period is lengthened, then Professor Resnick points out other time periods in the Bankruptcy Rules that he argues should be corresponding lengthened.

07-BK-013; 07-BR-029: Judge Philip H. Brandt. Judge Brandt, a U.S. Bankruptcy Judge in the Western District of Washington, argues that proposed Bankruptcy Rule 9006(a)(4)'s definition of the end of the "last day" "would eliminate 'drop-box' filings, and would advantage electronic filers over debtors and other parties representing themselves, and over attorneys who practice infrequently in bankruptcy court and are not electronic filers." The root of his concern is that (a)(4) sets a default rule that the end of the day is midnight for e-filers, but sets a default rule that the end of the day falls at the scheduled closing of the clerk's office for non-e-filers. He urges that 9006(a)(4) be amended to state "simply ... that the time period 'ends at midnight in the court's time zone'" for all filers.

Judge Brandt also raises points about Bankruptcy Rules 8002 and 9023; but those points are directed more toward the Bankruptcy Rules Committee than toward the Time-Computation Subcommittee.

07-BK-015; 07-CV-014; 07-BR-033: Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York. The Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York ("ABCNY Bankruptcy Committee") writes in opposition to the time-computation proposals. The Committee focuses its opposition on the time-computation proposal for Bankruptcy Rule 9006. With respect to the time-computation proposals for the other sets of Rules, the Committee cites with approval the comments of the Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York ("EDNY Committee").

The ABCNY Bankruptcy Committee's objections to the time-computation proposals are very similar to those stated by the EDNY Committee; in sum, the ABCNY Bankruptcy Committee believes that the costs of the time-computation proposals strongly outweigh their benefits. This summary highlights those aspects of the ABCNY Bankruptcy Committee's comments that differ from those of the EDNY Committee. The ABCNY Bankruptcy Committee suggests, among other problems, that "some local courts might decide to retain the present computational approach through the promulgation of local rules," which would compound the resulting confusion. The ABCNY Bankruptcy Committee also suggests that "[m]idnight" is often defined as 12:00 a.m., or the beginning of a given day." Thus, the Committee "believes that the intent of the proposal was to permit filings up to and including 11:59 p.m., or the end of a given day."

07-BK-022; 07-CV-019: National Bankruptcy Conference. Richard Levin writes on behalf of the National Bankruptcy Conference ("NBC"), which "strongly endorses and supports" the comments previously submitted by Professor Alan Resnick. The NBC also warns that the

proposed changes to various bankruptcy-relevant time periods could result in unintended consequences; it thus suggests “that the Advisory Committee delay incorporation of the 7, 14, 21, and 28 day time period changes into the Bankruptcy Rules until the impact of those changes [is] studied further”

07-CV-005: Patrick Allen. Mr. Allen writes in opposition to the proposed extension of certain ten-day periods in Civil Rules 50, 52 and 59. Among other things, he notes that under current Civil Rule 6, 10-day time periods are computed by skipping intermediate weekends and holidays. He does not discuss the time-computation proposal to change to a days-are-days approach. This comment seems directed toward matters within the particular expertise of the Civil Rules Committee rather than this Subcommittee.

07-CV-013: Alexander J. Manners. Mr. Manners, a vice president of CompuLaw LLC, supports proposed Civil Rule 6(a)(5)’s treatment of backward-counted deadlines.

With respect to Civil Rule 6(a)(6)’s definition of the term “legal holiday,” Mr. Manners proposes that proposed Rule 6(a)(6)(B) be changed to so as to read “any other day declared a holiday by the President, Congress, or the state where the district court is located and officially noticed as a legal holiday by the district court.” He makes this suggestion out of concern that, otherwise, litigants will be confused as to whether a state holiday counts as a “legal holiday” for time-computation purposes in instances when the federal district court fails to close on that day, or when it closes only for some purposes, or when it closes but fails to give timely notice of the closure.

Mr. Manners observes that under a “plain reading” of the three-day rule as it is stated in current Civil Rule 6, the three-day rule does not apply to backward-counted deadlines since in those instances “the party is not required to act within a specified time after service.” Mr. Manners argues that this can lead to unfairness. He suggests that Civil Rule 6’s three-day rule should be amended to apply the three-day rule to backward-counted deadlines (or else that each backward-counted deadline be modified to take account of this problem). Mr. Manners is not the only commentator to observe this problem with respect to the interaction of the three-day rule and backward-counted deadlines; the EDNY Committee suggests eliminating backward-counted deadlines for that reason among others. This suggestion, like other commentators’ suggestions concerning the three-day rule, seems best addressed as a new agenda item for the relevant Advisory Committees rather than as part of the time-computation project.

Mr. Manners proffers several suggestions for guiding the local rules amendment process. He suggests that the district courts be given “an implementation guide and timeline for district courts to follow in order to ensure their local and judges’ rules are amended correctly and in time to coincide with the adoption of the new Federal Rules.” That guide should, he argues, encourage local rulemakers to lengthen affected short time periods (taking account, *inter alia*, of any relevant state holidays) and to use multiples of 7 days (where possible) when doing so.

Mr. Manners also proposes an alteration to Civil Rule 6(c)’s treatment of motion paper deadlines, a matter that seems more appropriate for consideration by the Civil Rules Committee.

07-CV-015: U.S. Department of Justice. Jeffrey S. Buchholtz, Acting Assistant Attorney General, Civil Division, writes on behalf of the Department of Justice to comment on the proposed amendment to Civil Rule 81 that would define the term “state,” for purposes of the Civil Rules, to “include[, where appropriate, the District of Columbia and any United States commonwealth, territory [, or possession].” The Department supports the definition’s inclusion of commonwealths and territories, but opposes the inclusion of “possession.” The Department is “concern[ed] that the term ‘possession’ might be interpreted – incorrectly – to include United States military bases overseas.”

Howard Bashman’s Law.com article. Mr. Bashman wrote a column on the time-computation proposals which can be accessed at <http://www.law.com/jsp/article.jsp?id=1201918759261> . Mr. Bashman’s main comment in his column concerns the Civil Rules proposal to extend certain post-trial motion deadlines. As has been noted, extending those deadlines from 10 to 30 days will mean that those deadlines fall on the same day as the Rule 4(a) deadline for taking an appeal in cases that do not involve U.S. government parties. Mr. Bashman’s concern is that this will (1) prevent a potential appellant from knowing whether any post-trial motions will be filed prior to the deadline for taking an appeal and thus (2) increase the number of appeals that are filed only to be suspended pending the resolution of a timely post-trial motion.

Like Public Citizen’s comment to the same effect, this comment falls more within the jurisdiction of the Civil Rules Committee and the Appellate Rules Committee than of the Time-Computation Subcommittee.

- 18 • license;
- 19 • payment;
- 20 • release;
- 21 • res judicata;
- 22 • statute of frauds;
- 23 • statute of limitations; and
- 24 • waiver.

25 * * * * *

Committee Note

“[D]ischarge in bankruptcy” is deleted from the list of affirmative defenses. Under 11 U.S.C. § 524(a)(1) and (2) a discharge voids a judgment to the extent that it determines a personal liability of the debtor with respect to a discharged debt. The discharge also operates as an injunction against commencement or continuation of an action to collect, recover, or offset a discharged debt. These consequences of a discharge cannot be waived. If a claimant persists in an action on a discharged claim, the effect of the discharge ordinarily is determined by the bankruptcy court that entered the discharge, not the court in the action on the claim.

Summary of Comments

07-CV-015: Hon. Jeffrey S. Bucholtz, Acting Assistant Attorney General, writes at length to argue that “discharge in bankruptcy” should not be deleted from the Rule 8(c) list of affirmative defenses. Alternatively, the Committee Note should explain that the change is intended to require that creditors plead that the debt was excepted from discharge, and should not observe that the effect of a discharge ordinarily is determined by the bankruptcy court that entered the discharge.

It is recognized that the 9th Circuit BAP in 2005 ruled that a 1970 bankruptcy code amendment invalidated the “discharge in bankruptcy” provision of Rule 8(c); it is argued that whether or not the decision is correct as to the effects of the 1970 amendment, it is wrong after adoption of the 1978 Code. The 1970 amendment reflected fears that creditors would bring actions

on discharged debts, hoping for defaults that would waive the discharge defense. Now sanctions for willful violations of the discharge injunction provide adequate deterrence. In any event, if the debt was discharged the debtor can invoke Rule 60(b) to vacate the judgment or can ask the bankruptcy court to enforce the discharge injunction.

The central point is that not all debts of a bankruptcy debtor are discharged even if the debtor is “discharged.” Some debts are excepted.

One category of debts are not dischargeable only if declared not dischargeable by the bankruptcy court during the bankruptcy case; these are the only debts within the exclusive determination of the bankruptcy court — the creditor must advance these grounds of nondischargeability in the bankruptcy case or lose them.

Other debts are automatically excepted from discharge by operation of law; there is no need to raise nondischargeability in the bankruptcy case. Such debts include tax debts governed by 11 U.S.C. § 523(a)(1) — disputes frequently arise on the (a)(1)(C) question whether the debtor made any willful attempt to defeat the tax. At some point someone needs to plead to this question.

A debt also is not discharged if the creditor is not given notice of the bankruptcy case in time to file a claim. Because of this possibility, it is urged that “a debtor who responds to a post-discharge complaint on a debt that may well be excepted from discharge” without raising discharge as a defense should not be able to avoid the ensuing judgment. [It is not said how common this event is as compared to other grounds for nondischargeability, nor why the judgment should not be void under the governing statute if indeed the creditor had the required notice.]

The Committee Note observation about determination of the effect of a discharge by the bankruptcy court that entered the discharge is countered by observing that bankruptcy jurisdiction is conferred on the district courts (and the bankruptcy courts as units of the district courts).

It also is argued that a judgment on a debt that was arguably excepted from discharge must be accorded res judicata effect; this argument migrates into the assertion that if discharge is deleted as an affirmative defense the Committee Note should recognize that the result is to shift to the creditor the burden of pleading nondischargeability. At least if the pleaded ground of nondischargeability is “plausible,” the debtor should not be able to completely ignore the action on the claimed debt. (The idea seems to be that if the plaintiff pleads nondischarge and the defendant fails to deny the allegation, nondischarge is admitted.)

It also is argued that the statutory provision barring waiver of the provisions on the discharge injunction and voiding a judgment addresses only contractual waivers, not waiver by failure to plead discharge as an affirmative defense.

And it is noted that nonbankruptcy courts have concurrent jurisdiction to determine the application of a specific exception to discharge.

A particular problem arises from tax debts. The government often sues both the tax debtor and a fraudulent transferee, seeking a personal judgment against the debtor on the theory that the tax debt was not dischargeable because of a willful attempt to defeat payment and also judgment against the transferee. The debtor rushes to the bankruptcy court with a complaint to determine dischargeability. If the bankruptcy court proceeds, the government is at risk that a victory declaring the debt not dischargeable is not binding in the separate action against the transferee, while a ruling that the debt was discharged forecloses any action against the transferee. It is better to avoid dual litigation of the same issue by retaining jurisdiction in the district court where the collection action was filed.

Finally, it is urged that no apparent hardship has resulted from Rule 8(c), and that state practice commonly also treats discharge as an affirmative defense.

Response: Deletion of “discharge in bankruptcy” from the Rule 8(c) catalogue of affirmative defenses was recommended with confidence by bankruptcy judges. The detailed Department of Justice comments suggested the need for further advice. Professor Jeffrey Morris, Reporter for the Bankruptcy Rules Committee, generously took up the request for help and provided this response:

RESPONSE TO DOJ COMMENT ON CIVIL RULE 8(c)

The Department is correct, in part, in noting that creditors may pursue in either state or federal courts the collection of debts that are not discharged. It is also correct in noting that bankruptcy courts have exclusive jurisdiction only over dischargeability actions under § 523(a)(2), (4), and (6) as provided by § 523(c). Furthermore, the Department is correct that the bankruptcy courts have concurrent jurisdiction with other federal courts and state courts to determine the dischargeability of claims excepted from the discharge under the other subparagraphs in § 523(a) of the Bankruptcy Code. I do not believe that these correct statements, however, lead to the conclusion that Rule 8(c) should not be amended to delete “discharge in bankruptcy” from the list of affirmative defenses.

The Civil Rules Committee noted in its materials published in connection with the publication of the proposed amendment to Rule 8(c) that § 524(a)(1) provides that any judgment that is obtained at any time is void to the extent that the judgment purports to determine the personal liability of the debtor with respect to a discharged debt. The premise of the deletion of “discharge in bankruptcy” from the list of affirmative defenses is that the statute operates to prevent any such judgment from being effective. There should be no need for a debtor to affirmatively assert the discharge as a defense in an action based on a discharged claim. That is true without regard to whether the creditor is a governmental unit, or any other type of creditor. If the underlying claim is allegedly nondischargeable under § 523(a)(2), (4), or (6), and the creditor does not act timely in the bankruptcy court to obtain an order that the debt is excepted from the discharge, that creditor is permanently enjoined under § 524(a)(2) from attempting to collect that debt. Moreover, if the creditor violates that injunction and obtains a judgment, that judgment is void (note that it is void and not voidable) under § 524(a)(1). This statutory scheme is, and is intended to be, self executing. Requiring a debtor (who has already been told not to worry about a creditor who holds a discharged debt) to affirmatively plead the bankruptcy discharge is inconsistent with this system.

The Department notes that this system actually predates the 1978 Code, and the Civil Rules Committee’s materials also highlight that fact. Those materials state that § 524(a)(1) and its predecessor statute both created an injunction against the collection of discharged debts and against any attempts to collect those debts. In fact, one need not go too far back to find (off the top of my head, I think it was in 1966 or so) that debtors once had to apply for a discharge, and the failure to do so resulted in a debtor going through the process but receiving no discharge even though no grounds existed on which to object to the discharge. This led to the change in the default rule from “no discharge unless requested by the debtor” to “discharge granted unless an objection is successfully obtained by a party in interest.” Retaining the discharge as an affirmative defense is inconsistent with over 40 years of bankruptcy law.

The Department is correct that many kinds of debts are not discharged. Of course, for those debts, the debtor/defendant cannot affirmatively or otherwise plead the defense of a bankruptcy discharge. The only impact of maintaining the requirement that debtors affirmatively plead the discharge defense is to obtain judgments more easily in cases in which the debtor otherwise files an answer. Thus, under the DOJ view, if debtor/defendants file no answer, default judgments can be entered. If they file an answer but do not include an available bankruptcy discharge defense, then

the discharge defense is waived. This directly contradicts § 524(a) and should not be permitted under the Civil Rules.

It is this statutory scheme that makes deletion of “discharge in bankruptcy” from Rule 8(c) appropriate and, indeed, necessary. The other issues about concurrent jurisdiction and the like raised by DOJ are all correct, but not truly relevant. The closest question the Department raises has very little to do with DOJ whose most likely problems will arise under the tax and student loan nondischargeability categories. That is, under § 523(a)(3), creditors whose claims are not listed in the bankruptcy case can later assert in any court with jurisdiction that their claim was not discharged in the bankruptcy case. The Department’s brief discussion of the issue, however, is misleading in my opinion. In fact, the vast majority of individual debtor bankruptcy cases are no asset cases. The overwhelming majority of courts that have considered the issue have held that claims that were not listed in the debtor’s case are nonetheless discharged. Section 523(a)(3) is effectively limited to the protection of the holders of claims that suffered by virtue of not receiving notice of the case. These creditors are those who could not timely file an action under § 523(a)(2), (4), or (6), or creditors who would have shared in a distribution of the estate’s assets if they had been able to file a proof of claim in a timely fashion. Because most of the individual debtor cases are no asset cases, § 523(a)(3) plays a limited role.

My bottom line – the Rule should be amended as proposed. The Committee Note, however, should also be amended to avoid the suggestion made in the last sentence of the Note. The sentence certainly does not state that the bankruptcy court has exclusive jurisdiction over all matters relating to the discharge, but it could be misunderstood as meaning that bankruptcy courts have this exclusive jurisdiction. It is clear to me that the Committee had no such intention. The Note merely states what I think is the most regular result when an issue of the extent of the bankruptcy discharge is raised. But, **amending the Committee Note to replace the last sentence with something along the following lines might be more appropriate.**

SUGGESTED ADDITION TO COMMITTEE NOTE TO RULE 8(c):

Because the Bankruptcy Code provisions governing the effect of the discharge are self-executing, it is inappropriate to require that debtors affirmatively raise the discharge as a defense.

Recommendation: It is recommended that “discharge in bankruptcy” be stricken from Rule 8(c), as published, and that the final sentence of the published Committee Note be replaced as set out below.

This recommendation rests on the structure of the bankruptcy statutes. Rule 8(c) does not now address an action on a claim that has not been discharged in bankruptcy, and it will not address such an action after the amendment. If a debt has in fact been discharged, however, it would be inconsistent with the statutes even to require the discharged debtor to plead the discharge, much less to waive the discharge by failure to plead it. A judgment on a discharged debt is void, and there is no reason to contemplate superseding the statute even if that could be done without abridging the substantive right created by the discharge. (It would do no good, and much mischief, to create a special category of affirmative defense that must be pleaded but is not lost by failure to plead and that voids the judgment.)

Former Rule 15(a) addressed amendment of a pleading to which a responsive pleading is required by distinguishing between the means used to challenge the pleading. Serving a responsive pleading ~~terminated the right to amend. Serving a motion attacking the~~ pleading did not terminate the right to amend, because a motion is not a “pleading” as defined in Rule 7. The right to amend survived beyond decision of the motion unless the decision expressly cut off the right to amend.

The distinction drawn in former Rule 15(a) is changed in two ways. First, the right to amend once as a matter of course terminates 21 days after service of a motion under Rule 12(b), (e), or (f). This provision will force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in the motion. A responsive amendment may avoid the need to decide the motion or reduce the number of issues to be decided, and will expedite determination of issues that otherwise might be raised seriatim. It also should advance other pretrial proceedings.

Second, the right to amend once as a matter of course is no longer terminated by service of a responsive pleading. The responsive pleading may point out issues that the original pleader had not considered and persuade the pleader that amendment is wise. Just as amendment was permitted by former Rule 15(a) in response to a motion, so the amended rule permits one amendment as a matter of course in response to a responsive pleading. The right is subject to the same 21-day limit as the right to amend in response to a motion.

The 21-day periods to amend once as a matter of course after service of a responsive pleading or after service of a designated motion are not cumulative. If a responsive pleading is served after one of the designated motions is served, for example, there is no new 21-day period.

Finally, amended Rule 15(a) extends from 20 to 21 days the period to amend a pleading to which no responsive pleading is allowed and omits the provision that cuts off the right if the action is on the trial calendar. Rule 40 no longer refers to a trial calendar,** and many courts have abandoned formal trial calendars. It is more effective to rely on scheduling orders or other pretrial directions to establish time limits for amendment in the few situations that otherwise might allow one amendment as a matter of course at a time that would disrupt trial preparations. Leave to amend still can be sought under Rule 15(a)(2), or at and after trial under Rule 15(b).

** This statement anticipates the December 1, 2007 effective date of pending Rule 40 amendments.

Abrogation of Rule 13(f) establishes Rule 15 as the sole rule governing amendment of a pleading to add a counterclaim.

Summary of comments

07-CV-011: Robert M. Steptoe, Jr., Esq. agrees that a responsive pleading and a motion to dismiss should have the same impact on the right to amend once as a matter of course. But he suggests that the result should be that service of either cuts off the right to amend as a matter of course. Leave is often granted when it is required. Requiring leave will encourage plaintiffs to take greater care in framing the first amended complaint; that will help defendants because of “the closer scrutiny” given a second or subsequent motion for leave to amend.

07-CV-012: Professor Bradley Scott Shannon suggests (1) that the right to amend should be cut off by either a responsive pleading or a Rule 12 motion. “[T]he balance would be better struck by placing more of a burden to avoid mistakes on the initial pleader.” Even if the mistakes are fairly correctable, the court should retain discretion to grant or deny leave to amend. (2) “[A] court is all but compelled to defer consideration on a motion to dismiss until the 21 day period expires. That does not seem very efficient.”

07-CV-015: Hon. Jeffrey S. Bucholtz, Acting Assistant Attorney General, supports the change.

07-CV-018: The Seventh Circuit Bar Association Committee on Rules of Practice & Procedure offers “strong support.” “This promotes economy and eliminates delay where a Rule 12 motion is filed in response to the original complaint and the amendments ultimately do not alter the bases for the Rule 12 motion.”

07-CV-020: The Jordan Center for Criminal Justice and Criminal Reform makes two suggestions. The second is that the period to amend once as a matter of course after service of a responsive pleading or a Rule 12 motion should be extended to 28 days; 21 days is not enough, particularly when the defendant points out deficiencies that require “further factual investigation that may dramatically affect the legal landscape of the action.” The first rests on misinterpreting what is intended: the comment reads the proposal to create a gap that suspends and then revives the right to amend once as a matter of course — the right persists for 21 days after service of the pleading, disappears, and then reappears for 21 days after service of a responsive pleading or Rule 12 motion. The question raised by this suggestion is whether (a)(1)(A) should be revised: “(A) if the pleading is one to which a responsive pleading is not required, 21 days after serving it; (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion * * *.”

Recommendation: That Rule 15(a) be recommended for adoption as published. No changes need be made in the Committee Note. The Subcommittee and Committee considered many variations on the right to amend once as a matter of course and the events that cut it off. The argument that at least a responsive pleading should immediately terminate the right to amend was advanced vigorously in Standing Committee discussion. No new reasons have been suggested for reconsidering the recommendation. The suggestion made by the Jordan Center is a matter of style; the rule as published seems clear.

Rule 48. Number of Jurors; Verdict; Polling

1 **(a) Number of Jurors.** A jury must initially have begin
2 with at least 6 and no more than 12 members, and each juror
3 must participate in the verdict unless excused under Rule
4 47(c).

5 **(b) Verdict.** Unless the parties stipulate otherwise, the
6 verdict must be unanimous and must be returned by a jury of
7 at least 6 members.

8 **(c) Polling.** After a verdict is returned but before the jury
9 is discharged, the court must on a party's request, or may on
10 its own, poll the jurors individually. If the poll reveals a lack
11 of unanimity or assent by the number of jurors required by the
12 parties' stipulation, the court may direct the jury to deliberate
13 further or may order a new trial.

Committee Note

Jury polling is added as new subdivision (c), which is drawn from Criminal Rule 31(d) with minor revisions to reflect Civil Rules Style and the parties' opportunity to stipulate to a nonunanimous verdict.

Summary of Comments: There were no comments on Rule 48(c).

Recommendation: That Rule 48(c) be recommended for adoption as published. No changes need be made in the Committee Note.

Rule 81. Applicability of the Rules in General; Removed Actions

* * * * *

(d) Law Applicable.

(1) “State Law” Defined. When these rules refer to state law, the term “law” includes the state’s statutes and the state’s judicial decisions.

(2) District of Columbia “State” Defined. The term “state” includes, where appropriate, the District of Columbia and any United States commonwealth, territory [, or possession]. ~~When these rules provide for state law to apply, in the District Court for the District of Columbia:~~

~~—————(A) the law applied in the District governs; and~~

(3) “Federal Statute” Defined in the District of Columbia. ~~(B) In the United States District Court for the District of Columbia,~~ the term “federal statute” includes any Act of Congress that applies locally to the District.

COMMITTEE NOTE

Several Rules incorporate local state practice. Original Rule 81(e) provided that “the word ‘state’ * * * includes, if appropriate, the District of Columbia.” The definition is expanded to include any commonwealth, territory [, or possession] of the United States. As before, these entities are included only “where appropriate.” They are included for the reasons that counsel incorporation of state practice. For example, state holidays are recognized in computing time under Rule 6(a). Other, quite different, examples are Rules 64(a), invoking state law for prejudgment remedies, and 69(a)(1), relying on state law for the procedure on execution. Including commonwealths, territories[, and possessions] in these and other rules avoids the gaps

that otherwise would result when the federal rule relies on local practice rather than provide a uniform federal approach. Including them also establishes uniformity between federal courts and local courts in areas that may involve strong local interests, little need for uniformity among federal courts, or difficulty in defining a uniform federal practice that integrates effectively with local practice.

Adherence to a local practice may be refused as not “appropriate” when the local practice would impair a significant federal interest.

Summary of Comments:

07-CV-006: Jack E. Horsley, Esq., commenting on the Time-Computation proposals, suggests that Rule 81(c)(2) be amended: “After removal, repleading is unnecessary unless leave is granted on the party’s motion or unless the court orders it.”

07-CV-012: Professor Bradley Scott Shannon comments on 81(d)(1) — which was published only to indicate minor Style revisions — that the definition of state “law” is under-inclusive and might (for reasons not described) also be over-inclusive. Perhaps it should be deleted. As to (d)(2), “definitions framed only in terms of what is included, though perhaps helpful in resolving some ambiguities, can still leave a lot of unanswered questions. A better definition might be one that states specifically what is included (or, if not practicable, no definition).”

07-CV-015: Hon. Jeffrey S. Bucholtz, Acting Assistant Attorney General, supports the proposal but recommends that “possession” not be included. American Samoa is the only possible land that might fit within “possession.” The Department of Justice is concerned that “‘possession’ might be interpreted — incorrectly — to include United States military bases overseas.” Control over these bases is addressed through agreements with foreign nations.

Recommendation: That Rule 81(d) be recommended for adoption with one change — the bracketed “[or possession]” be deleted. The Department of Justice has been concerned from the beginning that “possession” describes a presently null set and that it might generate confusion about such issues as the status of military bases on foreign soil. Rule 81(d)(2) would read:

- (2) **“State” Defined.** The term “state” includes, where appropriate, the District of Columbia and any United States Commonwealth; or territory ~~for possession~~.

Rule 62.1. Indicative Ruling on Motion for Relief That Is Barred by a Pending Appeal

1 **(a) Relief Pending Appeal.** If a timely motion is made for
2 relief that the court lacks authority to grant because of an
3 appeal that has been docketed and is pending, the court may:

4 **(1) defer consideration of the motion;**

5 **(2) deny the motion; or**

6 **(3) state either that it would grant the motion if the**
7 court of appeals remands for that purpose or that the motion
8 raises a substantial issue.

9 **(b) Notice to the Court of Appeals.** The movant must
10 promptly notify the circuit clerk under Federal Rule of
11 Appellate Procedure 12.1 if the district court states that it
12 would grant the motion or that the motion raises a substantial
13 issue.

14 **(c) Remand.** The district court may decide the motion if
15 the court of appeals remands for that purpose.

Committee Note

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the action is remanded or that the motion raises a substantial issue. Experienced appeal lawyers often refer to the suggestion for remand as an “indicative ruling.”

This clear procedure is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. Rule 62.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Rule 62.1 applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the clerk of the appellate court under Federal Rule of Appellate Procedure 12.1 when the district court states that it would grant the motion or that the motion raises a substantial issue. Remand is in the appellate court's discretion under Appellate Rule 12.1.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the case is remanded for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

Summary of Comments

07-CV-012: Professor Bradley Scott Shannon thinks the proposal “eminently pragmatic,” but objects that a court that does not have jurisdiction should not be allowed to “decide” a matter. That “is improper, certainly as a matter of established principles of American legal process, if not also as a matter of constitutional justiciability.”

07-CV-015: Hon. Jeffrey S. Bucholtz, Acting Assistant Attorney General, supports the proposed rule. “It should be beneficial to practitioners, who generally do not know how to address motions issued while a case is pending on appeal, and it will provide clarity to both the district courts and courts of appeals in addressing such motions.”

07-CV-018: The Seventh Circuit Bar Association Committee on Rules of Practice & Procedure thinks the rule is “aimed primarily or exclusively at motions pursuant to Civil Rule 60. If that indeed is the case, then the new rules or the comments might mention that fact, so as to avoid a variety of other motions being made under the new rules, such as motions for fees.”

Appellate Rule 12.1

Rule 12.1. Remand After an Indicative Ruling by the District Court on a Motion for Relief That Is Barred by a Pending Appeal

- 1 **(a) Notice to the Court of Appeals.** If a timely motion is made in
2 the district court for relief that it lacks authority to grant because
3 of an appeal that has been docketed and is pending, the movant
4 must promptly notify the circuit clerk if the district court states
5 either that it would grant the motion or that the motion raises a
6 substantial issue.
- 7 **(b) Remand After an Indicative Ruling.** If the district court states
8 that it would grant the motion or that the motion raises a
9 substantial issue, the court of appeals may remand for further
10 proceedings but retains jurisdiction unless it expressly dismisses
11 the appeal. If the court of appeals remands but retains
12 jurisdiction, the parties must promptly notify the circuit clerk
13 when the district court has decided the motion on remand.

Committee Note

This new rule corresponds to Federal Rule of Civil Procedure 62.1, which adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party moves under Civil Rule 60(b) to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant relief under a rule such as Civil Rule 60(b) without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the action is remanded or that the motion raises a substantial issue. Experienced appeal lawyers often refer to the suggestion for remand as an “indicative ruling.”

[Appellate Rule 12.1 is not limited to the Civil Rule 62.1 context; Rule 12.1 may also be used, for example, in connection with

motions under Criminal Rule 33. *See United States v. Cronin*, 466 U.S. 648, 667 n.42 (1984).] The procedure formalized by Rule 12.1 is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal.

Rule 12.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Appellate Rule 12.1 applies only when those rules deprive the district court of authority to grant relief without appellate permission.

To ensure proper coordination of proceedings in the district court and in the court of appeals, the movant must notify the circuit clerk if the district court states that it would grant the motion or that the motion raises a substantial issue. The "substantial issue" standard may be illustrated by the following hypothetical: The district court grants summary judgment dismissing a case. While the plaintiff's appeal is pending, the plaintiff moves for relief from the judgment, claiming newly discovered evidence and also possible fraud by the defendant during the discovery process. If the district court reviews the motion and indicates that the motion "raises a substantial issue," the court of appeals may well wish to remand rather than proceed to determine the appeal.

If the district court states that it would grant the motion or that the motion raises a substantial issue, the movant may ask the court of appeals to remand the action so that the district court can make its final ruling on the motion. In accordance with Rule 47(a)(1), a local rule may prescribe the format for the litigants' notifications and the district court's statement.

Remand is in the court of appeals' discretion. The court of appeals may remand all proceedings, terminating the initial appeal. In the context of postjudgment motions, however, that procedure should be followed only when the appellant has stated clearly its intention to abandon the appeal. The danger is that if the initial appeal is terminated and the district court then denies the requested relief, the time for appealing the initial judgment will have run out and a court might rule that the appellant is limited to appealing the denial of the postjudgment motion. The latter appeal may well not provide the appellant with the opportunity to raise all the challenges that could have been raised on appeal from the underlying judgment. *See, e.g., Browder v. Dir., Dep't of Corrections of Ill.*, 434 U.S. 257, 263 n.7 (1978) ("[A]n appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review."). The Committee does not endorse the notion that a court of appeals should decide that the initial appeal was abandoned – despite the absence of any clear statement of intent to abandon the appeal – merely because an unlimited remand occurred, but the possibility that a court might take

that troubling view underscores the need for caution in delimiting the scope of the remand.

The court of appeals may instead choose to remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the appeal after the district court rules on the motion (if the appeal is not moot at that point and if any party wishes to proceed). This will often be the preferred course in the light of the concerns expressed above. It is also possible that the court of appeals may wish to proceed to hear the appeal even after the district court has granted relief on remand; thus, even when the district court indicates that it would grant relief, the court of appeals may in appropriate circumstances choose a limited rather than unlimited remand.

If the court of appeals remands but retains jurisdiction, subdivision (b) requires the parties to notify the circuit clerk when the district court has decided the motion on remand. This is a joint obligation that is discharged when the required notice is given by any litigant involved in the motion in the district court.

When relief is sought in the district court during the pendency of an appeal, litigants should bear in mind the likelihood that a separate notice of appeal will be necessary in order to challenge the district court's disposition of the motion. *See, e.g., Jordan v. Bowen*, 808 F.2d 733, 736-37 (10th Cir. 1987) (viewing district court's response to appellant's motion for indicative ruling as a denial of appellant's request for relief under Rule 60(b), and refusing to review that denial because appellant had failed to take an appeal from the denial); *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990) (“[W]here a 60(b) motion is filed subsequent to the notice of appeal and considered by the district court after a limited remand, an appeal specifically from the ruling on the motion must be taken if the issues raised in that motion are to be considered by the Court of Appeals.”).

The comments on Appellate Rule 12.1 generally go to questions that affect only that rule or the Committee Note. One question may suggest a reason to make two slight changes in the Rule 62.1 Committee Note. One of the comments on Appellate Rule 12.1 suggested that the court of appeals should always make only a limited remand for purposes of ruling on the motion pending in the district court, except that the appeal may be dismissed at the appellant's request. The Appellate Rules Committee has yet to meet on this question. Whatever action they take, there is no occasion to revise Rule 62.1 — the two rules are integrated in a way that leaves to Appellate Rule 12.1 responsibility for practice in the courts of appeals. But there should be nothing in the Rule 62.1 Committee Note that even implicitly muddles the distinction between dismissal of an appeal and a partial remand that calls for automatic return to the court of appeals after the district court has made its ruling on remand. The first paragraph refers to remand of “the action,” and the fourth paragraph refers to remand of “the case.” Those phrases might seem to exclude a partial remand that retains the appeal — and the case — in the court of appeals.

Recommendation: Rule 62.1 be recommended for adoption as published. The Committee Note should be revised to more accurately reflect the language of Rule 62.1(a)(3). The third sentence of the first paragraph would read: "But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the ~~action is remanded~~ court of appeals remands for that purpose or state that the motion raises a substantial issue." The first sentence of the fourth paragraph would read: "Often it will be wise for the district court to determine whether it in fact would grant the motion if the ~~case is remanded~~ court of appeals remands for that purpose."

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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March 4, 2008

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

I write to advise you of the concerns of the Judicial Conference's Committee on Rules of Practice and Procedure about the "Sunshine in Litigation Act of 2007" (S. 2449), which was introduced on December 11, 2007 and is now pending Senate Judiciary Committee consideration. The Committee on Rules of Practice and Procedure has carefully and thoroughly studied the bill's proposed requirements for issuing discovery protective orders under Rule 26(c) of the Federal Rules of Civil Procedure and for issuing orders approving settlements with confidentiality provisions. As a result of this work, the Rules Committee concluded that the legislation is not necessary to protect the public health and safety and that the discovery protective order provision would make it more difficult to protect important privacy interests and would make civil litigation more expensive, more burdensome, and less accessible.

Discovery Protective Orders

S. 2449 would require a judge presiding over a case, who is asked to enter a protective order governing discovery under Rule 26(c) of the Federal Rules of Civil Procedure, to make findings of fact that the information obtained through discovery is not relevant to the protection of public health or safety or, if it is relevant, that the public interest in the disclosure of potential health or safety hazards is outweighed by the public interest in maintaining the confidentiality of the information and that the protective order requested is no broader than necessary to protect the privacy interest asserted.

Bills that would regulate the issuance of protective orders in discovery under Rule 26(c), similar to S. 2449, have been introduced regularly since 1991. Under the Rules Enabling Act, 28 U.S.C. § 2071-2077, the Rules Committee studied Rule 26(c) to inform itself about the problems identified by these bills and to bring the strengths of the Rules Enabling Act process to bear on the problems that might be found. Under that process, the Rules Committee carefully examined and reexamined the issues, reviewed the pertinent case law and legal literature, held public hearings, and initiated and evaluated empirical research studies.

The Rules Committee consistently concluded that provisions affecting Rule 26(c), similar to those sought in S. 2449, were not warranted and would adversely affect the administration of justice. Based on lengthy and thorough examination of the issues, the Committee concluded that: (1) the empirical evidence showed that discovery protective orders did not create any significant problem of concealing information about safety or health hazards from the public; (2) protective orders are important to litigants' privacy and property interests; (3) discovery would become more burdensome and costly if parties cannot rely on protective orders; (4) administering a rule that added conditions before any discovery protective order could be entered would impose significant burdens on the court system; and (5) such a rule would have limited impact because much information gathered in discovery is not filed with the court and is not publicly available.

The Empirical Data Shows No Need for the Legislation

In the early 1990s, the Committee began studying pending bills requiring courts to make particularized findings of fact that a discovery protective order would not restrict the disclosure of information relevant to the protection of public health and safety. The study raised significant issues about the potential for revealing confidential information that could endanger privacy interests and increased litigation resulting from the parties' objections to, and refusal to voluntarily comply with, the broad discovery requests that are common in litigation. The Committee concluded that the issues merited further consideration and that empirical information was necessary to understand whether there was a need to regulate the issuance of discovery protective orders by changing Rule 26(c).

In 1994, the Rules Committee asked the Federal Judicial Center (FJC) to do an empirical study on whether discovery protective orders were operating to keep from the public information about public safety or health hazards. The FJC completed the study in April 1996. It examined 38,179 civil cases filed in the District of Columbia, Eastern District of Michigan, and Eastern District of Pennsylvania from 1990 to 1992. The FJC study showed that discovery protective orders are requested in only about 6% of civil

cases. Most of the requests are made by motion, which courts carefully review and deny or modify a substantial proportion; about one-quarter of the requests are made by party stipulations that courts usually accept.

The empirical study showed that discovery protective orders entered in most cases do not impact public safety or health. In its study, the FJC randomly selected 398 cases that had protective order activity. About half of the 398 cases involved a protective order governing the return or destruction of discovery materials or imposing a discovery stay pending some event or action. Only half of the 398 cases involved a protective order restricting disclosure of discovery materials. Of the cases in which a protective order was entered restricting access to discovery materials, a little more than 50% were civil rights and contract cases and about 9% were personal injury cases. In the cases in which a protective order is entered restricting parties from disclosing discovery material, most are not personal injury cases in which public health and safety issues are most likely to arise. The empirical data showed no evidence that protective orders create any significant problem of concealing information about public hazards.

Other Information Shows No Need for the Legislation

The Committee also studied the examples commonly cited as illustrations of the need for legislation such as S. 2449. In these cases, information sufficient to protect public health or safety was publicly available from other sources. The Committee examined the case law to understand what courts are in fact doing when parties file motions for protective orders in discovery. The case law showed that the courts review such motions carefully and often deny or modify them to grant only the protection needed, recognizing the importance of public access to court filings. The case law also shows that courts often reexamine protective orders if intervenors or third parties raise concerns about them.

The Committee also considered specific proposals to amend Rule 26(c), intended to address the problems identified in S. 2449's predecessor bills. The Committee published proposed amendments through the Rules Enabling Act process. Public comment led to significant revisions, republication, and extensive public comment. At the conclusion of this process, the Judicial Conference decided to return the proposals to the Committee for further study. That study included the work described above.

The Legislation Would Have Significant Negative Consequences

The Committee also carefully considered the impact of requiring findings of fact before any discovery protective order could be issued. As noted, the empirical data showed that about 50% of the cases in which discovery protective orders of the type addressed in S. 2449 are sought involve contract claims and civil rights claims, including employment discrimination. Many of these cases involve either protected confidential information, such as trade secrets, or highly sensitive personal information. In particular, civil rights and employment discrimination cases often involve personal information not only about the plaintiff but also about other individuals who are not parties, such as fellow employees. As a result, the parties in these categories of cases frequently seek orders protecting confidential information and personal information exchanged in discovery.

The risks to privacy are significantly greater today than when bills similar to S. 2449 were first introduced, because of the computer. The federal courts will soon all have electronic court filing systems, which permit public remote electronic access to court filings. Electronic filing is an inevitable development in this computer age and is providing beneficial increases in efficiency and in public access to court filings. But remote public access to court filings makes it more difficult to protect confidential information, such as competitors' trade secrets or individuals' sensitive private information. New rules implementing the E-Government Act do not reduce the need for protective orders to safeguard against dissemination of highly personal and sensitive information. If particularized fact findings are required before a discovery protective order can issue, parties in these cases will face a heavier litigation burden and some plaintiffs might abandon their claims rather than risk public disclosure of highly personal or confidential information.

Although few cases involve discovery into information relevant to public health or safety hazards, S. 2449 would apply to all civil cases. In many cases, protective orders are essential to effective discovery management. That importance has increased with the explosive growth in electronically stored information. Even relatively small cases often involve huge volumes of information. Requiring courts to review information – which can often amount to thousands or even millions of pages – to make such determinations will burden judges and further delay pretrial discovery. Parties often rely on the ability to obtain protective orders in voluntarily producing information without the need for extensive judicial supervision. If obtaining a protective order required item-by-item judicial consideration to determine whether the information was relevant to the protection of public health or safety, as contemplated under the bill, parties would be less likely to seek or rely on such orders and less willing to produce information voluntarily, leading to

discovery disputes. Requiring parties to litigate and courts to resolve such discovery disputes would impose significant costs and burdens on the discovery process and cause further delay. Such satellite disputes would increase the cost of litigation, lead to orders refusing to permit discovery into some information now disclosed under protective orders, add to the pressures that encourage litigants to pursue nonpublic means of dispute resolution, and force some parties to abandon the litigation.

The Legislation Would Primarily Affect Information that is Not Publicly Available Because it is Not Filed With the Court

Not only would the proposed legislation exact a heavy toll on litigants, lawyers, and judges, its potential benefit would be minimized by the general rule that what is produced in discovery is not public information. The Supreme Court recognized this limit when it noted in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984), that discovery materials, including “pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, ... and, in general, they are conducted in private as a matter of modern practice.” Information produced in discovery is not publicly available unless it is filed with the court. Information produced in discovery is not filed with the court unless it is part of or attached to a motion or other submission, such as a motion for summary judgment. Consequently, if discovery material is in the parties’ possession but not filed, it is not publicly available. The absence of a protective order does not require that any party share the information with the public. The proposed legislation would have little effect on public access to discovery materials not filed with the court.

Conclusion

The Committee opposes the proposed legislation on discovery protective orders on the ground that it is inconsistent with the Rules Enabling Act. The Committee’s substantive concerns with the proposed legislation result from the careful study conducted through the lengthy and transparent process of the Rules Enabling Act. That study, which spanned years and included research to gather and analyze empirical data, case law, academic studies, and practice, led to the conclusion that no change to the present protective-order practice is warranted and that the proposed legislation would make discovery more expensive, more burdensome, and more time-consuming, and would threaten important privacy interests.

Confidentiality Provisions in Settlement Agreements

The Empirical Data Shows No Need for the Legislation

S. 2449 would also require a judge asked to issue an order approving a settlement agreement to make findings of fact that such an order would not restrict the disclosure of information relevant to the protection of public health or safety or, if it is relevant, that the public interest in the disclosure of potential health or safety hazards is outweighed by the public interest in maintaining the confidentiality of the information and that the protective order requested is no broader than necessary to protect the privacy interest asserted. In 2002, the Committee on Rules of Practice and Procedure asked the Federal Judicial Center to collect and analyze data on the practice and frequency of “sealing orders” that limit disclosure of settlement agreements filed in the federal courts. The Committee asked for the study in response to proposed legislation that would regulate confidentiality provisions in settlement agreements. S. 2449 contains a similar provision. In April 2004 the FJC completed its comprehensive study, surveying civil cases terminated in 52 district courts during the two-year period ending December 31, 2002. In those 52 districts, the FJC found a total of 1,270 cases out of 288,846 civil cases in which a sealed settlement agreement was filed, about one in 227 cases (0.44%).

The FJC study then analyzed the 1,270 sealed-settlement cases to determine how many involved public health or safety. The FJC coded the cases for the following characteristics, which might implicate public health or safety: (1) environmental; (2) product liability; (3) professional malpractice; (4) public-party defendant; (5) death or very serious injury; and (6) sexual abuse. A total of 503 cases (0.18% of all cases) had one or more of the public-interest characteristics. That number would be smaller still if the 177 cases that were part of two consolidated MDL (multidistrict litigation) proceedings were viewed as two cases because they were consolidated into two proceedings before two judges for centralized management.

After reviewing the information from the 52 districts, the FJC concluded that there were so few orders sealing settlement agreements because most settlement agreements are neither filed with the court nor require court approval. Instead, most settlement agreements are private contractual obligations.

The Committee was nonetheless concerned that even though the number of cases in which courts sealed a settlement was small, those cases could involve significant public hazards. A follow-up study was conducted to determine whether in these cases, there was publicly available information about potential hazards contained in other records that were

not sealed. The follow-up study showed that in the few cases involving a potential public health or safety hazard and in which a settlement agreement was sealed, the complaint and other documents remained in the court's file, fully accessible to the public. In these cases, the complaints generally contained details about the basis for the suit, such as the defective nature of a harmful product, the dangerous characteristics of a person, or the lasting effects of a particular harmful event. Although the complaints varied in level of detail, all identified the three most critical pieces of information regarding possible public health or safety risks: (1) the risk itself; (2) the source of that risk; and (3) the harm that allegedly ensued. The product-liability suit complaints, for example, specifically identified the product at issue, described the accident or event, and described the harm or injury alleged to have resulted. In many cases, the complaints went further and identified a particular feature of the product that was defective, or described a particular way in which the product failed. In the cases alleging harm caused by a specific person, such as civil rights violations, sexual abuse, or negligence, the complaints consistently identified the alleged wrongdoer and described in detail the causes and extent of the alleged injury. These findings were consistent with the general conclusions of the FJC study that the complaints filed in lawsuits provided the public with "access to information about the alleged wrongdoers and wrongdoings."

The Legislation is Unlikely to be Effective

The FJC study shows that only a small fraction of the agreements that settle federal-court actions are filed in the court. Most settlement agreements remain private contracts between the parties. On the few occasions when parties do file a settlement agreement with the court, it is to make the settlement agreement part of the judgment to ensure continuing federal jurisdiction, not to secure court approval of the settlement. Such agreements would not be affected by prohibitions, like those in S. 2449, prohibiting a court from entering an order "approving a settlement agreement that would restrict disclosure" of its contents.

Conclusion

Based on the relatively small number of cases involving a sealed settlement agreement and the availability of other sources – including the complaint – to inform the public of potential hazards in cases involving a sealed settlement agreement, the Committee concluded that it was not necessary to enact a rule or a statute restricting confidentiality provisions in settlement agreements.

Honorable Patrick J. Leahy
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Summary

For these reasons, the Committee on Rules of Practice and Procedure has strong concerns about the discovery protective order and settlement order provisions of S. 2449 that you and the Judiciary Committee are urged to consider. I thank you for your consideration and look forward to continuing to work together to ensure that our civil justice system is just and fair.

Sincerely,



Lee H. Rosenthal
United States District Judge
Chair, Committee on Rules of Practice
and Procedure

Identical letter sent to Senator Arlen Specter
cc: Members, Senate Committee on the Judiciary

THE REPORTS FROM THE FEDERAL JUDICIAL CENTER
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Director

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UNITED STATES COURTS

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WASHINGTON, D.C. 20544

Office of Judges Programs

March 13, 2008

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Agenda Item on Draft Revisions of Civil and Criminal AO Forms*

Last year, the Forms Working Group of judges, clerks, and AO staff reviewed all the AO forms for compliance with the new federal privacy rules. It is now rewriting them in simple, modern English in light of the restyling of the Federal Rules of Civil Procedure that took effect last December and the earlier restyling of the Federal Rules of Criminal Procedure. Joe Spaniol, Style Consultant for the Standing Committee, has been advising the Working Group on this project.

The first batch of 33 draft restyled civil and criminal AO forms has been posted on the Judiciary's intranet for comment as an exposure draft. Any views of the committee and its members will be conveyed to the Working Group, which will meet this July to consider all comments received.

AO-0085	Notice, Consent, and Reference of a Civil Case to a Magistrate Judge [cf. Civil Rules Forms 80, 81, and 82]
AO-0085A	Notice and Consent to a Magistrate Judge's Consideration of a Dispositive Motion [cf. Civil Rules Forms 80, 81, and 82]
AO-0088	Subpoena to Appear and Testify at a Hearing or Trial in a Civil Action
AO-0088A	Subpoena to Testify at a Deposition in a Civil Case or Permit the Inspection of Property [proposed new form]
AO-0089	Subpoena to Testify in a Criminal Case
AO-0090	Subpoena to Testify at a Deposition in a Criminal Case
AO-0091	Criminal Complaint
AO-0093	Warrant for a Search and Seizure
AO-0093A	Warrant for a Search and Seizure on Oral Testimony
AO-0106	Application for a Search Warrant
AO-0108	Application for a Warrant to Seize Property Subject to Forfeiture
AO-0110	Subpoena to Testify Before a Grand Jury
AO-0115	Petition for a Change in Name by an Applicant for Citizenship

AO-0156 Jury Verdict
AO-0190 Record of the Number of Grand Jurors Concurring in an Indictment
AO-0191 Report of a Grand Jury's Failure to Concur in an Indictment
AO-0240A Order to Proceed Without Prepaying Fees or Costs
AO-0245A Judgment of Acquittal in a Criminal Case
AO-0249 Drug Offender's Reinstatement of Federal Benefits
AO-0398 Notice of a Lawsuit and Request to Waive Service of a Summons
[cf. Civil Rules Form 5]
AO-0399 Waiver of the Service of Summons [cf. Civil Rules Form 6]
AO-0440 Summons in a Civil Action
AO-0441 Summons on a Third-Party Complaint
AO-0442 Arrest Warrant
AO-0443 Warrant for Arrest of a Witness in a Criminal Case
AO-0450 Judgment in a Civil Case [cf. Civil Rules Forms 70 and 71]
AO-0455 Waiver of an Indictment
AO-0456 Notice of a Trial or Hearing
AO-0458 Appearance of Counsel
AO-0466B Election to Have a Preliminary Hearing Held in the Charging District and
to Waive the Time Requirement
AO-0467 Order Requiring a Defendant to Appear in the District Where Charges are
Pending and Transferring Bail
AO-0468 Waiver of Preliminary Hearing
AO-0470 Order Scheduling a Detention Hearing

UNITED STATES DISTRICT COURT

for the

_____ District of _____

Plaintiff)	
v.	)	Civil Action No.
Defendant)	

Notice, Consent, and Reference of a Civil Case to a Magistrate Judge

Notice of a magistrate judge's availability. A United States magistrate judge of this court is available to conduct all proceedings in this civil case (including a jury or nonjury trial) and to order the entry of a final judgment. The judgment may then be appealed directly to the United States court of appeals like any other judgment of this court. A magistrate judge may exercise this authority only if all parties voluntarily consent.

You may consent to have your case referred to a magistrate judge, or you may withhold your consent without negative consequences. The name of any party withholding consent will not be revealed to any judge who may otherwise be involved with your case.

Consent to a magistrate judge's authority. The parties consent to have a United States magistrate judge conduct all proceedings in this case including trial, the entry of final judgment, and all post-trial proceedings.

<i>Parties' printed names</i>	<i>Signatures of parties or attorneys</i>	<i>Dates</i>

Reference Order

It is ordered that this case is referred to United States Magistrate Judge _____
 _____ to conduct all proceedings and order the entry of a final judgment in accordance with 28 U.S.C.
 § 636(c) and Fed. R. Civ. P. 73.

Date: _____

District judge's signature

Printed name and title

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____)	
Plaintiff)	
v.	)	Case No.
_____)	
Defendant)	

Notice and Consent to a Magistrate Judge's Consideration of a Dispositive Motion

Notice of a magistrate judge's availability. A United States magistrate judge of this court is available to conduct all proceedings and enter a final order dispositive of each motion. A magistrate judge may exercise this authority only if all parties voluntarily consent.

You may consent to have your motions referred to a magistrate judge, or you may withhold your consent without negative consequences. The name of any party withholding consent will not be revealed to any judge who may otherwise be involved with your case.

Consent to a magistrate judge's consideration of a dispositive motion. The parties consent to have a United States magistrate judge conduct any and all proceedings and enter a final order as to each motion identified below (*identify each motion by document number and title*).

MOTION(S): _____

<i>Parties' printed names</i>	<i>Signatures of parties or attorneys</i>	<i>Dates</i>
_____	_____	_____
_____	_____	_____
_____	_____	_____

Reference Order

It is ordered that the motion(s) are referred to United States Magistrate Judge _____
_____ to conduct all proceedings and enter a final order on the motions identified above in
accordance with 28 U.S.C. § 636(c).

Date: _____

_____ District judge's signature

_____ Printed name and title

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____)	
Plaintiff)	
v.)	Civil Action No.
_____)	
Defendant)	

Subpoena to Appear and Testify at a Hearing or Trial in a Civil Action

To: _____

You are commanded to appear in the United States district court at the time, date, and place identified below to testify at a hearing or trial in this civil action. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place:	Courtroom No.:
	Date and Time:

You must also bring with you the following documents or objects *(blank if not applicable)*:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Fed. R. Civ. P. 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: _____

Name of clerk of court

Deputy clerk's signature

This subpoena has been issued on application of an attorney, whose name, address, e-mail, and telephone number are:

Proof of Service

This subpoena was received by me on *(date)* _____ and was:

- personally served by me on this witness _____ at *(place)* _____ on *(date)* _____ ;or
- on *(date)* _____ left at the witness's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there; and a copy was mailed to the witness's last known address; or
- returned unexecuted.

My fees are \$ _____ for travel and \$ _____ for services, for a total _____ .
I have tendered to the witness the statutory fees and mileage in the amount of \$ _____ .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Server's address

Additional information:

FEDERAL RULE OF CIVIL PROCEDURE 45 (C), (D), AND (E)

(c) Protecting a Person Subject to a Subpoena.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney’s fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party’s officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party’s officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert’s opinion or information that does not describe specific occurrences in dispute and results from the expert’s study that was not requested by a party; or

(iii) a person who is neither a party nor a party’s officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms:

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty’s failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

UNITED STATES DISTRICT COURT

for the

District of _____

_____)	
Plaintiff)	
v.	)	Civil Action No.
_____)	
Defendant	)	(If the action is pending in another district, state where:
	)	_____ District of _____)

Subpoena to Testify at a Deposition in a Civil Case or Permit the Inspection of Property

To: _____

You are commanded to appear at the time, date, and place shown below to testify at a deposition to be taken in this civil action. If you are an organization that is not a party to this action, you may send officers, directors, managing agents, or others who are qualified to testify about each of the following matters, or those set out in an attached document, and who agree to do so:

Place:	Date and Time:
--------	----------------

You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and permit their inspection and copying (*blank if not applicable*):

If you are the owner or legal occupant of the following described property, you must permit an inspection of it on *(date)* _____ at this hour: _____. The property's description and location are:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: _____

Issuing officer's signature

Printed name and title

Proof of Service

This subpoena was received by me on *(date)* _____ and was:

personally served by me on this witness _____ at *(place)* _____ on *(date)* _____ ;or

on *(date)* _____ left at the witness's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there; and a copy was mailed to the witness's last known address; or

returned unexecuted.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ .
I have tendered to the witness the statutory fees and mileage in the amount of \$ _____

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Server's address

EXPOSURE DRAFT

FEDERAL RULE OF CIVIL PROCEDURE 45 (C), (D), AND (E)

(c) Protecting a Person Subject to a Subpoena.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney’s fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party’s officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party’s officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert’s opinion or information that does not describe specific occurrences in dispute and results from the expert’s study that was not requested by a party; or

(iii) a person who is neither a party nor a party’s officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty’s failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America)

v.)

) Case No.

Defendant)

Subpoena to Testify in a Criminal Case

To:

You are commanded to appear in the United States district court at the time, date, and place shown below to testify in this criminal case. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place of Appearance:	Courtroom No.:
	Date and Time:

You must also bring with you the following documents or objects *(blank if not applicable)*:

Date: _____

Name of clerk of court

Deputy clerk's signature

This subpoena has been issued on application of an attorney, whose name, address, e-mail, and telephone number are:

Proof of Service

This subpoena was received by me on *(date)* _____ and was:

personally served by me on this witness _____ in *(city and state)* _____ on *(date)* _____ ; or

on *(date)* _____ left at the witness's residence or usual place of abode with *(name)* _____, a person of suitable age and discretion who resides there, and a copy was mailed to the witness's last known address; or

returned unexecuted.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____.
I have tendered to the witness the statutory fees and mileage in the amount of \$ _____.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Server's address

Additional Information:

EXPOSURE DRAFT

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America

v.

Case No. _____

Defendant

Subpoena to Testify at a Deposition in a Criminal Case

To: _____

You are commanded to appear at the time, date, and place set out below to testify at a deposition in a criminal case. If you are an organization that is *not* a party in this case, you may send an officer, director, managing agent, or other person who is qualified and agrees to testify about the following matters, or those set out in an attachment:

Place:	Courtroom No.:
	Date and Time:

You must also bring with you to this deposition the following documents or objects (*blank if not applicable*):

Date: _____

Issuing officer's signature

Printed name and title

This subpoena has been issued on application of an attorney whose name, address, e-mail and telephone number are:

Proof of Service

This summons was received by me on (date) _____ and was:

personally served by me on this witness _____ in (city and state) _____ on (date) _____ ; or

on (date) _____ left at the witness's residence or usual place of abode with (name) _____, a person of suitable age and discretion who resides there, and a copy was mailed to the witness's last known address; or

returned unexecuted.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____

I have tendered to the witness the statutory fees and mileage in the amount of \$ _____

I declare under penalty of perjury that this information is true.

Date returned: _____

Server's signature

Printed name and title

Additional Information:

EXPOSURE DRAFT

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America

v.

Case No. _____

Defendant

Criminal Complaint

I, the complainant in this case, state that the following is true to the best of my knowledge and belief.

On or about the date of _____ in the county of _____ in the _____ District of _____, the defendant violated _____ U. S. C. § _____, an offense described as follows:

This criminal complaint is based on these facts:

Continued on the attached sheet.

Complainant's signature

Printed name and title

Sworn to before me and signed in my presence.

Date: _____

Judge's signature

City and state: _____

Printed name and title

UNITED STATES DISTRICT COURT

for the

_____ District of _____

In the Matter of the Search of _____)
(Briefly describe the property to be searched)
or identify the person by name and address))

Case No. _____)
)
)
)
)

Warrant for a Search and Seizure

To: The United States marshal or any authorized United States law-enforcement officer

I have received an affidavit, or have recorded oral testimony, from (name the officer) _____
_____, who has reason to believe that a certain person or specified personal
property is concealed in the _____ District of _____ at this location:

The person or personal property believed to be concealed is (name the person or describe the property):

I am satisfied that the affidavit, or any recorded testimony, establishes probable cause to believe that the person
named or the property described is concealed at this location and establishes grounds to issue the warrant.

You are commanded to search, on or before (date) _____ (not to exceed 10 days), the
person or property named above, and arrest the person named or seize the property described. You must conduct the
search between the hours of 6:00 a.m. and 10:00 p.m. unless a search at any time during the day or night is authorized
below.

If this paragraph is initialed by me, you may conduct the search at any time during the day or night _____
Judge's initials

You must also prepare an inventory of any property seized, leave the original warrant and the inventory at the
place of seizure, and return this warrant and the inventory to United States Magistrate Judge _____

Date: _____

Judge's signature

Time issued: _____

Printed name and title

City and state: _____

Return

Date warrant received:

Date and time warrant executed:

Copy of warrant and inventory left with:

Inventory made in the presence of :

Inventory of the property taken and name of any person arrested:

Certification

I declare under penalty of perjury that this inventory is correct.

Signature of officer executing warrant

Printed name and title

Sworn to and signed before me on this date.

Date: _____

Judge's signature

Printed name and title

UNITED STATES DISTRICT COURT

for the

_____ District of _____

In the Matter of the Search of
*(Briefly describe the property to be searched
or identify the person by name and address)*

)
)
)
)
)
)

Case No. _____

Warrant for a Search and Seizure on Oral Testimony

To: The United States marshal or any authorized United States law-enforcement officer

I have received, and recorded electronically or by hand-writing, sworn testimony communicated to me by *(name the officer)* _____, who has reason to believe that a certain person or specified personal property is concealed in the _____ District of _____ at this location:

The person or personal property believed to be concealed is *(name the person or describe the property)*:

I am satisfied that circumstances make it reasonable to dispense with a written affidavit and that the oral testimony establishes probable cause to believe that the person named, or the property described, is concealed at this location and establishes grounds to issue the warrant.

You are commanded to search, on or before *(date)* _____ *(not to exceed 10 days)*, the person or property named above, and arrest the person named or seize the property described. You must conduct the search between the hours of 6:00 a.m. and 10:00 p.m. unless a search at any time during the day or night is authorized below.

If this paragraph is initialed by me, you may conduct the search at any time during the day or night _____
Judge's initials

You must also prepare an inventory of any property seized, leave the original warrant and the inventory at the place of seizure, and return this warrant and the inventory to United States Magistrate Judge _____

Date: _____

Judge's signature

Time issued: _____

City and state: _____

Printed name and title

Return

Date warrant received:

Date and time warrant executed:

Copy of warrant and inventory left with:

Inventory made in the presence of :

Inventory of the property taken and name of any person arrested:

Certification

I declare under penalty of perjury that this inventory is correct.

Signature of officer executing warrant.

Printed name and title

Sworn to and signed before me on this date.

Date _____

Judge's signature

Printed name and title

UNITED STATES DISTRICT COURT

for the

_____ District of _____

In the Matter of the Search of _____)
(Briefly describe the property to be searched)
or identify the person by name and address))
)
)
)

Case No. _____

Application for a Search Warrant

I, a federal law-enforcement officer or an attorney for the government, state under penalty of perjury that I have reason to believe that there is now concealed at the following location a person who is subject to search or arrest, or property that is subject to search (*name the person and the address or location of the property to be searched*):

The search is related to a violation of _____ U. S. C. § _____, briefly described as follows:

The basis for the search under Fed. R. Crim. P. 41(c) is:

- evidence of a crime;
- contraband, fruits of crime, or other items illegally possessed;
- property designed for use, intended for use, or used in committing a crime;
- a person to be arrested or a person who is unlawfully restrained.

The person to be arrested or the property to be seized is (*name or describe the person to be arrested, or describe the property to be searched*):

This application is based on these facts:

Continued on the attached sheet.

Affiant's signature

Printed name and title

Sworn to before me and signed in my presence.

Date: _____

Judge's signature

City and state: _____

Printed name and title

UNITED STATES DISTRICT COURT

for the

District of _____

In the Matter of the Seizure of
(Briefly describe the property to be seized)

)
)
)
)
)

Case No. _____

Application for a Warrant to Seize Property Subject to Forfeiture

I, a federal law-enforcement officer and the affiant in this case, state under penalty of perjury that because of a violation of _____ U.S.C. § _____, I have reason to believe that the following property is subject to forfeiture to the United States of America *(describe the property)*:

This application is based on these facts:

Continued on the attached sheet.

Affiant's signature

Printed name and title

Sworn to before me and signed in my presence.

Date: _____

Judge's signature

City and State: _____

Printed name and title

UNITED STATES DISTRICT COURT

for the

_____ District of _____

Subpoena to Testify Before a Grand Jury

To: _____

You are commanded to appear in this United States district court at the time, date, and place shown below to testify before the court's grand jury. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place:	Courtroom No.:
	Date and Time:

You must also bring with you the following documents or objects *(blank if not applicable)*:

Date: _____

Name of clerk of court

By: _____

Deputy clerk's signature

This subpoena has been issued on application of the United States attorney, or an assistant United States attorney, whose name, address, e-mail, and telephone number are:

Proof of Service

This subpoena was received by me on *(date)* _____ and was:

- personally served by me on this witness _____ at *(place)* _____ on *(date)* _____ ; or
- on *(date)* _____ left at the witness's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, and a copy was mailed to the witness's last known address; or
- returned unexecuted.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Server's address

Additional Information:

EXPOSURE DRAFT

UNITED STATES DISTRICT COURT

for the

_____ District of _____

Petition for a Change in Name by an Applicant for Citizenship

Instructions to the Applicant for Citizenship:

The Immigration and Nationality Act authorizes a United States district court to change the name of an applicant for citizenship at the same time that the court administers the oath of allegiance. The naturalization certificate will then show your new name. If you wish to change your name at the time of the naturalization ceremony, provide the following information:

- (1) My full name now is: _____
- (2) My place of residence is: _____
- (3) My country of birth is: _____
- (4) My date of birth is: _____
- (5) My alien registration number is: _____

Petition to the Court:

I certify that I am not seeking a change in name for any unlawful purpose, such as to avoid debt or evade law enforcement. I ask the court to change my name to:

Date: _____

Petitioner's signature

Certification of Name Change

I certify that the court granted this change in name on _____
Date

Date: _____

Printed name of clerk of court

By _____
Deputy clerk's signature

UNITED STATES DISTRICT COURT

for the

District of _____

Plaintiff

v.

Defendant

)
)
)
)
)

Case No.

Jury Verdict

We, the jury, find that:

EXPOSURE DRAFT

Date: _____

Foreperson's signature

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America

v.

)
)
)
)
)

Case No. _____

Defendant

Record of the Number of Grand Jurors Concurring in an Indictment

As the foreperson of the grand jury of this court at a session held at _____ on _____, I certify that (*specify number*) _____ grand jurors concurred in the indictment in this case. Under Fed. R. Crim. P. 6(c), this record is being filed with the court clerk and is *not* to be made public unless the court orders otherwise.

Date: _____

Foreperson's signature

EXPOSURE DRAFT

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America

v.

)
)
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)
)

Case No.

Defendant

Report of a Grand Jury's Failure to Concur in an Indictment

As the foreperson of the grand jury of this court at a session held at _____ on _____, I report that 12 or more grand jurors did not concur in finding an indictment in this case. Under Fed. R. Crim. P. 6(c), this record is being filed with the court clerk and is *not* to be made public unless the court orders otherwise.

Date: _____

Foreperson's signature

EXPOSURE DRAFT

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____)	
Plaintiff)	
v.	)	Case No.
_____)	
Defendant)	

Order to Proceed Without Prepaying Fees or Costs

It is ordered that the plaintiff's application under 28 U.S.C. § 1915 to proceed without prepaying fees or costs is:

Granted:

The clerk is ordered to file the complaint and issue a summons. The United States marshal is ordered to serve the summons with a copy of the complaint and this order on the defendant(s) as the plaintiff directs. The United States will advance the costs of service.

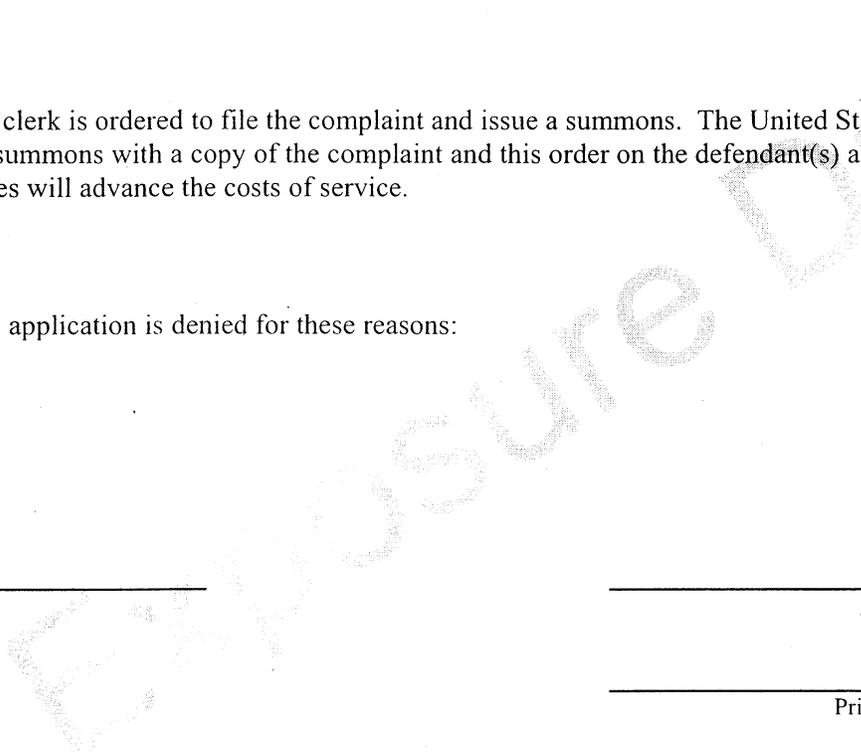
Denied:

This application is denied for these reasons:

Date: _____

Judge's signature

Printed name and title



UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America

v.

Defendant

)
)
)
)
)

Case No. _____

Judgment of Acquittal in a Criminal Case

This defendant has been found not guilty of all criminal charges in this case. Therefore, it is ordered that the defendant is discharged from custody and any appearance bond is exonerated.

Date: _____

Judge's signature

Printed name and title

EXPOSURE DRAFT

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America

v.

)
)
)
)
)

Case No.

Sentencing Date:

Defendant

Drug Offender's Reinstatement of Federal Benefits

It is ordered, under 21 U.S.C. §862(c), that the defendant's federal benefits suspended by this court on a conviction for the possession of a controlled substance are reinstated. The defendant has successfully completed a drug treatment and testing program, or has in good faith tried to gain admission to such a program but was unable to do so because of its cost or inaccessibility, or has otherwise been rehabilitated.

Date: _____

Judge's signature

Printed name and title

City and state of defendant's residence: _____

Last four digits of SSN: _____

Year of birth: _____

The clerk of court is responsible for sending a copy of this form to:

U.S. Department of Justice - Office of Justice Programs
Attn: Denial of Federal Benefits Program
810 Seventh Street, NW
Washington, D.C. 20531

UNITED STATES DISTRICT COURT

for the

 Plaintiff
 v.

 Defendant

)
)
)
)
)

Civil Action No.

Notice of a Lawsuit and Request to Waive Service of a Summons

To: _____
(Name of the defendant or - if the defendant is a corporation, partnership, or association - an officer or agent authorized to receive service)

Why are you getting this?

A lawsuit has been filed against you, or the entity you represent, in this court under the number shown above. A copy of the complaint is attached.

This is not a summons, or an official notice from the court. It is a request that, to avoid expenses, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these expenses, you must return the signed waiver within ____ days (*give at least 30 days or at least 60 days if the defendant is outside any judicial district of the United States*) from the date shown below, which is the date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may keep the other copy.

What happens next?

If you return the signed waiver, I will file it with the court. The action will then proceed as if you had been served on the date the waiver is filed, but no summons will be served on you and you will have 60 days from the date this notice is sent (see the date below) to answer the complaint (or 90 days if this notice is sent to you outside any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will arrange to have the summons and complaint served on you. And I will ask the court to require you, or the entity you represent, to pay the expenses of making service.

Please read the enclosed statement about the duty to avoid unnecessary expenses.

I certify that this request is being sent to you on the date below.

Date _____

 Signature of the attorney or unrepresented party

 Printed name

 Address

 E-mail address

 Telephone number

UNITED STATES DISTRICT COURT

for the

_____)	
Plaintiff)	
v.)	Civil Action No.
_____)	
Defendant)	

Waiver of the Service of Summons

To: _____
(Name of the plaintiff's attorney or unrepresented plaintiff)

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from _____, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

Date _____

Signature of the attorney or unrepresented party

Printed name

Address

E-mail address

Telephone number

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does *not* include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____)	
Plaintiff)	
v.	)	Civil Action No.
_____)	
Defendant)	

Summons in a Civil Action

To: _____
(Defendant's name)

A lawsuit has been filed against you.

Within ____ days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, whose name and address are:

If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Name of clerk of court

Date: _____

Deputy clerk's signature

(Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States allowed 60 days by Rule 12(a)(3).)

Proof of Service

I declare under penalty of perjury that I served the summons and complaint in this case on _____,
by:

- (1) personally delivering a copy of each to the individual at this place, _____; or
- (2) leaving a copy of each at the individual's dwelling or usual place of abode with _____
who resides there and is of suitable age and discretion; or
- (3) delivering a copy of each to an agent authorized by appointment or by law to receive it whose name is
_____; or
- (4) returning the summons unexecuted to the court clerk on _____.

My fees and expenses total \$ _____, which includes services of \$ _____ and travel of \$ _____.

Date: _____

Server's signature

Printed name and title

Server's address

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____)	
Plaintiff)	
v.	)	Civil Action No.
_____)	
Defendant, Third-party plaintiff)	
v.)	
_____)	
Third-party defendant)	

Summons on a Third-Party Complaint

To: _____
(Third-party defendant's name)

A lawsuit has been filed against defendant _____, who as third-party plaintiff is making this claim against you to pay part or all of what the defendant may owe to the plaintiff _____.

Within ___ days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff and on the defendant an answer to the attached third-party complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the defendant's attorney, whose name and address are:

It must also be served on the plaintiff's attorney, whose name and address are:

If you fail to do so, judgment by default will be entered against you for the relief demanded in the third-party complaint. You also must file the answer or motion with the court and serve it on any other parties.

A copy of the plaintiff's complaint is also attached. You may – but are not required to – respond to it.

Date: _____

Name of clerk of court

Deputy clerk's signature

(Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States allowed 60 days by Rule 12(a)(3).)

Server's Affidavit of Service

I declare under penalty of perjury that I served the summons and complaint in this case on _____,
by:

- (1) personally delivering a copy of each to the individual at this place, _____; or
- (2) leaving a copy of each at the individual's dwelling or usual place of abode with _____
who resides there and is of suitable age and discretion; or
- (3) delivering a copy of each to an agent authorized by appointment or by law to receive it whose name is
_____; or
- (4) returning the summons unexecuted to the court clerk on _____.

My fees and expenses total \$ _____, which includes services of \$ _____ and travel of \$ _____.

Date: _____

Server's signature

Printed name and title

Server's address

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America)

v.)

Case No. _____)

Defendant)

Arrest Warrant

To: The United States marshal or any authorized law-enforcement officer

You are commanded to arrest and bring before a United States magistrate judge without unnecessary delay
(name of person to be arrested) _____,
who is charged with violating the court imposed conditions of pretrial release or supervision, or of violating _____ U.S.C.
§ _____. This offense is briefly described as follows:

This charge is based on the following document filed with the court:

- Indictment Information Complaint Order of court
- Pretrial Release Violation Petition Probation Violation Petition Supervised Release Violation Violation Notice

Date: _____ Issuing officer's signature _____

Location: _____ Printed name and title _____

Return

This warrant was received on (date) _____, and the person was arrested on (date) _____
at (city and state) _____.

Date: _____ Arresting officer's signature _____

Printed name and title _____

This second page contains personal identifiers provided for law-enforcement use only and therefore should not be filed in court with the executed warrant unless under seal.

(Not for Public Disclosure)

Defendant's name: _____

Alias: _____

Last known residence: _____

Last known employment: _____

Place of birth: _____

Date of birth: _____

Social Security number: _____

Height: _____ Weight: _____

Sex: _____ Race: _____

Hair: _____ Eyes: _____

Scars, tattoos, other distinguishing marks: _____

FBI number: _____

Complete description of auto: _____

Investigative agency and address: _____

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America)

v.)

Case No.)

)

)

Warrant for the Arrest of a Witness in a Criminal Case

To: The United States marshal or other authorized law-enforcement officer

You are commanded to arrest and bring before this court (*name of person to be arrested*) _____, a witness who has been served with a subpoena to appear in this case and has failed to do so.

You are further commanded to detain this witness until this court orders discharge from custody.

Date: _____

Name of clerk of court

City and state: _____

Deputy clerk's signature

Arresting Officer's Return

This warrant was received on _____ and the person was arrested at _____ on _____.

Date: _____

Arresting officer's signature

Printed name and title

**This second page contains personal identifiers provided for law-enforcement use only
and therefore should not be filed in court with the executed warrant unless under seal.**

(Not for Public Disclosure)

Witness's name: _____

Alias: _____

Last known residence: _____

Last known employment: _____

Place of birth: _____

Date of birth: _____

Social Security number: _____

Height: _____ Weight: _____

Sex: _____ Race: _____

Hair: _____ Eyes: _____

Scars, tattoos, other distinguishing marks: _____

FBI number: _____

Complete description of auto: _____

Investigative agency and address: _____

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____)	
Plaintiff)	
v.	)	Civil Action No.
_____)	
Defendant)	

Judgment in a Civil Case

This action was (*check one*):

- tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.
- tried by Judge _____ without a jury and the following decision was reached.

It is ordered that (*check one*):

- the plaintiff (*name*) _____ recover from the defendant (*name*) _____ the amount of _____ dollars (\$ _____) with prejudgment interest at the rate of _____ % and postjudgment interest at the rate of _____ %, along with costs.
- the plaintiff recover nothing, the action be dismissed on the merits, and the defendant (*name*) _____ recover costs from the plaintiff (*name*) _____

Date: _____

Signature of clerk of court

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America

v.

)
) Case No.
)
)
)

Defendant

Waiver of an Indictment

I understand that I have been accused of violating _____ U.S.C. § _____, an offense that is punishable by imprisonment for more than one year. I was advised in open court of my rights and the nature of the proposed charges against me.

After receiving this advice, I waive my right to prosecution by indictment and consent to prosecution by information.

Date: _____

Defendant's signature

Defense counsel's signature

Defense counsel's printed name

Judge's signature

Judge's printed name and title

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____)	
Plaintiff)	
v.	)	Case No.
_____)	
Defendant)	

Notice of a Trial or Hearing

To: The parties

A trial or hearing in this case has been set (or reset) at the place, date, and time set forth below:

Place	Courtroom No.:
	Date and Time:

Type of Proceeding: _____

Date: _____

Name of judge or clerk of court

By: _____

Deputy clerk's signature

EXPOSURE

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____)	
Plaintiff)	
v.	)	Case No.
_____)	
Defendant)	

Appearance of Counsel

To: The clerk of this court and all parties of record

I am authorized to practice in this court, and I appear in this case as counsel for:

Date: _____

Counsel's signature

Printed name and bar number

Address

E-mail address

Telephone Number

FAX Number

I do not wish to receive electronic notices.

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America

v.

)

)

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)

)

Case No. _____

Charging district: _____

Case No. _____

Defendant

Election to Have a Preliminary Hearing Held in the Charging District and to Waive the Time Requirement

I elect to have the preliminary hearing held in the district where the charges against me are pending, and I waive my right under Fed. R. Crim. P. 5.1(b) to have the hearing held within 10 days of the initial appearance if I am in custody or within 20 days if I am not in custody.

I understand that I am required to appear in that district as directed.

Date: _____

Defendant's signature

Defense counsel's signature

Defense counsel's printed name

Judge's signature

Judge's printed name and title

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America

v.

Defendant

)

)

)

)

)

Case No.

Charging district:

Case No.

Order Requiring a Defendant to Appear in the District Where Charges are Pending and Transferring Bail

After a hearing in this court, the defendant is released from custody and ordered to appear in the district court where the charges are pending to answer those charges. If the time to appear in that court has not yet been set, the defendant must appear when notified to do so. Otherwise, the time and place to appear in that court are:

Place	Courtroom No.
	Date and Time

The clerk is ordered to transfer any bail deposited in the registry of this court to the clerk of the court where the charges are pending.

Date: _____

Judge's signature

Printed name and title

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America

v.

Case No. _____

Defendant

Waiver of a Preliminary Hearing

I understand that I have been charged with a crime in a criminal complaint filed in this court, or charged with violating the terms of probation or supervised release in a petition filed in this court. A magistrate judge has explained my right to a preliminary hearing under Fed. R. Crim. P. 5, or to a preliminary hearing under Fed. R. Crim. P. 32.1.

After receiving this explanation, I agree to waive my right to a preliminary hearing under Fed. R. Crim. P. 5 or Fed. R. Crim. P. 32.1.

Date: _____

Defendant's signature

Defense counsel's signature

Printed name of counsel and bar number

Address

E-mail Address

Telephone Number

FAX Number

UNITED STATES DISTRICT COURT

for the

_____ District of _____

United States of America

v.

)
) Case No.
)
)
)
)

Defendant

Order Scheduling a Detention Hearing

A detention hearing in this case is scheduled as follows:

Place:	Courtroom No.:
	Date and Time:

Pending the hearing, it is ordered that the defendant be detained in the custody of the United States marshal, or another law-enforcement officer whose name and title are:

It is further ordered that the custodian bring the defendant to the hearing at the time, date, and place set out above.

Date: _____

Judge's signature

Printed name and title

Calendar for September–November 2008 (United States)

September							October							November							
Su	Mo	Tu	We	Th	Fr	Sa	Su	Mo	Tu	We	Th	Fr	Sa	Su	Mo	Tu	We	Th	Fr	Sa	
	1	2	3	4	5	6				1	2	3	4							1	
7	8	9	10	11	12	13	5	6	7	8	9	10	11	2	3	4	5	6	7	8	
14	15	16	17	18	19	20	12	13	14	15	16	17	18	9	10	11	12	13	14	15	
21	22	23	24	25	26	27	19	20	21	22	23	24	25	16	17	18	19	20	21	22	
28	29	30					26	27	28	29	30	31		23	24	25	26	27	28	29	
														30							
7:☉ 15:☽ 22:☾ 29:●							7:☉ 14:☽ 21:☾ 28:●							5:☉ 13:☽ 19:☾ 27:●							

Holidays and Observances:		
Sep 1 Labor Day	Oct 13 Columbus Day	Nov 11 Veterans Day
Sep 11 Patriot Day	Oct 31 Halloween	Nov 27 Thanksgiving Day
Sep 22 Autumnal equinox	Nov 1 All Saints	
Oct 9 Leif Erikson Day	Nov 4 Election Day	

Calendar generated on www.timeanddate.com/calendar

