

**ADVISORY COMMITTEE
ON
CIVIL RULES**

**Santa Fe, NM
October 3-4, 2002**

AGENDA
ADVISORY COMMITTEE ON CIVIL RULES
OCTOBER 3-4, 2002

1. Opening Remarks of Chair
2. **ACTION** — Approving Minutes of May 6-7, 2002, Committee Meeting
3. Report on Legislation Affecting the Rules
4. Discussion of Style Project
 - A. Purpose and background of project and initial planning (App. A-E)
 - B. Process followed by Appellate and Criminal Rules Committees in stylizing Federal Rules of Appellate and Criminal Procedure (App. G-L)
 - C. Overarching issues (App. M)
 - D. Stylizing Rule 4 (test-run exercise) (App. N)
 - E. Proposed timetable governing style project (App. O)
5. Report on Class Actions
 - A. Remaining issues (oral report)
 - B. Federal Judicial Center report on *Effects of Amchem/Ortiz on the Filing of Federal Class Actions*
6. Report of Discovery Subcommittee on Electronic Discovery Issues
 - A. Request for informal comment on electronic discovery issues
 - B. Federal Judicial Center report on *A Qualitative Study of Issues Raised By the Discovery of Computer-Based Information in Civil Litigation*
7. Pending Agenda Topics
 - A. Proposed amendments to Rule 6(e) clarifying time-counting provision
 - B. Proposed amendment to Rule 15 to allow relation back if defendant had no information concerning identity of opposing party
 - C. Proposed new Rule 5.1 to provide notice to attorney general of constitutional challenge to statute
 - D. Proposed new Rule 62.1 to authorize indicative rulings by court
 - E. Technical amendment to Rule 27 to address outdated rule cross-reference
 - F. Proposed clarifying and conforming amendments to Admiralty Rules B(1)(a) and C(6)(b)(i)
 - G. Miscellaneous proposals placed on consent calendar
8. Next Committee Meeting

ADVISORY COMMITTEE ON CIVIL RULES

Effective October 1, 2002

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ADVISORY COMMITTEE ON CIVIL RULES

SUBCOMMITTEES

Subcommittee on Civil Forfeiture

Judge H. Brent McKnight, Chair

Subcommittee on Simplified Procedure

Judge Richard H. Kyle, Chair

Professor John C. Jeffries, Jr.

Professor Richard L. Marcus, Consultant

Subcommittee on Class Action

Judge Lee H. Rosenthal, Chair

Judge Richard H. Kyle

Sheila L. Birnbaum, Esquire

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Professor Myles V. Lynk

Subcommittee on Discovery

Professor Myles V. Lynk, Chair

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Professor Richard L. Marcus, Consultant

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AGENDA DOCKETING

ADVISORY COMMITTEE ON CIVIL RULES

Proposal	Source, Date, and Doc #	Status
[Copyright Rules of Practice] — Update	Inquiry from West Publishing	4/95 — To be reviewed with additional information at upcoming meetings 11/95 — Considered by cmte 10/96 — Considered by cmte 10/97 — Deferred until spring '98 meeting 3/98 — Deferred until fall '98 meeting 11/98 — Request for publication 1/99 — Stg. Cmte. approves publication for fall 8/99 — Published 4/00 — Cmte approves amendments 6/00 — Stg Cmte approves 9/00 — Jud. Conf approves 4/01 — Approved by Sup Ct 12/01 — Effective COMPLETED
[Recommends clarification of Admiralty Rule B]	William R. Dorsey, III, Esq., President, The Maritime Law Association (01-CV-B)	6/00 — Referred to reporter, chair, and Mark Kasanin 11/01 — Discussed and considered PENDING FURTHER ACTION
[Admiralty Rule B, C, and E] — Amend to conform to Rule C governing attachment in support of an in personam action	Agenda book for the 11/95 meeting	4/95 — Delayed for further consideration 11/95 — Draft presented to cmte 4/96 — Considered by cmte 10/96 — Considered by cmte, assigned to Subcmte. 5/97 — Considered by cmte 10/97 — Request for publication and accelerated review by ST Cmte 1/98 — Stg. Com. approves publication at regularly scheduled time 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg approves 9/99 — Jud. Conf. approves and transmits to Sup. Ct 4/00 — Supreme Court approved 12/00 — Effective COMPLETED

Proposal	Source, Date, and Doc #	Status
[Admiralty Rule C] — conform time deadlines with Forfeiture Act	Civil Asset Forfeiture Act of 2000	10/00 — Cmte considered draft 1/01 — Stg. Cmte approves publication; comments due 4/2/01 4/01 — Adv Cmte approved amendments 6/01 — Approved by ST Cmte 9/01 — Approved by Jud. Conf 4/02 — Approved by Sup Ct PENDING FURTHER ACTION
[Admiralty Rule-New] — Authorize immediate posting of preemptive bond to prevent vessel seizure	Mag. Judge Roberts 9/30/96 (96-CV-D) #1450	12/24/96 — Referred to Admiralty and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Hold until more information available (2) 5/02 — Adv Cmte discussed new rule governing civil forfeiture practice PENDING FURTHER ACTION
[Inconsistent Statute] — 46 U.S.C. § 786 inconsistent with admiralty	Michael Cohen 1/14/97 (97-CV-A) #2182	2/97 — Referred to reporter and chair Supreme Court decision moots issue COMPLETED
[Non-applicable Statute] — 46 U.S.C. § 767 Death on the High Seas Act not applicable to any navigable waters in the Panama Canal Zone	Michael Marks Cohen 9/17/97 (97-CV-O)	10/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Subcmte rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda COMPLETED
[Admiralty Rule C(4)] — Amend to satisfy constitutional concerns regarding default in actions <i>in rem</i>	Gregory B. Walters, Cir. Exec., for Jud. Council of Ninth Cir. 12/4/97 (97-CV-V)	1/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Hold until more information available (2) PENDING FURTHER ACTION
[Simplified Procedures] — federal small claims procedures	Judge Niemeyer 10/00	10/99 — Considered, subcmte appointed 4/00 — Considered 10/00 — Considered PENDING FURTHER ACTION
[CV4(c)(1)] — Accelerating 120-day service provision	Joseph W. Skupniewitz	4/94 — Deferred as premature DEFERRED INDEFINITELY
[CV4(d)] — To clarify the rule	John J. McCarthy 11/21/97 (97-CV-R)	12/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Subcmte rec. accumulate for periodic revision (1) PENDING FURTHER ACTION

Proposal	Source, Date, and Doc #	Status
[CV4(d)(2)] — Waive service of process for actions against the United States	Charles K. Babb 4/22/94	10/94 — Considered and denied 4/95 — Reconsidered but no change in disposition COMPLETED
[CV4(e) & (f)] — Foreign defendant may be served pursuant to the laws of the state in which the district court sits	Owen F. Silvions 6/10/94	10/94 — Rules deemed as otherwise provided for and unnecessary 4/95 — Reconsidered and denied COMPLETED
[CV4(i)] — Service on government in <u>Bivens</u> suits	DOJ 10/96 (96-CV-B; #1559)	10/96 — Referred to Reporter, Chair, and Agenda Sub cmte. 5/97 — Discussed in reporter's memo. 3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Standing Cmte approved 9/99 — Judicial Conference approved 4/00 — Supreme Court Approved 12/00 — Effective COMPLETED
[CV4(m)] — Extension of time to serve pleading after initial 120 days expires	Judge Edward Becker	4/95 — Considered by cmte DEFERRED INDEFINITELY
[CV4] — Inconsistent service of process provision in admiralty statute	Mark Kasanin	10/93 — Considered by cmte 4/94 — Considered by cmte 10/94 — Recommend statutory change 6/96 — Coast Guard Authorization Act of 1996 repeals the nonconforming statutory provision COMPLETED
[CV4] — To provide sanction against the willful evasion of service	Judge Joan Humphrey Lefkow 8/12/97 (97-CV-K)	10/97 — Referred to Reporter, Chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) PENDING FURTHER ACTION
[CV5] — Electronic filing		10/93 — Considered by cmte 9/94 — Published for comment 10/94 — Considered 4/95 — Cmte approves amendments with revisions 6/95 — Approved by ST Cmte 9/95 — Approved by Jud Conf 4/96 — Approved by Sup Ct 12/96 — Effective COMPLETED

Proposal	Source, Date, and Doc #	Status
[CV5] — Service by electronic means or by commercial carrier; fax noticing produces substantial cost savings while increasing efficiency and productivity	Michael Kunz, clerk E.D. Pa. and John Frank 7/29/96; 9/10/97 (97-CV-N); William S. Brownell, District Clerks Advisory Group 10/20/97 (97-CV-Q)	4/95 — Declined to act 10/96 — Reconsidered, submitted to Technology Subcommittee 5/97 — Discussed in reporter's memo. 9/97 — Information sent to reporter, chair, and Agenda Sub cmte. 11/98 — Referred to Tech. Subcommittee 3/99 — Agenda Sub cmte. rec. Refer to other cmte (3) 4/99 — Cmte requests publication 6/99 — Stg. Comte approves publication 8/99 — Published for comment 4/00 — Cmte approves amendments 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Approved by Sup Ct 12/01 — Effective COMPLETED
[CV5] — Resolution of dispute between court and courier as to whether courier or court was at fault for failure to file	Lawrence A. Salibra 6/5/00 (00-CV-C)	6/00 — Referred to reporter, chair, and Agenda Subc. PENDING FURTHER ACTION
[CV5(d)] — Whether local rules against filing of discovery documents should be abrogated or amended to conform to actual practice	Gregory B. Walters, Cir. Exec., for District Local Rules Review Cmte of Jud. Council of Ninth Cir. 12/4/97 (97-CV-V)	1/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/98 — Cmte. approved draft 6/98 — Stg Cmte approves with revision 8/98 — Published for comment 4/99 — Cmte approves amendments 6/99 — Stg. Comte approves 9/99 — Jud. Conf. approves and transmits to Sup. Ct 4/00 — Supreme Court approved 12/00 — Effective COMPLETED
[CV5(d)]— Does non-filing of discovery material affect privilege	St Cmte 6/99	10/99 — Discussed PENDING FURTHER ACTION
[CV5] — Modifying mailbox rule	J. Michael Schaefer, Esq. 12/28/98 (99-CV-A)	3/99 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda COMPLETED
[CV6] — Calculate "3" days either before or after service	Roy H. Wepner, Esq. 11/27/00 (00/CV/H)	12/00 — Referred to reporter and chair 5/02 — Adv Cmte considered alternative amendments PENDING FURTHER ACTION

Proposal	Source, Date, and Doc #	Status
[CV6(b)] — Enlargement of Time; deletion of reference to abrogated rule (technical amendment)	Prof. Edward Cooper 10/27/97; Rukesh A. Korde 4/22/99 (99-CV-C)	10/97 — Referred to cmte 3/98 — Cmte approved draft with recommendation to forward directly to the Jud Conf w/o publication 6/98 — Stg Cmte approved 9/98 — Jud. Conf approved and transmitted to Sup. Ct. 4/99 — Supreme Court approved 12/99 — Effective COMPLETED
[CV6(e)] — Time to act after service	ST Cmte 6/94	10/94 — Cmte declined to act COMPLETED
[CV6(e)] — Amend the rule to treat service by electronic means the same as service by mail	See Rule 5	4/99 — Cmte requests publication 6/99 — Stg. Cmte approves publication 8/99 — Published for comment 4/00 — Cmte approves amendments 6/00 — Stg Cmte approves 9/00 — Jud Conf approves 4/01 — Supreme Court approved 12/01 — Effective COMPLETED
[CV7.1] — See Financial Disclosure	Request by Committee on Codes of Conduct 9/23/98	11/98 — Cmte considered 3/99 — Agenda Subcmte rec. Hold until more information available (2) 4/99 — Cmte considered; FJC study initiated 10/99 — Discussed 4/00 — Considered; request for publication 6/00 — Stg Cmte approves publication 8/00 — Published 4/01 — Cmte approved amendments 6/01 — Stg Cmte approved 10/01 — Jud Conf approved 4/02 — Approved by Sup Ct PENDING FURTHER ACTION
[CV8(a)(2)] — Require “short and plain statement of the claim” that allege facts sufficient to establish a <i>prima facie</i> case in employment discrimination	Nancy J. Smith, Senior Assistant Attorney General, State of New Hampshire 6/17/02 (02-CV-E)	6/02 — Referred to reporter and chair PENDING FURTHER ACTION
[CV8, CV12] — Amendment of the general pleading requirements	Elliott B. Spector, Esq. 7/22/94	10/93 — Delayed for further consideration 10/94 — Delayed for further consideration 4/95 — Declined to act DEFERRED INDEFINITELY

Proposal	Source, Date, and Doc #	Status
[CV9(b)] — General Particularized pleading	Elliott B. Spector	5/93 — Considered by cmtc 10/93 — Considered by cmtc 10/94 — Considered by cmtc 4/95 — Declined to act DEFERRED INDEFINITELY
[CV9(h)] — Ambiguity regarding terms affecting admiralty and maritime claims	Mark Kasanin 4/94	10/94 — Considered by cmtc 4/95 — Approved draft 7/95 — Approved for publication 9/95 — Published 4/96 — Forwarded to the ST Cmtc for submission to Jud Conf 6/96 — Approved by ST Cmtc 9/96 — Approved by Jud Conf 4/97 — Approved by Supreme Court 12/97 — Effective COMPLETED
[CV11] — Mandatory sanction for frivolous filing by a prisoner	H.R. 1492 introduced by Cong Gallegly 4/97	5/97 — Considered by cmtc 3/99 — Agenda Sub cmtc. rec. Remove from agenda (5) 10/99 — Removed under consent calendar COMPLETED
[CV11] — Sanction for improper advertising	Carl Shipley 4/97 (97-CV-G)	5/97 — Referred to reporter, chair, and Agenda Sub cmtc. 3/99 — Agenda Sub cmtc. rec. Remove from agenda (5) COMPLETED
[CV11] — Should not be used as a discovery device or to test the legal sufficiency or efficiency of allegations in pleadings	Nicholas Kadar, M.D. 3/98 (98-CV-B)	4/98 — Referred to reporter, chair, and Agenda Sub cmtc. 3/99 — Agenda Sub cmtc. rec. Await preliminary review by reporter (6) 8/99 — Reporter recommends removal from the agenda 10/99 — Consent calendar removed from agenda COMPLETED
[CV12] — Dispositive motions to be filed and ruled upon prior to commencement of the trial	Steven D. Jacobs, Esq. 8/23/94	10/94 — Delayed for further consideration 5/97 — Reporter recommends rejection 11/98 — Rejected by cmtc COMPLETED
[CV12] — To conform to <i>Prison Litigation Act of 1996</i> that allows a defendant sued by a prisoner to waive right to reply	John J. McCarthy 11/21/97 (97-CV-R)	12/97 — Referred to reporter, chair, & Agenda Sub cmtc. 3/99 — Agenda Sub cmtc. rec. Ready for full committee consideration (4) 4/99 — Cmtc considered and deferred action DEFERRED INDEFINITELY

Proposal	Source, Date, and Doc #	Status
[CV12(a)(3)] — Conforming amendment to Rule 4(i)		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg Cmte approves 9/99 — Jud. Conf. approves & transmits to Sup.Ct. 4/00 — Supreme Ct transmits to Congress 12/00 — Effective COMPLETED
[CV12(b)] — Expansion of conversion of motion to dismiss to summary judgment	Daniel Joseph 5/97 (97-CV-H) #2941	5/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda COMPLETED
[CV14(a) & (c)] — Conforming amendment to admiralty changes		6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments 6/99 — Stg Cmte approves 9/99 — Jud. Conf. approves and transmits to Sup. Ct. 4/00 — Supreme Court approved 12/00 — Effective COMPLETED
[CV15(a)] — Amendment may not add new parties or raise events occurring after responsive pleading	Judge John Martin 10/20/94 & Judge Judith Guthrie 10/27/94	4/95 — Delayed for further consideration 11/95 — Considered by cmte and deferred DEFERRED INDEFINITELY
[CV15(c)(3)(B)] — Clarifying extent of knowledge required in identifying a party	Charles E. Frayer, Law student 9/27/98 (98-CV-E)	9/98 — Referred to chair, reporter, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. accumulate for periodic revision (1) 4/99 — Cmte considered and retained for future study 5/02 — Committee considered issue along with J. Becker suggestion in 266 F.3d 186 (3 rd Cir. 2001). PENDING FURTHER ACTION
[CV15(c)(3)(B)] — Amendment to allow relation back	Judge Edward Becker, 266 F.3d 186 (3 rd Cir. 2001)	10/01 — Referred to chair and reporter 1/02 — Committee considered 5/02 — Committee considered PENDING FURTHER ACTION
[CV19] — Clarify language regarding dismissal of actions	Prof. Bradley Scott Shannon 5/30/02 (02-CV-F)	7/02 — Referred to chair and reporter PENDING FURTHER ACTION

Proposal	Source, Date, and Doc #	Status
<p>[CV23] — Amend class action rule to accommodate demands of mass tort litigation and other problems</p>	<p>Jud Conf on Ad Hoc Communication for Asbestos Litigation 3/91; William Leighton ltr 7/29/94; H.R. 660 introduced by Canady on CV 23 (f)</p>	<p>5/93 — Considered by cmte 6/93 — Submitted for approval for publication; withdrawn 10/93, 4/94, 10/94, 2/95, 4/95, 11/95; studied at meetings. 4/96 — Forwarded to ST Cmte for submission to Jud Conf 6/96 — Approved for publication by ST Cmte 8/96 — Published for comment 10/96 — Discussed by cmte 5/97 — Approved and forwarded changes to (c)(1), and (f); rejected (b)(3)(A) and (B); and deferred other proposals until next meeting 4/97 — Stotler letter to Congressman Canady 6/97 — Changes to 23(f) were approved by ST Cmte; changes to 23(c)(1) were recommitted to advisory cmte 10/97 — Considered by cmte 3/98 — Considered by cmte deferred pending mass torts working group deliberations 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 4/00 — Comte Considered 10/00 — Comte Considered 4/01 — Request for publication 6/01 — ST Cmte approved for publication 8/01 — Published for public comment 10/01 — Cmte considered 1/02 — Cmte considered 5/02 — Committee approved 6/02 — ST Committee approved PENDING FURTHER ACTION</p>
<p>[CV23] — Standards and guidelines for litigating and settling consumer class actions</p>	<p>Patricia Sturdevant, for National Association for Consumer Advocates 12/10/97 (97-CV-T)</p>	<p>12/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 4/00 — Comte considered 10/00 — Comte Considered 4/01 — Request for publication 6/01 — ST Cmte approved for publication 8/01 — Published for public comment 10/01 — Cmte considered 1/02 — Cmte considered 5/02 — Committee approved 6/02 — ST Committee approved PENDING FURTHER ACTION</p>

Proposal	Source, Date, and Doc #	Status
[CV23(e)] — Amend to include specific factors court should consider when approving settlement for monetary damages under 23(b)(3)	Beverly C. Moore, Jr., for Class Action Reports, Inc. 11/25/97 (97-CV-S)	12/ 97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 4/00 — Comte Considered 10/00 — Comte Considered 4/01 — Request for publication 6/01 — ST Cmte approved for publication 8/01 — Published for public comment 10/01 — Cmte considered 1/02 — Cmte considered 5/02 — Cmte approved 6/02 — ST Committee approved PENDING FURTHER ACTION
[CV23(e)] — Require all “side-settlements,” including attorney’s fee components, to be disclosed and approved by the district court	Brian Wolfman, for Public Citizen Litigation Group 11/23/99 (99-CV-H)	12/99 — Referred to reporter, chair, and Agenda Sub cmte. 4/00 — Referred to Class Action subcmte 10/00 — Comte Considered 4/01 — Request for publication 6/01 — ST Cmte approved for publication 8/01 — Published for public comment 10/01 — Cmte considered 1/02 — Cmte considered 5/02 — Cmte approved 6/02 — ST Committee approved PENDING FURTHER ACTION
[CV23(e)] — Preserve right to appeal for <i>unnamed</i> class members who do not file motions to intervene; and class members not named plaintiffs have right to appeal judicial approval of proposed dismissal or compromise without first filing motion to intervene	Bill Lockyer, Attorney General, for State of California DOJ 3/29/00 (00-CV-B) 6/21/00	4/00 — Referred to reporter, chair, Agenda Subcmte., and Class Action Subcmte 6/00 — Referred to reporter, chair, Agenda Subcmte, and Class Action Subcmte 10/00 — Comte Considered 4/01 — Request for publication 6/01 — ST Cmte approved for publication 8/01 — Published for public comment 10/01 — Cmte considered 1/02 — Cmte considered 5/02 — Cmte approved 6/02 — ST Committee approved 6/02 — <i>Devlin v. Scardelletti</i> , 122 S.Ct. 2005 (6/10/02), resolved issue COMPLETED
[CV23(f)] — interlocutory appeal	part of class action project	4/98 — Sup Ct approves 12/98 — Effective COMPLETED

Proposal	Source, Date, and Doc #	Status
[CV23] — class action attorney fee		10/00 — Comte Considered 4/01 — Request for publication 6/01 — ST Cmte approved for publication 8/01 — Published for public comment 10/01 — Cmte considered 1/02 — Cmte considered 5/02 — Cmte approved 6/02 — ST Committee approved PENDING FURTHER ACTION
[CV26] — Interviewing former employees of a party	John Goetz	4/94 — Declined to act DEFERRED INDEFINITELY
[CV26] — Initial disclosure and scope of discovery	Thomas F. Harkins, Jr., Esq. 11/30/94 and American College of Trial Lawyers; Allan Parmelee (97-CV-C) #2768; Joanne Faulkner 3/97 (97-CV-D) #2769	4/95 — Delayed for further consideration 11/95 — Considered by cmte 4/96 — Proposal submitted by American College of Trial Lawyers 10/96 — Considered by cmte; Sub cmte. appointed 1/97 — Sub cmte. held mini-conference in San Francisco 4/97 — Doc. #2768 and 2769 referred to Discovery Sub cmte. 9/97 — Discovery Reform Symposium held at Boston College Law School 10/97 — Alternatives considered by cmte 3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg Cmte approves 9/99 — Jud. Conf. approves & transmits to Sup. Ct. 4/00 — Supreme Court approves 12/00 — Effective COMPLETED
[CV26] — Does inadvertent disclosure during discovery waive privilege	Discovery Subcmte	10/99 — Discussed PENDING FURTHER ACTION
[CV26] — Presumptive time limits on backward reach of discovery	Al Cortese	10/99 — Removed from agenda COMPLETED

Proposal	Source, Date, and Doc #	Status
[CV26] — Electronic discovery		10/99 — Referred to Subcmte 3/00 — Subcmte met 4/00 — Considered 10/00 — Comte Considered 4/01 — Cmte considered 5/02 — Cmte considered PENDING FURTHER ACTION
[CV26] — Interplay between work-product doctrine under Rule 26(b)(3) and the disclosures required of experts under Rules 26(a)(2) and 26 (b)(4)	Gregory K. Arenson, Chair, NY State Bar Assn Committee 8/7/00 (00-CV-E)	8/00 — Referred to reporter, chair, incoming chair, and Agenda Subcmte PENDING FURTHER ACTION
[CV26(a)] — To clarify and expand the scope of disclosure regarding expert witnesses	Prof. Stephen D. Easton 11/29/00 (00-CV-I)	12/00 — Sent to reporter and chair PENDING FURTHER ACTION

Proposal	Source, Date, and Doc #	Status
[CV26(c)] — Factors to be considered regarding a motion to modify or dissolve a protective order	Report of the Federal Courts Study Committee, Professors Marcus and Miller, and Senator Herb Kohl 8/11/94; Judge John Feikens (96-CV-F); S. 225 reintroduced by Sen Kohl	5/93 — Considered by cmte 10/93 — Published for comment 4/94 — Considered by cmte 10/94 — Considered by cmte 1/95 — Submitted to Jud Conf 3/95 — Remanded for further consideration by Jud Conf 4/95 — Considered by cmte 9/95 — Republished for public comment 4/96 — Tabled, pending consideration of discovery amendments proposed by the American College of Trial Lawyers 1/97 — S. 225 reintroduced by Sen Kohl 4/97 — Stotler letter to Sen Hatch 10/97 — Considered by Sub cmte. and left for consideration by full cmte 3/98 — Cmte determined no need has been shown to amend COMPLETED
[CV26] — Depositions to be held in county where witness resides; better distinction between retained and “treating” experts	Don Boswell 12/6/96 (96-CV-G)	12/96 — Referred to reporter, chair, and Agenda Sub cmte. 5/97 — Reporter recommends that it be considered part of discovery project 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/00 — Subcomte declines to take action COMPLETED
[CV30] — Allow use by public of audio tapes in the courtroom	Glendora 9/96/96 (96-CV-H)	12/96 — Sent to reporter and chair 11/98 — Rejected by cmte COMPLETED
[CV30(b)] — Inconsistency within Rule 30 and between Rules 30 and 45	Judge Janice M. Stewart 12/8/99 (99-CV-J)	12/99 — Referred to reporter, chair, Agenda Sub cmte., and Discovery Sub cmte. 4/00 — Referred to Disc. Subcomte PENDING FURTHER ACTION
[CV30(b)(1)] — That the deponent seek judicial relief from annoying or oppressive questioning during a deposition	Judge Dennis H. Inman 8/6/97 (97-CV-J)	10/97 — Referred to reporter, chair, and Agenda Sub cmte. 11/98 — Rejected by cmte COMPLETED

Proposal	Source, Date, and Doc #	Status
[CV30(d)(2)] — presumptive one day of seven hours for deposition		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg Cmte approves 9/99 — Jud. Conf. approves & transmits to Sup. Ct. 4/00 — Supreme Court approves 12/00 — Effective COMPLETED
[CV30(e)] — review of transcript by deponent	Dan Wilen 5/14/99 (99-CV-D)	8/99 — Referred to agenda Subcmte 8/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/00 — Subcmte declines to take action COMPLETED
[CV32] — Use of expert witness testimony at subsequent trials without cross examination in mass torts	Honorable Jack Weinstein 7/31/96	7/31/96 — Submitted for consideration 10/96 — Considered by cmte; FJC to conduct study 5/97 — Reporter recommends that it be considered part of discovery project 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) PENDING FURTHER ACTION
[CV33 & 34] — require submission of a floppy disc version of document	Jeffrey K. Yencho (7/22/99) 99-CV-E	7/99 — Referred to Agenda Subcmte 8/99 — Agenda Sub cmte. rec. Refer to other Sub cmte. (3) PENDING FURTHER ACTION
[CV34(b)] — requesting party liable for paying reasonable costs of discovery		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions (moved to Rule 26) 6/99 — Stg Cmte approves 9/99 — Rejected by Jud. Conf. COMPLETED
[CV36(a)] — To not permit false denials, in view of recent Supreme Court decisions	Joanne S. Faulkner, Esq. 3/98 (98-CV-A)	4/98 — Referred to reporter, chair, and Agenda Sub cmte. 11/98 — Rejected by cmte COMPLETED
[CV37(b)(3)] — Sanctions for Rule 26(f) failure	Prof. Roisman	4/94 — Declined to act DEFERRED INDEFINITELY

Proposal	Source, Date, and Doc #	Status
[CV37(c)(1)] — Sanctions for failure to supplement discovery		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments 6/99 — Stg Cmte approves 9/99 — Jud. Conf. approves & transmits to Sup. Ct. 4/00 — Supreme Court approves 12/00 — Effective COMPLETED
[CV39(c) and CV16(e)] — Jury may be treated as advisory if the court states such before the beginning of the trial	Daniel O’Callaghan, Esq.	10/94 — Delayed for further study, no pressing need 4/95 — Declined to act COMPLETED
[CV40] — Precedence given elderly in trial setting	Michael Schaefer 1/19/00; 00-CV-A	2/00 — Referred to chair, reporter, and Agenda Sub cmte. PENDING FURTHER ACTION
[CV41(a)] — Makes it explicit that actions <i>and</i> claims may be dismissed	Bradley Scott Shannon 5/30/02 (02-CV-F)	7/02 — Referred to chair and reporter PENDING FURTHER ACTION
[CV43] — Strike requirement that testimony must be taken orally	Comments at 4/94 meeting	10/93 — Published 10/94 — Amended and forwarded to ST Cmte 1/95 — ST Cmte approves but defers transmission to Jud Conf 9/95 — Jud Conf approves amendment 4/96 — Supreme Court approved 12/96 — Effective COMPLETED
[CV43] — Procedures for a “summary bench trial”	Judge Morton Denlow 8/9/00 (00-CV-F)	8/00 — Referred to reporter, chair, and incoming chair 10/00 — Comte considered, declined to take action as unnecessary at this time COMPLETED
[CV43(f)—Interpreters] — Appointment and compensation of interpreters	Karl L. Mulvaney 5/10/94	4/95 — Delayed for further study and consideration 11/95 — Suspended by advisory cmte pending review of Americans with Disabilities Act by CACM 10/96 — Federal Courts Improvement Act of 1996 provides authority to pay interpreters COMPLETED
[CV44] — To delete, as it might overlap with Rules of EV dealing with admissibility of public records	Evidence Rules Committee Meeting 10/20-21/97 (97-CV-U)	1/97 — Referred to chair, reporter, and Agenda Sub cmte. 3/98 — Cmte determined no need to amend COMPLETED

Proposal	Source, Date, and Doc #	Status
[CV45] — Nationwide subpoena		5/93 — Declined to act COMPLETED
[CV45] — Notice in lieu of attendance subpoenas	J. Michael Schaefer, Esq. 12/28/98 (99-CV-A)	3/99 — Referred to chair, reporter, and Agenda Sub cmte. 8/99 — Agenda Sub cmte. rec. Remove from agenda 10/99 — Consent calendar removed from agenda COMPLETED
[CV45] — Clarifying status of subpoena after expiration date	K. Dino Kostopoulos, Esq. 1/27/99 (99-CV-B)	3/99 — Referred to chair, reporter, and Agenda Sub cmte. 8/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/00 — Subcomte declines to take action COMPLETED
[CV45] — Discovering party must specify a date for production far enough in advance to allow the opposing party to file objections to production	Prof. Charles Adams 10/1/98 (98-CV-G)	10/98 — Referred to chair, reporter, Agenda Sub cmte., and Discovery Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/00 — Subcomte declines to take action COMPLETED
[CV45(d)] — Re-service of subpoena not necessary if continuance is granted and witness is provided adequate notice	William T. Terrell, Esq. 10/9/98 (98-CV-H)	12/98 — Referred to chair, reporter, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/00 — Subcomte declines to take action COMPLETED
[CV47(a)] — Mandatory attorney participation in jury voir dire examination	Francis Fox, Esq.	10/94 — Considered by cmte 4/95 — Approved draft 7/95 — Proposed amendment approved for publication by ST Cmte 9/95 — Published for comment 4/96 — Considered by advisory cmte; recommended increased attention by Fed. Jud. Center at judicial training COMPLETED
[CV47(b)] — Eliminate peremptory challenges	Judge William Acker 5/97 (97-CV-F) #2828	6/97 — Referred to reporter, chair, and Agenda Sub cmte. 11/98 — Cmte declined to take action COMPLETED

Proposal	Source, Date, and Doc #	Status
[CV48] — Implementation of a twelve-person jury	Judge Patrick Higginbotham	10/94 — Considered by cmte 7/95 — Proposed amendment approved for publication by ST Cmte 9/95 — Published for comment 4/96 — Forwarded to ST Cmte for submission to Jud Conf 6/96 — ST Cmte approves 9/96 — Jud Conf rejected 10/96 — Cmte's post-mortem discussion COMPLETED
[CV50] — Uniform date for filing post trial motion	BK Rules Committee	5/93 — Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective COMPLETED
[CV50(b)] — When a motion is timely after a mistrial has been declared	Judge Alicemarie Stotler 8/26/97 (97-CV-M)	8 /97 — Sent to reporter and chair 10/97 — Referred to Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) PENDING FURTHER ACTION
[CV51] — Jury instructions filed before trial	Judge Stotler (96-CV-E) Gregory B. Walters, Cir. Exec., for the Jud. Council of the Ninth Cir. 12/4/97 (97-CV-V)	11/8/96 — Referred to chair 5/97 — Reporter recommends consideration of comprehensive revision 1/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/98 — Cmte considered 11/98 — Cmte considered 3/99 — Agenda Sub cmte. rec. Ready for full Cmte consideration 4/99 — Cmte considered 10/99 — Discussed 4/00 — Cmte considered 10/00 — Cmte considered 4/01 — Cmte considered 1/02 — Cmte held public hearing 5/02 — Cmte approved amendments 6/02 — ST Committee approved PENDING FURTHER ACTION

Proposal	Source, Date, and Doc #	Status
[CV52] — Uniform date for filing for filing post trial motion	BK Rules Cmte	5/93 — Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective COMPLETED
[CV53] — Provisions regarding pretrial and post-trial masters	Judge Wayne Brazil	5/93 — Considered by cmte 10/93 — Considered by cmte 4/94 — Draft amendments to CV16.1 regarding “pretrial masters” 10/94 — Draft amendments considered 11/98 — Subcmte appointed to study issue 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/99 — Discussed (FJC requested to survey courts) 4/00 — Considered (FJC preliminary report) 1/02 — Cmte held public hearing 5/02 — Cmte approved amendments 6/02 — ST Committee approved PENDING FURTHER ACTION
[CV54(d)(1)] — Proposed amendments to 28 U.S.C. § 1920 and Rule 54 re taxation of costs	Judge Jane J. Boyle 2/02 (02-CV-B)	2/02 — Referred to reporter & chair 5/02 — Cmte declined to take action COMPLETED
[CV54(d)(2)] —attorney fees and interplay with final judgment CV 58	ST Cmte; AP amendment to FRAP 4(a)(7), 1/00	4/00 — Request for publication 6/00 — Stg Cmte approves publicatipon 8/00 — Published 4/01 — Cmte approved amendments 6/01 — ST Cmte approved 10/01 — Jud Conf approved 4/02 — Sup Ct approved PENDING FURTHER ACTION
[CV56] — To clarify cross-motion for summary judgment	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, & Agenda Sub cmte. PENDING FURTHER ACTION
[CV56(a)] — Clarification of timing	Scott Cagan 2/97 (97-CV-B) #2475	3/97 — Referred to reporter, chair, and Agenda Sub cmte. 5/97 — Reporter recommends rejection 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) PENDING FURTHER ACTION

Proposal	Source, Date, and Doc #	Status
[CV56(c)] — Time for service and grounds for summary adjudication	Judge Judith N. Keep 11/21/94	4/95 — Considered by cmte; draft presented 11/95 — Draft presented, reviewed, and set for further discussion 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision 1/02 — Committee considered and set for further discussion PENDING FURTHER ACTION
[CV58] — 60-day cap on finality judgment	ST Cmte; AP amendment to FRAP 4(a)(7), 1/00	4/00 — Request for publication 6/00 — Stg Cmte approves 8/00 — Published 4/01 — Cmte approved revised amendments 6/01 — ST Cmte approved 10/01 — Jud Conf approved 4/02 — Sup Ct approved PENDING FURTHER ACTION
[CV58] — Sets forth the procedures for entering a “final order”	Prof. Bradley Scott Shannon 5/30/02 (02-CV-F)	7/02 — Referred to reporter and chair PENDING FURTHER ACTION
[CV59] — Uniform date for filing for filing post trial motion		5/93 — Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective COMPLETED
[CV60(b)] — Parties are entitled to challenge judgments provided that the prevailing party cites the judgment as evidence	William Leighton 7/20/94	10/94 — Delayed for further study 4/95 — Declined to act COMPLETED
[CV62(a)] — Automatic stays	Dep. Assoc. AG, Tim Murphy	4/94 — No action taken COMPLETED
[CV62.1] — Proposed new rule governing “Indicative Rulings”	Advisory Comm on Appellate Rules 4/01	1/02 — Committee considered PENDING FURTHER ACTION

Proposal	Source, Date, and Doc #	Status
[CV65(f)] — rule made applicable to copyright impoundment cases	see request on copyright	11/98 — Request for publication 6/99 — Stg Cmte approves 8/99 — Published for comment 4/00 — Cmte approved 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Approved by Sup Ct 12/01 — Effective COMPLETED
[CV65.1] — To amend to avoid conflict between 31 U.S.C. § 9396 governing the appointment of agents for sureties and the Code of Conduct for Judicial Employees	Judge H. Russel Holland 8/22/97 (97-CV-L)	10/97 — Referred to reporter, chair, and Agenda Sub cmte. 11/98 — Cmte declined to act in light of earlier action taken at March 1998 meeting COMPLETED
[CV68] — Party may make a settlement offer that raises the stakes of the offeree who would continue the litigation	Agenda book for 11/92 meeting; Judge Swearingen 10/30/96 (96-CV-C); S. 79 Civil Justice Fairness Act of 1997 and § 3 of H.R. 903 Gregory K. Arenson 4/19/02 (02-CV-D)	1/21/93 — Unofficial solicitation of public comment 5/93, 10/93, 4/94 — Considered by cmte 4/94 — Federal Judicial Center agrees to study rule 10/94 — Delayed for further consideration 1995 — Federal Judicial Center completes its study DEFERRED INDEFINITELY 10/96 — Referred to reporter, chair, and Agenda Sub cmte. (Advised of past comprehensive study of proposal) 1/97 — S. 79 introduced § 303 would amend the rule 4/97 — Stotler letter to Hatch 5/97 — Reporter recommends continued monitoring 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda COMPLETED 5/02 — Referred to reporter and chair PENDING FURTHER ACTION
[CV73(b)] — Consent of additional parties to magistrate judge jurisdiction	Judge Easterbrook 1/95	4/95 — Initially brought to cmte's attention 11/95 — Delayed for review, no pressing need 10/96 — Considered along with repeal of CV74, 75, and 76 5/97 — Reporter recommends continued monitoring 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda COMPLETED

Proposal	Source, Date, and Doc #	Status
[CV 74,75, and 76] — Repeal to conform with statute regarding alternative appeal route from magistrate judge decisions	Federal Courts Improvement Act of 1996 (96-CV-A) #1558	10/96 — Recommend repeal rules to conform with statute and transmit to ST Cmte 1/97 — Approved by ST Cmte 3/97 — Approved by Jud Conf 4/97 — Approved by Sup Ct 12/97 — Effective COMPLETED
[CV 77(b)] — Permit use of audiotapes in courtroom	Glendora 9/3/96 (96-CV-H) #1975	12/96 — Referred to reporter and chair 5/97 — Reporter recommends that other Conf. Cmte should handle the issue 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda COMPLETED
[CV77(d)] — Electronic noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CV-N); William S. Brownell, District Clerks Advisory Group 10/20/97 (CV-Q)	9/97 — Mailed to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Ready for consideration by full Cmte (4) 4/99 — request publication 6/99 — Stg Comte approves publication 8/99 — Published for comment 4/00 — Cmte approves amendments 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Approved by Sup Ct 12/01 — Effective COMPLETED
[CV77.1] — Sealing orders		10/93 — Considered 4/94 — No action taken DEFERRED INDEFINITELY
[CV81] — To add injunctions to the rule	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, and Agenda Sub cmte. PENDING FURTHER ACTION

Proposal	Source, Date, and Doc #	Status
[CV 81(a)(2)] — Inconsistent time period vs. Habeas Corpus Rule 1(b)	Judge Mary Feinberg 1/28/97 (97-CV-E) #2164	2/97 — Referred to reporter, chair, and Agenda Sub cmte. 5/97 — Considered and referred to Criminal Rules Cmte for coordinated response 3/99 — Agenda Sub cmte. rec. Hold until more information available (2) 4/00 — Comte considered 6/00 — Stg Comte approves publication 8/00 — Published 4/01 — Cmte approves amendments 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf 4/02 — Sup Ct approved PENDING FURTHER ACTION
[CV81(a)(1)] — Applicability to D.C. mental health proceedings	Joseph Spaniol, 10/96	10/96 — Cmte considered 5/97 — Reporter recommends consideration as part of a technical amendment package 10/98 — Cmte. includes it in package submitted to Stg. Cmte. for publication 1/99 — Stg. Cmte. approves for publication 8/99 — Published for comment 4/00 — Cmte approved 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Sup Ct approves 12/01 — Effective COMPLETED
[CV81(a)(1)] — Applicability to copyright proceedings and substitution of notice of removal for petition for removal	see request on copyright	11/98 — Request for publication 1/99 — Stg. Cmte. approves for publication 8/99 — Published for comment 4/00 — Cmte approved amendments 6/00 — Approved by ST Cmte 9/00 — Approved by Jud Conf 4/01 — Approved by Sup Ct 12/01 — Effective COMPLETED

Proposal	Source, Date, and Doc #	Status
[CV81(a)(2)] — Time to make a return to a petition for habeas corpus	CR cmte 4/00	4/00 — Request for comment 6/00 — Stg Comte approved 8/00 — Published for comment 4/01 — Cmte approved amendments 6/01 — ST Cmte approved 10/01 — Jud Conf approved 4/02 — Sup Ct approved PENDING FURTHER ACTION
[CV81(c)] — Removal of an action from state courts — technical conforming change deleting “petition”	Joseph D. Cohen 8/31/94	4/95 — Accumulate other technical changes and submit eventually to Congress 11/95 — Reiterated April 1995 decision 5/97 — Reporter recommends that it be included in next technical amendment package 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) 4/99 — Cmte considered PENDING FURTHER ACTION
[CV82] — To delete obsolete citation	Charles D. Cole, Jr., Esq. 11/3/99 (99-CV-G)	12/99 — Referred to reporter, chair, and Agenda Subcommittee 4/00 — Comte approved for transmission without publication 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Sup Ct approves 12/01 — Effective COMPLETED
[CV83(a)(1)] — Uniform effective date for local rules and transmission to AO		3/98 — Cmte considered 11/98 — Draft language considered 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 4/00 — Comte considered DEFERRED INDEFINITELY
[CV83] — Negligent failure to comply with procedural rules; local rule uniform numbering		5/93 — Recommend for publication 6/93 — Approved for publication 10/93 — Published for comment 4/94 — Revised and approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective COMPLETED

Proposal	Source, Date, and Doc #	Status
[CV83(b)] — Authorize Conference to permit local rules inconsistent with national rules on an experimental basis		4/92 — Recommend for publication 6/92 — Withdrawn at Stg. Comte meeting COMPLETED
[CV84] — Authorize Conference to amend rules		5/93 — Considered by cmte 4/94 — Recommend no change COMPLETED
[Recycled Paper and Double-Sided Paper]	Christopher D. Knopf 9/20/95	11/95 — Considered by cmte 6/00 — CACM assigned issue and makes recommendation for Judicial Conference policy COMPLETED
[Pro Se Litigants] — To create a committee to consider the promulgation of a specific set of rules governing cases filed by pro se litigants	Judge Anthony J. Battaglia, on behalf of the Federal Magistrate Judge Assn. Rules Cmte, to support proposal by Judge David Piester 7/17/97 (97-CV-1);	7/97 — Mailed to reporter and chair 10/97 — Referred to Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. schedule for further study (3) PENDING FURTHER ACTION
[CV Form 1] — Standard form AO 440 should be consistent with summons Form 1	Joseph W. Skupniewitz, Clerk 10/2/98 (98-CV-F)	10/98 — Referred to chair, reporter, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Ready for full Cmte consideration (4) PENDING FURTHER ACTION
[CV Form 17] Complaint form for copyright infringement	Professor Edward Cooper 10/27/97	10/97 — Referred to cmte 3/99 — Agenda Sub cmte. rec. Ready for full Cmte consideration (4) 4/99 — Cmte deferred for further study PENDING FURTHER ACTION
[CV Forms 31 and 32] — Delete the phrase, “that the action be dismissed on the merits” as erroneous and confusing	Prof. Bradley Scott Shannon 5/30/02 (02-CV-F)	7/02 — Referred to chair and reporter PENDING FURTHER ACTION
[Adoption of form complaints for prisoner actions]	Iyass Suliman, prisoner 8/3/99 (99-CV-F)	8/99 — Referred to reporter, chair, and Agenda Sub cmte. 8/99 — Subc recommended removal from agenda 10/99 — Cmte approved recommendation COMPLETED
[Electronic Filing] — To require clerk’s office to date stamp and return papers filed with the court.	John Edward Schomaker, prisoner 11/25/99 (99-CV-1)	12/99 — Referred to reporter, chair, Agenda Sub cmte., and Technology Sub cmte. PENDING FURTHER ACTION

Proposal	Source, Date, and Doc #	Status
[Interrogatories on Disk]	Michelle Ritz 5/13/98 (98-CV-C); see also Jeffrey Yencho suggestion re: Rules 3 and 34 (99-CV-E)	5/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) PENDING FURTHER ACTION
[To change standard AO forms 241 and 242 to reflect amendments in the law under the Antiterrorism and Effective Death Penalty Act of 1997]	Judge Harvey E. Schlesinger 8/10/98 (98-CV-D)	8/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) PENDING FURTHER ACTION
[To prevent manipulation of bar codes in mailings, as in zip plus 4 bar codes]	Tom Scherer 3/2/00 (00-CV-D)	7/00 — Referred to reporter, chair, and incoming chair PENDING FURTHER ACTION
[Notice to U.S. Attorney. Requires litigant to notify U.S. Attorney when the constitutionality of a federal statute is challenged and when United States is not a party to the action]	Judge Barbara B. Crabb 10/5/00 (00-CV-G)	10/00 — Referred to reporter and chair 1/02 — Committee considered PENDING FURTHER ACTION
[Specifying page limit for motions in Civil Rules]	Jacques Pierre Ward 1/8/01 (01-CV-A)	4/00 — Referred to reporter and chair 1/02 — Committee recommended no change COMPLETED
[To develop new Federal procedures for decisions on minority litigant discrimination cases]	Tracey J. Ellis 1/26/02, 4/10/02 (02-CV-A)	1/02 — Referred to reporter and chair 4/02 — Referred to reporter and chair 5/02 — Cmte considered and rejected COMPLETED
[Court filing fee: AO regulations on court filing fees should not be effective until adoption in the FRCP or Local Rules of Court]	James A. Andrews 4/1/02, 5/13/02 (02-CV-C)	4/02 — Referred to reporter and chair 6/02 — Referred to reporter and chair PENDING FURTHER ACTION
[Substitute term “action” for “case” and other similar words; substitute term “averment” for “allegation” and other similar words]	Prof. Bradley Scott Shannon 5/30/02 (02-CV-F)	7/02 — Referred to reporter and chair PENDING FURTHER ACTION
[Provide specifically for <i>de bene esse</i> depositions]	Judge Joseph E. Irenas 6/7/02 (02-CV-G)	7/02 — Referred to reporter and chair PENDING FURTHER ACTION

DRAFT MINUTES
CIVIL RULES ADVISORY COMMITTEE
May 6-7, 2002

1 The Civil Rules Advisory Committee met on May 6 and 7, 2002, at the Park Hyatt Hotel in
2 San Francisco. The meeting was attended by Judge David F. Levi, Chair; Sheila Birnbaum, Esq.;
3 Justice Nathan L. Hecht; Dean John C. Jeffries, Jr.; Mark O. Kasanin, Esq.; Judge Paul J. Kelly, Jr.;
4 Judge Richard H. Kyle; Professor Myles V. Lynk; Hon. Robert D. McCallum, Jr.; Judge H. Brent
5 McKnight; Judge Lee H. Rosenthal; Judge Thomas B. Russell; Judge Shira Ann Scheindlin; and
6 Andrew M Scherffius, Esq. Professor Edward H. Cooper was present as Reporter, and Professor
7 Richard L. Marcus was present as Special Reporter. Judge Anthony J. Scirica, Chair, Judge Sidney
8 A. Fitzwater, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee.
9 Judge Bernice B. Donald attended as liaison from the Bankruptcy Rules Committee. Peter G.
10 McCabe, John K. Rabiej, and James Ishida represented the Administrative Office. Thomas E.
11 Willging represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present.
12 Observers included John Beisner; Alfred W. Cortese, Jr.; Jonathan W. Cuneo (NASCAT); Peter
13 Freeman (ABA); Jeffrey Greenbaum (ABA); Elizabeth Guarnieri; Marcia Rabiteau; Ira Schochet;
14 and Sol Schreiber.

15 Judge Levi opened the meeting by observing that although the agenda book was thick with
16 several long projects, many of the items on the agenda had become familiar by long study over the
17 years. Most committee members have participated in the process from the beginning of these
18 projects to the present conclusions. The long-drawn-out committee process has been vindicated.
19 Public comments, both in writing and at the hearings, have been very useful. The committee
20 recognizes its debt of gratitude to the many lawyers, judges, and others who have helped to improve
21 the proposed rules. The committee also has done good work. Judge Rosenthal in particular has
22 devoted enormous effort to Rule 23 for many years. The Reporters have done a marvelous job in
23 synthesizing the public comment and in preparing the rule language and notes for the Committee's
24 consideration. And the support provided by John Rabiej has been extremely important.

25 Many successive drafts of the agenda materials have culminated in proposals of
26 extraordinarily high quality. The reporters have had to struggle with the multiple functions of the
27 Committee Notes. When first published, the Notes have been used to explain why the Committee
28 believes the proposed changes are desirable. But as the process matures, the Notes have shifted to
29 the reduced role of explaining what the committee has done as a guide to future application. The
30 Notes for these rules proposals reflect a dramatic pruning process in response to these concerns.

January 2002 Minutes

31 The committee approved the minutes for the January 2002 meeting.

Rule 51

32 Only one change was proposed in the text of Rule 51 as published. Some comments, and
33 particularly the comments by the Department of Justice, suggested that the plain error provision of
34 Rule 51(d)(3) might go too far. As published, Rule 51(d) provided that a party "may assign as error"
35 three categories of instruction mistakes. The third, (d)(3), was "a plain error in or omission from the
36 instructions." The "plain error" term was borrowed from Criminal Rule 52(b), a general plain-error
37
38

39 provision that applies to a wide variety of errors in addition to instruction errors. But Criminal Rule
40 52(b) does not establish a right to assign a plain error. Instead, by providing that a plain error may
41 be "noticed," it recognizes judicial discretion. As a general matter, the Standing Committee prefers
42 that different sets of rules adopt the same approach to similar problems unless a good reason can be
43 shown for differences. There is little apparent reason to believe that plain-error review should be
44 more readily available in a civil action than in a criminal prosecution. Adoption of the Criminal
45 Rule approach was approved accordingly. Two additional changes in the plain-error provision were
46 suggested as well. The first was to delete "or omission from," on the theory that a "plain error in the
47 instructions" embraces wrongs both of omission and commission. This change was approved. The
48 second was to adopt the expression of the newly restyled Criminal Rules by substituting "consider"
49 for "notice." This change too was approved.

50 As thus amended and redesignated as Rule 51(d)(2), the plain error provision recommended
51 to the Standing Committee for adoption reads: "A court may consider a plain error in the instructions
52 affecting substantial rights that has not been preserved as required by Rule 51(d)(1)(A) or (B)."

53 Two additions were proposed for the Rule 51 Committee Note. The first adds three
54 sentences on "scope," stating that Rule 51 governs instructions on the law that governs the jury's
55 verdict. Other instructions, such as preliminary instructions to a venire or cautionary instructions
56 in immediate response to events at trial, fall outside Rule 51. This addition was discussed briefly
57 by asking whether it was useful to give examples of instructions that fall outside Rule 51. The
58 conclusion was that the examples are useful, and that it was clear that they were only examples, not
59 a complete list. The second Note addition is a brief description of Supreme Court decisions that
60 explain the plain-error approach taken in criminal cases. Both changes were approved.

61 A substantially reduced version of the published Committee Note was presented as an
62 illustration of the ways in which justifications and helpful practice comments can be stripped away,
63 leaving only explanations of the changes made in the rule. The proposed deletions were reviewed
64 in order, and approved for deletion.

65 The committee voted to recommend that the Standing Committee recommend adoption of
66 Rule 51 as revised.

67 *Rule 53*

68 Judge Scheindlin presented the report of the Rule 53 Subcommittee. She observed that
69 although the public comments and testimony on the proposed Rule 53 did not match in volume the
70 comments on Rule 23, the comments were very helpful. They led the Subcommittee, meeting by
71 telephone, to suggest ten changes in the rule as published. In order of the Rule 53 subdivisions, these
72 are to: (1) add to subdivision (a)(1)(C) an express preference to "pretrial and post-trial" matters; (2)
73 make a small style change in (a)(2); (3) add several specific matters to the (b)(2) provisions that
74 address the contents of the order appointing a master; (4) provide an opportunity to be heard before
75 the appointment order is amended; (5) clarify the (b)(4) effective-date provision; (6) raise the
76 question whether the court "must" afford an opportunity to be heard before acting on a master's
77 report; (7) recommend a new (g)(3) provision that increases the court's responsibility of de novo

78 review of the facts; (8) change the (g)(4) provision for review of conclusions of law to parallel the
79 changes on fact review; (9) adopt the tentatively published (g)(5) provision for reviewing matters
80 of discretion; and (10) delete entirely subdivision (i), which deals with appointment of magistrate
81 judges to serve as masters.

82 These changes, and other possible changes that were considered but not recommended, were
83 discussed one-by-one.

84 Rule 53(a)(1)(C), as published, authorizes appointment of a master to "address matters that
85 cannot be addressed effectively and timely by an available district judge or magistrate judge of the
86 district." Some of the comments expressed concern that this general provision might be read to
87 supersede the limits that Rule 51(a)(1)(B), drawing from longstanding doctrine, imposes on reference
88 to a master for trial. This interpretation was not intended. Instead, (C) was intended to establish a
89 standard to control the uses of masters for pretrial and post-trial purposes that have grown up since
90 Rule 53 was adopted. The standard is different from the trial-master standard, and must be kept
91 clearly separate. The distinction is emphasized by adding an explicit reference to these uses, so that
92 (C) will read: "address pretrial and post-trial matters * * *." This proposed change was accepted
93 without further discussion.

94 A separate question was addressed to (a)(1)(C). Suppose a master is appointed to address
95 defined matters on a showing that no available district judge or magistrate judge can address those
96 matters effectively and timely, but later developments in the court's docket make it possible for a
97 judge to address those matters? It was agreed that the time for applying the (a)(1)(C) standard is the
98 time of the initial appointment; the appointment need not be subject to the disruption of continual
99 reexamination of this criterion.

100 Rule 53(a)(2) addresses grounds for disqualification. As published, it referred to disclosure
101 of "a" potential "ground" for disqualification. A style improvement was suggested, making the rule
102 refer to disclosure of "the potential grounds for disqualification." The style change was accepted
103 without further debate. The appropriateness of permitting the parties to consent to appointment of
104 a master who would be disqualified without party consent was discussed. The parties cannot consent
105 to continued service by a judge who is disqualified; why should party consent be accepted as to a
106 master? Two responses were given. A master is not a judge; all parties may prefer the appointment
107 of a particular person who is particularly well qualified to discharge the master's duties, and in such
108 circumstances the need to protect the open assurance that there is no basis for disqualification
109 appears in a different light. In addition, one reason for refusing to accept party consent to continued
110 service by a judge who otherwise should be disqualified is concern that lawyers who expect to appear
111 before the same judge in other matters may feel pressure to consent. That concern is much reduced
112 with respect to a master.

113 Rule 53(a)(3) was addressed by several comments. As published, it provides that a master
114 must not during the period of the appointment appear as an attorney before the judge who made the
115 appointment. The comments suggested that this disqualification will impose an undue hardship,

116 particularly on lawyers in small firms. The subcommittee considered these comments, but concluded
117 that the provision should remain as published.

118 Discussion of the disqualification as attorney began with the observation that the
119 disqualification may deprive the court of the opportunity to appoint a good lawyer as master. There
120 is no disqualification from appearing in other cases before a judge who has appointed a lawyer to
121 conduct a trial or appeal; why should appointment as master be any different? The immediate
122 response was that a master is functioning not in the adversary process, as an appointed lawyer does,
123 but as an adjunct of the court.

124 One approach might be to mollify the rule by excepting cases that are active at the time of
125 the appointment as master. Another might be to seek the consent of the parties in other cases in
126 which the master appears as lawyer, but that would be an invitation to withhold consent as a means
127 of disqualifying a feared adversary. Concern also was expressed that if the master is not disqualified,
128 a party in another case with the master as attorney might seek to disqualify the appointing judge.

129 It was protested that the disqualification will be particularly costly in a small bar with few
130 lawyers. In the western states, for example, masters are regularly appointed in water-rights cases.
131 A master may be involved as lawyer in twenty other cases — and there is only one judge handling
132 them all.

133 The appearance of impropriety was brought back to the discussion, asking whether it is
134 proper for the same person to act simultaneously as a court adjunct and also as an adversary
135 representative before the court. Perhaps the concerns about depleting the pool available for
136 appointment could be addressed by adding a qualification that permits an attorney-master to appear
137 before the appointing judge in exceptional circumstances.

138 The question was renewed: what do we lose by deleting the disqualification? It remains
139 possible for the judge to impose disqualification in making the initial appointment.

140 It was suggested that the (b)(2)(B) limit on ex parte communications between master and
141 judge may reduce the fears of parties in other litigation that a master-attorney has a special entree
142 with the judge.

143 The interest of the states in regulating attorney conduct was noted. The problem of
144 simultaneously working as a judge's master and appearing before the judge in unrelated litigation
145 is likely to be seen as presenting a problem of conflicting interests, a matter traditionally regulated
146 by state disciplinary authorities. States likewise regulate the appearance of impropriety, a concept
147 with a long and detailed history. A federal judge cannot, by appointment, immunize a master from
148 regulation by state authorities.

149 A different analogy is provided by magistrate judges. Judicial Conference conflict-of-interest
150 rules for part-time magistrate judges provide that a part-time magistrate judge may appear in any
151 civil action in any court, and may appear as counsel in a criminal action in any state court but not in
152 any court of the United States. A partner or associate of a part-time magistrate judge may appear as
153 counsel in any federal court other than in the district in which the part-time magistrate judge serves,

154 so long as the magistrate judge has not been involved in the criminal proceeding in connection with
155 official duties.

156 Noting that the rule does not require disqualification of the master's firm — and that the Note
157 observes that this question is left to the discretion of the appointing judge — it was asked why the
158 appearance is different for other lawyers in the master's firm. It was suggested that screening
159 mechanisms can be used within the firm. But it was noted that the firm is likely to make it known
160 — perhaps on its web page — that one of its lawyers is master for a named judge. And some clients
161 are likely to find this an inducement to retain the firm. On the other hand, disqualification of the
162 entire firm would make it impossible for any lawyer in a firm with many lawyers to accept
163 appointment as a master.

164 The question of screening within the firm was carried further. Many states accept the use of
165 ethics screens to avoid extending disqualification from an individual lawyer to an entire firm. But
166 other states do not. Discussions of possible federal rules of attorney conduct have repeatedly
167 explored the question whether a federal rule, or a federal court order, can immunize a lawyer from
168 state discipline. The question has proved very difficult. Simply attempting to provide an answer in
169 Rule 53 will not guarantee the result. Perhaps the risk of conflict with state requirements, or
170 confusion, means that (a)(3) should be deleted.

171 In addition to state rules, most federal courts have local rules that include conflict-of-interest
172 provisions. Adoption of an express Rule 53 provision would override many of these rules.

173 It was suggested that perhaps (a)(3) should be revised to state that the court may, in
174 appointing a master, order that the master be disqualified. But there is no need to say that in the rule;
175 the judge can impose that term as a condition of appointment. Indeed, a judge would be expected
176 to screen a lawyer before appointment as master, at least asking how many cases the lawyer has
177 before the judge. But the parties may recommend the master, and the judge may be lulled by the
178 parties' recommendation to avoid further inquiry.

179 A counter-suggestion was that it would be better to establish a presumption of
180 disqualification, subject to exceptions.

181 This discussion prompted the suggestion that it is proper to write a rule that does not attempt
182 to solve every possible problem. Retaining the (a)(3) disqualification provision may create a
183 problem. Big firms and small firms both may find that a lawyer cannot practicably serve as master,
184 although for different reasons. Big states with big bars may avoid problems that will be encountered
185 in smaller states with small bars. The duration of an appointment may be unpredictable when it is
186 made, making it more difficult to foresee what problems a disqualification provision will generate.

187 An observer stated that in twenty-four years of serving as a master in many cases, the judge
188 always asks whether there is a conflict. Both the master and judge always assume that the master
189 will not appear before the judge. But the matter is not addressed in the order of appointment. At the
190 same time, it is always assumed that the master's firm can appear before the judge so long as there

191 is an ethical wall — the Note language suggesting the judge has discretion to disqualify the entire
192 firm should be abandoned.

193 The Federal Judicial Center study of masters did not come across any case in which the
194 disqualification question was addressed.

195 It was suggested that it might be better to address the disqualification question only in the
196 Note, perhaps by suggesting that the question is one that may be addressed by disciplinary rules.

197 The response was made that disqualification does belong in the rule. Rule 53 has spoken
198 only to trial masters. The revision is designed to bring Rule 53 to bear on the many appointments
199 for non-trial duties. All master appointments should be brought into the rule. The disqualification
200 issue is important. That it is difficult does not justify leaving it out of the rule.

201 Another suggestion was that the disqualification problem may not be as severe as it seems:
202 in a multi-judge district, the master can avoid disqualification by having other cases reassigned to
203 other judges. Yet reassignment may not be a panacea; the master's client may prefer the judge
204 originally assigned, creating a conflict for the master. And the court itself may not allow
205 reassignment.

206 The discussion of disqualification was summarized by suggesting four alternatives: carry
207 forward the disqualification provision as published in (a)(3); modify the provision by permitting
208 defeat of the disqualification in exceptional circumstances; modify the provision still further, to say
209 only that the court may order disqualification; or delete the provision entirely.

210 A motion to delete (a)(3) passed by voice vote, with dissents. Mark Kasanin abstained
211 because he is a member of the Maritime Law Association practice and procedure committee that was
212 one of the groups raising the issue.

213 The Note is to be revised to describe the question, alluding to the overtones of state
214 disciplinary interests.

215 Rule 53(b)(2) sets out matters that must be included in the order appointing a master. The
216 Department of Justice suggested several additions to this provision, reflecting their frequent
217 experience with masters. The Subcommittee decided to recommend adoption of several of these
218 additions.

219 One change was recommended in (b)(2)(A), adding specification of any investigating or
220 enforcement duties. This change was approved, with a style change to read "any investigation or
221 enforcement duties."

222 (b)(2)(B), addressing ex parte communications between master and the parties or court,
223 would be changed by adding this: "limiting ex parte communications with the court to administrative
224 matters unless there is good cause to permit ex parte communications on other matters." It was
225 asked how the limit on ex parte communications with the court will work. The order will tell the
226 parties what the rules are. The judge adopts the limit in the appointing order, or decides not to adopt

227 the limit so that ex parte communications are not limited to administrative matters. And the order
228 can be amended.

229 Ex parte communications with the parties are treated differently — some master functions
230 with respect to mediation or settlement require ex parte communication. But an observer noted that
231 in many years of experience as a master, he has followed the practice of never talking to either side
232 without the permission of all parties. He suggested that the rule should adopt this standard, with an
233 exception for settlement masters or enforcement masters.

234 It was asked why have a "good cause" restraint on permitting ex parte communications with
235 the court on non-administrative matters? Why not just leave it to the court, abandoning the
236 suggested new language? A response was that appointment of a master is an exceptional event; the
237 rule should state the normal expectation. A further response was that in settlement or mediation, the
238 parties may prefer that the court not hear from the master. And if the master believes there would
239 be a benefit in ex parte communications with the court, the master can raise the question. But it was
240 responded that it is difficult to understand what circumstances might establish good cause — as a
241 matter of ethics, for example, a master should not communicate with the court on settlement matters.
242 In rebuttal, it was urged that there are many different master functions. In a mass-tort case, for
243 example, the master may be appointed for functions that require constant communication with the
244 court; in one current action the master consults with the court daily.

245 Further discussion was followed by adoption of a motion to change the wording of (b)(2)(B):
246 "the circumstances — if any — in which the master may communicate ex parte with the court or a
247 party, limiting ex parte communications with the court to administrative matters unless the court in
248 its discretion permits ex parte communications on other matters."

249 (b)(2)(C), proposed after much discussion of what Rule 53 might say about the record of
250 proceedings before a master, simply states that the order appointing a master must state the nature
251 of the materials to be preserved as the record. The Department of Justice suggested that the rule
252 should be made more specific, addressing the manner in which the record is made, including an
253 obligation to create a record. The difficulty, however, is that masters perform many functions; it may
254 be difficult or even counter-productive to require a record of settlement or mediation work, or of
255 enforcement-investigation work. We do not want to require every master to preserve a record of
256 everything done as master. The key may be whether the master is to engage in fact-finding, but even
257 that may be difficult to draft. But even then there is a risk that a direction to preserve identified
258 categories of material may lead a master to disregard other material that should be retained.

259 The problem of making a record remains difficult. It was agreed to add a filing requirement
260 in (C), to parallel the method-of-filing addition to (D) that was discussed in tandem. The order must
261 state "the nature of the materials to be preserved and filed as the record * * *." It may be difficult
262 to know what materials should be filed at the time the appointment is made, but the core requirement
263 is clear: a master should make and file a complete record of everything that is to be considered in
264 making or recommending findings of fact on the basis of evidence. The order can be amended to
265 respond to needs that emerge as the master proceeds to discharge the appointed duties.

266 It was asked whether the (b)(2)(D) requirement that the order state the standards for
267 reviewing the master's order and recommendations could be used to supersede the standards of
268 review set out in (g)(3) and (4). It would be possible to ensure against this possibility by expressly
269 incorporating (g)(3) and (4), so that the appointing order must state "the standards under Rule
270 53(g)(3) and (4) for reviewing the master's orders and recommendations." But it was concluded that
271 the intent is sufficiently clear on the face of the rule; a sentence will be added to the Committee Note,
272 however, to make the point.

273 Subdivision (b)(3) provides that the order appointing a master may be amended at any time
274 after notice to the parties. Two changes were considered; one is recommended for adoption. The
275 public comments suggested that if the master is appointed by consent of the parties under Rule
276 53(a)(1)(A), consent of all the parties should be required to amend the order. Although this
277 suggestion seems attractive on first approach, it dissolves on closer examination. The most
278 compelling problem is that the court must have power to cancel the appointment if the master's
279 duties are not being performed well, or if the court concludes that the court itself should discharge
280 those duties. Other problems can emerge as well — the need to adjust the terms of compensation,
281 for example, might be thwarted by the veto of one interested party. That change is not
282 recommended. But a second change is recommended: the rule should expressly provide an
283 opportunity to be heard on a proposed amendment. This change was adopted. Later discussion led
284 to one more change: subdivision (b)(4), dealing with entry of the appointing order, was moved ahead
285 of (b)(3) because entry logically comes before amendment. What was published as (b)(3) will
286 become (b)(4), renumbering what was (b)(4) as (b)(3).

287 The "effective date" provision published as Rule 53(b)(4) was awkwardly drafted. Further
288 reflection led to a recommendation that it be changed to a paragraph on "Entry of order." Brief
289 discussion led to approval of this draft: "The court may enter the order appointing a master only after
290 the master has filed an affidavit disclosing whether there is any ground for disqualification under 28
291 U.S.C. § 455 and, if a ground for disqualification is disclosed, after the parties have consented with
292 the court's approval to waive the disqualification."

293 Action on a master's order, report, or recommendations is covered by subdivision (g). (g)(1),
294 as published, said that the court "may" afford an opportunity to be heard. The committee approved
295 the subcommittee recommendation that "may" be changed to "must." As with other hearing
296 requirements in the rules, a "hearing" does not require live argument. When there is no occasion to
297 take witness testimony, the court can afford a hearing by written submissions only.

298 It was asked whether it is wise to include in (g)(1) authority for the court to take evidence in
299 acting on a master's report. This authority appears in present Rule 53(e)(2). Given all that masters
300 may be asked to do, it seems wise to preserve the authority — the alternative of remanding to the
301 master to take any "new" evidence may be cumbersome, and the court may prefer to hear again the
302 same testimony that was presented to the master. The opportunity to take evidence may be
303 particularly useful when the court provides de novo review, as recommended by proposed revisions
304 of Rule 53(g)(3).

305 It was pointed out that subdivision (g)(2) is captioned "Time," but in fact is the basic
306 provision for objections. It was agreed that a new caption must be found. One possibility is "Time
307 for Objections."

308 Fact review was addressed by publishing two versions of Rule 53(g)(3). The first version
309 called for de novo review unless the appointing order directed review for clear error, or unless the
310 parties stipulate with the court's consent that the master's findings will be final. Present Rule
311 53(e)(2) establishes clear-error review in nonjury cases, and (e)(4) permits the parties to stipulate for
312 finality. The first version retained these as options, but established a preference for de novo review.
313 Version 2 sought to parallel the distinctions made on review of a magistrate judge by providing a
314 preference for de novo review as to "all substantive fact issues," but a preference for clear-error
315 review of "non-substantive fact findings or recommended findings." Both versions reflected the
316 growing concern expressed by several courts of appeals that Article III courts should not — and
317 perhaps may not — surrender factfinding responsibilities to a non-Article III court adjunct.

318 The subcommittee proposed a new version that would require de novo review of all fact
319 issues unless the parties stipulate with the court's consent that review will be for clear error or that
320 the findings of a master appointed with party consent under 53(a)(1)(A) or for pretrial or post-trial
321 duties under 53(a)(1)(C) will be final. The requirement of party consent to depart from de novo
322 review would reduce the Article III concerns. Even then, it is not clear that the Article III problem
323 is solved. The problem is particularly acute with respect to a trial master who makes or recommends
324 findings on the merits of the claims or defenses in the action. But the parties cannot control the
325 standard of review simply by their stipulation — the court must consent to the stipulation. There is
326 a long tradition of reliance on special masters, and Rule 53 has provided for clear-error review unless
327 the parties stipulate to finality. These traditions may satisfy the demands of Article III. The *LaBuy*
328 decision, however, may reflect an evolving trend that will reach beyond the justification for
329 appointing a master to the standards of review. A confident answer cannot be given until the Article
330 III courts determine just how far Article III limits master practice. It should be remembered that the
331 project to rewrite Rule 53 is motivated by the desire to bring pretrial and post-trial masters into the
332 rule for the first time. Present Rule 53 governs only trial masters. There is no clear reason yet to
333 write a rule that rejects any use of trial masters, abandoning everything that has been in Rule 53 up
334 to now. For the present, it seems better to continue to permit appointment of trial masters subject
335 to the several new restrictions embodied in the rule: a presumption for de novo review that can be
336 overcome only on stipulation of all parties and with the court's consent, abolition of masters in jury
337 trials absent party consent, and a paring back that deletes the right of the parties to stipulate to
338 finality for a trial master's findings unless the initial appointment was made by consent of the parties.

339 It was asked what value there is in having a master if all findings have to be reviewed de
340 novo. One answer is that many masters will be appointed for pretrial and post-trial duties that do
341 not lead to review of everything the master does. Even when review is sought, the parties may
342 stipulate to clear-error review in these settings more readily than they would stipulate if finality were
343 permitted for a trial master. And if the initial appointment is by party consent, stipulations for clear-

344 error review or finality are likely to be made. De novo review is most likely to be provided for a trial
345 master. Courts will not always be asked to decide every issue de novo.

346 The next question was whether the de novo review provision will require that the court
347 review every fact finding even though no one objects. It was responded that in a vast number of
348 cases nothing is done because there is no objection. But the court should remain free to act in the
349 absence of objections. The process of resolving some objections, moreover, may lead the court to
350 review and determine related fact findings that have not been the subject of objections. Still, it needs
351 to be decided whether the district judge is required to act in the absence of objections. The Article
352 III question does not extend to requiring decision of an issue that no party has asked to have decided.
353 This conclusion seems even more clear when the master is acting on many types of pretrial matters,
354 such as determining the facts surrounding a challenged discovery response.

355 It was asked how a court can make a de novo determination of credibility — clearly a matter
356 of fact — without hearing the witness? It was pointed out that in reviewing findings by a magistrate
357 judge, the court is not required to rehear the witnesses. Section 636(b)(1) provides that when a
358 magistrate judge conducts evidentiary hearings a judge of the court "shall make a de novo
359 determination of those portions of the report or specified proposed findings or recommendations to
360 which objection is made. * * * The judge also may receive further evidence or recommit the matter
361 to the magistrate with instructions." In *United States v. Raddatz*, 1980, 447 U.S. 667, the Court ruled
362 that de novo determination does not require rehearing the witness through live testimony. The Court,
363 however, cautioned against rejecting a magistrate judge's credibility determination without seeing
364 and hearing the witness, and several lower court decisions suggest that a redetermination of witness
365 credibility requires hearing the witness.

366 These questions were redirected toward the provision for reviewing questions of law. Should
367 the parties be able to consent to finality with respect to questions of law? It was urged that it is a bad
368 idea to "box the judge in on the law." And it was asked when it is expected that the court will
369 consent to a stipulation for finality — when the appointment is made, or when the parties seek to
370 make a stipulation later? The stipulation is likely to be plausible only before findings are made.
371 After findings are made, it is possible that all parties are prepared to make objections but to surrender
372 the objections in return for surrender of all objections. Then the situation is the same as if no
373 objections are made. But should the court be able to withdraw its consent to the finality stipulation
374 after the findings are made? And if the parties stipulate to finality, is the stipulation binding in the
375 court of appeals as well as in the district court? Surely both the district court and the court of appeals
376 should be able to override the stipulation?

377 Several related questions came next: is there any need to provide for reviewing questions of
378 law? Why not make the review provision parallel to the fact-review provision? Why not simply
379 provide that review of law questions is de novo?

380 The question of an obligation to review in the absence of objections recurred. Should a judge
381 be obliged to review privilege determinations made by a master with respect to 500 documents when
382 objections are made only as to ten? Surely the provision should require de novo review only if an

383 objection is made, giving permission to review de novo if no objection is made without requiring
384 review.

385 It was observed that Rule 53(g) does not attempt to provide guides for distinguishing between
386 matters of law and fact, nor to suggest the complications of "mixed questions." There is a difference
387 between interpreting a statute and applying a rule to a specific fact situation. A party stipulation for
388 finality with respect to issues of law application seems different from a stipulation with respect to
389 more general questions of law. Perhaps some questions of law-application should be analogized to
390 matters of fact for this purpose, at least if we are to distinguish law from fact. The Civil Rules never
391 have attempted to provide guidance on these questions, however, and it is better not to begin the
392 attempt now.

393 Further consideration of subdivisions (g)(3) and (4) included an alternative approach that
394 would substitute a waiver approach for the stipulation for finality. The waiver would be added as
395 a new final sentence of (g)(2): "But the parties may with the court's consent waive the opportunity
396 to object to a master's findings of fact or conclusions of law." This waiver would be reflected in a
397 revised (g)(3): "If a party has objected under Rule 53(g)(2) the court must decide de novo all issues
398 raised by the objection on which a master has made or recommended findings of fact or conclusions
399 of law, unless the parties have stipulated with the court's consent that the findings will be reviewed
400 for clear error." It would be possible to vary this approach by adding an express recognition that the
401 court can review findings even in the absence of an objection: "The court may — and if a party has
402 objected under Rule 53(g)(2) must — decide de novo * * *."

403 Discussion of this alternative approach led to revision of the new version initially submitted
404 by the subcommittee. The committee approved Rule 53(g)(3) to read: "The court must decide de
405 novo all objections to findings of fact made or recommended by a master unless the parties stipulate
406 with the court's consent that (A) the findings will be reviewed for clear error, or (B) the findings of
407 a master appointed under Rule 53(a)(1)(A) or (C) will be final." The committee approved Rule
408 53(g)(4) to read: "The court must decide de novo all objections to conclusions of law made or
409 recommended by a master." The Committee Note will state that the court may decide questions of
410 fact or law de novo even when no party objects.

411 Rule 53(g)(5) was published in brackets that expressed uncertainty whether it should be
412 adopted. It establishes an abuse-of-discretion standard of review for a master's rulings on a
413 procedural matter unless the appointing order establishes a different standard. Comments endorsed
414 adoption of this provision. Courts should be able to determine what is a matter of "procedure" for
415 this purpose. Adoption, deleting the brackets, was approved.

416 Rule 53(i) was designed to regulate the use of magistrate judges as masters. The version
417 published for comment was shaped by concerns expressed in the Standing Committee. The
418 published version was an awkward reflection of several pressures that push in different directions.
419 There is a strong pressure to have judges act only in their official roles as judges. Stepping outside
420 to perform other public acts is always sensitive, and it becomes even more sensitive when the acts
421 are directly related to litigation before the judge's own court. This consideration would lead to

422 prohibiting any role for a magistrate judge as master: if the task is one that can be performed as
423 magistrate judge, it should be performed by acting as magistrate judge. If the task is one that cannot
424 be performed as magistrate judge, a magistrate judge should not be appointed to perform it as master.
425 This pressure is offset by others. One offsetting pressure arises from 28 U.S.C.A. § 636(b)(2), which
426 provides both that a judge may designate a magistrate judge to serve as a special master pursuant to
427 the Federal Rules of Civil Procedure and also that on consent of the parties a magistrate judge can
428 be appointed to serve as special master in any civil case "without regard to the provisions of rule
429 53(b) * * *." This statute seems to favor appointment of magistrate judges, perhaps in part because
430 the parties would not become responsible for the master's compensation. The force of this statute
431 is reduced, however, by its position in the history of § 636: it was adopted before later amendments
432 that considerably expanded the range of duties that can be assigned to a magistrate judge acting as
433 magistrate judge. A second offsetting pressure arises from specific statutory provisions for special
434 masters. Title VII of the Civil Rights Act of 1964 provides for assigning cases to a special master,
435 and some judges have found magistrate judges a useful resource for these cases. Yet a third offsetting
436 pressure arises from the concern that at times it may be better to assign a public judicial officer to
437 perform some of the roles that may be assigned to a master and that cannot be assigned to a
438 magistrate judge acting as magistrate judge. Hence the second sentence of the published proposal:
439 "Unless authorized by a statute other than 28 U.S.C. § 636(b)(2), a court may appoint a magistrate
440 judge as master only for duties that cannot be performed in the capacity of magistrate judge and only
441 in exceptional circumstances."

442 Rule 53(i) elicited strong and cogent negative comments. It was opposed by the Committee
443 on Administration of the Magistrate Judges System and by the Federal Magistrate Judges
444 Association. These comments reflected the severe tensions at work in this area. The committee
445 concluded that it is better to delete all of 53(i). These questions are better left to further evolution
446 of practice under the relevant statutes.

447 Deletion of Rule 53(i) led to discussion of the subcommittee proposal to adopt a new Rule
448 53(h)(4) that would absorb the final sentence of Rule 53(i) as published: "A magistrate judge is not
449 eligible for compensation under Rule 53(h)." It was pointed out that there is no need for this
450 provision, and that including it in Rule 53 might create a confusing implication. In April 1976, 1976
451 Conf. Rept. pp. 19-20, the Judicial Conference adopted a policy that precludes even a part-time
452 magistrate judge from accepting fees for services performed as a special master, "whether or not such
453 service is rendered in the magistrate judge's official capacity." The committee agreed to delete
454 newly proposed 53(h)(4).

455 Further discussion of Rule 53 led to the question whether a master can be appointed to
456 conduct "Markman" hearings on the interpretation of patent claims under the pretrial provisions of
457 (a)(1)(C), or whether the appointment must meet the trial-master standards of (a)(1)(B). The
458 Committee Note suggests that this task blurs the divide between trial and pretrial functions. The
459 Markman case ruled that interpretation of patent claims presents a question of law to be decided by
460 the court, not a fact question for the jury. Review of the master will be de novo as a matter of law
461 under Rule 53(g)(4). Experience suggests that an expert master may be able to help resolve the

462 matter both more effectively and more timely, meeting the standards for appointment as a pretrial
463 master. The Federal Circuit has approved and even praised the use of masters in this setting. If the
464 expense seems disproportionate to the needs and stakes of the case, party objections to a reference
465 are likely to block the reference. It was agreed that the Committee Note should be expanded slightly
466 to reflect this discussion.

467 The subcommittee did not have an opportunity to make recommendations on a substantially
468 shortened Committee Note that resulted from deletions proposed by the reporter. Discussion led to
469 restoration of a few of the deletions and approval of the Note as thus shortened. It was observed that
470 reduction of the lengthy Note was a good thing.

471 Finally, a few changes not recommended were discussed briefly. The Department of Justice
472 proposed that Rule 53(c) be amended by adding an express provision that a master can enter a
473 protective discovery order under Rule 26(c). The subcommittee concluded that confusion might
474 arise from singling out this one specific issue from the many other orders that a master might enter.
475 The subcommittee also reconsidered, in light of comments, two issues that had regularly been
476 considered in the course of preparing Rule 53 for publication. One issue goes to the liability of a
477 master for malfeasance; early drafts included a provision for a bond to ensure an effective remedy,
478 but this provision was deleted. One reason for deletion was fear that these issues approach matters
479 of substantive liability. A second issue goes to appeal. The opportunities for interlocutory review
480 of an order appointing a master are slim. Many other important pretrial orders also are ordinarily
481 not appealable, however, and the subcommittee concluded that there is no reason to accord special
482 treatment to master appointments. There is nothing like the years of experience and frustration that
483 led to adoption of the class-certification appeal provisions in Rule 23(f). Finally, several comments
484 expressed fear that appointment of masters might be unduly encouraged by deletion of the provision
485 in present Rule 53(b) that "reference to a master shall be the exception and not the rule." The
486 Committee Note twice says that deletion of this phrase is not intended to weaken the strictures
487 against appointing trial masters, the only subject covered by present Rule 53. The "exceptional
488 condition" term is retained, and does all the needed work. Locating "the exception and not the rule"
489 within a revised Rule 53 that covers pretrial and post-trial masters, and also masters appointed by
490 consent, would of itself create problems. There was no suggestion that any of these items be added
491 to Rule 53.

492 The revisions of Rule 53 approved by the committee, and the reduction of the Committee
493 Note, were approved for recommendation to the Standing Committee.

494 *Rule 23*

495 Judge Rosenthal introduced the report of the Rule 23 Subcommittee. The first matter for
496 attention will be to finish action on the proposals published in August 2001 in light of the public
497 comments and testimony. The published proposals are deliberately narrow, although not
498 unimportant. They focus on process. They provide guidance from the time of the certification
499 decision to the end-point of acting on attorney fees. The Committee Notes published with these

500 proposals may be shortened; much-improved versions are included in the materials. They describe
501 what the amendments do. Further suggestions for refinement will be welcomed.

502 The second matter for attention is to consider what other Rule 23 topics might be approached.
503 Earlier proposals to sharpen the criteria for class certification have been put aside for the foreseeable
504 future. We chose not yet to address settlement classes, but to wait for *Amchem* and *Ortiz* to
505 "percolate" in the lower courts. But the time may have come to think further about a settlement-class
506 rule, and also about the special problems presented by "futures" plaintiffs.

507 Turning to the published proposals, the first amendment — Rule 23(c)(1)(A) — changes the
508 time for certification from "as soon as practicable" to "at an early practicable time." This proposal,
509 and the accompanying Note material, provoked extensive comment. The Subcommittee
510 recommends that the published Rule be adopted, but proposes changes in the Committee Note to
511 further improve the discussion of the relation between discovery and a well-informed certification
512 decision.

513 Changes are proposed for other parts of (c)(1). (c)(1)(B) is changed by adding an express
514 requirement that an order certifying a class appoint class counsel under Rule 23(g). (c)(1)(C) is
515 changed by dropping all reference to a "conditional" class certification; the footnote explains the
516 need to avoid any hint that a tentative class certification is appropriate. The Committee Note is
517 changed to emphasize the ability to change the class definition if trial makes the need apparent. The
518 amendment that changes the cut-off of amendment from "decision on the merits" to "final judgment"
519 is retained.

520 A substantial change is proposed in Rule 23(c)(2). The published proposal would require
521 notice by means calculated to reach a reasonable number of members in a (b)(1) or (b)(2) class.
522 Civil rights plaintiffs protested that notice costs would cripple worthwhile class actions, to the point
523 of deterring filing. Others argued that notice is desirable as a matter of principle. In place of the
524 requirement, revised (c)(1)(A) would provide simply that the court may direct appropriate notice to
525 a (b)(1) or (2) class. This authority exists, at least in part, under present Rule 23(d)(2), but this
526 express provision will serve both as a reminder and as an encouragement. The revised Committee
527 Note will emphasize the need to consider the cost of notice and the opportunity to devise forms of
528 notice that are inexpensive. This proposal is meant to strike a fair balance between the competing
529 concerns. As to (c)(2)(B), the Committee Note discussion of plain language is improved. Other
530 technical changes are proposed as well.

531 A number of changes are proposed for the settlement-review provisions of Rule 23(e). As
532 published, (e)(1) made explicit the requirement that many courts have read into the ambiguous notice
533 provision in present Rule 23(e): notice must be directed to a proposed class even if the action is
534 settled or dismissed before a decision whether to certify the class. The public comments raised
535 several questions about notice in these circumstances. Many comments agreed that it is rare to find
536 that absent class members have relied on the filing and consequent tolling of limitations periods; few
537 class-action filings generate much publicity. There is room for concern that class-action allegations
538 may be added to a complaint to draw attention to the case or to exert settlement pressure, but there

539 is little that a court can practicably do to address this concern when the only parties before it agree
540 to terminate the litigation on terms that do not affect the class. There also is room for concern that
541 a number of actions may be filed in different courts, using pre-certification dismissals as a means
542 of forum shopping. Again, however, there are few practical remedies. In addition to the infrequent
543 benefits, a notice requirement poses distinct problems. One obvious problem is cost. A second
544 problem may be the means of notice: general notice addressed to the class described in the complaint
545 may not do much good, but without extensive discovery it may be difficult to identify the persons
546 who would get more individualized notice. Notice costs are an obvious concern. Some of the
547 comments added concern that limitations on the opportunity to "withdraw" class claims would
548 interfere with the right to amend a complaint under Rule 15(a). Pre-certification developments can
549 demonstrate the value of withdrawing some theories that may impede certification, for example, and
550 it would intrude on adversary preparation to require a justification for the withdrawal.

551 Faced with these concerns, the subcommittee advises that it would be better to delete any
552 requirement that the court approve pre-certification dismissal. Subdivision (e)(1) should be amended
553 to apply the court-approval requirement only to dismissal of the claims, issues, or defenses of a
554 certified class. Notice is still required for all class members who would be bound by a settlement.

555 Early drafts of proposed Rule 23(e) included a lengthy list of factors to guide the court's
556 determination whether a proposed settlement is fair, reasonable, and adequate. Doubts about the
557 wisdom of including such a "laundry list" in the rule led to displacing the list from the rule text to
558 the Committee Note. There is less risk that a list in the Note will be mistaken as an exclusive list
559 of considerations, and less risk that the list will become a check-off form applied by rote in
560 reviewing all settlements. Comments on the published Note, however, expressed the same
561 reservations even about including the list in the Note. Deletion of the list is among the
562 recommended Note changes.

563 A second major change is proposed for the Rule 23(e)(2) provision on "side agreements."
564 The published rule would authorize the court to direct the parties to file a copy or summary of any
565 agreement or understanding made in connection with the proposed settlement. Many comments
566 suggested that a filing requirement should be imposed on the parties. The Subcommittee proposes
567 to amend the rule to require parties seeking approval of a settlement to file a statement identifying
568 any agreement or understanding made in connection with the settlement. The Committee Note
569 would be changed to describe the court's authority to require that copies be filed, and to direct filing
570 of summaries or copies of agreements not identified by the parties.

571 The change in Rule 23(e)(2) that requires the parties to identify agreements adds to the load
572 that must be carried by the description of the agreements as those "made in connection with the
573 proposed settlement." This phrase is not precise. It would be good to draft a more precise
574 description if one can be devised, but repeated efforts have failed. The difficulty is to find a phrase
575 that encourages filing of the important related agreements, but does not create a "trap for the wary"
576 by language that includes too much on retrospective inquiry.

577 Rule 23(e)(3) published alternative versions of a discretionary "settlement opt-out" provision.
578 The first provided that notice of settlement of a (b)(3) class action must include a right to opt out of
579 the settlement if an earlier opt-out opportunity had expired, unless the second opportunity is
580 excluded "for good cause." The second alternative was less directive, simply providing that the
581 notice settlement may state terms that afford a second opportunity to request exclusion. The
582 Subcommittee recommends adoption of the second alternative. It is more discretionary with the trial
583 court. Even this discretionary provision may provide great benefits to the court and to class
584 members. The court will be able to use this opportunity to gain information about the quality of the
585 settlement. The opportunities for abuse of the second opt-out to disrupt a good settlement, however,
586 will be reduced.

587 Comments on the Rule 23(e)(4) provisions for making and withdrawing objections reflected
588 the long-running disagreements the committee has encountered. Plaintiffs and defendants commonly
589 unite in challenging the value of objections to settlements that have been hammered out between the
590 parties. Objectors commonly unite in challenging the quality of many settlements. These comments
591 have not shown persuasive reasons to change the published rule. But the Note language can be
592 revised. The object is to achieve a Note statement that reflects the distinction between personal and
593 class-wide objections. The Note reminds the court that it can inquire into an unexplained
594 withdrawal. There was concern that the published Note encouraged too much discovery for
595 objectors; the Note is revised to emphasize the need for court control of discovery.

596 The attorney-appointment provisions in Rule 23(g) are new. Most of the comments agreed
597 that it is good to include an express appointment provision in Rule 23. It is important to define the
598 responsibilities of class counsel, and to define the procedure for appointment. The comments,
599 however, suggested that Rule 23(g), and particularly the Committee Note, reflected an intent that the
600 court stir up competition for appointment as class counsel even in cases with only one applicant.
601 The Note should be revised to show that there is no intent to favor competition when there is none,
602 that when there is only one applicant the court's responsibility is the present responsibility to assure
603 adequate representation. In no-competition cases, Rule 23(g) simply shifts the focus on counsel
604 competence from Rule 24(a)(4) to Rule 23(g), separating it from the focus on the adequacy of the
605 class representative. When there are rival applicants, on the other hand, the rule directs the court to
606 look beyond mere adequacy to select the attorney best able to represent class interests.

607 The counsel-appointment criteria in Rule 23(g)(1)(C) raised concern that the rule would
608 further entrench an already entrenched class-action bar. The subcommittee recommends addressing
609 this concern by adding an emphasis on knowledge and experience in the law as a relevant factor
610 independent of experience with complex litigation. Similar refinements are recommended for the
611 role of counsel's ability to devote resources to the litigation: resources, although important, are not
612 to be determinative.

613 A further change is recommended for Rule 23(g)(2) by making express provision for
614 designation of interim class counsel.

615 Rule 23(g)(1)(C)(iii) and 23(g)(2)(C) provide a bridge to the attorney-fee provisions of Rule
616 23(h) by establishing a foundation to consider fee terms during the appointment stage.

617 Rule 23(h) is recommended for adoption with only small style changes. The express
618 incorporation of Rule 54(d)(2) was again considered, but the incorporation remains important
619 because of the nexus among Rule 54(d)(2), Rule 58, and Appellate Rule 4. Notice to class members
620 of an attorney fee application is limited to "a reasonable manner" because of concerns about adding
621 another large cost item. Note language is recommended that stresses the importance of allowing an
622 adequate time for objectors to examine the materials that support a fee application before the
623 objection deadline expires. The Note also emphasizes the need to consider benefits actually
624 achieved for class members in setting fees. The focus can be on amounts actually distributed, the
625 value of coupons, or the non-cash value of specific relief.

626 Other recommended changes in the Committee Note would delete discussion of risks borne
627 by counsel, and delete much of the discussion of agreements about fees, "inventory" lawyers, the
628 individual clients of class counsel, and the like. The details seemed to generate risks of over-
629 statement or confusion.

630 Open discussion followed this introduction.

631 *Rule 23(c)*

632 Beginning with Rule 23(c)(1), it was asked whether it is desirable to eliminate the provision
633 for "conditional" certification. The original purpose of this provision was to allow a court to rule
634 that a class is certified subject to fulfillment of stated conditions, such as a condition that a more
635 adequate representative be found. There is reason to doubt the wisdom of what seems to be a
636 premature certification in such circumstances; the effort to foresee the future effects of the dramatic
637 changes made in 1966 may have failed on this score as well as with respect to the growth of (b)(3)
638 class actions. More importantly, this original intent seems to have been lost in practice. Instead, the
639 invitation to conditional certification seems to be read all too often as an invitation to certify now
640 in the face of uncertainty, reasoning that a tentative certification can be undone later. Tentative
641 certification exerts great pressure, even if it is expressed as tentative. It is better to defer the
642 certification decision until the court is clear that certification is — or is not — appropriate. The
643 value of conditional certification is further reduced by the continuing express provision that an order
644 determining whether to certify a class may be amended before final judgment.

645 Another comment noted that conditional certification can be misused. It may be used to
646 encourage settlement in an action that cannot be tried; one purpose may be to avoid choice-of-law
647 problems that would defeat a class trial. Making a certification "conditional" accomplishes nothing.
648 State courts frequently make use of this device, and it is misused.

649 Discussion asked whether "conditional" certification makes sense when it is not clear whether
650 individual or class issues will "predominate" in a (b)(3) class. A related question was whether a
651 provisional certification for purposes of reviewing a proposed settlement remains available, and what
652 its effect may be. A provisional certification for settlement review, for example, may indicate that

653 the action has proceeded to a point that deserves protection by injunction against rival litigation that
654 might undo the settlement. The response was that care should be taken in certifying a class without
655 at least a good sense that certification requirements are satisfied, a matter addressed also in
656 connection with the time-of-certification provision. A provisional certification for settlement review,
657 however, should be viewed as a certification that deserves protection by whatever means would be
658 available to protect a proposed settlement in a class that had been certified before the settlement was
659 reached and proposed to the court for approval.

660 The frequency of decertification was addressed by Mr. Willging, who noted that the FJC
661 study of class actions in four courts for two years found that a decertification question was raised 23
662 times out of 402 actual cases. In 9 of the 23 cases the certification was affirmed; in 3 it was reversed
663 or modified; and in the remaining cases there was no action on the question.

664 It was suggested that a "conditional" certification is eligible for appeal under Rule 23(f).

665 This discussion concluded by the committee's decision to delete conditional certification
666 from Rule 23(c)(1)(C).

667 Discussion of Rule 23(c)(1)(B) led back to (c)(1)(A). The question was how can a court
668 define the class claims, issues, or defenses at the time of certification? The Note discussion of
669 (c)(1)(A) suggests "controlled" discovery that will inform the certification decision. The Note
670 further suggests that some courts require trial plans that describe the issues that will be tried on a
671 class basis and the issues that will be tried on an individual basis; it was suggested that perhaps it
672 should say that "many" courts require trial plans. The public comments provided much information
673 about the need to be able to illuminate the certification decision through discovery. They also
674 suggested the fear that pre-certification discovery will generate many disputes as proponents of
675 certification seek unlimited discovery on the merits while opponents argue that all discovery requests
676 are improper because they address the merits rather than certification issues. The experience of some
677 committee members reflects these perspectives, reporting extensive arguments about the scope of
678 pre-certification discovery. The Committee Note seeks to address these comments by stating the
679 importance of active discovery management by the court.

680 The problem of certification discovery was put in perspective by the comment that this is not
681 an issue in many classes. Matters pertinent to the certification decision can be found out quickly in
682 employment, securities, and other cases. The trial plan, and questions of class-wide proof, are a
683 problem in mass torts. The Note, as revised, does the best that can be done with these problems.
684 The Note follows the direction that is emerging in the cases, including decisions by the 3d and 7th
685 Circuits in 2001 that recognize the need for some merits discovery to inform the certification
686 decision. Arguments can still be made whether the emphasis on "controlled" discovery into the
687 merits is too much offset by the implication that it can be artificial and wasteful to attempt fine
688 distinctions between certification discovery and merits discovery. But the Note seems in all to strike
689 the right balance, recognizing that what is most important is effective case-by-case control.

690 Discussion moved to the Committee Note commenting on the (c)(2)(B) requirement that
691 notice of certification must be in plain, easily understood language. The Note refers to the need to

692 consider whether class members are more likely to understand notice in a language other than
693 English. But any large class is likely to include some members who are more fluent in other
694 languages. This level of detail seems better left to the Manual on Complex Litigation. The
695 committee determined to delete the proposed new Note sentence on other languages.

696 The text of Rule 23(c)(2)(B), with the revisions proposed by the Subcommittee, was
697 approved without further comment.

698 *Rule 23(e)*

699 Discussion of Rule 23(e) began with a reminder that the Subcommittee proposes to limit the
700 requirement of court approval to settlements of the claims, issues, or defenses "of a certified class."
701 The history is that some courts read present Rule 23(e) to require approval of pre-certification
702 dismissal. Rule 23(e)(1)(A) as published made that requirement explicit. The Committee Note,
703 however, reflected the committee's uncertainty as to what remedies might be applied in lieu of
704 approving dismissal. Notice to members of the alleged class might protect reliance on the pending
705 action to toll limitations periods. Other methods might be devised to check forum-shopping.

706 The Subcommittee proposes new Note language that would reflect elimination of the
707 requirement of court approval for pre-certification dismissal. Other new language, however, would
708 suggest that the court can impose terms that protect potential class members who may have relied
709 on the class filing or that prevent abuse of class-action procedure. This language was challenged as
710 very open. It was noted that these problems will appear only in a very small number of cases. "The
711 rare case will be reliance, or forum-selecting that goes beyond the pale." The Note language is
712 intentionally open, but not empty.

713 The Note language may not be empty, but it was observed that it has no foundation in the rule
714 once the approval requirement is removed. There also may be a conflict with the right to amend
715 under Rule 15(a), which seems to permit amendment once as a matter of course to delete class
716 allegations before a responsive pleading is filed.

717 It was asked as a counter what is the bearing of Rule 41(a)(1), which opens the description
718 of the plaintiff's right to dismiss by "Subject to the provisions of Rule 23(e)." It was noted that this
719 qualification still has meaning under revised 23(a)(1), since court approval still is required for
720 voluntary dismissal after a class is certified. Whether the meaning of 41(a)(1) is changed depends
721 on whether present Rule 23(e) is interpreted to require approval of a pre-certification dismissal.

722 A committee member recalled directing notice of a pre-certification dismissal: if it can be
723 done under the present rule, it can be done under the new rule without facing these problems in the
724 Note. The Manual for Complex Litigation advises that if there is abuse of the class process, the
725 court can protect the class by giving notice that would allow others to come in to represent the class.
726 There also may be inherent power to protect the class. And the authority to regulate related case
727 filings may support measures to address forum-shopping concerns.

728 A motion to delete the two proposed new sentences that describe terms exacted for pre-
729 certification dismissal was adopted.

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730 The Subcommittee recommends changes in the Committee Note to respond to comments that
731 thought the published Note was hostile to settlements. There was no intent to reflect hostility, and
732 new language has been added to reflect the need to balance the values achieved by settlement against
733 the need for care to ensure that the general value of settlement is not vitiated by a particular
734 inadequate settlement.

735 The Rule 23(e)(1)(B) provision for notice of a proposed settlement "in a reasonable manner"
736 would be supplemented by new Committee Note language discussing the need for individual notice
737 "in the manner required by Rule 23(c)(2)(B) for certification of a Rule 23(b)(3) class" in some
738 circumstances. It was asked whether this observation should be qualified by referring to individual
739 notice "when practicable." This qualification is part of (c)(2)(B), however, so it is incorporated by
740 that reference.

741 A similar question was addressed to notice if a settlement opt-out opportunity is provided
742 under Rule 23(e)(3). This question will arise only if a (b)(3) class is settled after expiration of the
743 initial opportunity to request exclusion. Rule 23(e)(1)(B) requires notice to the class in a reasonable
744 manner; the court can determine how far the manner of notice should be adjusted to reflect what is
745 practicable to protect the second opt-out.

746 Attention turned to the Subcommittee proposal to revise Rule 23(e)(2) to require the parties
747 to identify any agreement or understanding made in connection with a proposed settlement. The first
748 comment was that a decision must be made as to what agreements are covered. The rule language
749 is very broad: does it reach an unspoken "understanding"? "A wink and a nod"? The reference to
750 "understanding" is troubling. The Committee Note describes agreements that "bear significantly on
751 the reasonableness of the settlement." That is an appropriate test. But that is a very small problem.
752 What other agreements might be seen to be made in connection with a settlement? An agreement
753 to settle individual cases on terms different from the terms available to class members? An
754 agreement among attorneys on fee division? There is a further problem with oral agreements: we
755 do not want to encourage hidden agreements. But the whole provision is very broad.

756 One possibility would be to add a stronger link to the settlement terms to anchor the duty to
757 identify. The requirement could be limited to agreements "directly related" to the settlement. But
758 some comments thought such rule terms would make it too easy to avoid the requirement. We need
759 a formula that people can understand, but that reaches most of what we need.

760 It was responded that what we need depends on what we are trying to close down.

761 One example of the difficulty is provided by a recent Seventh Circuit case in which the class
762 action that was eventually settled was launched by paying a \$100,000 consultation fee to a lawyer
763 who had a client that became the class representative. It is difficult to know whether the referral fee
764 agreement was made in connection with the settlement. There might have been a direct connection,
765 but it may have been no more than the easiest way to initiate the action.

766 The question whether "understanding" is a necessary part of the rule was renewed. It is clear
767 that unwritten agreements should be reached, but so long as they are agreements they are covered

768 by the requirement to identify an agreement. The advice to delete "understanding" was renewed
769 later.

770 Some interpretive help may be found in the Committee Note sentence stating that: "The
771 functional concern is that the seemingly separate agreement may have influenced the terms of the
772 settlement by trading away possible advantages for the class in return for advantages for others." But
773 is that guidance enough?

774 The next suggestion was that the test should be "materiality." What we need is identification
775 of something that brought about the settlement. The materiality suggestion was later renewed: we
776 should require disclosure of "any agreement or understanding material to the settlement." Any
777 agreement that affects the fairness of the settlement terms is material. This wording was resisted,
778 with an alternative suggestion that the rule address an agreement that "may have influenced the terms
779 of the settlement." The "may have influenced" suggests a historical inquiry, but that may be
780 acceptable. A more specific objection was that focus on influencing "the terms of the agreement"
781 may not reach the side agreements without which there would not have been any settlement. Such
782 vital agreements are the ones we most want to know about, but might not be seen to have influenced
783 any specific settlement term.

784 Another alternative formulation was suggested: an agreement that "bears significantly" on
785 the settlement must be identified. But this formula does not escape the "eye of the beholder"
786 problem.

787 One fear is that any formulation will encourage objectors to seek depositions of the attorneys
788 who negotiated the settlement. None of the alternatives seems to reduce the risk: materiality, bears
789 significantly, made in connection with, simply frame the question in different terms.

790 It was observed that "objectors are bought off every day. You are giving a weapon to the bad
791 objectors." Even if "understanding" is dropped, a problem will remain. The settlement negotiation
792 will be conducted in a manner similar to the practice that attorney fees are not discussed before the
793 settlement terms are agreed upon: "it is in the room. These matters will be put off."

794 The question was posed whether there are in fact agreements that relate to the settlement but
795 are not part of the settlement terms. An answer was that there are, but that they "see the light of day.
796 You cannot eliminate unethical behavior." The proposal goes too far; it will deter good settlements.

797 Another drafting suggestion was to limit the identification requirement to any agreement
798 made in connection with "and as a condition of" settlement.

799 A reminder was provided that the process is designed in two steps: the parties identify
800 agreements, and the court then decides whether to require further disclosure. It was responded that
801 the objectors will demand to see any identified agreement.

802 The next observation was that any clear standard invites people on the borderline to avoid
803 identification. Perhaps it is best to adopt a broad standard, but to encourage the judge not to go too
804 deeply into the next step of requiring further disclosures. "I despair of finding a formula" more

805 effective than "made in connection with." It was further observed that broad wording of the
806 identification requirement may discourage the parties from making the kinds of agreements that we
807 worry about.

808 Further discussion suggested that this proposal is likely to be controversial. It is a mistake
809 to rely on the Note alone; the rule itself should say, as closely as possible, what we want to make
810 happen.

811 The committee was reminded of the process that led to the present suggestion. The "made
812 in connection with" formula was part of the published proposal that simply authorized the court to
813 direct the parties to file a copy or summary of the agreement. That proposal did not address the
814 means by which the court might become aware of the agreements it might wish to examine. The
815 many comments favoring mandatory identification by the parties responded to the understandable
816 concern that ordinarily the court would have no basis for knowing about agreements that do not
817 directly affect the settlement terms that apply to class members. None of the comments helped to
818 sharpen the formula that defines the agreements to be identified by the parties. The value of a
819 precise formula is increased by changing to a party-identification requirement. But the difficulty of
820 drafting a precise formula is not reduced. The Subcommittee recognized the problem and struggled
821 with it, but was unable to find better wording.

822 So the court's need to know of the agreements it might wish to explore must be defined in
823 a way that, to repeat the phrase, is not "a trap for the wary." One way to alleviate uncertainty may
824 be to reinstate the examples of "side agreements" that the Subcommittee would strike from the
825 Committee Note.

826 Returning to the rule reference to an "understanding," it was noted that the word "agreement"
827 is familiar to the law. It is well developed in the law of contracts. "Understanding," on the other
828 hand, is not well developed. The course of safety is to rely on the well-developed "agreement"
829 concept and to delete the non-technical reference to understanding. To be sure, even the concept of
830 agreement has its ragged edges — the law of conspiracy, both criminal and civil, is sufficient
831 illustration.

832 The "made in connection with" formula was supported as an objective standard. Tests that
833 suggest a response that "I was not influenced by it" are not. But it was responded that "there will be
834 no agreements in connection with the settlement."

835 It was asked whether the rule should specify "oral or written" agreements. A counter-proposal
836 was that the rule might be limited to a copy of any written agreement.

837 The problem continued: the rule should not be so narrow as to be easily circumvented. One
838 approach would be to adopt a broad standard for the requirement that parties identify agreements,
839 but a narrow standard for the court to direct disclosure to others.

840 New Subcommittee language for the Committee Note on agreements made by insurers was
841 addressed. This language was proposed in response to the testimony and comments of insurance
842 companies. An essential part of the process that leads a defendant to settlement is often resolution

843 of an insurer's participation in paying part of the settlement. Insurers fear that agreements they make
844 with their insureds may seem to be made in connection with the settlement, and that identification
845 and eventual disclosure will make it more difficult to reach these agreements. One illustration was
846 an agreement with the insured on how many "occurrences" are involved in the litigation. Other
847 illustrations were complex, drawing from areas of insurance practice that were not fully illuminated
848 by the testimony. The first suggestion was that it is better to say that "information about" insurance
849 coverage may bear on the reasonableness of a settlement than to say that "an understanding of"
850 insurance coverage is relevant. It was noted that the insurance policies themselves are commonly
851 made available; indeed, disclosure often may be required by Rule 26(a)(1)(D). And the court may
852 need to know about agreements that affect how much insurance money is available. The resources
853 available have an important bearing on the reasonableness of a settlement. Simply knowing the
854 policy terms often does not carry far enough. But it was protested that people are not now asking for
855 disclosure of such agreements. The concern for confidentiality may be met, however, if disclosure
856 is made only to the court.

857 The Committee concluded that there is not enough information to support sophisticated
858 understanding of the problems that arise from agreements about an insurer's share of settlement
859 payments. Without a good understanding, it is better not to adopt the suggested new language.

860 Further overnight deliberations by the Subcommittee led to specific proposals. Rule 23(e)(2)
861 would be amended by deleting "or understanding" from the party-identification requirement. The
862 duty to identify would be limited to "any agreement made in connection with the proposed
863 settlement, voluntary dismissal, or compromise." The Committee Note would be revised to read as
864 follows:

865 Subdivision (e)(2) requires parties seeking approval of a settlement, voluntary
866 dismissal, or compromise under Rule 23(e)(1) to file a statement identifying any
867 agreement made in connection with the settlement. This provision does not change
868 the basic requirement that the parties disclose all terms of the settlement or
869 compromise that the court must approve under Rule 23(e)(1). It aims instead at
870 related undertakings that, although seemingly separate, may have influenced the
871 terms of the settlement by trading away possible advantages for the class in return for
872 advantages for others. Doubts should be resolved in favor of identification.

873 Further inquiry into the agreements identified by the parties should not
874 become the occasion for discovery by the parties or objectors. The court may direct
875 the parties to provide to the court or other parties a summary or copy of the full terms
876 of any agreement identified by the parties. The court also may direct the parties to
877 provide a summary or copy of any agreement not identified by the parties that the
878 court considers relevant to its review of a proposed settlement. A direction to
879 disclose may raise concerns of confidentiality. Some agreements may include
880 information that merits protection against general disclosure.

881 This language makes it clear that the court may direct that a summary or copy be provided
882 to the court only, be provided to the court and parties only, or be made available more generally.

883 It was urged that there should be further work on this language to address confidentiality
884 concerns. The court may examine a summary or copy of an agreement and conclude that the
885 agreement is not relevant to the settlement review. It may be useful to add a statement that the court
886 should provide an opportunity to make claims to work product or other relevant protections.

887 The proposed Note language renewed the question of the court's sources of information
888 about agreements not identified by the parties. This question, however, is less pressing than it was
889 under the published version of (e)(2) that did not require the parties to identify their agreements.

890 The question whether to include examples of side agreements in the Committee Note was
891 renewed. The Subcommittee continued to recommend against providing examples. The Manual for
892 Complex Litigation can provide a more useful, and more easily changed, list.

893 It was urged that the committee consider restoring Committee Note language addressing the
894 concerns that should be considered in determining whether to direct filing of a copy or summary of
895 an agreement identified by the parties. The language would have to be rewritten to avoid the tie to
896 deleted references to "the functional concern" underlying (e)(2) identification requirements. But it
897 may be useful as a further explanation of the value of the filing requirement. It was replied that it
898 adds nothing useful to say the same thing again in the context of court directions to file. But it was
899 protested that something may be added. One example that the Subcommittee would delete from the
900 Committee Note is the "blow out" provision that empowers a defendant to escape a proposed
901 settlement if a specified threshold of opt-outs is exceeded. Practice is to disclose these agreements
902 to the court in camera; the parties to the settlement do not want the class and others to know the
903 terms for fear of encouraging concerted efforts to solicit exclusion requests. It was urged that these
904 matters are better covered by the Manual for Complex litigation; there is no problem that requires
905 a "solution" by advice in the Committee Note. But it may remain possible to add a clause to the
906 proposed Note language that refers to the value of court directions for further disclosure.

907 A final question was whether the Note should refer to "trading away" advantages for the
908 class. The language was defended on the ground that the settlement negotiation process is very much
909 a trading process, in which many possible alternative packages of terms are explored and winnowed
910 down by trading off provisions for mutual advantage. But it may be possible to substitute some other
911 word. The reporter, Subcommittee chair, and committee chair were left free to decide whether to
912 say "relinquish" or something similar in place of "trading away."

913 The changes in Rule 23(e)(2) and the Committee Note language proposed by the
914 Subcommittee were approved.

915 Rule 23(e)(3), creating a "settlement opt-out," was published in alternative versions. The
916 Subcommittee recommends adoption of the second version, which provides in neutral terms that the
917 court may provide a second opportunity to opt out of a (b)(3) class settlement if the original
918 opportunity expired before settlement terms were announced. This version was favored by many of

919 the comments, although other comments favored the first version that provided a second opt-out
920 opportunity unless good cause is shown to deny the opportunity.

921 The committee voted to recommend adoption of the second version. Discussion then turned
922 to the Committee Note.

923 The first question noted that several comments opposed any settlement opt-out, and
924 suggested that perhaps these comments reflect experience in specific subject-matters. Perhaps the
925 Note could suggest that there are classes of cases that are not suited to the settlement opt-out. It was
926 decided that it would be too difficult to establish support for identifying what those cases might be.

927 A second question addressed the Subcommittee proposal to add Note language saying that
928 an agreement among the parties to settlement terms that permit exclusion may be a factor weighing
929 in favor of settlement. The language is a brief summary of many longer passages recommended for
930 deletion. It was concluded that this sentence should be retained.

931 A third question addressed Committee Note language stating that the settlement opt-out
932 reduces the influence of inertia and ignorance that apply at the time of the first opt-out opportunity.
933 The language seems weak. The committee agreed to delete this language.

934 The next question went to new language addressing the possibility that a court may wish to
935 impose terms to control the effect of a settlement opt-out. Two terms are identified: that a class
936 member who elects exclusion is bound by rulings on the merits made before the settlement, or cannot
937 participate in any other class action pursuing claims arising from the same transactions or
938 occurrences. Such terms dilute the value of the opportunity to opt out, even recognizing that courts
939 will not exact such terms in all cases. A prohibition on joining another class action, for example,
940 may defeat a central purpose for requesting exclusion — the hope that better terms can be got in
941 circumstances that do not reasonably support individual litigation. We should not discourage other
942 class actions when many members of the present class are dissatisfied with the settlement terms. And
943 we should not adopt changes that make it more difficult to bring class actions. It was responded that
944 today there is no second opportunity to opt out after settlement terms are known; it is proper to
945 suggest discretion to impose limits that avoid a "free ride." But it was protested that this Note
946 language does not interpret anything in the text of Rule 23(e)(3). The stakes are not high; it is not
947 quite right to say cautionary things about administration of this new device.

948 The discussion of terms limiting the effect of a settlement opt-out was defended on the
949 ground that the Note attempts to address objections to the settlement opt-out provision. And the
950 Note is a help in resolving uncertainties as to the consequences, particularly with respect to issue
951 preclusion. The question of "opt-out farmers," however, may be distinct.

952 A motion was approved to delete the Note sentence suggesting that the court might condition
953 exclusion on the term that a class member who opts for exclusion may not participate in another
954 class action pursuing claims arising from the same underlying transaction or occurrence.

955 Rule 23(e)(4) recognizes the right of any class member to object to a proposed settlement and
956 provides that an objection may be withdrawn only with the court's approval. Discussion began with

957 the question whether a class member must intervene to object. It was agreed that intervention is not
958 necessary to support an objection in the trial court. The distinctive question whether intervention
959 is needed to support standing to appeal is now pending in the Supreme Court and is not referred to
960 in the revised Committee Note.

961 Objection was made to suggested Committee Note language stating that the court has
962 discretion whether to provide procedural support to an objector. This sentence distills a much
963 lengthier discussion in the published Note. There were objections that the published Note went too
964 far in encouraging support for objectors, but concern remains that the rule and Note should not
965 discourage support for objectors. But shortening the statement may be even more dangerous, leaving
966 an open-ended invitation to expand support for objectors beyond present levels. "We don't need it;
967 it is dangerous." The committee voted to reject the proposed new sentence.

968 It was suggested that as published, Rule 23(e)(4)(B) seems to apply to any objector, whether
969 or not a class member. It was agreed that (B) should be restyled: "An objection made under Rule
970 23(e)(4)(A) may be withdrawn only with the court's approval." Since (A) applies only to an
971 objection by a class member, the ambiguity is removed.

972 The committee voted to adopt 23(e) as revised during the discussion.

973 *Rule 23(g)*

974 Rule 23(g) brings appointment of class counsel into Rule 23 for the first time. It was
975 introduced without further summary.

976 The first question expressed concern with the appearance of unfairness that may arise when
977 the trial judge who is to hear the case gives time so competing applications can be made and then
978 makes the appointment. It would be better to have a different judge make the appointment. The
979 class adversary will fear that the judge who selects the lawyer will be too much impressed by the
980 lawyer. The provision allowing a reasonable period to apply for appointment "may lead to an
981 internet solicitation by the court." The rule, moreover, seems tilted toward the experienced lawyer,
982 at the expense of the neophyte who actually "discovered the pollution" and filed the action.

983 A prompt reaction was that although it has been suggested that appointment of class counsel
984 might be assigned to a magistrate judge, it is better to have the appointment made by the judge
985 responsible for the class action.

986 A second reaction is that the problem of appearances arises when there is more than one
987 applicant for appointment. These circumstances occur now, and the court is involved now.
988 Adopting express provisions in Rule 23(g) reduces the appearance of unfairness by establishing a
989 regular, transparent process that is guided by explicit criteria and bounded by the standard calling
990 for appointment of the attorney best able to represent the class.

991 The problem of entrenching already entrenched class-action specialists is recognized in
992 proposed additions to the list of appointment criteria and also in new Note provisions.

993 It was suggested that the Note discussion of Rule 23(g)(2)(B) "does not seem to track the
994 rule." As published, (g)(2)(B) allows a reasonable period for applications by attorneys seeking to
995 represent the class even when there are no present competitors. It seems to invite the delay. "I just
996 don't like appointing counsel who did not file." It was responded that such appointments occur now
997 when there are parallel actions. And new language suggested for the Committee Note says that the
998 primary ground for deferring appointment would be that there is reason to anticipate competing
999 applications. Examples are provided — there are multiple class actions, or individual actions are
1000 pending on behalf of putative class members. It was suggested that these illustrations should be
1001 incorporated in the rule itself. This suggestion was resisted on the ground that these are but
1002 illustrations, and it is difficult to draft suitable rule language that does not fall short or go too far.

1003 The Subcommittee concluded that this discussion points to reconsideration of some of the
1004 Note language addressing the process for selecting among several applications. The Note can be
1005 made to flow better, and to distinguish more clearly between situations with only one applicant for
1006 class counsel and situations with rival applicants. The account must include recognition that it may
1007 be better to allow time for new applicants when the only present applicant will not provide adequate
1008 representation for the class. This concern makes it appropriate to discuss deferring decision even
1009 when there is only one applicant. But the Note should be reviewed further to ensure that it does not
1010 encourage over-use of delay to wait for competing applications.

1011 The revised Note discussion was applauded as excellent. A friendly amendment was
1012 proposed in this spirit. The first paragraph of the revised Note includes a sentence stating that the
1013 procedure and standards for appointment vary depending on whether there are multiple applicants
1014 to be class counsel. It would help to add to Rule 23(g)(2)(C) an express statement of the court's duty
1015 when there is only one applicant. A model might be found in the later Note statement that when
1016 there is only one applicant, the court's task is limited to ensuring that the applicant is adequate under
1017 the criteria specified in Rule 23(g)(1)(C). The rule does not now state that the court must assure that
1018 counsel is adequate; (2)(C) is the best place to say it.

1019 This approach was supported by observing that it is better to state the adequate representation
1020 requirement in the rule rather than resolve a possible ambiguity in the Note.

1021 A beginning draft was suggested: "If there is one applicant for appointment as class counsel
1022 the court must assure * * *." This amendment was moved for adoption.

1023 Adoption of the amendment was resisted on the ground that there is no need for it. The
1024 "must assure" language, further, may imply that the court has a continuing obligation to supervise
1025 class counsel. An alternative draft might be: "If there is one applicant for appointment as class
1026 counsel, the court must ensure that the applicant is adequate under Rule 23(c)(1)(B)."

1027 This approach was supported with the observation that there is no ambiguity in the published
1028 draft, but that the addition will "get everyone quickly and easily attuned to it." Committee members
1029 who have worked intensely with these problems "can connect the dots," but it is not so easy for those
1030 who come to the question afresh.

1031 It was protested that even as reduced, the proposed language still seems to emphasize the
1032 court's "duty to qualify counsel."

1033 An alternative was suggested for (C): "If more than one qualified applicant * * *." This
1034 addition was adopted, with leave to substitute some other word such as "adequate." It was also
1035 agreed to include in Rule 23(g)(2)(B) a statement of the standard the court should use to determine
1036 whether to appoint the only applicant. The Subcommittee was charged with drafting this provision.

1037 A motion was made to delete all of 23(g)(2)(B), eliminating any express reference in the rule
1038 to allowing a reasonable period for applications for appointment as class counsel. The motion was
1039 opposed on the ground that (B) simply describes what happens. A response was that there is no need
1040 to advertise what happens. A further response was that a good illustration is provided by the recent
1041 Seventh Circuit decision in the tax-refund-anticipation-loan case. The class action was filed after
1042 many other actions had been filed, and in face of a class action in a state court that was nearing trial.
1043 The fact that the attorneys filing the present action could provide adequate representation does not
1044 ensure that they can provide the most effective representation for the class in these circumstances,
1045 and there is good reason to anticipate that if the court delays the certification decision other counsel
1046 may apply. The Note can help, but "there is a place for this in the Rule."

1047 The committee voted to delete Rule 23(g)(2)(B). The Committee Note can be revised to
1048 express the thought expressed by (B).

1049 Attention turned to Rule 23(g)(2)(A), proposed by the Subcommittee. This subparagraph
1050 expressly recognizes the court's authority to designate interim class counsel before determining
1051 whether to certify a class. How can counsel be designated to act for a class that does not yet exist?
1052 It was urged by many voices that commonly there is much that must be done on behalf of a proposed
1053 class before a certification decision can be made. Motions are made and must be responded to.
1054 Discovery often is appropriate or necessary. The conceptual concern that a class has not yet come
1055 into recognized existence can be met by adding a few words: "The court may designate interim
1056 counsel, to act on behalf of the putative class, before determining whether to certify the action as a
1057 class action." This change was approved by the committee.

1058 It was observed that Rule 23(g) generally does a brilliant job of regulating attorney conduct
1059 without regulating attorney conduct. Duties are placed on the court and the parties, not directly on
1060 the attorneys. The one exception is the direct command of Rule 23(g)(1)(B) that class counsel must
1061 fairly and adequately represent the interests of the class. State rules of professional responsibility
1062 and many local district rules regulate the general duty to represent a client. They also address the
1063 division of fealty owed as between class and class representative as clients. The Committee Note
1064 expressly says that the obligation of class counsel may be different from the obligation that has been
1065 adopted by most state and local rules. This intrusion on state and local-rule regulation could be
1066 avoided by reframing the rule: "The court must ensure that class counsel fairly and adequately
1067 represents the interests of the class."

1068 This concern was met by recalling that many comments from class counsel welcomed Rule
1069 23(g)(1)(B). They now explain to class representative clients that the decision to frame an action

1070 as a class action imposes on counsel a professional obligation to the class that must be reconciled
1071 with the obligation to the representative client, and that the obligation to the representative client
1072 changes accordingly. But it was responded that the source of this practice now is in state rules of
1073 professional responsibility. 23 (g)(1)(B) changes that, and imposes the obligation "top-down" in the
1074 federal system. It was rejoined that this consequence already flows from Rule 23(a)(4), which
1075 establishes requirements of adequate representation by class counsel through the requirement that
1076 the representative provide adequate representation for the class.

1077 No motion was made to amend the Rule 23(g)(1)(B) statement.

1078 It was asked whether designation of interim class counsel is now the norm. It was agreed that
1079 the Note could say that the rule authorizes designation when needed.

1080 It was observed that "everyone who files will seek to be designated as a head-start in the race
1081 for appointment as class counsel." It was agreed in response that the Note could be revised to
1082 describe designation of interim class counsel not "in order" to protect class interests but "if
1083 necessary" to protect class interests.

1084 Attention was directed next to Rule 23(g)(1)(C)(iii), which provides that the court may direct
1085 potential class counsel to propose terms for attorney fees and nontaxable costs. It was urged that this
1086 provision should be deleted. The Committee Note discusses many other examples of information
1087 that applicants might be directed to provide. The explicit reference to fees provides a hint that we
1088 are ready to go back to low bidding and auctions. The response was that there were many comments
1089 and much testimony on the direction to provide fee information. We were repeatedly encouraged
1090 to get the court involved in regulating attorney fees at the beginning of the action, not to facilitate
1091 bidding but to avoid later difficulties. It helps to start thinking about these issues early. The Note
1092 explicitly says that there will be numerous class actions in which information about fees and costs
1093 is not likely to be useful. But fee information is a distinct concern in many class actions. The
1094 Federal Courts Study Committee thought that early guidelines are important. (iii) is not an
1095 expression that either favors or disfavors auctions.

1096 The provision for information about fees and nontaxable costs was questioned from a
1097 different perspective by asking whether we should view the court as a consumer of the legal services
1098 provided by class counsel. It was agreed that it does not help to view the court as consumer, but the
1099 fee topic is important nonetheless.

1100 A motion to strike the reference in 23(g)(1)(C)(iii) to proposing terms for attorney fees and
1101 nontaxable costs failed.

1102 Turning back to Rule 23(g)(1)(C)(i), it was agreed that the third "bullet," focusing on the
1103 work counsel has done in identifying or investigating potential claims in the case, should be moved
1104 up to become the first item in the list. This is a logical first point in the appointment inquiry.

1105 Further discussion led to agreement that an evaluation of counsel's "experience" should
1106 include not only frequency and duration of involvement, but also the rate of success and failure.

1107 The Committee Note on Rule 23(g)(1)(B) was discussed next, pointing to the statement that
1108 the class representative cannot command class counsel to accept or reject a settlement proposal. It
1109 was observed that we are separating counsel appointment from its present roots in Rule 23(a)(4).
1110 This is a further attenuation of the relationship between the representative and class counsel. The
1111 separation may reflect reality. But this is a fundamental policy question. The Private Securities
1112 Litigation Reform Act adopts the representative-as-client approach. Rule 23(g) assigns to the court
1113 responsibility for selecting who will be attorney for one side of the case.

1114 The response was that in many actions it is class counsel, not the class representative, who
1115 is the "main actor." The bond between attorney and representative as client may seem attenuated.
1116 There are cases in which the court looks to class counsel. The role of class representative has caused
1117 difficulties. An example is the representative who refuses settlement unless there is a large
1118 individual payoff for the representative. The Note has been stripped of case citations, but the cases
1119 confirm the Note statement. The problem cannot be made to go away by ignoring it in the Note. The
1120 Private Securities Litigation Act is a break with this tradition. The class action continues to be one
1121 on behalf of other people. Outside securities litigation, it is not the class representative's position
1122 to replace class counsel. It is proper to be concerned about the separation between class
1123 representative and class counsel. Some of the comments and testimony reflected the importance of
1124 maintaining real attorney-client relationships forged between class representative and class counsel,
1125 and the Note has been changed to reflect this concern. But Rule 23(g) is intended to adopt, in a
1126 modest way, the best practice, to bring to it standards, discipline, regularity.

1127 The committee was reminded that by putting a duty on the attorney to represent the interests
1128 of the class Rule 23(g)(1)(B) is invoking disciplinary rules. Enforcement will be not only through
1129 the court in the class action but also by state orders suspending or disbaring lawyers who fail the
1130 duty.

1131 The committee agreed that it was useful to have had this discussion, and that nothing need
1132 be changed.

1133 *Rule 23(h)*

1134 Rule 23(h) is proposed in the same mode as Rule 23(g), as a clear restatement of present good
1135 practices.

1136 A specific drafting question was asked of Rule 23(h)(2): "A class member or a party from
1137 whom payment is sought may object to the motion." In a common-fund award case, it could be
1138 argued that a class member is a party from whom payment is sought. It was agreed to clarify the
1139 separation by adding commas — "A class member, or a party from whom payment is sought, may
1140 * * *."

1141 It was observed that disciplinary rules commonly regulate the reasonableness of attorney fees.
1142 Rule 23(h) avoids the risk of trespassing on these rules by putting the obligation to determine
1143 reasonableness on the court.

1144 In a reprise of a discussion that was addressed to the Rule 23(e) Note, it was observed that
1145 the Committee Note cites a specific case. There is a view, shared by some Standing Committee
1146 members, that it is unwise to cite specific cases. Even a case that is an exemplary statement of
1147 current wisdom may pass into oblivion, or even be overruled. The advantages of invoking a good
1148 judicial discussion should not lead to frequent citation. It was agreed that if possible the Note should
1149 paraphrase, rather than cite, specific decisions.

1150 It was suggested that it is not useful to refer in the Note to the importance of judicial
1151 involvement with fee awards "to the healthy operation" of class actions. It was agreed that "healthy"
1152 would be replaced by "proper."

1153 It was asked why Rule 23(h)(1) sets specific notice requirements for a fee motion by class
1154 counsel — will there be fee motions by others? The answer is that indeed there may be fee motions
1155 by others. A person who acted to represent a putative class in the interim before appointment of
1156 class counsel, for example, may be awarded fees even though someone else was appointed as class
1157 counsel. Notice to the class of motions by persons not appointed as class counsel might be useful,
1158 but the timing of such motions often may make it impossible to combine notice of the fee application
1159 with another notice that must go out for independent reasons. Separate notice is expensive. An
1160 application by class counsel, on the other hand, can be described in the Rule 23(e) notice of
1161 settlement review. But if the class claims are adjudicated rather than settled, separate notice "in a
1162 reasonable manner" is required. These matters are discussed in the Committee Note.

1163 A motion to adopt Rule 23(h) was approved. With the revisions discussed at this meeting,
1164 the committee recommends to the Standing Committee that Rules 23(c), (e), (g), and (h) be
1165 recommended for adoption.

1166 *Minimal Diversity Jurisdiction*

1167 Judge Levi introduced discussion of a memorandum describing the need to consider minimal
1168 diversity or similar legislation that might reduce problems that arise from overlapping, duplicating,
1169 and competing class actions. These problems have been described to the Committee for many years.
1170 Most of the problems arise from class actions filed in state courts; the systems for transfer of related
1171 cases among federal courts seem to reduce to manageable proportions the problems that might arise
1172 from multiple federal filings. A year ago this committee concluded that the remaining problems are
1173 so serious as to warrant adoption of Rule 23 provisions. The proposed provisions would test the
1174 limits of Enabling Act authority, however, and also would raise questions under the anti-injunction
1175 act. Rather than ask the Standing Committee to approve publication of the proposals, it was decided
1176 in the end to seek comment by more informal means. The Reporter circulated a Call for Informal
1177 Comment. Many responses were made in the course of the hearings and written comments on the
1178 published Rule 23 proposals. These comments showed that the problems that the Committee has
1179 heard about over the last ten years persist. The problems are so important as to justify continuing
1180 work toward an answer.

1181 At the January 2002 meeting the committee considered the many comments already in hand
1182 and concluded that it is better to support legislative solutions before devoting any more effort to

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1183 contentious court rule proposals. It asked for a draft resolution on possible legislation. The
1184 memorandum in support of a resolution concludes with a set of findings and recommendations. It
1185 aims at the broad concept of legislation, without attempting to endorse any particular bill or even a
1186 particular legislative approach.

1187 The first question addressed Item 6 in the findings and recommendations. Item 6 says that
1188 legislation addressing these problems can be adopted without imposing undue burdens on federal
1189 courts. Is it proper to make this assertion? There have been many suggestions that a substantial
1190 number of cases might be drawn into the federal courts by legislation adopted to regulate state-court
1191 class actions. It was responded that the burden that might result from carefully designed legislation
1192 is not undue. Of course it is difficult to predict with certainty what the burden will be, apart from
1193 the confident prediction that the burden will depend on the particular solutions adopted. But it must
1194 be remembered that legislation can be helpful — indeed most helpful — without drawing all class
1195 actions from state courts into federal courts. The Judicial Conference Executive Committee
1196 expressed opposition in 1999 to proposed bills that seemed likely to bring all class actions to federal
1197 courts. That position need not extend to more carefully designed legislation.

1198 Another committee member said that the memorandum presents an elegant, balanced, and
1199 thoughtful summary of the problems. It does not weigh in on any side of the debate. It only urges
1200 the importance of further study. It remains important to determine who the audience will be: is it
1201 to be only the Standing Committee? Does the memorandum become a public document? Is it crafted
1202 so Congress will understand the importance of the points being made?

1203 It is clear that the memorandum can be addressed to the Standing Committee. There is
1204 reason to believe that the Standing Committee will pursue the topic within the Judicial Conference.
1205 Other Judicial Conference committees have an interest in these problems. The Federal-State
1206 Jurisdiction Committee has considered the questions raised by minimal diversity class-action bills
1207 for some years now. The Court Administration and Case Management Committee also may be
1208 interested. It will be important to follow the ordinary processes of communication among the
1209 committees.

1210 Further expressions of support led to adoption of the memorandum as the committee's
1211 statement.

1212 *Other Class-Action Questions*

1213 The committee was asked what Rule 23 topics might remain to be addressed. No other topic
1214 has been developed to a point that would justify a present vote committing the committee to further
1215 work, but any directions to help prepare for the October meeting would be helpful. Settlement
1216 classes remain a matter of active interest. The problems of future claims also remain, as witnessed
1217 by the report of the mass torts subcommittee of the Bankruptcy Administration Committee. Opt-in
1218 class proposals were suggested by several of the witnesses and comments addressed to the August
1219 2001 proposals. It would help to offer suggestions to the Subcommittee of any other subjects it
1220 should address.

1221 *Bankruptcy Committee Mass-Torts Report*

1222 The Committee on the Administration of the Bankruptcy System appointed a Subcommittee
1223 on Mass Torts to consider the proposals of the National Bankruptcy Review Commission that the
1224 bankruptcy statutes be amended to establish a system to handle "mass future claims" in bankruptcy.
1225 Judge Rosenthal acted as this committee's liaison to the subcommittee.

1226 Judge Rosenthal introduced the subcommittee report by acknowledging that it is incomplete.
1227 Some of the areas of less-than-complete analysis are reflected in the reporter's memorandum
1228 summarizing the report. The report was a group effort to point to problems that are apparent on not
1229 very searching review of the Commission recommendations.

1230 The problem of identifying mass future claims so that a representative can be appointed is
1231 real. The hope was to achieve a final resolution of future claims in bankruptcy courts. It is an
1232 ambitious and interesting set of proposals. The *Amchem* and *Ortiz* decisions mean that Rule 23 is
1233 not now a realistic response to mass future claims. So many have been searching for a solution.

1234 That the proposals are interesting does not disguise the fact that they present many problems.
1235 The most fundamental problems arise from the relationship between Article III courts and the
1236 bankruptcy courts; due process; and federalism. None of the reports goes as far as necessary to reach
1237 final answers to these problems.

1238 The subcommittee's conclusion that the Commission proposals "are an important step in the
1239 right direction" is sound if it is understood to mean that the inquiry must be continued. The
1240 recommendation would be premature if it were read as a more enthusiastic affirmation of the
1241 Commission proposals.

1242 The Commission definition of mass future claims is open-ended. The subcommittee report
1243 recommends that it be made more specific. But a workable degree of specificity might create a
1244 procedure that cannot be useful — there may be no useful circumstances in which it is possible to
1245 estimate with confidence the number of future victims and the severity and value of their injuries.
1246 These and other problems are identified, but are not explored at the level of detail that provides a
1247 basis to guess whether solutions are possible.

1248 It seems reasonable to endorse careful further study, but not to endorse adoption of the
1249 Commission recommendations. It would be premature to take the subcommittee report to the
1250 Judicial Conference. Further study by the Bankruptcy Committee would be appropriate. Or, if the
1251 task of exploring the remaining problems to a practical conclusion seems onerous, it also would be
1252 appropriate to put aside the Commission recommendations.

1253 Further discussion noted that the Commission recommendations allow a "defendant" to take
1254 all matters into the bankruptcy courts, apparently making the bankruptcy courts into courts of general
1255 jurisdiction. Although the proposal is interesting, it requires study in the years-long level of detail
1256 that has characterized this committee's study of class actions.

1257 It was noted that future claims are addressed "every day" by bankruptcy courts that deal with
1258 asbestos claims. Some of the companies going into bankruptcy say they are not insolvent because
1259 they view the claims as fraudulent. These asbestos cases are governed by a specific provision in the
1260 bankruptcy statute. It is worthwhile to keep working on these problems to see whether a more
1261 general bankruptcy statute can be adopted for other defendants.

1262 The committee concluded that it is not able to endorse the Commission recommendations
1263 as an approach to the complicated and important problems generated by anticipated mass future tort
1264 claims. The proposals are important, but further investigation and study are needed. The ongoing
1265 experience with asbestos may help. Judge Levi will transmit this conclusion to the Bankruptcy
1266 Administration Committee.

1267 *Electronic Discovery*

1268 Professor Lynk stated that since the January meeting the Discovery Subcommittee has met
1269 by conference call. He and Professor Marcus have continued to work together. Although in January
1270 the Subcommittee expected that it would now be seeking authorization to draft specific proposals
1271 for consideration at the October meeting, more work remains to be done before specific proposals
1272 may be feasible. "There is a lot of heat" in the world of practice, but there is little light to illuminate
1273 the nature of the problems of the rules approaches that might prove helpful.

1274 Professor Marcus noted the preliminary report from the Federal Judicial Center in the agenda
1275 materials. The report is in preliminary form; there is time to ask for a different approach if that
1276 might be more helpful. The FJC has pursued many inquiries. What remains now is to complete a
1277 set of ten specific case studies. The work to date, however, has not suggested any particularly clear
1278 line of inquiry or rulemaking. If better questions should be asked, it is important to describe them
1279 now.

1280 There are many approaches that could be taken to drafting new rules, but many people have
1281 expressed doubts whether changing the rules can do much to ameliorate the problems encountered
1282 in practice. There is great interest in the problems, but not much enthusiasm for any particular
1283 solutions. And the problems continue to present a series of moving targets.

1284 It was noted that the FJC study seeks to identify problems that rules changes might address,
1285 but offers few rule suggestions. Rule 37 requires an order before sanctions can be imposed. The
1286 rules do not adequately address spoliation. Discovery of computer-based information may raise such
1287 distinctive spoliation problems that we need a new and distinctive rule for them.

1288 It was agreed that the preservation-spoliation problem has been a longstanding concern.
1289 Businesses desperately want clear and reliable guidelines for record preservation policies. And even
1290 at that, they may not appreciate how truly great their problems are.

1291 Another set of new problems presented by discovery of computer-based information relate
1292 to third-party protection. Email, for example, is now used for purposes that would not have
1293 generated any form of communication a few years ago. Some companies permit use of company
1294 email facilities for personal messages. Outsiders seeking discovery of the company email records

1295 gain access to much personal information that is completely irrelevant to any litigation or the
1296 purposes of discovery. We need to explore whether there are ways to get information of the
1297 discovery to the affected individuals, and ways to protect their privacy interests.

1298 Another set of problems that may prove distinctively different with discovery of computer-
1299 based information relate to cost sharing. The problem of who should pay arises in every case. This
1300 is particularly important with discovery from nonparties. Practice for the moment seems to have
1301 developed no more acceptance of cost bearing between the parties than has developed with other
1302 modes of discovery. As to discovery from nonparties, however, it seems to be accepted that the
1303 requesting party should bear the costs of responding. But a different view was expressed that cost
1304 shifting among parties may be gaining more acceptance because of the great costs that can arise from
1305 extraordinary recovery efforts.

1306 Still another set of problems arise from the choice between responding in electronic form or
1307 in hard copy.

1308 The cost of preserving back-up tapes can be another special problem. One committee
1309 member has a client that is spending \$1,000,000 a month to preserve back-up tapes.

1310 One extreme possibility is that the use of electronic technology will be severely restricted if
1311 companies come to fear discovery.

1312 Texas has adopted specific court rules for discovery of electronic information. But so far
1313 there are no available cases to show how the rules are working.

1314 Two final observations were that special masters may be particularly useful in sorting through
1315 problems arising from discovery of computer-based information and that the committee may be
1316 driven to creating laboratory experiments that test the effects of different possible rules.

1317 *Federal Judicial Center Report*

1318 Mr. Willging described work in progress on Rule 23. A preliminary presentation was mailed
1319 out before this meeting. "Very preliminary" data have been compiled on filings and on overlapping
1320 actions. One purpose of presenting the preliminary report is to learn whether it would be helpful to
1321 present the data in different forms.

1322 Even in this preliminary stage, there are some intriguing results. The raw filings data change
1323 a lot when account is taken of consolidation and similar efforts. But such empirical work will be
1324 most effective if it can be focused on the questions that interest the committee.

1325 The same observation is true of the next step, which will inquire into the motives that guide
1326 attorneys as they choose between federal and state courts. A draft questionnaire is included in the
1327 materials: can it be better focused? The questionnaire will go to both plaintiff and defendant
1328 lawyers, seeing comparison of federal courts with state courts in a number of dimensions.

1329 Discussion confirmed that it is good to ask about the effect on forum selection of choice-of-
1330 law approaches, and about the effect of approaches to objectors.

September 5, 2002

1331 It was suggested that many lawyers seek state courts to avoid the restrictions that the *Daubert*
1332 rules place on use of expert witnesses in federal courts.

1333 Another factor to explore is the complexity of pretrial procedures. Many lawyers perceive
1334 federal pretrial practice to be more complex than the practice in state courts.

1335 One of the motives for undertaking this study is to determine whether certification standards
1336 for settlement classes in federal courts are encouraging plaintiffs to file in state courts rather than
1337 federal courts.

1338 Mr. Willging also noted that Todd Hillsee, who testified on the class-action notice provisions
1339 at the January hearing, has provided the Federal Judicial Center with draft short-form notices.
1340 Reactions of the committee to these forms would be useful.

1341 *Other Items*

1342 The relation-back provisions of Rule 15(c)(3) will be on the October agenda for discussion.
1343 A simple revision has been suggested by the opinion in *Singletary v. Pennsylvania Department of*
1344 *Corrections*, 3d Cir.2001, 266 F.3d 186. The suggestion is attractive. The specific problem is that
1345 a plaintiff who knows that it is impossible to identify an intended defendant is given less effective
1346 relief than a plaintiff who mistakenly believes that the proper defendant has been properly named.
1347 But in approaching it the committee must consider a series of questions. Perhaps the first question
1348 is how frequently the committee should act to correct interpretations of the rules that seem wrong.
1349 It is not wise, and perhaps would not be possible, to react whenever a court seems to give a wrong
1350 answer. Even when a number of courts have concurred in a seemingly wrong answer, the question
1351 may not be so important as to deserve a rule amendment. Continual amendment to provide specific
1352 answers to ever more specific questions could produce rules that are too complex and too rigid to
1353 survive. A second question is whether this specific question should be addressed without also
1354 reviewing other aspects of Rule 15(c)(3) that seem unsatisfactory. There are good reasons to
1355 question the way the rule is presently drafted. A third question, specific to Rule 15(c), is whether
1356 it is wise to continually revisit a rule that presents significant Enabling Act questions. One main
1357 function of Rule 15(c)(2) and (3) is to allow claims that would be barred by limitations in the state
1358 courts that provide the law governing the claim. Acting to expand this incursion into the realms of
1359 state law may be inappropriate.

1360 The Appellate Rules Committee has urged revision of Rule 6(e) to correct an ambiguity about
1361 the effect of the provision that when service is made by mail or other defined means "3 days shall
1362 be added to the prescribed period" for responding. This committee can take the lead by proposing
1363 an answer at the fall meeting. It will remain to be determined whether the Appellate Rules
1364 Committee will wish to publish a parallel provision for the Appellate Rules at the same time, or will
1365 prefer to await comments on a published Rule 6(e) revision.

1366 Judge Jane J. Boyle has urged that some Judicial Conference committee should consider the
1367 problems that arise from the interplay between Rule 54(d) and the increasingly antique cost
1368 provisions in 28 U.S.C. § 1920. The problem is that some courts have felt unable to adjust

1369 provisions that address the costs of preparing papers for application to video and other modern
1370 media. The committee concluded that the problem is better addressed through statutory revision than
1371 through rules amendments. The question of taxable costs has a sufficiently substantive element that
1372 it would be better not to take it on through the Enabling Act if other approaches are possible. The
1373 topic is recommended for consideration by the appropriate Judicial Conference committee.

1374 There may be a problem of notice to the Attorney General when the constitutionality of a
1375 federal statute is required. Notice is required by statute, and Rule 24(c) regulates the manner of
1376 notice. But Rule 24(c) does not work as well as it might. This problem was raised during the
1377 process of amending the Appellate Rules provisions that address these issues. The Department of
1378 Justice has confirmed that failures of the notice process are sufficiently frequent to justify
1379 consideration of new rule provisions. This topic will be placed on the fall agenda.

1380 One of two consent calendar items, 02-CV-A, was brought on for discussion. The committee
1381 is requested to do something about a district court practice that requires advance permission to file
1382 new actions after an individual litigant has been identified as a vexatious litigant. The committee
1383 concluded that this specific problem is not of the character that justifies adoption of a general
1384 national rule. This item is removed from the agenda without further action. The recommendation
1385 to remove the other consent calendar item from the agenda was approved for want of any motion to
1386 remove it from the consent calendar.

1387 It was noted that progress is being made with development of a new Admiralty Rule G to
1388 govern civil forfeiture practice. The Maritime Law Association has approved the approach taken
1389 in current drafts. It is hoped that a draft will be ready to circulate for informal comments over the
1390 summer, and to place on the agenda for the fall meeting.

1391 *Next Meeting*

The next meeting was set for October 3 and 4 in Santa Fe, New Mexico.

Respectfully submitted

Edward H. Cooper, Reporter



LEONIDAS RALPH MECHAM
Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

CLARENCE A. LEE, JR.
Associate Director

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

August 2, 2002
Via Federal Express Mail

MEMORANDUM TO JUDGES SCIRICA, LEVI, AND ROSENTHAL AND
PROFESSORS COOPER AND MARCUS

SUBJECT: *Statements of Witnesses Testifying at Class-Action Hearing*

For your information, I have attached statements of the witnesses who testified at the Senate Judiciary Committee's hearing on July 31. Dellinger's statement refers to the rules committees' position on minimal-diversity jurisdiction. Henderson's statement contains a few critical comments about the proposed Rule 23 amendments.

A handwritten signature in black ink, appearing to be "JR", written in a cursive style.

John K. Rabiej

Attachments

cc: Peter McCabe, Secretary (with attach.)

United States Senate Committee on the Judiciary

Committee Information

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"Class Action. Litigation. "

Senate Judiciary Committee
Full Committee

DATE: July 31, 2002
TIME: 10:00 AM
ROOM: SD-226

OFFICIAL HEARING NOTICE / WITNESS LIST:

July 24, 2002

NOTICE OF FULL COMMITTEE HEARING

The Senate Committee on the Judiciary will hold a hearing on Wednesday, July 31, 2002, at 10:00 a.m. in Room 226 of the Dirksen Senate Office Building, on "Class Action Litigation."

By order of the Chairman

Hearing before the
Senate Committee on the Judiciary

on

"Class Action Litigation"

Wednesday, July 31, 2002
10:00 a.m., Senate Dirksen Building Room 226

Witness List

Paul Bland
Staff Attorney
Trial Lawyers for Public Justice
Washington, DC

Walter E. Dellinger, III
Partner
O'Melveny & Myers
Washington, DC

Thomas Henderson
Chief Counsel and Senior Deputy
Lawyers' Committee for Civil Rights
Washington, DC

Lawrence Mirel
Commissioner of District of Columbia
Department of Insurance and Securities Regulation
Washington, DC

TESTIMONY

MR. PAUL BLAND, JR.

MR. WALTER E. DELLINGER, III

MR. THOMAS HENDERSON

MR. LAWRENCE MIREL

MRS. SHANEEN WAHL

MS. HILDA BANKSTON

MEMBER STATEMENTS

THE HONORABLE PATRICK LEAHY

THE HONORABLE ORRIN HATCH

THE HONORABLE RUSS FEINGOLD

THE HONORABLE HERB KOHL

- Members
- Subcommittees
- Hearings
- Nominations
- Business Meetings
- Press

Statement
United States Senate Committee on the Judiciary
Class Action Litigation.
July 31, 2002

The Honorable Patrick Leahy
United States Senator , Vermont

I hope this hearing will present a fair and balanced view of class action litigation in our state and federal courts.

It is my intention to undertake a deliberate and careful review of information from parties actually involved in class action litigation to provide a realistic picture of the benefits and problems with class action litigation.

Unfortunately, I believe that some special interest groups have distorted the state of class action litigation by relying on a few anecdotes in their ends-oriented attempt to justify moving almost all class action cases involving state law into federal court.

Instead, I hope this hearing will focus fairly on the hard evidence and facts in most class action cases. We should remember that our state-based tort system remains one of the greatest and most powerful vehicles for justice anywhere in the world. One reason for that is the availability of class action litigation to let ordinary people band together to take on powerful corporations or even their own government.

Defrauded investors, deceived consumers, victims of defective products, asbestos survivors, smokers, and thousands of other ordinary people have all been able to rely on class action lawsuits under our state-based tort system to seek and receive justice.

I am old enough to remember the civil rights battles of the 1950s and 1960s and the impact of class actions to vindicate basic rights through our courts.

The landmark Supreme Court decision in *Brown v. Board of Education* was the culmination of appeals from four class action cases, three from federal court decisions in Kansas, South Carolina and Virginia and one from a decision by the Supreme Court of Delaware.

Only the Supreme Court of Delaware, the state court, got the case right by deciding for the African-American plaintiffs. The Supreme Court of Delaware, a state court, understood before any federal court that Aseparate but equal is inherently unequal.@

More recently, the tobacco class action litigation has contributed to fundamentally change the very dynamics of tobacco and public health. For the first time, that class action litigation uncovered and presented serious and credible evidence about the tobacco industry=s 45-year campaign of deception about the dangers of cigarettes. As a result, the class action settlements negotiated by the state attorneys general and the private bar have brought about profound changes in the tobacco industry. The tobacco industry is now finally admitting on its Internet web sites that smoking causes cancer and is addictive. Before the litigation, the executives of these same companies denied under oath to Congress that smoking was addictive.

The very existence of the multi-state tobacco settlements is a credit to class actions under our

state-based civil justice system.

In fact, without the use of class actions, does anyone believe that the tobacco companies would have ever come to a negotiating table? Without the willingness of private attorneys acting on behalf of their clients, taking significant financial and professional risks, and pursuing these matters so diligently, the states would not have settlement payments for the next 25 years, which will be devoted to promoting the public health of their citizens.

Thousands, if not millions, of lives will be saved because of future public health improvements made possible by the tobacco class action settlement.

Another example of class action litigation serving the public interest is the Firestone Tire debacle. The recent national tire recall was started, in part, from the disclosure of internal corporate documents on consumer complaints of tire defects and design errors that were discovered in litigation against Bridgestone/Firestone, Inc.

Plaintiffs' attorneys turned this information over to the National Highway Traffic Safety Administration, triggering a NHTSA investigation.

On August 9, 2000, Bridgestone/Firestone recalled 6.5 million tires after they were linked to 101 fatalities, 400 injuries and 2,226 consumer complaints. Later, the NHTSA warned that another 1.4 million Firestone tires on the road may be defective.

As reported by TIME Magazine at the time, it is doubtful that the internal corporate consumer complaint information would have ever seen the light of day absent the civil justice discovery process. We all know that without consolidating procedures like class actions, it might be impossible for plaintiffs to obtain effective legal representation. Defense lawyers tend to be paid by the hour—and well paid.

Plaintiffs' lawyers in this type of setting tend to work without pay for the possibility of obtaining a portion of the proceeds, if successful. It may well prove uneconomical for counsel to take on governmental or corporate defendants if they must do so on a case-by-case, individual basis. It may be that individual claims are simply too small to be pursued.

Sometimes that is what cheaters count on and how they get away with their schemes. Cheating thousands of people "just a little" is still cheating. Class actions allow the little guys to band together, allow them to afford a competent lawyer and allow them to redress wrongdoing.

For instance, class actions made it possible for individual tobacco victims to band together to take on the powerful tobacco conglomerates in ways that individual smokers could not afford. It allows stockholders and small investors to join together to go after investment scams.

It would be criminal to leave some people with valid claims with no effective way to seek relief. I am extremely hesitant to restrict these legal rights and remedies without substantial evidence that such restrictions are justified and carefully circumscribed.

To those who think it is good politics to attack the plaintiffs' lawyers who risk much so that their clients may obtain a measure of justice, I hope they will think again.

I am hesitant to restrict legal rights and remedies in an era of corporate irresponsibility and executive misconduct. I attended yesterday's White House signing ceremony of the Sarbanes-Oxley Act and heard bipartisan demands for holding corporate wrongdoers accountable for their actions. I agree that now is

not the time to shield corporate wrongdoers from justice.

Instead, Congress should be taking all the steps needed to hold accountable for their actions those who have defrauded so many and threatened the economic security of small investors, those on pensions, those whose savings for their children's college education has been lost and those hardworking Americans who are being left with over \$7 trillion in stock market losses.

The legal rights and procedures that protect consumers, investors and employees matter now more than ever.

Just a few months ago, a group of investors recovered millions in lost investments under state corporate fraud laws in a state class action case. In *Baptist Foundation of Arizona v. Arthur Andersen*, mostly elderly investors banded together to successfully recoup \$217 million from Arthur Andersen for questionable accounting practices surrounding an investment trust.

This Arthur Andersen case is just one example of how state-based class action litigation may help hold corporate wrongdoers accountable and help defrauded investors recoup their losses.

I look forward to hearing from our witnesses as the Committee begins the process of undertaking a fair and balanced review of class action litigation in our state and federal courts. In so doing, I want to say that while I may disagree with Senator Kohl about the problem and needed solution in this area, I do so respectfully. It is his request that we honor by holding this hearing. I am happy to accommodate him in this regard.

I hope that we can find common ground on another issue of significance with respect to litigation and that is with respect to asbestos litigation. I want to work with all Senators on both sides of the aisle in the coming months to see if we cannot devise a better process for fairly compensating those suffering and developing afflictions from asbestos. This is a matter to which I would like to see us turn our attention in September and beyond. The Supreme Court issued us a challenge to help with asbestos litigation and with the good faith of lawmakers and those from all sides of the issues we can make a real difference.

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Statement
United States Senate Committee on the Judiciary
Class Action Litigation.
July 31, 2002

The Honorable Orrin Hatch
United States Senator , Utah

Mr. Chairman, I would like to thank you and Senator Kohl for scheduling this hearing on the important topic of class action litigation. I am pleased also that the Chairman has agreed to hold a hearing in September on the problems with asbestos litigation. I am hopeful that we can work together on that issue.

Over the past decade, it has become clear that abuses of the class action system have reached epidemic levels. In recent years, it has become equally clear that the ultimate victims of this epidemic are poorly-represented class members and individual consumers throughout the nation. The Class Action Fairness Act of 2002 represents a modest, measured effort to remedy the plague of abuses, inconsistencies, and inefficiencies that infest our current system of class action litigation.

It is essential that we address the abuses that are running rampant in our current class action litigation system. Frequently, plaintiff class members are not adequately informed of their rights or of the terms and practical implications of a proposed settlement. Too often judges approve settlements that primarily benefit the class counsel, rather than the class members. There are numerous examples of settlements where class members receive little or nothing, while attorneys receive millions of dollars in fees. Multiple class action suits asserting the same claims on behalf of the same plaintiffs are routinely filed in different state courts, causing judicial inefficiencies and encouraging collusive settlement behavior. And state courts are more frequently certifying national classes leading to rulings that infringe upon or conflict with the established laws and policies of other states.

Despite the mountains of evidence demonstrating the drastically increasing harms caused by class action abuses, I am sure that several here today will attempt to deny the existence of any problem at all. Others will try to confuse the issue with spurious claims that proposed reforms would somehow disadvantage victims with legitimate claims or further worsen class action abuses. Others may even contend that past legislative reforms have contributed to recent financial debacles and that the proposed reforms will encourage more. Such claims are nothing more than red herrings intended to divert today's debate from the real issues.

In this regard let me emphasize a few points regarding S. 1712. First, this bill does not seek to eliminate state court class action litigation. Class action suits brought in state courts have proven in many contexts to be an effective and desirable tool for protecting civil and consumer rights. Nor do the reforms we will discuss today in any way diminish the rights or practical ability of victims to band together to pursue their claims against large corporations. In fact, we have included several consumer protection provisions in our legislation that I feel strongly will substantially improve plaintiffs' chances of achieving a fair result in any settlement proposal.

There are three key components to S. 1712. First, the bill implements consumer protections against abusive settlements by: (1) requiring simplified notices that explain to class members the terms of proposed class action settlements and their rights with respect to the proposed settlement in "plain English"; (2) enhancing judicial scrutiny of coupon settlements; (3) providing a standard for judicial approval of settlements that would result in a net monetary loss to plaintiffs; (4) prohibiting "bounties" to class representatives; and (5) prohibiting settlements that favor class members based upon geographic

proximity to the courthouse.

Second, the bill requires that notice of class action settlements be sent to appropriate state and federal authorities to provide them with sufficient information to determine whether the settlement is in the best interest of the citizens they represent.

Finally, the bill amends the diversity-of-citizenship jurisdiction statute to allow large interstate class actions to be adjudicated in Federal court by granting jurisdiction in class actions where there is "minimal diversity" and the aggregate amount in controversy among all class members exceeds \$2 million.

Although some critics have argued that this amendment to diversity jurisdiction somehow violates the principles of federalism or is inconsistent with the Constitution, I fully agree with Mr. Dellinger, who will testify today, that it is "difficult to understand any objection to the goal of bringing to the federal court cases of genuine national importance that fall clearly with the jurisdiction conferred on those courts by Article III of the Constitution."

Lastly, I would like to express my appreciation to the many individuals who have shared with me the details of their experiences with class action litigation. In particular, I am grateful to those victims of various abuses of the current system who have come forward and told their stories in the hope that something positive might come out of their terrible experiences.

In particular, I would like to acknowledge Irene Taylor of Tyler, Texas, who is here today. Mrs. Taylor was bilked out of approximately \$20,000 in a telemarketing scam that defrauded senior citizens out of more than \$200 million. In a class action brought in Madison County, Illinois, the attorneys purportedly representing Mrs. Taylor negotiated a proposed settlement which will exclude her from any recovery whatsoever.

I would also like to recognize Martha Preston of Baraboo, Wisconsin. Ms. Preston cannot not be here for health reasons, but has sent us a letter that I will submit for the record. Ms. Preston was involved in the famous BancBoston case, brought in Alabama state court, which involved the bank's failure to post interest to mortgage escrow accounts in a prompt manner. Although Ms. Preston did receive a settlement of about \$4, approximately \$95 was deducted from her account to help pay the class counsel's legal fees of \$8.5 million. Notably, Ms. Preston testified before this committee five years ago asking us to stop these abusive class action lawsuits, but it appears that – at least thus far – her plea has not been heard.

I would like to ask unanimous consent that written statements from Martha Preston, the Chamber of Commerce, America's Community Bankers, Irving Cohen, Patrick Baird and the American Council of Life Insurers be inserted in the record for today's hearing.

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Statement
United States Senate Committee on the Judiciary
Class Action Litigation.
July 31, 2002

The Honorable Russ Feingold
United States Senator , Wisconsin

Mr. Chairman, I commend you for holding this hearing. I know my good friend and colleague from Wisconsin feels strongly about this bill, and I'm glad the committee is taking the time to examine it.

I have opposed the Class Action Fairness Act in the past, and I am likely to do so in the future. The main reason for my opposition is that I do not think the bill is fair, despite its title. I do not think the bill is fair to citizens who are injured by corporate wrongdoers and are entitled to prompt and fair resolution of their claims in a court of law. I do not think it is fair to our state courts, which are treated by this bill as if they be cannot be trusted to issue fair judgements in cases brought before them. I do not think it is fair to state legislatures, which are entitled to have the laws they pass to protect their citizens interpreted and applied by their own courts.

Make no mistake, by loosening the requirements for federal diversity jurisdiction over class actions, S. 1712 will result in nearly all class actions being removed to federal court. This is a radical change in our federal system of justice. We have 50 states in this country, Mr. Chairman, with their own laws and courts. State courts are an integral part of our system of justice. They have worked well for our entire history. It is hard to imagine why this committee, which includes many ardent defenders of federalism and the prerogatives of state courts and state lawmakers, would support this wholesale stripping of jurisdiction from the states over class actions. In my opinion, the need for such a radical step has not been demonstrated.

Yes, there are abuses in some class actions suits. Some of the most disturbing involve class action settlements that offer only discount coupons to the members of the class and big payoffs to the plaintiffs' lawyers. Incidentally, these types of settlements are also favored by corporate wrongdoers, since they cost much less than providing real damages. I am pleased to see that the sponsors of the bill in this Congress have made an effort to address some class action abuses specifically, rather than just assume that they will go away if the bills are removed to federal court. I believe that if we are serious about addressing coupon settlements and other abuses, there are more efficient ways to accomplish that goal. But the fact remains that abuses have occurred in federal as well as state class actions. This bill is therefore more about federalizing class actions than about reducing class action abuse.

Mr. Chairman, class actions are an extremely important tool in our justice system. They allow plaintiffs with very small claims to band together to seek redress. Lawsuits are expensive, so without the opportunity to pursue a class action, a single plaintiff in many cases simply cannot afford his or her day in court. But with a class action, justice can be done and compensation can be obtained.

There are three possible outcomes of this bill's going into effect. Either the state courts will be deluged with individual claims, since class actions can no longer be maintained there, or there will be a huge increase in the workload of the federal courts, or many injured people will never get redress for their injuries. I don't believe any of these three choices are acceptable.

Particularly troubling is the increase in the workload of the federal courts. These courts are already overloaded. This Committee has unfortunately led the way in bringing more and more litigation to the

federal courts, particularly criminal cases. And yet there is a shortage of federal judges, as our friends on the Republican side constantly complain. Criminal cases, of course, take precedence in the federal courts because of the Speedy Trial Act. So the net result of removing virtually all class actions to federal court will be to delay those cases. There is an old saying with which I'm sure we're all familiar: Justice delayed is justice denied. I fear that this bill will make that aphorism a reality for too many victims of corporate misbehavior.

Some in the business community have expressed concern about nationwide class actions, like some of the tobacco litigation, being resolved in a single state court. I can understand why that might seem unfair to some. But this bill doesn't just address that situation. It also prevents a group of plaintiffs who are all from the same state from pursuing a class action in their own state if the primary defendant is incorporated in another state. That doesn't seem right to me, particularly because corporations subject themselves to the laws of a state and its courts when they conduct business in that state. We are long past the point in our history when it can be plausibly argued that litigants cannot get a fair shake in another state's court.

Mr. Chairman, I look forward to learning more about this year's version of the "Class Action Fairness Act." But unless I decide that it is truly fair to consumers as well as corporate defendants, I will not support it. Again, I commend you for holding this hearing to help us make this determination.

Thank you.

Statement
United States Senate Committee on the Judiciary
Class Action Litigation.
July 31, 2002

The Honorable Herb Kohl
United States Senator , Wisconsin

Mr. Chairman, thank you for calling today's hearing on class action abuses, an issue of increasing concern to many of us.

We have a simple story to tell. Consumers are getting the short end of the stick in class action cases, recovering coupons or pocket change, while their lawyers reap millions.

Our remedy is straightforward. Class action notices should be written in plain English so consumers understand their rights and responsibilities. Second, state attorneys general should be notified of proposed class action settlements to stop abusive cases if they want. Third, a class action consumer bill of rights will help limit coupon or other unfair settlements.

Finally, we allow many class action lawsuits to be removed to federal court. This is only common sense. These are national cases affecting consumers in 50 states. If the court rules were being drafted today, these are exactly the types of cases which we would want and expect to be tried in federal court. Stories of nightmare class action settlements that affect consumers around the country are all too frequent. For example, a suit against Blockbuster video yielded dollar off coupons for future video rentals for the plaintiffs while their attorneys collected \$9.25 million. In California state court, a class of 40 million consumers received \$13 rebates on their next purchase of a computer or monitor – in other words they had to purchase hundreds of dollars more of the defendants' product to redeem the coupons. In essence, the plaintiffs received nothing, while their attorneys took almost \$6 million in legal fees. We could list many, many more examples.

No one can argue with a straight face that the class action process is not in serious need of reform.

We do not claim that this bill is perfect. We are happy to entertain other proposals in an effort to address the class action problem. But, we do feel that we are on the right track. The consumer protections in our bill go a long way to stopping cases like the one involving Martha Preston of Baraboo, Wisconsin who was a member of the Bank of Boston case. When her class action suit was over, Mrs. Preston had technically won the case, but ended up owing \$75 to her lawyers and defending a lawsuit that her own lawyers filed against in her state court. Under our bill that will never happen again.

Thank you, Mr. Chairman.



Testimony
United States Senate Committee on the Judiciary
Class Action Litigation.
July 31, 2002

Mr. Walter E. Dellinger, III
Partner , O'Melveny & Meyers

The financial scandals of recent months have eroded confidence in important public and private institutions. As Congress realized, private interests were manipulating, and some cases evading, rules intended to protect the public by ensuring openness and accountability in corporate decisionmaking. Congress acted promptly and decisively by enacting corrective legislation.

There remains another problem of accountability and openness, one that affects the institutions of government we most expect to act fairly, openly, and impartially in the public interest – the courts. The problem relates to the startling explosion in class action litigation over the past decade. I say “relates to” because, while others have identified the problem as the very existence of an increase class-action litigation, I want to emphasize a somewhat different point. The concern I have come to share arises from the evidence showing an extraordinary concentration of class action litigation in certain state courts – certain county courts, to be precise. The empirical and anecdotal evidence I have seen in respect to the performance of these courts in far too many cases gives me great concern that the rights of truly injured individual plaintiffs, as well as the rights of corporate defendants, have fallen victim to manipulation, and even evasion, of settled rules – rules that, no less than the financial disclosure laws, are intended to ensure openness and accountability, as well as fundamental fairness, in the judicial resolution of major disputes with nationwide consequences.

This hearing will not be the first time Congress has heard of these problems, but it should be the last: I believe Congress has before it all that it needs to recognize that the Class Action Fairness Act of 2002 is a measured and appropriate response to a problem that is not going to go away in the absence of legislative action.

The principal purpose and effect of the bill is undeniably modest: it merely adjusts the rules of diversity jurisdiction so that certain large multi-party cases – those with true nationwide compass, affecting many or even all states at once – will be litigated in the federal courts rather than in the courts of just one state (or county) or another. The bill will not eliminate a single class action that satisfies the standards for basic fairness already set forth in the federal rules governing class actions. What it will do is to ensure that all nationwide class actions satisfy at least those basic standards.

It is difficult to understand any objection to the goal of bringing to the federal court cases of genuine national importance that fall clearly within the jurisdiction conferred on those courts by Article III of the Constitution.

When the Framers drafted the Constitution, they purposely entrusted to Congress the authority to give federal courts jurisdiction over disputes among persons residing in different states, in order to avoid the possibility of state court bias in favor of local litigants and to prevent “uneven” justice from interfering with the conduct of interstate commerce. Unfortunately, over the years, statutory gaps in federal diversity jurisdiction have prevented most interstate class actions from being heard in federal court. S. 1712 would correct this anomaly, helping to restore faith in the fairness and integrity of the judicial process.

I. THE SCOPE OF THE PROBLEM: GROWING UNFAIRNESS IN CLASS ACTION LITIGATION

Class actions are not wrong in principle. To the contrary, their true purpose is noble – to vindicate the rights of large groups of individuals who sought justice for civil rights violations and other wrongs but could not achieve such justice individually. Without question, that honorable intent has been fulfilled in many cases over the years. And it has often been achieved fairly, for in the federal courts and in the courts of most states, certain important rules are followed that ensure cases will only be litigated as class actions when doing so will be fair and just both to individual plaintiffs and to defendants. These rules

require that the factual and legal claims be common to every member of the class, and that there be no issue that would divide class members against one another. These rules are intended to protect “unnamed” members of the plaintiff class, by ensuring that their interests will be adequately represented – and protected – in the prosecution of the case by the named plaintiffs and their attorneys.

Such rules also protect defendants, because if a class is certified in the absence of these restrictions, a large award reflecting the alleged injuries of all the class members may be imposed upon a defendant, even though important differences in the facts and/or law relevant to their individual cases might well have meant that many of them actually would have been entitled to no recovery at all, had their cases been tried individually.

The problem that concerns me is this: there is evidence establishing a strong trend of concentrated class action filings in recent years in just a few state-court forums. It appears to be generally understood that certain county courts will apply very lax standards in determining which cases are appropriately heard as class actions. The evidence of this trend includes:

- A preliminary report on a major empirical research project by RAND’s Institute for Civil Justice (“ICJ”) observed a “doubling or tripling of the number of putative class actions” that was “concentrated in the state courts.”
- A survey indicated that while federal court class actions had increased somewhat over the past decade, the frequency of state court class action filings had increased 1,315 percent – with most of the cases seeking to certify nationwide or multi-state classes.
- The final report on the RAND/ICJ class action study confirmed the explosive growth in the number of state court class actions and concluded that class actions “were more prevalent” in certain state courts “than one would expect on the basis of population.”
- And an empirical research article published in the HARVARD JOURNAL FOR LAW AND PUBLIC POLICY last year identified certain “magnet” county courts that have earned “class action-friendly” reputations and are experiencing dramatic increases in class action filings. For example, in the Circuit Court of Madison County, Illinois, the number of class action filings in the county per year has increased 1850 percent over the last three years. Most of these new cases are led by attorneys outside the county, and nearly all sought to certify nationwide classes in disputes that have little, if any, connection to Madison County.

As I have suggested, a predictable consequence of all this is injury not just to the defendants subjected to these cases, but to the unnamed plaintiffs who are swept into the litigation with little knowledge, no participation, and inadequate representation by named plaintiffs whose rights and interest may differ significantly from their own. The risk to class members’ rights when basic class action rules are ignored is especially acute if a corporate defendant succumbs to the pressure to resolve the case by agreeing to a settlement in which individual class member recoveries are small (or even non-existent) in comparison to the fees paid to the lawyers who filed the action, as has been reported in press accounts. A more systematic look at where the money goes in class settlements was undertaken by the Institute for Civil Justice/RAND in a study jointly funded by the plaintiffs’ and defense bar. That study indicates that in state court consumer class action settlements (i.e., non-personal injury monetary relief cases), the class counsel frequently receive more money than all class members combined. Significantly, another study found that this phenomenon was not occurring in federal courts – “[i]n most [class actions handled by federal courts], net monetary distributions to the class exceeded attorneys’ fees by substantial margins. I do not mean to suggest by this that plaintiffs’ lawyers have no legitimate interest in compensation for work done on successful case, or that all class action settlements are unfair. What I am saying is that class action filings have increased disproportionately in just a few jurisdictions for the apparent reason that those jurisdictions are less likely to enforce class-action rules that exist to ensure full representation of the interests of absent class members, whose interests all too often are not fully protected.

The question, then, is what Congress should do to control the unfairness to plaintiffs and defendants resulting from improper state-court adjudication of the important class action device.

II. THE CLASS ACTION FAIRNESS ACT: A MODEST SOLUTION TO GROWING STATE

COURT CLASS ACTION UNFAIRNESS.

While the class action problem is a serious and costly one, the solution is actually quite simple. In fact, 200 years ago, the Framers of the U.S. Constitution actually foresaw – and tried to prevent – the very types of problems that are occurring in state court class actions when they authorized giving our federal courts “diversity jurisdiction” over cases that involve parties from different states (like class actions). Unfortunately, the scope of that jurisdictional authority, set forth in Article III of the U.S. Constitution, has been limited statutorily in a way that inadvertently excludes most interstate class actions from federal court – and that inadvertence is a major source of the state court class action problem. By correcting this anomaly and enabling multi-state class actions to be heard in federal courts, the Class Action Fairness Act of 2002 would stem the flow of interstate class actions into select state courts that have developed reputations as class-action friendly venues, and thereby significantly curtail the unfairness that inevitably results.

Although the Constitution generally leaves to state courts the adjudication of local questions arising under state law, it specifically extends federal jurisdiction to include one category of cases involving issues of state law – “diversity” cases, referred to in the Constitution as suits “between Citizens of different States.” The Framers established the concept of federal diversity jurisdiction to ensure that local biases would not affect the outcome of disputes between in-state plaintiffs and out-of-state defendants. Diversity jurisdiction was designed not only to diminish the risk of uneven justice, but also to protect the reputation of our courts: “to shore up confidence in the judicial system by preventing even the appearance of discrimination in favor of local residents.” The Framers reasoned that some state courts might discriminate against out-of-state businesses engaged in interstate commerce and that allowing these cases to be heard in federal court would ensure the availability of a fair, uniform and efficient forum for adjudicating interstate commercial disputes. Thus, since the nation’s inception, diversity jurisdiction has served to guarantee that parties of different state citizenship have a means of resolving their legal differences on a level playing field in a manner that nurtures interstate commerce. As Judge John J. Parker noted “[n]o power exercised under the Constitution . . . had greater influence in welding these United States into a single nation [than diversity jurisdiction]; nothing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment into various parts of the Union, and nothing has been so potent in sustaining the public credit and the sanctity of private contracts.”

So why can’t interstate class actions be heard in federal court now? The problem is that in enacting the diversity jurisdiction statute, Congress did not exercise the full authority granted under Article III for diversity jurisdiction. Instead, Congress sought to limit diversity jurisdiction to cases that are large and that have real interstate implications. Thus, under 28 U.S.C. § 1332, an action is subject to federal diversity jurisdiction only where the parties are “completely” diverse (i.e., where no plaintiff is a citizen of the same state where any defendant is deemed to be a citizen) and where each plaintiff asserts claims that exceed a threshold amount in controversy – currently set at \$75,000.

Although class actions would appear to meet these criteria because they usually involve a lot of money and parties from multiple jurisdictions, section 1332 tends to exclude class actions from federal courts, while allowing into federal courts much smaller single-plaintiff cases having few (if any) interstate ramifications. There are two reasons for this phenomenon:

- First, the diversity statute has been interpreted to require “complete” diversity, such that diversity jurisdiction is lacking whenever any single plaintiff is a citizen of the same state as any single defendant. Thus, federal jurisdiction in multiple-state cases of national importance can easily be avoided by the simple expedient of including at least one named plaintiff and defendant that share a common state citizenship (e.g., by adding one small local retailer as a defendant in a case that is principally targeted at an out-of-state manufacturer).
- Second, courts have held that a class action satisfies the jurisdictional amount requirement only if it can be shown that every member of the proposed class has separate and distinct claims exceeding \$75,000 – it is not enough that the entire action puts \$75,000 in controversy. Although some federal

courts have questioned the breadth and current vitality of this rule, even a liberal interpretation (which allows a case into federal court as long as at least one plaintiff's claims raise more than \$75,000 in controversy) still bars most interstate class actions from federal court. Again, a class action can easily be configured to ensure that at least one class member does not satisfy the minimum amount, or by seeking \$74,999 in recovery on behalf of each and every plaintiff and class member. Either way, attorneys bringing class actions can manage to stay out of federal court – and have the action tried in the state court in the county of their choosing – even though the total amount at stake in such a class action might exceed hundreds of millions of dollars and have true multistate national implications.

Thus, we are left with the strange, and in my view, indefensible situation: Federal courts have jurisdiction over a garden-variety state law claim arising out of an auto accident between a driver from one state and a driver from another state, or a slip-and-fall by a Virginia plaintiff in a Maryland convenience store – as long as the plaintiff alleges medical bills, lost wages and other damages amounting to \$75,001. But at the same time, federal jurisdiction does not encompass large-scale, interstate class actions involving thousands of plaintiffs from multiple states, defendants from many states, the laws of several states, and hundreds of millions of dollars – cases that have obvious and significant implications for the national economy.

S. 1712 would correct this anomaly by amending the diversity statute to provide for federal jurisdiction over interstate class actions. Specifically, S. 1712 would allow federal courts to adjudicate class actions (as well as mass joinder actions with more than 100 plaintiffs) in which any of the plaintiffs (named or unnamed) or defendants come from different states. Moreover, this bill would change the amount-in-controversy threshold to allow class actions into federal court as long as the aggregate claims exceed \$2 million. Significantly, however, the bill does not extend federal jurisdiction to encompass truly “intra-state” class actions, i.e., cases in which the claims are governed primarily by the laws of the state in which the case is filed, and the majority of the plaintiffs and the primary defendants are citizens of that state. The legislation therefore allows federal courts to exercise jurisdiction over substantial interstate class actions with significant nationwide commercial implications, while retaining exclusive state court jurisdiction over more local class actions that principally involve parties from that state and application of that state's own laws.

Although S. 1712 is a modest bill, it would go a long way toward preventing the types of bias and uneven justice that are leading to class action unfairness in certain state courts. The legislation would also eliminate concerns that local prejudices are stacking the deck against out-of-state defendants in many local courts that have become class action “magnets.” As the Washington Post put it recently: This corrupt system is made possible to some degree because of how difficult it is to yank cases from state court and move them into the federal system – where judges tend to examine them more skeptically. The bill would expand the jurisdiction of the federal courts, permitting easier removal of state actions. This would allow greater uniformity around the country in considering these cases. . . . And it would mean that cases of national importance would be decided by courts that represent the nation at large. This is a modest step – as are the bill's other provisions, which attempt to curb the uglier abuses of the class action system.

Critics of this bill have argued in the past that it is unconstitutional, that it will prevent truly aggrieved people from filing class actions, and that it undermines core federalism principles. These criticisms are misplaced.

The category of cases encompassed by S. 1712 clearly falls within the “judicial Power of the United States” set forth in Article III of the Constitution. As I noted earlier, the only reason that class actions are currently excluded from federal court is that the modern-day class action device did not exist back in the late eighteenth century when Congress established the basic framework for determining which cases should be permitted in the federal courts under the Article III diversity jurisdiction authority. In fact, S. 1712 would fulfill the intentions of the Framers because the rationales that underlie the diversity jurisdiction concept apply with equal – if not greater – force to interstate class actions. Class actions squarely implicate the Framers' concern with preserving national standards for regulating and protecting

interstate commerce through the exercise of diversity jurisdiction. In fact, the substantial federal interest in protecting interstate commerce is an integral part of our constitutional history, as much of the impetus for calling the Constitution Convention stemmed from a general concern that the Articles of Confederation provided the federal government with too little authority to regulate interstate commerce. As Chief Justice Marshall recognized early on, the Commerce Clause embodies the substantial federal interest in regulating “that commerce which concerns more States than one,” as distinguished from “the exclusively internal commerce of a State,” which is more properly the concern of the states alone. The large-scale, interstate class actions addressed by this bill will, in every instance, involve “that commerce which concerns more States than one.”

In sum, if Congress were starting anew to define what kinds of cases should be included within the scope of diversity jurisdiction, interstate class actions would surely top the list, since they typically involve the largest amounts in controversy, the most people, and the most substantial interstate commerce implications. S. 1712’s extension of federal courts’ diversity jurisdiction to cover interstate class actions is thus entirely in keeping with the scope of the federal judicial power in Article III, and also with the Framers’ intent that Congress define the contours of federal jurisdiction (within constitutional limitations) in accordance with the national interest.

S. 1712 would not hamper the filing – or litigation – of valid class actions. This legislation would not prohibit any class actions from being filed, since it does not address whether class actions may be brought. Indeed, it does not alter substantive law at all; it makes no changes in any person’s rights or ability to assert claims. Instead, it only addresses where a particular type of class action should be adjudicated – namely, interstate class actions that involve plaintiffs and defendants from several states and that call for the interpretation and application of the laws of many different states. To be sure, this may mean that some class actions currently being certified in some state courts will not be heard as class actions – but only those that should not be class actions, because they do not satisfy the basic requirements of fairness and due process too often ignored in those courts.

The bill also provides affirmative protections for class members’ rights when the action is filed in federal court. The bill contains a “consumer bill of rights,” which seeks to help class members understand their rights and to protect consumers from unfair settlements. As to class actions in federal courts, that “bill of rights” would require:

- That written notice of proposed class settlements be provided to class members in a clearer, simpler format.
- That coupon or other non-cash settlements not be approved unless the court holds a hearing and makes a written finding that the settlement is fair, reasonable, and adequate.
- The rejection of proposed settlements that result in a net loss for the class members, unless there is a written finding that the non-monetary benefits to the class members outweigh any loss precipitated by the terms of the settlement.
- The rejection of proposed settlements that either (a) provide greater recoveries to certain class members based on residencies in closer proximity to the court or (b) provide unreasonable “bounties” to the class representatives.
- That specified federal and state officials be notified of proposed settlements and provided an opportunity to comment on the adequacy of the proposal.

S. 1712 would not undermine federalism principles. One of the most surprising criticisms that I have heard about this bill is that it would constitute an unwarranted federal intrusion into the ability of states to interpret their own substantive state laws and experiment with class action lawsuits. That line of reasoning reflects a wholly misguided understanding of federalism – what I would label “false federalism.” In fact, contrary to these concerns, this legislation would protect the prerogative of states to determine their own laws and policies by restricting the ability of state courts to dictate the laws of other states.

Importantly, the class action legislation does not contemplate any federal displacement of state policy choices manifested in substantive law. Indeed, the proposed legislation does not touch on substantive

law in any manner. Instead, the legislation would apply uniform, federal procedural requirements to a narrow, carefully defined group of lawsuits with national economic impact. Moreover, the legislation's exclusion of federal jurisdiction over "intra-state" cases would specifically respect and maintain a state's authority to apply its own laws in cases that primarily involve parties from its own state. Under the current system, many state courts faced with interstate class actions have undertaken to dictate the substantive laws of other states by applying their own laws to all other states, resulting in a breach of federalism principles by fellow states (not by the federal government). And because the state court decision has binding effect everywhere by virtue of the Full Faith and Credit Clause, the other states have no way of revisiting the interpretation of their own laws. Certainly, a state does not have any cognizable, federalism-based interest in interpreting, applying, and thereby dictating the substantive law of other states. S. 1712 would curb this disturbing trend.

A good example of the federalism problems inherent in the current system arises out of a nationwide insurance case in Illinois that was upheld by a state appellate court in the face of objections from a host of constituencies – including Public Citizen, the Attorneys General of Massachusetts, New York, Pennsylvania, and Nevada, and the National Association of State Insurance Commissioners. The specific issue in that multi-billion dollar, nationwide class action was whether auto insurers' use of "aftermarket" auto parts in repairs (as distinguished from parts made by the original manufacturer) amounts to fraudulent behavior. The Illinois court applied Illinois law to all fifty states even though state policy on the use of aftermarket parts varies widely: Some states, in fact, encourage or require insurers to use aftermarket parts in an effort to reduce insurance rates. According to an article in *The New York Times* about the case, the Illinois court's ruling "overturn[ed] insurance regulations or state laws in New York, Massachusetts, and Hawaii, among other places," creating "what amounts to a national rule on insurance."

In contrast, federal courts have exhibited particular sensitivity to the variations in substantive law among the different states, in accordance with core principles of federalism. Moreover, when federal courts apply state law pursuant to their diversity jurisdiction, there is no danger of a bias in favor of any particular state's laws (which is not the case when one state decides to apply its own laws to all other states). Indeed, that is the basic premise underlying diversity jurisdiction, which promotes federalism principles.

Federal courts can handle the additional work entailed by expanded class action jurisdiction. Another criticism I have heard of this bill is that it would put too big a burden on federal courts. The real problem is that the current system places too large a burden on state courts. Since 1984, civil filings in state trial courts have increased by 28 percent, versus a four percent increase in federal courts. And even more tellingly, state court trial judges are assigned, on average, upwards of 2,000 new cases every year. In contrast, each federal judge was assigned an average of only 454 new cases last year.

Moreover, federal courts have more resources at their disposal to adjudicate large, interstate class actions. Virtually all federal court judges have two or three law clerks on staff; state court judges typically have none. And federal court judges are usually able to delegate some aspects of their class action cases (e.g., discovery issues) to magistrate judges or special masters; such personnel are usually not available to state court judges. In addition, federal courts can litigate overlapping class actions more effectively by virtue of multidistrict litigation procedures. When 25 duplicative class actions are filed in different state courts (a not atypical situation), each is separately litigated in a different court system, and the parties and the court therefore must engage in the wasteful exercise of separately handling such overlapping cases. When 25 duplicative class actions are filed in different federal courts, they are typically consolidated for pretrial proceedings in a multidistrict litigation proceeding under a federal statute that allows for such coordination.

I have heard suggestions that the federal judiciary opposes S. 1712 on the ground that it would unnecessarily increase the workload of federal courts. I therefore find it noteworthy that within the past several months, two key committees of the federal Judicial Conference – the Standing Committee on Rules and Procedure and the Advisory Committee on Civil Rules – have specifically endorsed the

concept of enlarging federal jurisdiction over certain class actions through “minimal diversity legislation.” Both committees embraced a finding that the wave of class actions in various state courts competing with each other and with class actions in federal courts

create[s] problems that: (a) threaten the resolution and settlement of such actions on terms that are fair to class members, (b) defeat appropriate judicial supervision, (c) waste judicial resources, (d) lead to forum shopping, (e) burden litigants with the expenses and burdens of multiple litigation of the same issues, and (f) place conscientious class counsel at a potential disadvantage.

The committees also concluded that

[l]arge nationwide and multi-state class actions, involving class members from multiple states who have been injured in multiple states, are the kind of national litigation consistent with the purposes of diversity litigation and appropriate to jurisdiction in federal court. Federal jurisdiction protects the interests of all states outside the forum state, including the many states that draw back from the choice-of-law problems that inhere in nationwide and multi-state classes.

Conclusion

S. 1712 would substantially ameliorate present problems with unfair state-court class actions by giving federal courts jurisdiction over most interstate class actions and thereby making it harder for plaintiffs’ lawyers to avoid the more rigorous scrutiny that is typically afforded to class action settlements by federal judges.

At the same time, it would comport with the intention of the Framers, who envisioned that large, multi-state cases would be heard in federal court. As I noted earlier in my testimony, current law has resulted in an anomaly under which federal courts have jurisdiction over “slip-and-fall” cases in which a plaintiff steps over state lines, trips in a convenience store and seeks \$75,000 in damages, lost wages and medical expenses; at the same time, however, federal courts are barred from adjudicating most interstate class actions even though these cases typically involve millions of dollars and implicate more “national” issues. By ensuring that interstate class actions can be heard by federal courts, this bill would not only fulfill the intention of the Framers, but would also substantially diminish class action abuse, promote federalism principles, and allow for the more efficient resolution of duplicative class actions that are filed in different courts. At the same time, the bill would not grant federal jurisdiction for intra-state class actions that are genuinely matters of state concern, nor would it affect the substantive law governing a plaintiff’s ability to file a class action lawsuit.

In short, S. 1712 would eliminate many of the current problems with class actions without impinging on the ability of state courts to adjudicate truly intra-state disputes or otherwise affecting the litigation of valid class actions. For these reasons, I strongly urge the Members of this Committee to support this bill.





United States District Court
District of South Carolina

Date: August 16, 2002

Subject: Proposed Local Rule Amendments

Notice

In August 2001, the United States District Court for the District of South Carolina adopted a new local rule (5.03) which prescribes sealing of documents filed with the court except when certain strict requirements, including public notice, are met. The court now proposes to amend Local Rule 5.03¹ to clarify that settlement agreements filed with the court will not be sealed.

The proposed amendment to Local Rule 5.03 provides:

- (C) No settlement agreement filed with the court shall be sealed pursuant to the terms of this rule.

The court also proposes to amend Local Rule 83.1.05² and Local Criminal Rule 57.1.5 concerning "Appearances by Attorneys not Admitted in the District." The purpose of the proposed amendment is to conform the pro hac vice requirements for federal court practice to those of the South Carolina Supreme Court. The application fee would be raised from seventy-five dollars (\$75) to one hundred dollars (\$100.00), and an application form similar to the state court form would be required.

The proposed amendments (with forms)³ to Local Civil Rule 83.1.05 and Local Criminal Rule 57.1.5 provides:

Appearances by Attorneys Not Admitted in the District. Upon motion, any person who is a member in good standing of the Bar of a United States District Court and the Bar of the highest court of any state or the District of Columbia may be permitted to appear in a particular matter in association with a member of the Bar of this Court. A motion seeking admission under this Rule, accompanied by an Application and Affidavit setting forth the movant's qualifications for admission and the movant's agreement to abide by the ethical standards governing the practice of law in this Court, shall be submitted to this Court upon the forms prescribed by this Court. The motion shall be accompanied by an application fee of One Hundred Dollars (\$100.00). The appearance of such a person in a particular action(s) shall confer jurisdiction upon this Court for any alleged misconduct of that person in all matters related to the action(s). The Court may revoke admission under this Rule at its discretion.

You have an opportunity to comment on these proposed amendments to the Local Civil and Criminal Rules. Any modification necessary as a result of public comment will be considered after September 30, 2002, the expiration date for receiving said comments. Comments should be sent to:

Larry W. Propes
Clerk of Court
U.S. District Court
1845 Assembly Street
Columbia, South Carolina 29201

¹ The language of the current Local Civil Rule 5.03: Filing of Documents Under Seal can be viewed and downloaded from the Court's internet web site at the following link: <http://www.scd.uscourts.gov/Rules/Aug2001/CV/Ch5.pdf>

² The language of the current Local Civil Rule 83.1.05 and Local Criminal Rule 57.1.5 can be viewed and downloaded from the Court's internet web site at the following links:

- Local Civil Rule 83.1.05 --
<http://www.scd.uscourts.gov/Rules/Aug2001/CV/Ch83I.pdf>
- Local Criminal Rule 57.1.5 --
<http://www.scd.uscourts.gov/Rules/Aug2001/CR/Ch57.pdf>

³ The proposed amendments with forms can be downloaded from the Court's internet web site at the following link: <http://www.scd.uscourts.gov/notices/docs/ruleamend.pdf>

September 2, 2002

South Carolina Judges Seek to Ban Secret Settlements

By ADAM LIPTAK

South Carolina's 10 active federal trial judges have unanimously voted to ban secret legal settlements, saying such agreements have made the courts complicit in hiding the truth about hazardous products, inept doctors and sexually abusive priests.

"Here is a rare opportunity for our court to do the right thing," Chief Judge Joseph F. Anderson Jr. of United States District Court wrote to his colleagues, "and take the lead nationally in a time when the Arthur Andersen/Enron/Catholic priest controversies are undermining public confidence in our institutions and causing a growing suspicion of things that are kept secret by public bodies."

If the court formally adopts the rule, after a public comment period that ends Sept. 30, it will be the strictest ban on secrecy in settlements in the federal courts. Mary Squiers, who tracks individual federal courts' rules for the United States Judicial Conference, said only Michigan had a similar rule, which unseals secret settlements after two years. The conference is the administrative body for federal courts.

Judge Anderson said the new rule might save lives.

"Some of the early Firestone tire cases were settled with court-ordered secrecy agreements that kept the Firestone tire problem from coming to light until many years later," he wrote. "Arguably, some lives were lost because judges signed secrecy agreements regarding Firestone tire problems."

Lawyers say the proposal, which was widely discussed at the American Bar Association's conference in Washington last month, is likely to be influential in other federal courts and in state courts, which often follow federal practice in procedural matters. In South Carolina, the state's chief justice has expressed great interest in the proposal.

The Catholic Church scandals are one reason for a renewed interest in the topic of secrecy in the courts, legal experts say.

"All reactions are going to be affected by the bureaucratic cover-your-cassock responses of the church hierarchy," said Edward H. Cooper, a law professor at the University of Michigan.

But some legal experts and industry groups say the blanket rule is unwise.

"The judges of South Carolina, God bless them, have not evaluated the costs of what they are proposing," said Arthur Miller, a law professor at Harvard and an expert in civil

procedure. He said the ban on secret settlements would discourage people from filing suits and settling them, and threaten personal privacy and trade secrets.

Joyce E. Kraeger, a staff lawyer at the Alliance of American Insurers, said the current system, in which judges have discretion to approve sealed settlements or not, worked fine. "There shouldn't be a one-size-fits-all approach," Ms. Kraeger said.

Jeffrey A. Newman, a lawyer in Massachusetts who represents people who say they were abused by Catholic priests, praised the South Carolina proposal. Mr. Newman said he regretted having participated in secret settlements in some early abuse cases. "It was a terrible mistake," he said, "and I think people were harmed by it."

Mr. Newman said a rule banning secret settlements, combined with the Internet, would create a powerful tool for lawyers seeking information on patterns of wrongful conduct.

The impact of such a ban could be limited, however, if adopted only by federal courts. Most personal injury and product liability cases, and almost all claims of sexual abuse by clergy, are litigated in state courts.

Several states have laws and rules that limit secret settlements, typically in cases involving public safety. Florida, for instance, forbids court orders that have the effect of "concealing a public hazard."

Experts say many of those limits are difficult to enforce, particularly when every party to a case is urging the judge to approve a settlement. Indeed, Judge Anderson's colleagues rejected his proposal, which was limited to matters of public health and safety, in favor of a blanket ban.

The federal proposal in South Carolina has caught the attention of Jean Toal, the chief justice of the South Carolina Supreme Court. Chief Justice Toal said that she would await the formal adoption of the rule before making her own proposal, but that the issue was important and timely.

"I'm very intrigued about this," she said, noting that some of her interest arose from "recent claims involving pedophilia and sealed cases." Judge Anderson and Chief Justice Toal noted that a Columbia, S.C., newspaper, *The State*, had spurred their interest in the issue by publishing a series of articles on secret settlements by doctors repeatedly accused of medical malpractice.

Even under the South Carolina proposal, the settlement amount and the requirement that parties keep quiet could be placed in a private contract not filed with the court. If the contract were violated, a new lawsuit would be required to seek redress. A court-approved settlement, on the other hand, can be enforced by returning to the original judge for a contempt order.

"If they don't want the might and majesty of the court system to enforce their settlement, that's one thing," Chief Justice Toal said. "Sealing the economic terms of the settlement is only one part of it. We're often talking about sealing the entire public record of the case."

Opponents of the proposal argue that secrecy encourages settlements, which they say are desirable given limited court resources.

Judge Anderson told his colleagues that their court, at least, had available capacity. He wrote that the court had disposed of 3,856 civil cases in the previous 12 months, which included only 35 cases tried to a verdict.

"If the rule change I propose were enacted and it did result in two or three more jury trials per judge per year (which is far from certain)," Judge Anderson wrote, "I think we could handle the increased workload with little problem."

Robert A. Clifford, a Chicago lawyer who typically represents plaintiffs, scoffed at the notion that defendants would not settle without secrecy provisions, saying the alternative to a public settlement was a far more public trial.

"The undeniable fact is that the reason they want secrecy is so victim No. 2 does not find out what victim No. 1 got," Mr. Clifford said.

Ms. Kraeger, of the insurers alliance, did not dispute that. "Making that information widely known could have the effect of driving up litigation costs," she said.

Professor Miller emphasized that plaintiffs might not want to have their new wealth made public.

"There is a right not to enable every neighbor and business associate to know what you got," he said. "Would you want to receive calls from telemarketers who discover that you just got \$1 million?"

In a forthcoming article in *The Hofstra Law Review* prompted by settlements in sexual abuse cases involving clergy, Stephen Gillers, a law professor at New York University, argues that confidentiality provisions that forbid victims to talk about their experiences amount to obstruction of justice and violate ethical rules governing lawyers.

Professor Gillers, though, would exclude settlement amounts, trade secrets and private information from any requirement that settlements be made public.

Judge Anderson was most concerned with the selling of secrecy as a commodity, he said in an interview. He recalled being told by a plaintiff's lawyer that the lawyer had obtained additional money for his client in exchange for the promise of secrecy.

"That's what really lit my fuse," the judge said. "It meant that secrecy was something bought and sold right under a judge's nose."

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SEALING RECORDS: A FIRST SKETCH

Introduction

The records-sealing topic came to the agenda at the October, 1993 meeting with a suggestion that a presumptive twenty-five year time limit should be adopted for sealing orders. The Committee decided not to act on this issue in isolation, but directed that the general topic of sealing orders be placed on the agenda for further study. Sealing practices vary widely. The source and limits of sealing power are obscure. There is a perception, based on anecdotal evidence rather than any rigorous showing, that the use of sealing orders is growing. The Civil Rules do not deal with sealing outside the context of discovery protective orders. Establishing standards in a Civil Rule could reduce the level of variation in practice and — depending in part on the nature of the Rule adopted — might reduce the frequency of sealing. In addition to standards, a rule could establish procedures with respect to such matters as notice, hearing, temporary sealing, required findings, specificity of terms, duration, and modification or vacating.

Foundations for Rulemaking

A decision to move ahead with the rulemaking process must consider the relationship between the potential benefits of adopting a new rule and the difficulties of adopting a good rule. The balance between risk and benefit is not clear.

The potential benefits depend on the inadequacy of present practice with respect to standards or procedures. The last several years have witnessed a flurry of legislative measures based on the premise that courts have ordered sealing for far too much information. The remedies are addressed both to the standards and the procedures for sealing. Several state solutions and one "model" proposal are set out as appendices to show a variety of approaches. The assumption that too much information is sealed is disputed. Some observers discount the most frequently asserted harms by asserting that they seldom occur — that the public is not deprived of information necessary to evaluate harmful products or questionable governmental activity, and that other litigants are not forced into wasteful overlapping discovery. The same observers also extol the virtues of sealing to protect important interests in privacy and to lubricate the wheels of settlement or litigation.

We do not have much reliable information to support consideration of this first question. What standards for sealing are announced, and what standards might be revealed by the actual facts of current practice, remain obscure. The actual effects of sealing also are obscure; widespread sealing, indeed, may thwart efforts to learn about

the potential benefits of open access to sealed records. If much useful information is sealed, leaving open only less useful information, there is little basis for comparative study.

Drafting a rule that will improve matters remains a challenge even if it is concluded that improvement is needed. The existence of several state models — most of them relatively new — can provide a good start. Beyond that point, the most important choice is between a rule that leaves much to open-ended discretion and a rule that seeks to provide detailed standards and procedures adapted to differences in the materials to be sealed and the reasons for sealing. Each additional point of detail increases the need for clear understanding of complicated issues that may be difficult to foresee.

Two additional limits on the rulemaking process must be confronted. The First Amendment is the first limit. It clearly gives a right of access to criminal proceedings. Several courts have concluded that there also is a First Amendment right of access to civil proceedings, including not only trial but documents filed before trial. The relationship between the First Amendment right of access and the common law right of access remains obscure. The First Amendment tests are likely to be expressed in terms that limit sealing to narrow limits carefully tailored to serve overriding interests. First Amendment tests also are likely to insist on protection of the public interest by procedures that include some form of public notice and opportunity for hearing, and also include specific findings of the factors that support sealing. A Civil Rule must find some way to avoid any attempt to circumvent First Amendment requirements. The procedure-only character of the Enabling Act is the second limit. One common suggestion, for example, is that access should be allowed to private or government settlement agreements. Rules that would limit the power to agree to confidential settlements that are not filed with the court likely are sufficiently substantive to be beyond the scope of the Enabling Act.

Wise rulemaking requires solid foundations. It is easiest to draft good rules when there is a clearly identified problem in a current rule or when there is a well-understood body of contemporary practice that can be absorbed in rule form. The first step must be to assess the foundations for a sealing rule.

Basic Blocks

At least four basic sets of concerns must be addressed once the decision is made to draft a new rule.

(1) Present Public Access: What materials and events now fall within a right of

public access? How far is access a matter of common-law principle, how far a matter of First Amendment Protection?

(2) Changing Present Access: Is the need for a rule simply to foster uniform adherence to the mainstream of general present practice? Or are there reasons to expand or contract presently recognized rights of access?

(3) Relation to Nonsealed Information: If court information is sealed, what effect does the seal have on dissemination of information from other sources? How far, for example, should an order sealing a complaint limit the right of the plaintiff to discuss the filing of the suit or information that bears on the dispute but is not described as drawn from or reflected in the complaint?

(4) Procedural Requirements: What provisions should be made for temporary sealing orders? Notice to nonparties? Description of the matters to be sealed that facilitates opposition but does not defeat effective sealing? Hearing? Findings as to factors that control the decision? Duration? Vacating or terminating?

Interests That Favor Access

The interests that favor access have supported a commonlaw presumption that there is a right of public access to civil trials, pleadings, judgments, and to any material submitted for consideration by the court in deciding a motion. The First Amendment right of access may start at a quite similar point. Discovery materials occupy a less certain position. Rule 26(c) specifically covers protective orders. Beyond that point, it seems to be generally assumed that there is no right of access to the discovery process itself — that the conduct of a deposition, for example, is not a public event. This assumption may lead to the conclusion that access to the fruits of discovery depends on filing, with a presumptive right of access to anything filed with the court but not to unfiled materials. This conclusion in turn would place special pressure on Rule 5(d), which allows a court to order that discovery materials generally not be filed. It seems strange to turn the right of access on such matters as the filing storage capacity of a particular district court.

The nature of the interests favoring access generally has been explored in cases dealing with access to criminal trials. Some of these interests bear directly on the quality of factfinding, while others rise to very abstract judgments about the role of courts in a democratic society.

The most case-specific interests in access stress the possibility that access will produce better testimony. Public knowledge of a trial may lead unknown witnesses to

present themselves. And, as a far more common occurrence in an increasingly anonymous society, the knowledge that proceedings are open and the presence of bystanders may encourage the parties and witnesses to remain honest.

Other concrete interests in access are familiar from discussion of discovery protective orders. Litigation may involve products, persons, or circumstances that pose a threat of injury to nonparties. Publication of the facts of a lawsuit may help others protect themselves. Publication also may facilitate sharing of information among litigants in separate actions, reducing the costs, accelerating the speed, and improving the results. At the extremes of conduct, openness may deter evasion of discovery or even destruction of evidence useful for other cases.

More abstract interests begin with fostering public confidence in the judicial process. Citizens who know the process is open and accessible will trust it better than a secret process. The open process, moreover, is likely to deserve greater confidence. Public exposure is a shield against judicial surrender to improper influences. It also is a shield against public oppression — if the risk of oppression is not often as great in civil actions as in criminal prosecutions brought by the very government that sponsors the court, the risk remains real both in government civil actions and in purely private litigation. Public participation in celebrated civil actions also may achieve something of the catharsis that comes from vicarious public participation in celebrated criminal trials. As the lawmaking component of civil adjudication continues to expand in scope and importance, moreover, public access may provide a strand of legitimizing support.

Right To Disseminate

Most discussion of the interests opposed to sealing focuses on the values of access by nonparties. A party, however, may claim an independent interest in disseminating information. This interest is subject to regulation if information is acquired with the help of the court, particularly if the help is discovery rather than a trial subpoena. A comprehensive sealing rule must deal with the question of prohibiting dissemination of information independently acquired.

Interests That Favor Sealing

Most discussion of the interests that favor sealing focuses on the risk of specific harm to specific parties in particular litigation. There are, however, clear analogues to the broad theoretical arguments that champion openness as a public value. These arguments are not often articulated because they are taken for granted. Reconsideration of things taken for granted is not unthinkable. The few illustrations provided below are intended to illustrate some unarticulated assumptions, however, not to invite

reconsideration.

Jury deliberations constitute a vital part of the decision process. Jury secrecy undoubtedly masks occasional miscarriages of justice. Public access, however, is seldom suggested. The Seventh Amendment may well stand in the way. Consultations with each other by judges of a multi-judge panel, and conferences by judges with law clerks, likewise are vital parts of the decision process. So too are draft opinions. Article III may well protect against public intrusion in these processes. In camera consideration of material claimed to be privileged may affect vital public interests, particularly if some form of governmental privilege is claimed. Full protection of a privilege, however, probably demands that such proceedings remain closed.

Beyond this clear core of judicial privacy, other settings may present more difficult problems. Conferences in chambers, pretrial conferences in general, settlement conferences, and other events could be the occasion for judicial overreaching or for actions that shape ultimate decision more effectively than the trial itself. Public access, however, could stifle any hope for significant accomplishment.

The more common illustrations of privacy needs cover a familiar range of values. Protection is sought for reasons of national security. Law-enforcement needs may be urged with respect to investigative techniques, identity of informants, or such devices as drug courier profiles. Commercial information is often protected, not only in the area of technical trade secrets but across much wider areas of information that could cause advantage or disadvantage in competitive struggle. Physical safety may be involved — crime informants again are an example, as are victims of some wrongs such as sexual violence or domestic abuse. Even witnesses may need to be protected against harassment or worse. A variety of personal privacy interests are asserted, ranging from such things as medical and employment records through personal financial information, or sexual habits. Interests of nonparties may be invoked in similar terms, including such matters as lists of organization members. Fears of exploitation or even harassment may arise from matters as simple as the amount of a settlement. In a small number of cases, there may be concerns that publicity will jeopardize the opportunity for a fair trial, just as may occur in criminal cases. Still other interests abound.

Materials and Events Covered

Protection may be sought for a wide variety of materials or events. For purposes of rulemaking, however, a relatively small set of categories can embrace almost all significant matters.

The presumption of access seems strongest with respect to pleadings, motions

and material advanced in support or opposition, and trial. The presumption may be diluted slightly with respect to other materials filed with the court but not otherwise advanced as a basis for decision. Discovery materials, as noted above, generate more uncertain reactions, particularly as to materials not filed with the court and the conduct of depositions. Pretrial conferences may fall outside the presumption of access; certainly there is little discussion in the general literature.

Special problems arise from settlement and the events that surround it. No one argues that the public should have access to private settlement discussions. Settlement conferences under court auspices probably are viewed in the same way. A settlement agreement that is not filed with the court also is likely to remain outside the right of access. It seems common, however, for the parties to wish both to file a settlement agreement as an entrée for future judicial enforcement and to maintain confidentiality. The presumption of access probably attaches if a party actually seeks judicial enforcement; the situation is less certain if the parties agree to maintain confidentiality and no judicial action is sought.

Disciplinary proceedings for a judge or member of the bar also present distinctive problems. These problems likely can be omitted from any rule that may be drafted. Court administrative records likewise may be safely omitted.

Sealing Standards

The task of setting standards requires bringing together the categorical nature of the materials offered for sealing — pleadings, motions, discovery, settlement, trial, or other; the specific nature of the information involved; the nature of the injury that might be forestalled by sealing; and the nature of the private and public interests harmed by sealing. This task can be captured in a terse "good cause" formula, a more pointed balancing formula that directs attention to the factors to be considered, a series of different formulas tied to the categories of materials involved, or possibly even a set of more definite rules.

The standards also might differentiate between sealing by agreement of all parties and sealing opposed by one or more parties. The distinction is likely to make more sense in some settings than in others. Consent of the parties to seal the dollar amount of a settlement may deserve great deference. Consent to seal the other terms of a settlement agreement may deserve some deference, but the choice to file the agreement clearly puts the parties beyond full control, and the seal wears thin once any party asks the court to take action enforcing the agreement. In another dimension, a rule that requires sweeping public access should address private agreements designed to subvert the rule. The Texas rule, for example, treats unfiled discovery material as public

records. A private sealing agreement probably cannot defeat the rule; return of discovery materials to the producing party probably carries an obligation to maintain the materials as public records.

It is easier to draft an open-ended rule. Even with more specific guidance in a Committee Note, it may be wondered whether an open-ended rule would do much to increase uniformity or improve results.

A more specific rule would promise greater control. It also would require much more work to be sure it was wise. It is not possible to learn much about sealing practices simply by reading reported decisions and secondary literature. It seems likely that the vast majority of sealing orders remain effective, often without challenge. What kinds of showings are actually required to support sealing of what sorts of materials is largely unknown. The potential harm to private and public interests cannot even be guessed.

Procedural Requirements

Supreme Court decisions dealing with access to criminal proceedings emphasize the importance of procedure, a theme taken up in some of the state rules. In addition to setting out standards for sealing, a variety of procedural issues can be addressed.

Notice is an obvious starting point. The purpose of sealing is to prevent access by nonparties. The purpose of denying sealing is to serve public and private interests by allowing access. In all logic, some provision should be made for notice to nonparties. It is relatively easy to draft a general public notice provision. An attempt to sort out more limited notice provisions will be more difficult. It would be awkward, for instance, to provide notice to public media but only limited categories of other "interested" persons. Means of notice also must be resolved. The more effective the notice procedure, the more frequently will nonparties appear to resist sealing. More procedure will make sealing harder work for the courts. The added burden relates in part to the next point — to the extent that the procedure makes effective sealing possible, nonparties often enough will be forced to resist sealing of information that, were it available, would be of no use or interest.

Nonparty participation creates an unavoidable dilemma in facilitating intelligent participation and maintaining the possibility of effective sealing. Only full disclosure of the material can support fully effective participation, but that would be self-defeating. Limited access may be effective in some cases, but some of the most obvious restrictive devices carry their own problems. Limiting access to counsel for purposes of the sealing motion runs into the fact that counsel may be the person most feared; perhaps the fear

exists only in cases in which it is desirable to stimulate additional litigation, but it is hard to be confident of that. This procedural dilemma will require careful consideration. The common response of in camera inspection again imposes substantial burdens, even if it can be shared with magistrate judges or masters.

Provision also could be made for temporary sealing orders. The only question in this dimension, indeed, is whether it might be adequate to leave this obvious need to implication.

The standards for sealing might be supplemented by specific provisions for burdens of justification. A single burden of justification could be imposed on a party seeking to impose a seal or to oppose vacating. Or a burden of showing the need for sealing could be imposed on the party seeking the seal, while the burden of showing the need for access could be imposed on the party opposing the seal. Perhaps other variations could be imagined — one example might be a distinction between prejudgment opposition to initial sealing and postjudgment requests to unseal.

Specific findings can be required as to the factors weighed in deciding whether to seal. The emphasis on the importance of specific findings with respect to access to criminal proceedings suggests that findings should be required at least when sealing is ordered.

Specificity requirements can be created for sealing orders along lines similar to the requirements for injunctions under Civil Rule 65(d). This provision could include specific recognition of partial sealing orders — an order denying public access but allowing sharing among parties in related actions would be one important example.

This provision also would be the place for any presumptive limits on duration; the twenty-five year limit discussed in October might be a sensible beginning.

OUTLINE FOR STYLE PROJECT PRESENTATION

I. Stylization Project

A. Judge Levi's opening remarks on history and purpose of style project

- Judge Keeton's initiative in 1992 (Appendix A)
- Work on Civil Rules style project commences in 1992, but ultimately deferred (Appendix B & C)
- Standing Committee's 1995 self-study recommendation on stylization (Appendix D)
- Appellate Rules stylization published in 1996, while Criminal Rules stylization published in 2000 (both successfully received)
- Criminal and Appellate Rule Committees' justification and purpose of stylization projects (Appendix E)
- Status of Civil Rules Committee style project — report on work completed to date (Garner comprehensive draft, Pointer edits, full committee edits to Rules 20-30, and Kimble's and Spaniol's edits to Rules 1-15)

B. John Rabiej's report on the actual stylization process undertaken by Appellate and Criminal Rules Committees

1. Overview (Appendix G)

- Standing Committee Style Subcommittee's Role (Appendix H)
- Reliance on Garner's *Guidelines for Drafting and Editing Court Rules*
- Assistance of law professor for research questions (Appendix I)
- Developing a timetable for completing project
- Appointing subcommittees
- Two-track approach to review "style" and "substantive" changes
- Record-keeping practices
- Request for comment sent to targeted audience

2. Description of subcommittee review process

- Standing Style Subcommittee submits revised rules (submission includes edits made by them and research questions and responses provided by law professor)
- batch of rules circulated to subcommittee members for review
- individual subcommittee members assigned responsibility over specific rules (Appendix K)
- subcommittee members' comments collated and marked in handwritten notations on master document, which is later sent to subcommittee for its consideration (Appendix K)

Civil Rules Style Project
Page Two

- individual subcommittee member assigned responsibility over specific rule leads discussion at subcommittee meeting
 - presentation made with aid of computer and projector displaying draft on screen for instantaneous editing
- C. Judge Parker discusses his style-project experiences, including any observations and suggestions on the process
- D. Professor Schlueter discusses his style-project experiences, including any observations and suggestions on the process (Appendix L)
- E. Professor Cooper discusses overarching issues based on “Civil Rules Style Project: Introductory Questions” memorandum (Appendix M)
- Structure
 - Sacred phrases
 - Definitions
 - “Legacy” provisions
 - Ambiguities
 - Substantive Change
 - Integration with other rules: style
 - Integration with other rules: content
 - Internal cross-references
 - Committee Notes Forms
- F. Hands-on stylization of Rule 4 under aegis of Judges Kelly and Russell (Appendix N)
- G. Judge Levi and Professor Cooper present and discuss tentative timetable for completion of Civil Rules project (Appendix O)

"A"

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ROBERT E KEETON
CHAIRMAN

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F RIPPLE
APPELLATE RULES
SAM C POINTER JR
CIVIL RULES
WILLIAM TERRELL HODGES
CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

JOSEPH F SPANIOL JR
SECRETARY

May 27, 1992

MEMORANDUM TO THE MEMBERS OF THE STANDING COMMITTEE:

SUBJECT: Substantive and Numerical Integration of Federal Rules of Procedure

I have asked Judge Pratt to chair a new Subcommittee on Substantive and Numerical Integration of Federal Rules of Procedure. I am asking each of our Liaison Members to serve as a member of this Subcommittee (i.e., Judge Sloviter - Appellate, Judge Ellis - Bankruptcy, Judge Bertelsman - Civil, Mr. Wilson - Criminal, Mr. Perry - Evidence, and Professor Baker - Long Range Planning).

Two developments have led me to the decision to create this Subcommittee and ask it to proceed expeditiously to give us a preliminary report of its thinking on June 18, 1992 and its recommendations at the December 1992 meeting.

The first development is a tentative plan (to be considered at our June 1992 meeting) for development (by the Subcommittee on Style and the Advisory Committee on Civil Rules) of a recommendation to the Standing Committee in December 1992 regarding amendments of style for the entire set of Federal Rules of Civil Procedure. The Subcommittee on Style will be making its recommendations to the Advisory Committee on Civil Rules for their consideration at their November 1992 meeting. (I will invite discussion at our June meeting of coordinating this expedited consideration of the style of the Rules of Civil Procedure with consideration of the style of each of the other sets of rules if the Advisory Committees in Appellate, Criminal, and Bankruptcy are interested in such a plan.)

The second development is that our consultations about proposed amendments of provisions in the several separate sets of

Memorandum
Page Two
May 27, 1992

rules on the subject of "Technical and Conforming Amendments" has underscored, for me at least and I understand for many others, the advantages of having a single rule on this subject, rather than four or five separate rules of identical (or even worse, disparate) text. We could better accomplish this substantive integration if we sent it out for public comment simultaneously with a proposal for numerical integration.

If you have a special interest or a view you wish considered by the new Subcommittee, I encourage you to call or write to Judge Pratt promptly.


Robert E. Keeton

CHARLES ALAN WRIGHT

"B"

THE UNIVERSITY OF TEXAS
SCHOOL OF LAW

April 8, 1992

To: ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

From: CHARLES ALAN WRIGHT

Several weeks ago the members of the Subcommittee on Style of the Standing Committee received from Judge Pointer a set of the materials that you will be considering at your meeting next week. Judge Pointer very thoughtfully sent them on a floppy disk as well as in hard form.

This created something of a problem for the Subcommittee. Our expectation, as set out in the memorandum Judge Keeton sent to all of you along with his memorandum of February 11th, was that we would "review every draft that comes forward to the Standing Committee from one of the Advisory Committees". Perhaps it was some atavistic notions of ripeness or of the final-judgment rule that caused us to feel that we should wait until a draft was ready to go, so far as the Advisory Committee is concerned, before we undertook our review. But in fact we have not stuck consistently to that in the two months we have been in operation and our desire is of course to be as helpful to the Advisory Committees and to the rulemaking process generally as is possible.

The fact that this draft had not yet been subject to the scrutiny your committee will give it next week was, therefore, not in itself a reason for saying we would not do this. Unfortunately the calendar, and the schedules the members of the Subcommittee have, required us reluctantly to conclude that we could not do it.

The consultant to the Subcommittee, Bryan A. Garner, is also a very busy person, but he was eager to be helpful on the very important set of rules your Committee has under consideration. He said that he could complete his review of your draft in time for your meeting, even though his suggestions would probably have to go to you in handwritten form and there would not be time for the Subcommittee members to go over them. The draft that you are receiving with this memorandum is Bryan Garner's suggestions. No member of the Subcommittee has yet seen it. We will review your rules when you send them forward to the Standing Committee after your meeting.

The Subcommittee has already worked with Mr. Garner on the pending amendments to the Appellate Rules and to the Bankruptcy Rules. From this experience he and we have reached a common understanding on many points of style. We follow a meticulous practice on the use of "shall", "may", "must", and "is". We insist on the serial comma and observance of the rules about "that" and "which". We have agreed-on rules (in large measure taken from what the Civil Rules Committee has always done) on capitalization of the titles of rules and of subdivisions of rules and on the names used

to refer to parts of rules. We hyphenate phrasal adjectives but otherwise are stingy with hyphens. You will, I am sure, see signs of many of these things in the suggestions Bryan Garner is making concerning your draft.

This does not mean that we always agree with our Consultant. Although it is certainly true that "timely" can be either an adverb or an adjective, we were not persuaded by Mr. Garner that it is better in this particular context to use it as an adverb. It saves words to say "timely moves", but to our ears "makes a timely motion" is more natural. Mr. Garner understands our view on this, and I am sure he will not be urging you to change "timely" from an adjective to an adverb. I mention this only because it is possible that in his work on your draft there will be things that have not come up previously and that he might take a view that the Subcommittee, when this draft comes to us, will not accept.

In its work, the Subcommittee is operating under guidelines concerning when we do or do not propose a change. These are described in the Preliminary Note that we intend to append to each set of rules as we send it forward to the Judicial Conference.

Preliminary Note on Style

It is important that rules adopted by the Supreme Court, and having the force of law, be grammatically and stylistically correct, but it is even more important that they be stated with as much clarity as the subject matter permits. Accordingly in 1992 the Standing Committee on Rules of Practice and Procedure created a Subcommittee on Style to review proposed amendments with these goals in mind. As the Notes to particular rules indicate, a number of changes have been made for reasons of style.

The Subcommittee has reviewed only those rules for which other amendments are submitted for substantive or technical reasons. This means that stylistic changes are here proposed even though the original form of words remains unchanged in other rules. So that this will not itself lead to unclarity in the rules, the Subcommittee has used the following guidelines in determining when to propose changes.

1. Clarity of meaning. Where it will clarify the meaning of a rule, style changes have been made in a proposed amendment of an existing rule, even if this places the style of the amended rule at odds with the style of other rules that are not being amended.

For example, the word "shall" is used in several different ways in the rules. It is sometimes used in a permissive rather than a mandatory

sense, it sometimes purports to impose an obligation on the wrong actor, and it is sometimes used as a future-tense modal verb rather than as a mandatory verb. In those rules now being amended, the following principles have been followed: (1) "shall" is used only to denote a duty; (2) "may" is used to denote a privilege or discretionary power; (3) "is entitled to" is used to denote a right; (4) "may not" is used to denote a prohibition; and (5) "must" is used to denote a condition precedent or subsequent.

2. Substantive changes. Stylistic changes do not change the substance. If it is unclear whether a change in the interest of clarity would alter the substantive meaning of a rule, this has been reviewed with the Advisory Committee to be sure that there is no substantive change.

3. Departure from prevalent style in other rules. Changes that are purely stylistic and that also depart from the prevalent style in other rules have been avoided. The stylistic improvement that might be made is outweighed by the cost in reader uncertainty on why one form of words is used in one rule and a different form in many other rules.

4. Style changes without cost. If a change improves style, even though not essential to clarity, the change has been made if there is no significant likelihood that anyone will be confused by it.

For example, there is great variation among the various sets of rules promulgated by the Supreme Court, and even within a particular set, on whether and how to capitalize words in the titles of rules or subdivisions of rules. If the capitalization in the titles in a rule to be amended for other reasons departs from the prevalent usage, a change is here proposed.

5. Debatable matters of style. On points of style that are quite debatable even among experts in English usage, a change has been proposed only if one view seems clearly preferable.

I call your attention particularly to Guideline 2. It is often true that what may seem to be merely a change in style will have unwanted substantive effects. The Advisory Committee will be more aware of this than the Subcommittee on Style or its consultant can be. Please let us know wherever we have blundered in this respect. The whole purpose of having a Subcommittee on Style is to make your rules more easily understood by those who must work with them. It is no part of our purpose to change the substance of the rules you have carefully worked out.



"C"

LEONIDAS RALPH MECHAM
Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JOHN K. RABIEJ
Chief

CLARENCE A. LEE, JR.
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WASHINGTON, D.C. 20544

Rules Committee Support Office

January 14, 2000

MEMORANDUM TO JUDGE ANTHONY J. SCIRICA

SUBJECT: *Style Project*

I have identified some of the functions that the style subcommittee has performed to date. The operation of the subcommittee has not been smooth and various options to change the process have been under consideration.

Status of Comprehensive Revisions

The Standing Committee's Style Subcommittee has completed comprehensive revisions of the Appellate, Civil, and Criminal Rules. The Appellate Rules revision took effect in 1998. The Criminal Rules revision has been reviewed by the advisory committee and will be published in August. Committee Notes to the second half of the rules are being drafted by the reporter and will be reviewed by the advisory committee in spring. The style subcommittee has completed its work on the project, save to revisit any new changes to the rules made by the advisory committee.

The Civil Rules comprehensive revision was reviewed and substantially edited by Judge Sam Pointer, the former advisory committee chair. Civil Rules 20 through 30 were reviewed by the full advisory committee in a 3-day meeting in 1995. After that experience, the advisory committee decided to defer indefinitely a comprehensive revision of the rules. The committee was convinced that the many substantive changes arising from a comprehensive revision would raise too many controversies that would doom the project if presented as a whole to the bench and bar. As an alternative, the committee agreed to restyle each subdivision of a rule at the time that it was being amended. But the recent proposed changes have been controversial, and the advisory committee has limited and refrained from making changes other than specific substantive ones. It remains to be seen whether all future changes proposed by the advisory committee will be restricted to substantive matters in an effort to limit controversy and increase the chances of approval.

The Chief Justice indicated his opposition to a revision of the Evidence Rules, because a comprehensive change would overwhelm lawyers who are familiar with existing rules and must be able to resort to the rules instantly at trial. The Bankruptcy Rules advisory committee has used a style subcommittee for many years, and all new proposed amendments continue to be vetted by that subcommittee. The advisory committee has decided that no comprehensive revision is necessary.

"D"

A Self-Study of Federal Judicial Rulemaking

**A Report from the Subcommittee
on Long Range Planning to the
Committee on Rules of Practice,
Procedure and Evidence of the
Judicial Conference of the United States**

December 1995

- [13] **Recommendation to the Chair: The practice of appointing liaison members from the Standing Committee to the various Advisory Committees should be continued.**

Subcommittee on Style. Judge Robert E. Keeton, the immediate past Chair of the Standing Committee, established a Subcommittee on Style and charged it with undertaking a restyling of the various sets of federal rules.

That Subcommittee appointed a Consultant who has written a manual on rules drafting. The Subcommittee regularly has contributed to the efforts of the Advisory Committees and the Standing Committee to achieve greater consistency and clarity in the language of the federal rules.

The objective of this effort—uniform, readable, rules consistent with modern legal usage—is important not only to users of the rules but also to drafters, for clarity promotes understanding. The work of the Subcommittee, and particularly the Consultant’s drafting manual, will be advantageous to the Standing Committee (and other legal drafters) in the years to come. But it remains an open question whether the plan to rewrite the body of existing rules will succeed. The principal question is whether it is possible to revise the rules without too many accidental change in meaning. A stated goal of preserving meaning invites readers to use the old rules to interpret the new ones, which may complicate interpretation for some time. (This has occurred with the 1948 amendments to Title 28 of the United States Code.) Discovery of ambiguities also leads to discovery of unwelcome substance; yet definitions of “unwelcome” differ, and the ensuing debate about substance may frustrate agreement on style changes.

The Supreme Court also has shown some unease with this process, which until the completion of the project produces differences in style across rules; the “restyled” rules use terminology in a different way from the older rules. When sending a package to Congress on April 27, 1995, the Supreme Court changed “must” to “shall” to preserve consistent usage. The Court may prefer an all-at-once project, of the kind now under way, but thoroughgoing restyling will be a long time coming for several sets of rules. The Advisory Committee on Appellate Rules has completed its initial review of a complete rewrite; the other advisory committees are mid-way in the process or have not yet begun it.

The Long Range Planning Subcommittee believes that the objects of the project are desirable, and that it should be continued. Better drafting for rules newly proposed, or revised for other reasons, should be pursued assiduously. Costs and benefits of revising whole sets of rules at once are more closely balanced: the gains are greater, but so too the costs. Experience with the Appellate Rules will permit the Standing Committee to decide how to proceed with the other sets of rules.

- [14] **Recommendation to the Standing Committee: The Standing Committee should continue to improve the style of new and amended rules, and should use its experience to decide whether to revise each set of federal rules fully.**

**Preliminary Draft of Proposed Revision
of the Federal Rules of Appellate Procedure
Using Guidelines for Drafting and Editing
Court Rules**

and

**Preliminary Draft of Proposed Amendments
to Appellate Rules 27, 28, and 32**

Request for Comment

April 1996

**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES**

**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES**

April 1, 1996

TO THE BENCH, BAR, AND PUBLIC:

The Judicial Conference Advisory Committee on Federal Rules of Appellate Procedure has completed its style revision of the entire set of Appellate Rules using uniform drafting guidelines. It has requested that the proposed revision be circulated to the bench, bar, and public generally for comment.

The style revision of the Appellate Rules is part of a comprehensive effort to clarify and simplify the language of all the Federal Rules of Practice and Procedure. The changes here proposed are intended to be nonsubstantive. In the course of reviewing the rules, however, existing ambiguities and inconsistencies surfaced, and the committee decided that a few substantive revisions were necessary. These limited changes have been specifically identified in the Committee Notes.

The advisory committee has also been considering substantive amendments to Appellate Rules 27, 28, and 32. Proposed amendments to these three rules were published last year and were revised in light of comment received. Rather than publish these revisions separately, we have included them as part of this packet. Accompanying Committee Notes explain the substantive changes.

We request that all suggestions and comments, whether favorable, adverse, or otherwise, be placed in the hands of the Secretary as soon as convenient and, in any event, **no later than December 31, 1996**. All communications should be addressed to the Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544. Comments received become part of the official record and are available for public inspection.

To provide individuals and organizations an opportunity to comment orally on the proposed amendments, hearings are scheduled to be held in Washington, D.C. on July 8, 1996, and in Denver, Colorado on August 2, 1996. Those wishing to testify should contact the Secretary of the Committee at the above address at least 30 days before the hearing.

The Advisory Committee on Appellate Rules will review all timely received comments and will take a fresh look at the proposals in light of the comments. If the advisory committee approves the changes, they and any revisions, as well as a summary of all comments received, will then be considered by the Standing Committee.

The Judicial Conference Standing Committee on Rules of Practice and Procedure has not approved these proposals, except to authorize their publication for comment. These proposed amendments have not been submitted to nor considered by the Judicial Conference of the United States or the Supreme Court.

Alicemarie H. Stotler
Chair

Peter G. McCabe
Secretary

**ADVISORY COMMITTEE ON APPELLATE RULES
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES**

The Federal Rules of Appellate Procedure were enacted more than twenty-five years ago. The rules have been amended on twelve occasions since then by committees and reporters who have had no drafting guidelines to direct them. Without uniform drafting guidelines, inconsistencies in language and ambiguities in the rules have surfaced. Changes in committee membership and reporters, who produce initial drafts, have added to the unevenness in the rules.

In 1991, the Standing Committee on Rules of Practice and Procedure embarked on a style project to promote uniformity among the different sets of rules (i.e., appellate, bankruptcy, civil, and criminal procedural rules) and to simplify and clarify them. Bryan A. Garner, a respected legal-writing scholar, has led the style project under the auspices of the Committee's Subcommittee on Style. The advisory rules committees have used the uniform drafting guidelines, which were developed by Mr. Garner, in drafting individual proposed rules amendments.

When the Standing Committee on Rules of Practice and Procedure recommended that the advisory rules committees consider revising entire sets of rules using uniform drafting guidelines, the Advisory Committee on Appellate Rules welcomed the opportunity. A review of the Appellate Rules discloses obvious drafting problems and unclear provisions that can be improved. The rules often contain long narrative passages with few section dividers and headings to aid readers. There are inconsistencies in the general format of the rules.

The changes proposed in these revisions are intended to be non-substantive. The advisory committee is keenly aware that seemingly minor changes can unintentionally result in substantive changes. The committee refrained from making stylistic improvements if they resulted in substantive changes unless otherwise necessary. Revisions were approved only after the completion of an elaborate review process.

Inevitably, some substantive changes had to be made. These changes are identified by the committee and explained in the accompanying Notes to the rules. Although the committee devoted much time to identifying the substantive changes, we hope that this comment period and the widespread review afforded by it will capture any that we inadvertently missed. We also hope to receive comments on the uniform drafting guidelines, which can be obtained on request from the Secretary to the Committee.

The proposed revision of the Federal Rules of Appellate Procedure using uniform drafting guidelines is set out in the right-hand column of the accompanying side-by-side comparison. The text in the left-hand column contains the existing rule. Text italicized in the left-hand column identifies proposed rules amendments that were earlier published for comment with prospective effective dates either of December 1, 1996, or December 1, 1997.

James K. Logan
Chair

BACKGROUND NOTE

The Federal Rules of Practice and Procedure are respected for their clarity and simplicity and serve as working models for many state and local court rules. Some of the brightest legal minds have participated in the rulemaking process, drafting and revising the various sets of rules beginning in the 1930's. Yet the rules suffer from a shortcoming inherent in their development. Each set of rules — Appellate, Bankruptcy, Civil, Criminal, and Evidence — was prepared by a separate committee with its own set of consultants and drafters and its own set of stylistic preferences that have changed over time. Too often the rules now contain different phrases and words intended to mean the same thing, leading to unnecessary ambiguity and the loss of simplicity.

In 1991, the Judicial Conference Committee on Rules of Practice and Procedure, under the leadership of its chair, Judge Robert E. Keeton, established a Subcommittee on Style tasking it to clarify, simplify, and eliminate inconsistencies in proposed rules amendments. That charge was later expanded to include a review of the entire set of Appellate Rules. A list of the members on the Subcommittee on Style follows. The subcommittee's first chair was one of the country's premier experts on legal procedure, Professor Charles Alan Wright. One of Professor Wright's first actions was to request Bryan A. Garner, a leading legal-writing scholar, to assist the subcommittee in its work.

Bryan Garner prepared drafting guidelines setting out a common set of style preferences from which the style subcommittee began its work. The guidelines have been published as the *Guidelines for Drafting and Editing Court Rules*. They are also available on request from the Secretary to the Committee on Rules of Practice and Procedure. The guidelines are intentionally flexible and recognize the need to accept exceptions on occasion to accommodate certain entrenched traditions. We would be pleased to receive comment on this publication also.

In 1994, after nearly six months of intensive work, Bryan Garner finished revising the entire set of the Federal Rules of Appellate Procedure. The draft went to the Subcommittee on Style and was considered by the Judicial Conference Advisory Committee on Appellate Rules at its October 1994 meeting, after the committee divided itself into several subcommittees to review individual rules. The advisory committee later devoted most of its April and October 1995 three-day meetings to the draft. During that period, the Subcommittee on Style was reviewing the same draft and the advisory committee's modifications to it. At its October 1995 meeting, the advisory committee reviewed the recommendations of the Subcommittee on Style and made its final changes to the draft. It recommended that the draft be published for public comment for an extended time beginning in April 1996 and ending nine months later on December 31, 1996.

The Committee on Rules of Practice and Procedure reviewed the proposed revision at its January 1996 meeting and approved the advisory committee's recommendation to publish it. The attached draft is the product of this effort. It is being circulated widely and has been made available to legal online services and publishers. Public hearings have also been scheduled. We

hope to receive substantial feedback.

At the end of the comment period, the advisory committee will review all comments received and decide on appropriate modifications. Assuming the bench, bar, and public reaction is generally favorable, the set of rules as revised will be submitted to the Committee on Rules of Practice and Procedure at its summer 1997 meeting. Action on the proposal could then be taken by the Judicial Conference at its September 1997 session and later by the Supreme Court. If approved by the Court, it would be transmitted to Congress by May 1, 1998, and would take effect on December 1, 1998, unless Congress acted otherwise.

We recognize that a comprehensive change of established and well-known legal usages may cause transitional difficulties, and we did not undertake this revision lightly. We believe that even a cursory examination of the side-by-side comparison between the existing and proposed rules will disclose their manifest superiority. And we hope that present and future generations of lawyers and jurists will benefit from today's careful efforts to revise the rules for clarity and consistency.

**THE SUBCOMMITTEE ON STYLE
OF THE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

Professor Charles Alan Wright, chair (1991— 1993);
Judge George C. Pratt, member (1991— 1993), chair (1993 — 1995);
Judge Alicemarie H. Stotler, member (1991 — 1993);
Joseph F. Spaniol, Jr., consultant (1991 — present);
Bryan A. Garner, consultant (1991 — present);
Judge Robert E. Keeton, *ex officio* (1991 — 1993);

Judge James A. Parker, member (1993 — 1995), chair (1995 — present);
Professor Geoffrey C. Hazard, Jr., member (1993 — present); and

Judge William R. Wilson, Jr., member (1995 — present).

**Preliminary Draft of
PROPOSED STYLE REVISION
OF THE FEDERAL RULES OF
CRIMINAL PROCEDURE**

**COMMITTEE ON RULES OF
PRACTICE AND PROCEDURE OF
THE JUDICIAL CONFERENCE OF
THE UNITED STATES**

Request For Comment

**ALL WRITTEN
COMMENTS DUE BY
FEBRUARY 15, 2001**

August 2000

NOTE: PRELIMINARY DRAFT OF AMENDMENTS TO RULES 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, AND 43, AND NEW RULE 12.4 PROPOSED SEPARATE FROM "STYLE REVISION" PROJECT ARE PUBLISHED IN ANOTHER PAMPHLET

**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES**

August 15, 2000

To the Bench, Bar, and Public:

I. Proposed Style Amendments to the Federal Rules of Criminal Procedure

The Judicial Conference Advisory Committee on Federal Rules of Criminal Procedure has completed its style revision of the Criminal Rules in accordance with uniform drafting guidelines. The restyling of the Criminal Rules is the second in a series of comprehensive revisions to simplify, clarify, and make more uniform all of the federal procedural rules. The proposed restyled Criminal Rules are now circulated to the bench, bar, and public for comment. They are posted on the Internet at www.uscourts.gov/rules.

The proposed changes are intended to be primarily stylistic only. However, the Advisory Committee's extensive style review revealed ambiguities and inconsistencies in the rules that required correction. The committee has attempted to identify any revision that may cause a change in practice and explained them in the Committee Notes.

II. Proposed Substantive Amendments to the Federal Rules of Criminal Procedure

In addition to the style revisions, the Advisory Committee also has been considering one new rule and substantive amendments to ten existing rules. The eleven substantive proposed changes to the Criminal Rules are published in a separate pamphlet (along with other proposed substantive changes to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure). The eleven proposed substantive amendments are published separately from the proposed style amendments to highlight amendments that will significantly change current procedural practice.

III. Opportunity for Public Comment

Please provide any comments and suggestions on the proposed amendments (substantive or stylistic) whether favorable, adverse, or otherwise as soon as possible. **The comment deadline is February 15, 2001.** Please send all correspondence to: Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544. Comments may be sent electronically via the Internet to www.uscourts.gov/rules.

The Advisory Committee will hold public hearings on the proposed substantive and stylistic amendments on the following dates:

January 24, 2001	New Orleans, Louisiana
January 29, 2001	San Francisco, California
February 12, 2001	Washington, D.C.

If you wish to testify you must contact the Committee Secretary at the above address **at least 30 days before the hearing.** The Advisory Committee will review all timely comments. All comments are made part of the official record and available to the public.

After the public comment period, the Advisory Committee will decide whether to submit the proposed amendments to the Standing Committee on Rules of Practice and Procedure. At present, the Standing Committee has not approved these proposed amendments, except to authorize their publication for comment. The proposed amendments have not been submitted to nor considered by the Judicial Conference or the Supreme Court.

Anthony J. Scirica
Chair

Peter G. McCabe
Secretary

INTRODUCTION TO PROPOSED STYLE REVISION OF FEDERAL RULES OF CRIMINAL PROCEDURE

The Federal Rules of Criminal Procedure were enacted more than fifty years ago. Since then, the rules have been amended on twenty-seven occasions by committees and reporters who did not have drafting guidelines to assist them. Congress has also directly amended the criminal procedure rules. In some instances, the lack of drafting guidelines gave rise to inconsistent and ambiguous language.

In 1991, the Judicial Conference's Standing Committee on Rules of Practice and Procedure, through its Subcommittee on Style, commenced a restyling project to clarify, simplify, and make uniform the federal procedural rules. The Rules of Criminal Procedure are the second set of procedural rules to be restyled. Following uniform drafting guidelines developed by a noted legal writing scholar, the Advisory Committee on Criminal Rules prepared a comprehensive stylistic revision of the criminal procedure rules. The restyled rules are now published for public comment.

The proposed changes are intended to be primarily stylistic only. However, during the course of its comprehensive review, the Advisory Committee identified certain ambiguities and inconsistencies in the rules that required correction. The committee has attempted to identify any revision that may cause a change in practice and explained them in the Committee Notes.

For easy comparison, the proposed restyled rules are set forth in side-by-side comparison with their present counterparts. The Advisory Committee believes this presentation will illustrate the clarity and consistency of the restyled rules, and will help you identify any unintended substantive changes.

The Committee looks forward to your comments.

W. Eugene Davis
Chair
Advisory Committee on Criminal Rules

BACKGROUND NOTE ON THE RULES RESTYLING PROJECT

The Federal Rules of Practice and Procedure are respected for their clarity and simplicity. They are models for many state and local court rules. Since their inception, some of the brightest legal minds have helped draft and revise the procedural rules. Yet the rules suffer from a shortcoming. Each set was drafted and modified by different committees, with different drafters and stylistic preferences. As a result, the rules are sometimes inconsistent and ambiguous.

To solve the problem, in 1991 the Judicial Conference Standing Committee on Rules of Practice and Procedure, under the leadership of its Chair, Judge Robert E. Keeton, established a Subcommittee on Style, tasking it to clarify, simplify, and eliminate inconsistencies in proposed rules amendments. That charge was later expanded to include a systematic review of the appellate, bankruptcy, civil, and criminal rules. The first chair of that Subcommittee, Professor Charles Alan Wright, enlisted the aid of a leading legal writing scholar, who prepared uniform drafting guidelines on which the style subcommittee based its work.

The Appellate Rules were the first to be restyled—a three-year process. The restyled Appellate Rules took effect in 1998 and have been well-received. The Criminal Rules were the next set to be restyled. After two years of restyling effort, the Advisory Committee on Criminal Rules presented the restyled rules to the Standing Committee, which has now approved the rules to be published for public comment. The proposed rules are being widely circulated and made available to legal online services and publishers. Three public hearings have been scheduled. The Committees hope to receive substantial feedback. At the end of the comment period, the Advisory Committee will review all comments and make any appropriate amendments. If public comment is favorable, the restyled rules could be submitted for approval to the Standing Committee in June 2001, to the Judicial Conference in September 2001, and later to the Supreme Court. If approved by the Supreme Court, the restyled rules could be transmitted to Congress in May 2001 to take effect in December 2002.

The rules committees recognize that a comprehensive change of established and well-known rules may cause initial transitional difficulty. They believe that the following side-by-side comparison will show that the restyled rules are a tremendous improvement that will benefit all.

THE SUBCOMMITTEE ON STYLE OF THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Professor Charles Alan Wright, chair (1991— 1993);
Judge George C. Pratt, member (1991— 1993), chair (1993 — 1995);
Judge Alicemarie H. Stotler, member (1991 — 1993);
Joseph F. Spaniol, Jr., consultant (1991 — present);
Bryan A. Garner, consultant (1991 — present);
Judge Robert E. Keeton, *ex officio* (1991 — 1993);

Judge James A. Parker, member (1993 — 1995), chair (1995 — 1999);
Professor Geoffrey C. Hazard, Jr., member (1993 — present);
Judge William R. Wilson, Jr., member (1995 — 1999)
R. Joseph Kimble, consultant (2000 — present);

Judge J. Garvan Murtha, chair (2000 — present); and
Judge Anthony J. Scirica, *ex officio* (1998 — present).

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

The Committee on Rules of Practice and Procedure met on June 7-8, 2001. The Department of Justice was represented by Roger A. Pauley, Director, Department of Justice, Office of Legislation, Criminal Division.

Representing the advisory rules committees were: Judge Will L. Garwood, chair, and Professor Patrick J. Schiltz, reporter, of the Advisory Committee on Appellate Rules; Judge A. Thomas Small, chair, and Professor Jeffrey W. Morris, reporter, of the Advisory Committee on Bankruptcy Rules; Judge David F. Levi, chair, Judge Lee H. Rosenthal, member, Professor Richard L. Marcus, special consultant, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge W. Eugene Davis, chair, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Judge Milton I. Shadur, chair, and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Peter G. McCabe, the Committee's secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief, Administrative Office's Rules Committee Support Office; Nancy Miller of the Administrative Office; Joseph Cecil of the Federal Judicial Center; Professor Mary P. Squiers, Director of the Local Rules Project; and

NOTICE

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declining the requested instruction without first renewing the request by objection. The “plain error” doctrine recognized in most but not all circuits would be confirmed.

Rule 53 (Masters) would be comprehensively amended to reflect contemporary practice. Courts have increasingly appointed special masters for pretrial and post-judgment purposes. The existing rule provides little guidance on appointment standards or procedures. The proposed amendments would establish a framework to regularize the practice, but they are not designed to encourage or discourage use of special masters. Comment is particularly requested on whether a de novo or clearly erroneous standard of review is appropriate regarding a master’s fact findings.

The Committee approved the advisory committee’s recommendation to circulate the proposed rule amendments to the bench and bar for comment.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules completed a comprehensive “style” revision of Criminal Rules 1-60 using uniform drafting guidelines. It also proposed substantive amendments to several rules that have been under consideration outside the “style” project. The two sets of amendments to the Criminal Rules were published in separate pamphlets for comment by the bench and bar in August 2000. Three public hearings were scheduled on the proposed amendments, but only one was held in Washington, D.C. on April 25, 2001, because no witnesses requested to testify at the two other hearings.

Proposed Comprehensive “Style” Revision of Criminal Rules

The “style” revision of the Criminal Rules is part of an effort to clarify and simplify the language of the procedural rules. The comprehensive revision is similar in nature to the revision of the Federal Rules of Appellate Procedure, which took effect in December 1998. The original

draft of the comprehensive revision was prepared by a leading legal-writing scholar. The draft was then vetted by the Committee's Style Subcommittee with the assistance of two law professors. The revised draft was submitted to the advisory committee, which divided itself into two subcommittees. Both the advisory committee and its subcommittees held a total of 16 meetings during a 28-month period intensively reviewing all the rules. The draft went through countless flyspecking sessions and many iterations before it was approved for publication for public comment.

In addition to publishing the proposals in major legal publications and circulating them to the large bench-and-bar mailing list, the proposed amendments were distributed to several hundred law professors who teach criminal procedure. Copies of the proposals were also sent to all major bar groups, including liaisons from each of the state bar associations. Major organizations involved in the administration of criminal justice were alerted early to the project, provided input throughout the project, and commented on the published proposals. These included the Department of Justice, Federal Magistrate Judges Association, Federal Public Defenders Association, and National Association of Criminal Defense Lawyers. Virtually all comments received from the bench, bar, and law professors were favorable to the restyled rules. The only negative comments were received from the National Association of Criminal Defense Lawyers, who were concerned that the changes might generate satellite litigation arising from inadvertent substantive changes. It bears notice, however, that they failed to identify any inadvertent substantive change. The committees' deliberate and laborious process was designed to ferret out any inadvertent substantive changes. No substantive changes beyond those identified by the advisory committee and specifically described in the Committee Notes to the rules have been identified so far.

Overarching Revisions

In its “style” project, the advisory committee focused on several major elements. First, it attempted to eliminate the existing confusion regarding key terms and phrases that appear throughout the rules by simplifying and standardizing them. For example, existing Rule 54 (Application and Exception) draws a distinction between a “Federal magistrate judge,” which is limited to a federal magistrate judge, and a “Magistrate judge,” which includes state judicial officials. The proposed amendments eliminate these misleading titles and include a state judicial official in the definition of “judge.” Second, the committee deleted provisions that no longer are applicable or necessary, usually because case law has evolved since the rule was first promulgated. Third, it reorganized several rules to make them easier to read and apply. Over the years, these rules have evolved inconsistently, occasionally resulting in convoluted provisions. For example, existing Rule 40 (Commitment to Another District) contains multiple layers of procedures that have bedeviled even experienced lawyers. The rule has been reorganized.

Specific Revisions Affecting Present Practices

The “style” revision resolved existing ambiguities in the rules that may affect present practices in some districts, which are identified in the Committee Notes accompanying the specific rule. None of the specific rule changes drew criticism during public comment. The more significant changes are highlighted below.

Rule 4 (Arrest Warrant or Summons on a Complaint) was amended to conform to the recently enacted Military Extraterritorial Jurisdiction Act (Pub. L. No. 106-523, 106th Cong.), which authorizes arrest warrants to be executed outside the United States on military personnel and Department of Defense civilian personnel. The comprehensive “style” revision of the rules was published for comment before the statute was enacted. The proposed amendment to Rule 4

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

The Committee on Rules of Practice and Procedure met on June 19-20, 1997. All the members attended the meeting, except Alan C. Sundberg. Acting Deputy Attorney General Seth P. Waxman attended on June 19. The Department of Justice was represented on June 20 by Ian H. Gershengorn and Roger A. Pauley.

Representing the advisory committees were: Judge James K. Logan, chair, and Professor Carol Ann Mooney, reporter, of the Advisory Committee on Appellate Rules; Judge Adrian G. Duplantier, chair, and Professor Alan N. Resnick, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Paul V. Niemeyer, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge D. Lowell Jensen, chair, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules. Judge Fern M. Smith, chair of the Evidence Rules Committee, was unable to be present.

Participating in the meeting were Peter G. McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief, and Mark D. Shapiro,

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attorney, of the Administrative Office's Rules Committee Support Office; Patricia S. Channon of the Bankruptcy Judges Division; James B. Eaglin of the Federal Judicial Center; Professor Mary P. Squiers, Director of the Local Rules Project; and Bryan A. Garner and Joseph F. Spaniol, consultants to the Committee.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules completed its style revision project to clarify and simplify the language of the appellate rules. It submitted revisions of all forty-eight Rules of Appellate Procedure and a revision of Form 4 (no changes were made in Forms 1, 2, 3, and 5), together with Committee Notes explaining their purpose and intent. The comprehensive style revision was published for public comment in April 1996 with an extended comment period expiring December 31, 1996. Public hearings were scheduled but canceled, because no witness requested to testify.

The style revision has taken up most of the advisory committee's work during the past four years. The style changes were designed to be nonsubstantive, except with respect to those rules outlined below, which were under study when the style project commenced. A few additional substantive changes have been made necessary by legislative enactments or other recent developments. Almost all comments received from the bench, bar, and law professors teaching procedure and legal writing were quite favorable to the restyled rules. Only one negative comment was received—that to the effect “why change a system that has worked?”

The advisory committee recommended, and the Standing Rules Committee agreed, that the submission to the Judicial Conference and its recommendation for submission to the Supreme Court, if the changes are approved, should be in a different format from the usual

submission. Instead of striking through language being eliminated and underlining proposed new language, the changes made by the restylization project can best be perceived by a side-by-side comparison of the existing rule (in the left-hand column) with the proposed rule (in the right-hand column). Commentary on changes that could be considered more than stylistic—generally resolving inherent ambiguities—are discussed in the Committee Notes. A major component of the restylization has been to reformat the rules with appropriate indentations. Your Committee concurs with the recommendation of the advisory committee that the physical layout of the rules should be an integral part of any official version—and of any published version that is intended to reflect the official version.

In connection with the restylization project, the advisory committee and the Standing Rules Committee bring to the attention of the Judicial Conference two changes in the restyled rules—the use of “en banc” instead of “in banc” and the use of “must” in place of “shall.” Although 28 U.S.C. § 46 has used “in banc” since 1948, a later law, Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1633, used “en banc” when authorizing a court of appeals having more than fifteen active judges to perform its “en banc” functions with some subset of the court’s members. Also the Supreme Court uses “en banc” in its own rules. *See* S. Ct. R. 13.3. The “en banc” spelling is overwhelmingly favored by courts, as demonstrated by a computer search conducted in 1996 that found that more than 40,000 circuit cases have used the term “en banc” and just under 5,000 cases (11%) have used the term “in banc.” When the search was confined to cases decided after 1990, the pattern remained the same—12,600 cases using “en banc” compared to 1,600 (11%) using “in banc.” The advisory committee decided to follow the most commonly used “en banc” spelling. This is a matter of choice, of course, but both committees recommend the more prevalent use to the Judicial Conference.

The advisory committee adopted the use of “must” to mean “is required to” instead of using the traditional “shall.” This is in accord with Bryan A. Garner, *Guidelines for Drafting and Editing Court Rules* § 4.2 at 29 (1996). The advisory committee is aware that the Supreme Court changed the word “must” to “shall” in some of the amendments of individual rules previously submitted to the Court. In doing so, the Supreme Court indicated a desire not to have inconsistent usages in the rules, and concluded “that terminology changes in the Federal Rules be implemented in a thoroughgoing, rather than piecemeal, way.” The instant submission is a comprehensive revision of all the appellate rules. Because of the potentially different constructions of “shall,” see Garner, *A Dictionary of Modern Legal Usage* 939-42 (2d ed. 1995), the advisory committee eliminated all uses of “shall” in favor of “must” when “is required to” is meant. Both the advisory committee and the Standing Rules Committee recognized room for differences of opinion and do not want the restylization work rejected due to the use of this word.

Included in this submission are some rules that have substantive amendments, all of which have been published for public comment at least once except the proposed abrogation of Rule 3.1 and the proposed amendments to Rule 22. Both of the latter changes are responsive to recent legislation. The changes to Rules 26.1, 29, 35, and 41 were approved for circulation to the bench and bar for comment in September 1995. They were resubmitted for public comment in April 1996 as a part of the comprehensive style revision. After considering suggestions received during these two comment periods, they were approved with minor changes along with the restylized version of the rules. Revised Rules 27, 28, and 32 were approved for circulation for public comment in April 1996 along with the restylized rules—with special notations to the bench and bar that these three rules underwent substantive changes. Rules 5, 5.1 (the latter of which is proposed to be abrogated), and Form 4 were sent out for comment separately, after the

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LEONIDAS RALPH MECHAM
Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

CLARENCE A. LEE, JR.
Associate Director

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

May 31, 2002

MEMORANDUM TO JUDGE DAVID F. LEVI

SUBJECT: *Stylization Process*

I have attached a memorandum that I had prepared for Judge Scirica last year describing the actions taken by the Criminal Rules Committee in restyling the rules. It gives a good chronology of the project and a realistic projection of what the Civil Rules Committee can expect.

During the Criminal Rules project there were several key developments and issues, including the following that may provide useful lessons:

- Role of the Standing Committee Style Subcommittee
- Designation of Professor Stephen A. Saltzburg (former committee reporter) as special consultant
- Developing a timetable for completion of the project
- Subcommittee process
- Developing two-track approach for submission of "style" and "substantive" changes
- Record-keeping practices
- Request for comment sent to targeted audience

Role of the Standing Committee Style Subcommittee

Judge James Parker of the Standing Committee chaired the Style Subcommittee. When the consultant, Bryan Garner, submitted the first draft of restyled rules, Judge Parker assigned batches of rules for review to his subcommittee, which included Judge Wilson and Professor Hazard, and Joseph Spaniol. Judge Parker and Spaniol also reviewed all the rules. The subcommittee held several meetings to discuss edits.

Judge Parker thoroughly reviewed all the proposals and raised questions about individual edits. Many of the questions required further research, especially on the genesis of particular provisions. Professor Saltzburg was hired to oversee the research of Judge Parker's inquiries. The subcommittee reviewed Professor Saltzburg's analyses and then submitted their edits to the

full Criminal Rules Committee for its consideration. A copy of the inquiries and responses was forwarded to the full Criminal Rules Committee.

Judge Parker, Professor Kimble, who was hired as a substitute for Garner, and Joseph Spaniol personally attended many of the Criminal Rules subcommittee meetings.

Designation of Professor Stephen A. Saltzburg (former committee reporter) as Special Consultant

Judge Parker identified many provisions in the rules whose purpose or justification was not evident. Many of these provisions were in place when the rules originally took effect in the 40's. Research was needed and Professor Saltzburg, former committee reporter, provided the help. As a rough estimate, he handled more than 100 specific questions posed by Judge Parker or the Style Subcommittee.

Professor Saltzburg attended most of the Criminal Rules subcommittee meetings (about 10 meetings). He was particularly effective in raising unintended consequences of revisions suggested and considered at the subcommittee meetings.

Developing a Timetable for Completion of the Project

In October 1998, I prepared several alternative timetables for completion of the Criminal Rules project. The key decision was whether to accelerate the committee's work and move at warp speed (3 years) or to be more deliberate. Factors in favor of warp speed included: (1) each year the terms of about 2 committee members expire — the longer the project the greater the discontinuity; (2) prolonging the project magnifies the committee's agony and weakens its attention and enthusiasm; and (3) prolonging the project increases the probability that it will never be completed. Factors in favor of more deliberate speed included: (1) opportunity to provide perhaps better review; and (2) warp speed requires multiple annual meetings imposing significant burdens on committee members, particularly on the chair and reporter.

Subcommittee Process

The chair created two subcommittees and appointed two members to chair them. The rules were divided among the subcommittees. We tried to equalize the division, although it was far from simple. The subcommittee members were asked to review all the rules assigned to their subcommittee, but each member was responsible to focus on specific rules assigned individually to them. A hard-copy of the batch of rules under consideration was distributed to each subcommittee member with a request to make any edits or comments about five weeks before a scheduled subcommittee meeting. Usually we gave them about 2-4 weeks to respond. Their responses were sent to me and I integrated their comments by hand into a single consolidated document that was distributed to the subcommittee and used at the subcommittee meetings.

At the subcommittee meetings, the member assigned the rule would make a presentation. On occasion, I would notice that individual subcommittee members would be oblivious to the ongoing discussion of a rule amendment that was not assigned to them. Usually, the member was concentrating on preparing the presentation of his assigned rules.

The stylization process fell into the following routine: subcommittee meets and reviews draft of a batch of about 10 rules; full committee reviews edits made by subcommittee to the batch of rules; subcommittee meets to review Notes for first half of the rules, which were prepared after subcommittee reviewed text of rules; full committee reviews rule and Notes: first half of rules sent to Standing Committee; subcommittee reviews questions posed by Standing Committee; full committee reviews and transmits entire set of rules.

Altogether we held 10 subcommittee meetings and 6 committee meetings within a 28-month span. The reporter attended virtually every meeting. The chair usually did not attend the subcommittee meetings. The subcommittee chairs played particularly crucial roles. They had to devote much time and effort.

Developing Two-Track Approach for Submission of "Style" and "Substantive" Changes

After meeting with the Chief Justice a few years ago on the Criminal Rules project, Judge Scirica made it clear that no "substantive" changes could be included in the "style" package. This directive immensely complicated the process.

It became apparent that resolving the many ambiguities in the rules resulted in potentially a large number of "substantive" changes. So we narrowly defined "substantive" changes as including amendments that were in the pipeline before the style project and revisions that were new. There were many decisions to be made in classifying particular changes. But the real problems occurred when we presented both packages to the Standing Committee, Conference, and Supreme Court. There was much duplication magnifying chance for inadvertent omissions and error. The two-track approach requires much explanation at each stage when transmitting the packages to the Standing Committee, Conference, and the Supreme Court. We submitted two packages to the Court to preserve the substantive amendments in the event that the Court rejected the style change or vice-versa. (We had about 10 substantive amendments that were in the pipeline.)

Record-Keeping Practices

No minutes or audio recording of the subcommittee meetings was made. Text of the rules was displayed on a screen and editing was accomplished in real time by means of a computer and projector. Hard-copies of the revised text were sent to the subcommittees immediately after their meetings to verify the edits.

A record of the actions taken at the subcommittee meetings would have been helpful. (We will tape record the Civil Rules subcommittee meetings.) We have identified an inadvertent omission to a single rule made at one of the subcommittee meetings. But no one recalls how it happened.

Request for Comment Sent to Targeted Audience

We sent the draft of all the revised rules to a select audience before publishing for general comment. Our results overall were disappointing. We sent it to over 100 law professors. We got little response. We also sent it to the Federal Magistrate Judges Association Subcommittee on Rules and the National Association of Criminal Defense Lawyers. We received some comment, but not much. It is difficult to gauge the attention that the Department of Justice gave to the project because its sole spokesperson was a member of the committee. In the end, the material proved too intimidating to allow careful review from the outside.



John K. Rabiej

Attachments

cc: Professor Edward H. Cooper (with attach.)
Peter G. McCabe, Secretary (with attach.)



LEONIDAS RALPH MECHAM
Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

CLARENCE A. LEE, JR.
Associate Director

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

June 4, 2001

MEMORANDUM TO JUDGE ANTHONY J. SCIRICA

SUBJECT: *Work of Criminal Rules Committee on "Style" Project*

Criminal Rules Restyling Project

Bryan Garner began restyling the Criminal Rules in early 1998. The Standing Style subcommittee vetted Garner's comprehensive revision in late 1998 and raised questions on substantive issues, which were referred to Professor Stephen Saltzburg, former committee reporter. The subcommittee then revised the draft and submitted it to the Advisory Committee on Criminal Rules for its consideration.

Judge Davis divided the advisory committee into two subcommittees, assigning blocks of rules. The subcommittees held meetings in Washington, which were all well attended. At each of the subcommittee meetings, Judge James Parker, former chair of the Standing Style Subcommittee, and Professor Joseph Kimble and Joseph Spaniol, consultants to the subcommittee, participated. Professor Saltzburg provided research assistance to both the Standing Committee's Style Subcommittee and the advisory committee and attended several meetings. Reporter David Schlueter also attended every subcommittee meeting.

The committee's schedule was demanding and intense, with 10 subcommittee meetings and 6 full committee meetings held during a 28-month period from December 1998 to April 2001. Numerous teleconference calls were also conducted among committee members.

The following time chart sets out the committee and subcommittee meetings on the restylization project:

1. January 1998 — Appellate Rules restyling project completed; Bryan Garner begins restyling Criminal Rules
2. August 1998 — Garner completes revision
3. November 1998 — Standing Style Subcommittee reviews Garner's revision and begins to submit research questions on substantive issues to Professor Stephen Saltzburg

Style Project
Page 2

4. December 1998 — Standing Style Subcommittee meets to consider Professor Saltzburg's responses
5. February 1999 — Standing Style subcommittee incorporates Professor Saltzburg's responses, edits Garner's revision, and submits revised rules to advisory committee
6. March 1999 — Subcommittee "A" meets to discuss first draft of Rules 1-9
7. April 1999 — Full advisory committee meets to discuss first draft of Rules 1-9 as revised by Subcommittee "A"
8. May 1999 — Subcommittee "B" meets to discuss first draft of Rules 10-22
9. June 1999 — Subcommittee "A" conducts lengthy conference call on stylized rules
10. June 1999 — Full advisory committee meets to discuss Rules 1-22 as revised by Subcommittees "A" and "B"
11. August 1999 — Bryan Garner submits edited Rules 23-60
12. August 1999 — Subcommittee "A" meets to review Rules 23-31
13. October 1999 — Full advisory committee meets to review revised draft of Rules 1-31 and first draft of Rules 31-60
14. November 1999 — Subcommittee "B" meets to review first draft of Rules 32-40
15. November 1999 — Subcommittee "A" meets to discuss Rules 1-31, including Committee Notes
16. January 2000 — Standing Committee reviews Rules 1-30 and poses questions on several changes to advisory committee
17. January 2000 — Full advisory committee meets to review Rules 1-31 and first draft of Rules 32-60
18. January 2000 — Judge Scirica and Professor Coquillette advise the Chief Justice of restyled rules project

19. February 2000 — Subcommittee “A” meets to review first draft of Rules 41-60 and respond to Standing Committee’s questions
20. March 2000 — Subcommittee “B” meets to review Rules 1-31; 10-22; and 32-40; and respond to Standing Committee’s questions
21. April 2000 — Full advisory committee meets to review Rules 1-60, now separated into style and substantive packages
22. April through September — Standing Style Subcommittee undertakes comprehensive review of stylized rules
23. June 2000 — Standing Committee approves publication
24. August 2000 — Rules published for comment
25. February 2001 — Subcommittee “A” meets to discuss public and Standing Style Subcommittee comments on Rules 41-60
26. March 2001 — Subcommittee “B” meets to discuss public and Standing Style Subcommittee comments on restyled rules
27. April 2001 — Public hearing conducted and full advisory committee meets to discuss rules
28. June 2001 — Finalized rules submitted to Standing Committee for transmission to Judicial Conference



John K. Rabiej

"H"

3 February 1999

TO: Advisory Committee on Criminal Rules

FROM: Style Subcommittee of the Standing Committee

Enclosed is a restyled draft of Rules 1-9. Our approach has been to clarify the rules and make them internally consistent, following the *Guidelines for Drafting and Editing Court Rules* (1996).

This effort has involved several types of edits:

- reorganizing provisions to make them logical;
- adding headings to make the organization plain;
- ensuring that terminology is consistent, especially in reference to prosecutors (see the attached chart);
- eliminating confusing and duplicative definitions;
- creating new definitions of *federal judge*, *judge*, *magistrate judge*, and *state or local officer* in order to simplify and clarify the drafting throughout the entire set of rules — an effort that required close attention to all the affected rules, as well as counsel from our substantive expert, Professor Stephen Saltzburg;
- correcting the variant words of authority (*shall*, *may*, and the like), which are currently inconsistent throughout the rules; and
- creating new paragraphs and subparagraphs for enhanced readability.

Professor Saltzburg would like to eliminate virtually all statutory references throughout the Rules. We have not done so, however, because we think the Advisory Committee should look closely at this question. There are competing interests here. On the one hand, specific statutory references can become quickly outmoded as soon as statutes are revised. On the other hand, they can be handy reference tools for those who need to know where the relevant statute is. In restyled Rule 1(b)(3)(B), we deleted the reference to 48 U.S.C. § 1801 (Mariana Islands) in part because there was no parallel statutory reference for the Virgin Islands in Rule 1(b)(3)(C). In Rule 1(b)(5), there are many more statutory cross-references that the Advisory Committee might consider deleting. We doubt whether a single standard will apply throughout the rules. The existing rules do not seem to reflect considered judgments on this point.

Even though these restyled rules reflect many drafts by the Style Subcommittee, we acknowledge that they can be further improved. But we do believe that upon close examination, the Advisory Committee will see the substantive benefits of restyling: it's true here as elsewhere that improving the language improves the content.



" I "

LEONIDAS RALPH MECHAM
Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

CLARENCE A. LEE, JR.
Associate Director

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

November 2, 1998
Via Fax

MEMORANDUM TO JUDGE JAMES A. PARKER

SUBJECT: *Professor Saltzburg's Responses to Research Questions on the Restyled Criminal Rules*

I am sending to you Professor Saltzburg's answers to research questions regarding Criminal Rules 20 through 32. For your records, this is Professor Saltzburg's seventh separate memorandum.

A handwritten signature in black ink, appearing to read "JR" or similar initials.

John K. Rabiej

Attachments

cc: Style Subcommittee (with attach.)
Honorable W. Eugene Davis (with attach.)
Professor David A. Schlueter (with attach.)

November 2, 1998

MEMORANDUM

TO: JOHN RABIEJ

FOR: JUDGE PARKER, JUDGE DAVIS

RE: STYLE CHANGES

FROM: STEVE SALTZBURG

Rule 20 (d)

1. Although the language is not crystal clear, it appears that "the court" refers to the court where the juvenile is held. Prior to 1975, consent was not required of the U.S. Attorney where the act was committed. The rule was amended to require both U.S. Attorneys to consent, but only one court. This reading of the rule is consistent with the last sentence which refers to "the court" and clearly indicates that it is the court where the juvenile is held.

2. Although the issue was not raised, my routine suggestion is to avoid statutory references. Juvenile could be defined in the definitional section if it is retained in Rule 54.

Rule 25 (a)

1. The word "judge" is arguably ambiguous, even though all of us understand the intent of the rule. Why not eliminate the words "regularly sitting in or assigned to the court" and substitute the concept "Any judge eligible to preside at a trial may finish . . ." The current language covers all regularly sitting judges and any judge who is assigned. The proposed substitute uses the word "assigned." It seems that a judge who is not assigned cannot preside. This is a tautology. The word eligible would make the point better.

Rule 25 (a) and (b)

1. There are not many cases, thank goodness, under this Rule. However, the import seems pretty clear. As originally adopted, the Rule was confined to actions after verdict or a finding of guilt. Constitutional issues have been raised as to the substitution of judges without a defendant's consent. But, the amendment of the Rule in 1966 was intended to deal with protracted jury trials and the burden of retrial. The difference between bench and jury trials is that in a jury trial the jury is the finder of fact and has heard all witnesses and evidence. This would not be true if judges were changed in a bench trial prior to verdict or a finding of guilt.

Rule 25 (b)

1. The word “verdict” appears to refer to a jury verdict, and the words “finding of guilt” appear to refer to a bench trial.

Rule 26.1

1. Unlike Rules 12.1, 12.2 and 12.3 where the notice is intended to be directed at the government, the notice in Rule 26.1 clearly must be directed to the court at least in part because the court rules on foreign law disputes as a “question of law.” You could borrow the approach of Rule 12.3 and reverse it by providing that: “A party who intends to raise an issue of foreign law must provide the court with reasonable written notice and must serve a copy upon all parties.”

Rule 26.2 (e)

1. Under the *Jencks Act*, 18 U.S.C. 3500, the court is required to strike a witness’s testimony if the government fails to comply with an order turn over statements, unless the court determines that the more serious sanction of a mistrial is required. The Advisory Committee’s Note to Rule 26.2 indicates that “if a defendant refuses to comply with the court’s disclosure order, the court’s only alternative is to enter an order striking or precluding the testimony of the witness, as was done in *Nobles*.” *United States v. Nobles*, 422 U.S. 225 (1975). The words “shall” mean “must.”

Rule 28

1. The language of this rule is obscure. I interpret it as follows. The Criminal Justice Act of 1964, 18 U.S.C. 30006(A)(e), provides authority for appointment of experts, including interpreters for the defense. The Court Interpreters Act of 1978, 28 U.S.C. 1827, 1828, also is relevant. The assumption is that the court will authorize payment of most interpreters out of the funds provided by the A.O. Rule 28 appears to provide authority, however, for imposing the costs of an interpreter on the government, which would mean that the court would require the prosecution to pay the bill. This little discussed language may be a specific authorization to shift certain costs against the U.S. in a criminal prosecution. The difference in funds provided by law or by the government is that funds provided by law are A.O. funds, and funds provided by the government may be Justice Department funds.

Rule 29 (a)

1. The first sentence of this subdivision can and should be eliminated. It served its purpose long ago. The remainder of the Rule protects a defendant and indicates that a motion can be made after either party rests and even after verdict and that there is no waiver by making a motion.

2. The last sentence of the Rule remains necessary to assure that the old-waiver rule – you waive your right to present evidence by making a motion – is not deemed reinstated. Although prevailing practice was largely consistent with the last sentence, the drafters felt it necessary to include it. Taking it out might be read as changing the law.

Rule 30

1. There should be no problem substituting “begins deliberations” for “retires to consider its verdict.” The meaning is the same. It is difficult to imagine that a court would say that, if a party objected immediately after the jury left the courtroom but before they reached the jury room, the objection is late.

Rule 31 (d)

1. The law is clear that a verdict is not final when it is announced. *United States v. Love*, 597 F.2d 81, 84-85 (6th Cir. 1979). In *United States v. Shepherd*, 576 F.2d 719, cert. denied, 439 U.S. 852 (1978). The trial judge addressed an acquitted defendant and released him after the jury’s verdict was read. The judge then polled the jury, but Shepherd objected that the judge had interfered with his rights. The court of appeals found error but declared it harmless. The court note in footnote 3 that there must be an opportunity between the return of the verdict and the recording of the verdict for a poll. But, there is no explanation of the term “record.” It seems to me that it would be preferable to change “is recorded” to “is accepted by the court.” This makes clear that the verdict as read is not accepted until there is an opportunity for the parties to request or the court to direct a poll and for any poll to be conducted.

Rule 31 (e)

1. It would make more sense to delete the words “or property.” The concept “interest in property” is intended to indicate that the government can only subject to forfeiture things that can be seized. Once the concept is captured, use of the word “property” a second time is unnecessary. My use of the word “interest” is consistent with such cases as *United States v. Ofchinick*, 883 F.2d 1172, 1176 (3rd Cir. 1989).

Rule 32 (c)(1)

1. The word “determinations” in the last sentence is intended to refer back to “a determination that a finding is not necessary.” As rewritten, the Rule fails to address the necessity of appending a copy of the court’s determination to the presentence report. I respectfully suggest that the rule as now written and as rewritten confuses “objections” with controverted matters. I would delete the rewritten subdivision (D) and combine the rewritten (B) with (D) to read as follows: “must rule on any unresolved objections to the presentence report either by making a finding as to any disputed matter, or by declaring that the matter will not affect or will not be considered in sentencing.” Then, I would change the word “findings” to “ruling” in rewritten (E).



"K (1)"

LEONIDAS RALPH MECHAM
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ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

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WASHINGTON, D.C. 20544

Rules Committee Support Office

April 26, 1999
Via Federal Express Mail

MEMORANDUM TO CRIMINAL RULES STYLE SUBCOMMITTEE "B"

SUBJECT: *Review of Stylized Rules*

The subcommittee meeting will be held on Tuesday, May 25, 1999, in the Thurgood Marshall Federal Judiciary Building. Information on lodging arrangements will soon be sent to you.

Judge Dowd has asked that you review for discussion at the May 25th meeting each of the 16 stylized rules, which were forwarded to you in late March and are attached. To ensure that each rule receives attention, Judge Dowd requests that during your overall review you focus on particular rules as assigned below:

Robert C. Josefsberg — Rules 10-11
Judge John M. Roll — Rules 12.1-14
Henry Martin — Rules 15-16
Justice Daniel E. Wathen — Rules 17.1-22

Please mail or fax at (202) 502-1766 your hand-written comments or proposed edits directly on the pages of your assigned rules as well as on the other rules to me **by Tuesday, May 18**. I will incorporate them into a single "master" document that will be circulated at the June meeting.

Roger Pauley and Professor Kate Stith will review all the rules. We have also asked the Rules Committee of the Federal Magistrate Judges Association to review these rules and submit their comments by May 14. I will identify and include their suggested edits in the "master" copy.

For your information, I have included the research inquiries posed by Judge James A. Parker, chair of the Standing Rules Committee Style Subcommittee, to Professor Stephen Saltzburg and his responses regarding the 16 rules.

Please call me at (202) 502-1820 if you have any questions regarding this matter. Thank you for your help.

John K. Rabiej

Attachments

cc: Honorable W. Eugene Davis
Honorable James A. Parker
Professor Stephen A. Saltzburg
Professor David A. Schlueter



LEONIDAS RALPH MECHAM
Director

ADMINISTRATIVE OFFICE OF THE
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WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

March 11, 1999
Via Fax

MEMORANDUM TO SUBCOMMITTEE "A"

SUBJECT: *"Master Document"*

I have attached a "master" document that contains the comments suggested by each of you on Rules 1 through 9. I have identified the author of the comment parenthetically in the text or margins. Please note that the Standing Committee's Style Subcommittee added a few changes that are noted parenthetically as "SSC." In addition to the specific changes in the text of Rules 5 and 5.1, Judge Miller has submitted a narrative explanation of the changes, which is also attached.

We had asked the Magistrate Judges Association Rules Committee to review the rules. But they were unable to do it in time for this meeting.

I look forward to our meeting tomorrow at 8:30 a.m. in the 7th Floor conference room of the Thurgood Marshall Building.

John K. Rabiej

Attachment

cc: Honorable Anthony J. Scirica
Honorable W. Eugene Davis
Standing Committee Style Subcommittee
Professor David A. Schlueter
Peter G. McCabe, Secretary

Perhaps, move to Rule (b)(1)(5)(E)? (Carnes)
 Delete entire paragraph. (SSC)

I. SCOPE, PURPOSE, AND CONSTRUCTION	Title I. Applicability of Rules ¹
Rule 1. Scope	Rule 1. Title; Scope; Definitions (Carnes)
These rules may be known and cited as the Federal Rules of Criminal Procedure. ²	(a) Title. These rules are to be known as the Federal Rules of Criminal Procedure.
<p>These rules govern the procedure in all criminal proceedings in the courts of the United States, as provided in Rule 54(a); and, whenever specifically provided in one of the rules, to preliminary, supplementary, and special proceedings before United States magistrate judges and at proceedings before state and local judicial officers.³</p> <p>These rules apply to all criminal proceedings in the United States District Courts; in the District of Guam; in the District Court for the Northern Mariana Islands, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263); in the District Court of the Virgin Islands; and (except as otherwise provided in the Canal Zone) in the United States District Court for the District of the Canal Zone; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that the prosecution of offenses in the District Court of the Virgin Islands shall be by indictment or information as otherwise provided by law.</p>	<p>(b) Scope.</p> <p>(1) <i>In General.</i> These rules govern the procedure ^(Jackson) in all criminal proceedings in the United States district courts.</p> <p>(2) <i>State or Local Officer.</i> ^{does} When ^{only when (Carnes)} a rule so states, it applies to a proceeding before a state or local officer.</p> <p>(3) <i>Territorial Courts.</i> These rules also apply to criminal proceedings in the following courts:</p> <p>(A) the ^a District ^{court (SSC)} of Guam;</p> <p>(B) the district court for the Northern Mariana Islands, except as otherwise provided by law;⁴ and</p> <p>(C) the district court of the Virgin Islands, except that the prosecution of offenses in that court must be by indictment or information as otherwise provided by law.</p>

¹ The Style Subcommittee (SSC) expanded Rule 1 by incorporating Rules 54 and 60, a step that seems organizationally preferable. Rule 60 is the short statement of title of all the rules; logically, it should be at the beginning. Rule 54, meanwhile, deals with the application of the rules — even though existing Rule 1 purports to cover “Scope.” The SSC believes that a statement of the scope of the rules should be at the beginning to show readers which proceedings are governed by these rules. If that principle is sound, then both 54(a) and 54(b) belong up front.

Definitions should be in Rule 1 since they apply generally to all rules (Bucklew)

This draft also shows Rule 54(c) — “Application of Terms” — as a new Rule 1 (d), now entitled “Definitions.” The SSC believes that it may be helpful to have at the beginning the definitions that apply generally to all the rules. But if moving the definitions into Rule 1 makes it too long, Rule 54 could be retained as a separate rule of general definitions. Professor Saltzburg recommends the latter, but with our pared down definitions, keeping them under Rule 1 doesn’t seem to create an unwieldy rule. The Advisory Committee should consider this point.

² This is the language of Rule 60 — currently the *last* provision in the Rules.

³ This is the language of current Rule 1 — in its entirety.

⁴ Professor Saltzburg suggests deleting the statutory reference to 48 U.S.C. § 1801 because 99.9% of the users of these rules will never need it, the deletion makes this provision parallel with (C) just below, and we save a couple of words.

cite should be to “Act of March 24, 1976” etc., or in original (SSC)

(1) **Removed Proceedings.** These rules apply to criminal prosecutions removed to the United States district courts from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law.

(2) **Offenses Outside a District or State.** These rules apply to proceedings for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, except that such proceedings may be had in any district authorized by 18 U.S.C. § 3238.

(3) **Peace Bonds.** These rules do not alter the power of judges of the United States or of United States magistrate judges to hold security of the peace and for good behavior under Revised Statutes, § 4069, 50 U.S.C. § 23, but in such cases the procedure shall conform to these rules so far as they are applicable.

(4) **Proceedings Before United States Magistrate Judges.** Proceedings involving misdemeanors and other petty offenses are governed by Rule 58.⁵

(4) **Removed Proceedings.** Although these rules govern all proceedings after removal from a state court, state law governs a dismissal by the prosecution.

~~(2) **Offenses Outside a District or State.** These rules apply to proceedings for offenses committed on the high seas or elsewhere outside the jurisdiction of any particular state or district, as provided in 18 U.S.C. § 3238.⁶~~

~~(3) **Peace Bonds.** These rules do not alter the power of a judge, including a magistrate judge, to hold security of the peace and for good behavior under 50 U.S.C. § 23. In such a case, however, the procedure must conform to these rules when applicable.⁷~~

~~(4) **Misdemeanors and Petty Offenses.** Rule 58 governs proceedings involving misdemeanors and petty offenses.⁸~~

⁵ All the language in the left column currently appears in Rule 54(b). We think it logically belongs here.

⁶ This paragraph refers to a venue statute dealing with where an offense committed on the high seas or elsewhere outside the jurisdiction of a particular district is to be tried. Once venue has been established, the Criminal Rules automatically apply.

⁷ Professor Saltzburg says that this provision is inconsistent with the statute itself and therefore suggests deleting it.

⁸ This duplicates what is said in Rule 58. We suggest deleting it.

agree
(Bucklew)

(5) **Other Proceedings.** These rules are not applicable to extradition and rendition of fugitives; civil forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties. Except as provided in Rule 20(d) they do not apply to proceedings under 18 U.S.C. Chapter 403 — Juvenile Delinquency — so far as they are inconsistent with that chapter. They do not apply to summary trials for offenses against the navigation laws under Revised Statutes §§ 4300-4305, 33 U.S.C. §§ 391-396, or to proceedings involving disputes between seamen under Revised Statutes §§ 4079-4081, as amended, 22 U.S.C. §§ 256-258, or to proceedings for fishery offenses under the Act of June 28, 1937, c. 392, 50 Stat. 325-327, 16 U.S.C. §§ 772-772i, or to proceedings against a witness in a foreign country under 28 U.S.C. § 1784.⁹

(5) **Excluded Proceedings.** These rules do not apply to ~~the following:~~
(SSC)

- (A) the extradition and rendition of a fugitive;
- (B) a civil property forfeiture for the violation of a federal statute;
- (C) the collection of a fine or penalty;
- (D) a proceeding under a statute governing juvenile delinquency to the extent the procedure is inconsistent with the statute, unless Rule 20(d) provides otherwise;¹⁰ (Carnes)
- (E) a summary trial for ~~an~~ ^{Navigation} offense ~~against the navigation laws~~ under 33 U.S.C. §§ 391-96;
- (F) a dispute between seamen under 22 U.S.C. §§ 256-58;
- (G) a proceeding involving a fishery offense ~~under 16 U.S.C. §§ 772-772i,~~ ^(SSC) ~~or~~
- (H) a proceeding against a witness in a foreign country under 28 U.S.C. § 1784; ~~or~~ (Carnes)

delete (SSC) }

delete (SSC) }

(I) a proceeding before a state or local officer, unless a rule states it applies.
(Carnes)

⁹ All the language in the left column currently appears in Rule 54(b). We think it logically belongs here.

¹⁰ Here we have substituted broader language because, as Professor Saltzburg notes, there are many proposals for new legislation affecting juveniles.

[Is it clear "authorized assistant" includes Deputy Attorney General?]
(Carnes)

(c) Application of Terms. As used in these rules the following terms have the designated meanings.

"Act of Congress" includes any act of Congress locally applicable to and in force in the District of Columbia, in Puerto Rico, in Puerto Rico, in a territory or in any insular possession.¹¹

"Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney, when applicable to cases arising under the laws of Guam the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein, and when applicable to cases arising under the laws of the Northern Mariana Islands the Attorney General of the Northern Mariana Islands or any other person or persons as may be authorized by the laws of the Northern Marianas to act therein.

"Civil action" refers to a civil action in a district court.¹²

The words "demurrer," "motion to quash," "plea in abatement," "plea in bar" and "special plea in bar," or words to the same effect, in any act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12.

"District court" includes all district courts named in subdivision (a) of this rule.

(c) Definitions. The following definitions apply to these rules:

- (1) "Demurrer," "motion to quash," "plea in abatement," "plea in bar," and "special plea in bar," or similar words in a federal statute mean a Rule 12 motion.
(Carnes)
- (2) "Government's attorney"¹³ includes:
 - (A) the Attorney General, or an authorized assistant;
 - (B) a United States attorney, or an authorized assistant;
(Carnes)
 - (C) when applicable to cases arising under Guam law, the Guam Attorney General or any other person Guam law authorizes to act in the matter; and
 - (D) when applicable to cases arising under the laws of the Northern Mariana Islands, the Northern Mariana Islands Attorney General or any other person that Northern Mariana Islands law authorizes to act in the matter.
(Carnes)

* Leave in? See, e.g., Rule 4(d)(1).

(KS)

¹¹ The phrase *Act of Congress* is not used in the restyled rules. The SSC has consistently used *federal statute* instead. Professor Saltzburg approves this approach.

¹² This definition seems unnecessary. Professor Saltzburg agrees.

¹³ Throughout these rules, *attorney for the government* has been changed to *government attorney*. Currently, the rules contain eight variations: (1) *government*, (2) *government('s) attorney*, (3) *attorney(s) for the government*, (4) *counsel for the government*, (5) *United States attorney*, (6) *the prosecution*, (7) *attorney for the prosecution*, and (8) *prosecuting attorney*. We have substituted *government's attorney* throughout, except where *government* seemed more appropriate. We have also provided a chart showing where each variation appears in the current rules.
(Carnes)

Agree
(Bucklew)

"Federal magistrate judge" means a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates.¹⁴

"Judge of the United States" includes a judge of the district court, court of appeals, or the Supreme Court.¹⁵

"Law" includes statutes and judicial decisions.¹⁶

"Magistrate judge" includes a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States, another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates, and a state or local judicial officer, authorized by 18 U.S.C. § 3041 to perform the functions prescribed by Rules 3, 4, and 5.

"Oath" includes affirmations.

"Petty offense" is defined in 18 U.S.C. § 19.

"State" includes District of Columbia, Puerto Rico, territory and insular possession.

"United States magistrate judge" means the officer authorized by 28 U.S.C. §§ 631-639.¹⁷

(3) "Federal judge" means:

(A) a United States judge as defined in 28 U.S.C. § 451; or

(B) a United States magistrate judge.

(4) "Judge" means a federal judge or a state or local officer.

(5) "Magistrate Judge"¹⁸ means a United States magistrate judge appointed under 28 U.S.C. § 631.¹⁹

(6) "State or local officer" includes:

(A) a state or local officer authorized to act under 18 U.S.C. § 3041; and

(B) a judicial officer specifically empowered by statute in force in any territory or possession, including the District of Columbia and Puerto Rico, to perform a function to which a particular rule relates

(7) "Oath" includes an affirmation.

(8) "Petty offense" is defined in 18 U.S.C. § 19.

(9) "State" includes the District of Columbia, ~~Puerto Rico, a territory, and an insular possession.~~ and any commonwealth, territory, or possession of the United States. (SSC)

¹⁴ In the current rules, there are three definitions of *magistrate judge*. The SSC has consolidated these into one: Rule 1(c)(5). Professor Saltzburg agrees with this approach.

¹⁵ The phrase *Judge of the United States* does not appear in the restyled rules. The SSC has uniformly used the phrase *federal judge* instead. Professor Saltzburg has approved this approach.

agree (Buckles) — ¹⁶ Professor Saltzburg agrees with the SSC that this definition is superfluous. If anything, it suggests that administrative regulations are somehow excluded. The SSC has deleted it.

agree (Buckles) — ¹⁷ All the language in the left column derives from current Rule 54(c). We think it might be better here, especially given that we have shortened it.

¹⁸ The current rules define *magistrate judge* in three places (as seen in the left column). We have consolidated the definitions here.

¹⁹ We plan to put the following language in Rule 54: "When these rules authorize a magistrate judge to act, a United States judge as defined in 28 U.S.C. § 451 may act."

Rule 2. Purpose and Construction	Rule 2. Purpose and Construction
<p>These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.</p>	<p>These rules are intended to provide for the just determination of every criminal proceeding. They <u>must</u> be construed to eliminate unjustifiable expense and delay ^{and to} secure simplicity in procedure and fairness in administration <u>and</u></p>

[Do we really want to use "must" instead of "shall" here? Does this fit with the note to 4.2C (p. 29) discussing the proper use of "shall" in the Guidelines for Drafting and Editing] (Carney)

x

~~Page 10, Rule 2~~

I would rearrange these phrases so that we don't lead with saving money.

(15)

II. PRELIMINARY PROCEEDINGS	Title II. Preliminary Proceedings
Rule 3. The Complaint	Rule 3. The Complaint
The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate judge.	The complaint is a written statement of the essential facts constituting the offense charged. It must be made under oath <u>before a federal judge or a state or local officer</u> . ²⁰

Why not say Judge. Judge is defined in revised 1(c)(4) to mean "a federal judge or a state or local officer."
(Bucklaw)

~~Page 7, Rule 3, n. 20~~ It was my understanding when I was prosecuting that the *complainant* must swear before the judge, but the complainant need not be the same person as the *affiant* who wrote the affidavit upon which the complaint is based. Thus, while both the complaint and the accompanying affidavit are sworn statements, only the *complainant* need be sworn before the judge. Thus, FBI agent C can swear out a complaint--which is basically just a sworn statement stating the charge--referring to a separate affidavit of FBI Agent A [e.g., "I, the undersigned complainant being duly sworn state that the following is true and correct to the best of my knowledge and belief: On or About April 19, 1995, in Oklahoma City, TIMOTHY JAMES MCVEIGH did maliciously damage This complaint is based on the facts in the sworn to in the attached affidavit of FBI Agent A."]

(KS)

Not generally done in our district. The practice is the complainant appears before the magistrate judge (illegible from fax) (Bucklaw)

²⁰ Professor Saltzburg says Rule 3 does not require a complainant, who swears to the facts in a complaint, to actually appear before a magistrate judge. The intent of Rule 3 is to require the complaint to be sworn although it may be presented to the magistrate judge by someone other than the complainant. If this is correct, Rule 3 should be revised to so state.

<p>Rule 4. Arrest Warrant or Summons upon Complaint</p>	<p>Rule 4. Issuing an Arrest Warrant or a Summons on a Complaint (SSC)</p>
<p>(a) Issuance. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest²¹ of the defendant shall issue to any officer authorized by law²² to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.</p>	<p>(a) Issuance. If from the complaint or from one or more affidavits filed with the complaint, there is probable cause to believe that an offense has been committed and that the defendant has committed it, the judge will²³ issue an arrest warrant to any officer authorized to execute it. At the request of the government's attorney, the judge will²⁴ issue a summons instead of a warrant. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to a summons, the judge may²⁵ issue a warrant.²⁶</p>
<p>(b) Probable Cause. The finding of probable cause may be based upon hearsay evidence in whole or in part.</p>	<p>(b) Probable Cause. Hearsay evidence may be used to establish probable cause.²⁷</p>

Why not "must" or "may" (Carnes)

Why not "must"? (Carnes)

(Bucklew)

The defendant has committed (Jackson)

The current Rule 4(b) seems clearer to me than the revised rule. I think it more clearly spells out Probable cause may be based wholly on hearsay. (Bucklew)

[Shouldn't this be "a" to allow a different judge to issue the warrant?] (Carnes) yjs

Page 8, Rule 4. Please note that we use "will" here in reference to what the judge is supposed to do. I agree that this is the correct word here - and would further urge that we ALWAYS use "will" rather than "must" in connection with judicial (court) prescription. Why? An axiom of our system is that judges are law-abiders. Tell them their duties and they'll do it. Use of the word "must" seems way too strong in reference to judicial duties. (KS)

- agree (Bucklew) -²¹ The Supreme Court, in various opinions, has referred to *arrest warrant*. That phrase would be an improvement on *warrant for the arrest*.
- agree (Bucklew) -²² Wright & Miller, in *Federal Practice and Procedure*, recommend deleting the phrase *by law*, which is implied in the concept of authorization.
- agree (Bucklew) -²³ Professor Saltzburg says *will* is preferable in this sentence.
- agree (Bucklew) -²⁴ Ditto.
- agree (Bucklew) -²⁵ Professor Saltzburg says *may* is the correct word here. *Must* is inappropriate because valid reasons such as inclement weather may prevent a person from appearing, but such a person should not always be subject to arrest.
- agree (Bucklew) -²⁶ Professor Saltzburg agreed that the sentences should be in active voice and that the actor should be a judge.

Disagree -²⁷ Professor Saltzburg would abolish Rule 4(b) because this is covered by Fed. R. Evid. 1101(d) and Supreme Court cases. The same language appears in Rule 5.1(d). Professor Saltzburg reasons that the specific mention of hearsay could lead to the inference that hearsay is excluded in other places where it's not specifically mentioned. Also, Rule 32 doesn't refer to hearsay even though it is admissible in sentencing hearings. Cf. note 50.

<p>(c) Form.</p> <p>(1) Warrant. The warrant shall be signed by the magistrate judge and shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate judge.</p> <p>(2) Summons. The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place.</p>	<p>(c) Form.</p> <p>(1) Warrant. A warrant must²⁸: it (Carves)</p> <p>(A) contain the defendant's name or, if the defendant's name ^{it} is unknown, a name or description by which the defendant can be identified with reasonable certainty;</p> <p>(B) describe the offense charged in the complaint;</p> <p>(C) command that the defendant be arrested and brought before the nearest available judge; and</p> <p>(D) be signed by a judge.</p> <p>(2) Summons. A summons must²⁹ be in the same form as a warrant except that it must³⁰ require the defendant to appear before a judge at a stated time and place.</p>
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

²⁸ *agreed (Buller)* Professor Saltzburg says *must* is the correct word here.

²⁹ *agreed (Bucklow)* Ditto. (But perhaps "is to" would be better. (SSC))

³⁰ *agreed (Bucklow)* Ditto.

Why use "must" in (d)(1) but "may be" in (d)(2) - we mean the same thing in both, i.e., only in or by. (Carnes)

What we really mean is: "A warrant may be executed by a marshal or other authorized officer." Not that any given one must do it. (Carnes)

<p>(d) Execution or Service; and Return.</p> <p>(1) By Whom. The warrant shall be executed by a marshal or by some other officer authorized by law.³¹ The summons may be served by any person authorized to serve a summons in a civil action.</p> <p>(2) Territorial Limits. The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.</p>	<p>(d) Execution or Service, and Return.</p> <p>(1) By Whom. A marshal or other authorized officer <u>must execute a warrant.</u> A person authorized to serve a summons in a civil case <u>may</u> serve the summons.</p> <p>(2) Territorial Limits. A warrant may be executed, or a summons served, at any place within the jurisdiction of the United States.</p>
<p>(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant at the time of the arrest but upon request shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant at the time of the arrest, the officer shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to the defendant personally, or by leaving it at the defendant's dwelling house³² or usual place of abode with some person of suitable age and discretion then residing therein and by mailing a copy of the summons to the defendant's last known address.</p>	<p>(3) Manner.</p> <p>(A) A warrant is executed by arresting the defendant. If the officer does not possess the warrant at the time of arrest, the officer must inform the defendant of its existence and of the offense charged. At the defendant's request, the officer must show the warrant to the defendant as soon as possible.</p> <p>(B) A summons is served on a defendant:</p> <p>(i) by personal delivery; or</p> <p>(ii) by leaving it at the defendant's residence or usual place of abode with a person of suitable age and discretion <u>residing</u> at that location <u>and</u> by mailing a copy to the defendant's last known address.</p> <p>(Carnes) reasonably</p> <p>who resides (Carnes)</p> <p>or (Carnes)</p>

Should the revision affirmatively say that the officer does not need to possess the warrant at the time of arrest? The Rule as revised implies that he does not, but does not affirmatively say he does not as the current Rule does. (Bucklew)

* Page 10, Rule 1(d), (1) [Should "Civil case" be changed to "Civil action" in line with the definition in Rule 1? We do mean in the federal courts, don't we?]

(KS)

³¹ See note 19.

³² Professor Saltzberg approves the change from *dwelling house* to *residence*. (Bucklew) agreed

Government attorney's (Jackson) (Bucklew)

(4) Return. The officer executing a warrant shall make return thereof³³ to the magistrate judge or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to and canceled by the magistrate judge by whom it was issued. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the magistrate judge before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not canceled or summons returned unserved or a duplicate thereof³⁴ may be delivered by the magistrate judge to the marshal or other authorized person for execution or service.

(4) Return.

(A) After executing a warrant, the officer must return it to the judge³⁵ before whom the defendant is brought in accordance with Rule 5. At the government's request, an unexecuted warrant must be brought back³⁶ for cancellation by the judge who issued it.

(B) On or before the return day, the person to whom a summons was delivered for service must return it to the judge who issued it.

(C) At the government's request, made while the complaint is pending, the judge may redeliver an unexecuted and uncanceled warrant, or the original or a copy of an unserved summons, to the marshal or other authorized person who must try to execute or serve it.³⁷

* ~~Proposed by Bucklew (1/1/84)~~ [It is unclear whether the judge is *required* to cancel upon the government's request. If so, change "for cancellation" to "and will be cancelled".... (KS)]

agreed (Bucklew)³³ Professor Saltzburg approves the change from *shall make return thereof* to *must return it*.

agreed (Bucklew)³⁴ Professor Saltzburg says *duplicate thereof* refers only to *summons*, and not also to *warrant*. Hence, revised Rule 4(d)(4)(C) refers only to a copy of the summons.

agreed (Bucklew)³⁵ Because of Rule 1(c)(4), the deleted language *or other officer* is now unnecessary.

wording is awkward (Bucklew)³⁶ Professor Saltzburg approved our suggestion of *brought back*. The word *return* appears earlier in the paragraph in a different sense from what is here intended.

agreed (Bucklew)³⁷ Professor Saltzburg proposed the wording *who must try to execute or serve it*. The SSC agreed.



" K (2) "

LEONIDAS RALPH MECHAM
Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JOHN K. RABIEJ
Chief

CLARENCE A. LEE, JR.
Associate Director

WASHINGTON, D.C. 20544

Rules Committee Support Office

May 27, 1999
Via Federal Express Mail

MEMORANDUM TO CRIMINAL RULES SUBCOMMITTEE "B"

SUBJECT: *Revised Rules 10-22*

I have attached Rules 10 through 16, which incorporate revisions adopted at the May 25 meeting. Please review them for accuracy. If you had left the meeting before consideration of Rule 16, you may wish to pay particular attention to the adopted revisions.

The subcommittee had insufficient time to review Rules 17 through 22. But these rules are contained in only six pages and hopefully most of the suggested edits can be agreed upon in advance of the June 21-22 meeting. I have included pages 64-70 of the "master copy," which contain the edits proposed by subcommittee members. Each of the proposed edits has been numbered — a total of 31 edits. With the exception of five numbered edits, every proposed edit recommends a specific edit. **In accordance with the subcommittee's decision, we will presume that the specific edits are acceptable to you, unless you advise me otherwise by June 7, 1999.**

There are five suggested numbered edits that raise questions or otherwise are open-ended, without proposing a specific edit. To facilitate our work on this project, specific suggestions regarding these five edits are given below. They will be adopted unless you advise us otherwise.

Suggestion # 7 — identifies an ambiguity. To address the ambiguity, the following is suggested: "No party may subpoena a statement of a witness or of a prospective witness under this rule."

Suggestion # 8 — raises a potential theoretical problem. The suggestion is to retain the existing clause.

Suggestion # 15 — suggests an edit similar to other edits made in analogous situations. The suggestion is to adopt the following: "The defendant's statement that the defendant wished to plead guilty or nolo contendere is not, in any civil or criminal proceeding, admissible against the defendant." (Both Judge Parker and Bryan Garner recommend that the intervening clause "in any civil or criminal proceeding" should follow the word "admissible" so that the provision would read as follows: "The defendant's statement that the defendant wished to plead guilty or nolo

contendere is not admissible in any civil or criminal proceeding against the defendant.” Under their recommendation, the placement of the clause would need to be moved in the other places in the rules where it appears.)

Suggestion # 28 — identifies a potential inconsistency with an earlier rule. The suggestion is to adopt the following: “ ... the clerk must send to the transferee district court the file or a certified copy of it, and any bail taken.

Suggestion # 31— draws attention to the “vacant” Rule 22. The suggestion is to include in brackets the following: [transferred to Rule 21(d)].

Suggestion # 4 raises a question regarding the use of “document” as a substitute for the original reference to “books, papers, documents or other objects.” In accordance with the decision of the subcommittee in analogous provisions, it seems appropriate to retain the original reference. Accordingly, (c)(1) would read: “A subpoena may order the witness to produce any books, papers, documents or other objects the subpoena designates.”

I have also attached a proposed amendment to Rule 11 from Professor Schlueter and a new suggestion to amend Rule 11(e)(6) submitted by Judge Sedwick.



John K. Rabiej

Attachments

cc: Honorable W. Eugene Davis
Honorable James A. Parker
Professor Stephen A. Saltzburg
Professor Kate Stith
Professor David A. Schlueter
Peter G. McCabe, Secretary

include the seal of the court, (K.S.)

Rule 17. Subpoena	Rule 17. Subpoena
<p>(a) For Attendance of Witnesses; Form; Issuance. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed¹¹⁸ to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a United States magistrate judge in a proceeding before that magistrate judge, but it need not be under the seal of the court.</p>	<p>(a) Witness's Attendance. ⁽¹⁾ The clerk must issue a subpoena under the court's seal. ^(K.S.) The subpoena must state the court's name and the title of the proceeding, ⁽²⁾ and must ^(K.S.) command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena — signed and sealed — to the party requesting it and that party must fill in the blanks before the subpoena is served. When a magistrate judge issues a subpoena in a proceeding before the magistrate judge, the subpoena need not contain the court's seal. e.l. DW</p>
<p>(b) Defendants Unable to Pay. The court shall order at any time that a subpoena be issued for service on a named witness upon an ex parte application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. If the court orders the subpoena to be issued, the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.</p>	<p>(b) Defendant Unable to Pay. Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.</p>
<p>(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.¹¹⁹ The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.</p>	<p>(c) Producing Documents and Objects.</p> <p>(1) A subpoena may order the witness to produce any <u>document</u> or other object the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect <u>them</u>. <u>all or part of</u> <u>DW</u> <u>S</u></p> <p>(2) On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable.</p>

Is this Adequate to cover the listed items in the original? Maybe it can be handled in the Notes. DW

¹¹⁸ Professor Saltzburg approved substituting *witness* for *each person to whom it is directed*.

¹¹⁹ Professor Saltzburg approved deleting *or oppressive*.

<p>(d) Service. A subpoena may be served by the marshal, by a deputy marshal or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to that person the fee for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof.</p>	<p>(d) Service. A marshal, deputy marshal, or any nonparty who is at least 18 years old may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness-attendance fee and the legal mileage allowance. The server need not tender the attendance fee or mileage allowance when the United States, a federal officer, or a federal agency has requested the subpoena.</p>
<p>(e) Place of Service. (1) In United States. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States. (2) Abroad. A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C., § 1783.</p>	<p>(e) Place of Service. (1) <i>In the United States.</i> A subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States. (2) <i>In a Foreign Country.</i> Title 28 U.S.C. § 1783¹²⁰ governs the subpoena's service if the witness is in a foreign country. (DL) (Ja)</p>
<p>(f) For Taking Depositions; Place of Examination. (1) Issuance. An order to take a deposition authorizes the issuance by the clerk of the court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. (2) Place. The witness whose deposition is to be taken may be required by subpoena to attend at any place designated by the trial court, taking into account the convenience of the witness and the parties.</p>	<p>(f) Deposition Subpoena. (1) Issuance. A court order to take a deposition authorizes the clerk in the district where the deposition is to be taken to issue a subpoena for any witness named or described in the order. (le) witness (2) Place. After considering the convenience of the witness and the parties, the court may order — and the subpoena may require — the deponent to appear anywhere the court designates.</p>
<p>(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate judge.</p>	<p>(g) Contempt. The district court may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by that court or by a magistrate judge of that district.</p>
<p>(h) Information Not Subject to Subpoena. Statements made by witnesses or prospective witnesses may not be subpoenaed from the government or the defendant under this rule but shall be subject to production only in accordance with the provisions of Rule 26.2.</p>	<p>(h) Information Not Subject to a Subpoena. No party may subpoena a statement of a witness or a prospective witness under this rule. Rule 26.2 governs the production of those statements. (7)</p>

Either "witness" or "deponent" should be used consistently in this subdivision. Although deponent is more accurate, you may wish to use witness to be consistent throughout the rule.

¹²⁰ Consider substituting *Federal law* or *A federal statute* for the U.S. Code reference.

For example, (g) concerning contempt might be misconstrued to exclude contempt of deponents.

ambiguous: a) statement of witness
 b) prospective witness
 is what it sounds like but not what current rule says. (KS)

9 Consider rewriting like Rule 17 (FX2), i.e.:
 After considering the convenience of the defendant
 and the witnesses and the prompt administration of justice,
 the court must... DW

Rule 17.1 Pretrial Conference	Rule 17.1. Pretrial Conference
At any time after the filing of the indictment or information ¹²¹ the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon. No admissions made by the defendant or the defendant's attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and the defendant's attorney. This rule shall not be invoked in the case of a defendant who is not represented by counsel.	On its own, or on a party's motion, the court may hold one or more pretrial conferences to promote a fair and expeditious trial. When a conference ends, the court must prepare and file a memorandum of any matters agreed to during the conference. The government may not use any statement ¹²² made during the conference by the defendant or the defendant's attorney unless it is in writing and signed by the defendant and the defendant's attorney. The court may not hold a pretrial conference if the defendant is unrepresented. ¹²³

V. VENUE	Title V. Venue
Rule 18. Place of Prosecution and Trial	Rule 18. Place of Prosecution and Trial
Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.	Unless a statute or these rules permit otherwise, the government must prosecute an offense in the district in which the offense was committed. The court must fix the place of trial within the district with due regard for the convenience of the defendant and the witnesses, and the prompt administration of justice. ID

Since no statute can trump the Constitution (e.g. venue provision), the purpose of the introductory language in the rule may only be to alert the reader that such statutes and waiver rules exist. Query whether this is something which the Note could do instead. RP

Consider leaving it, however, to avoid potential confusion with Rules 20 & 21. DW

¹²¹ Professor Saltzburg approved deleting *at any time after the filing of the indictment or information*.

¹²² Professor Saltzburg recommended this change from the word *admission*.

¹²³ Professor Saltzburg notes that this rule was adopted before the Supreme Court's decision in *Faretta v. California*, which recognized the right of self-representation. He urges that the rule be rethought substantively, and he recommends that self-represented defendants be allowed to attend pretrial conferences. If the Advisory Committee agrees, the rule's last sentence should be deleted. I agree RP DW

(11) DW sec. 21

Rule 20. Transfer From the District for Plea and Sentence

(a) **Indictment or Information Pending.** A defendant arrested, held, or present in a district other than that in which an indictment or information is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive trial in the district in which the indictment or information is pending, and to consent to disposition of the case in the district in which that defendant was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is arrested, held, or present, and the prosecution shall continue in that district.

Rule 20. Transfer From the District for Plea and Sentence

(a) **Indictment or Information Pending.**

(1) **Consent to Transfer.** A defendant who is arrested, held, or present in a district other than the one where an indictment or information is pending may consent to the transfer of the proceeding to the transferee district, where the prosecution will continue if:

(A) the defendant states in writing a wish to plead guilty or nolo contendere and to waive trial in the district where the indictment or information is pending, and consents in writing to the court's disposing of the case in the transferee district, and files the statement in the transferee district¹²⁴; and

(B) the United States attorneys for both districts approve the transfer in writing.

(2) **Clerk's Duties.** After receiving the defendant's statement and the required approvals,¹²⁵ the clerk where the indictment or information is pending must send the file, or a certified copy, to the clerk in the transferee district.

In lieu of : (1) Consent to Transfer. A prosecution will be transferred from the district where the indictment or information is pending to the district where the defendant is arrested, held, or present, if :

(Ks)

¹²⁴ Adding *and files the statement in the transferee district* makes this rule parallel to Rule 20(b)(1)(A).

¹²⁵ The SSC added this introductory language (*After receiving the defendant's statement and the required approvals*) to show when the clerk must act. The existing rule says *upon receipt*.

(b) **Indictment or Information Not Pending.** A defendant arrested, held, or present, in a district other than the district in which a complaint is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive venue and trial in the district in which the warrant was issued, and to consent to disposition of the case in the district in which that defendant was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon filing the written waiver of venue in the district in which the defendant is present, the prosecution may proceed as if venue were in such district.

In lieu of:

(14)

A prosecution will be transferred from the district where the complaint is pending to the district where the defendant is arrested, held, or present if:

(KS)

(b) **Complaint Pending (No Indictment or Information).**

(1) **Consent to Transfer.** A defendant who is arrested, held, or present in a district other than the one where a complaint is pending may ~~waive venue and~~¹²⁶ consent to the transfer of the proceeding to the transferee district, where the prosecution will continue if:

(A) the defendant states in writing a wish to plead guilty or nolo contendere and to waive trial in the district where the warrant was issued, consents in writing to the court's disposing of the case in the transferee district, and files the statement in the transferee district; and

(B) the United States attorneys for both districts approve the transfer in writing.¹²⁷

(2) **Clerk's Duties.** After receiving the defendant's statement and the required approvals, the clerk where the complaint is pending must send the file, or a certified copy, to the clerk in the transferee district.¹²⁸

(c) **Effect of Not Guilty Plea.** If after the proceeding has been transferred pursuant to subdivision (a) or (b) of this rule the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced, and the proceeding shall be restored to the docket of that court. The defendant's statement that the defendant wishes to plead guilty or nolo contendere shall not be used against that defendant.

(c) **Effect of Not Guilty Plea.** If the defendant pleads not guilty after the case has been transferred under Rule 20(a) or (b), the clerk must return the papers to the court where the prosecution began, and that court must restore the proceeding to its docket. The government cannot use against the defendant the statement that the defendant wished to plead guilty or nolo contendere.

(15)

This may be narrower than present language - why not use same language as in 12.1, 12.2, or 12.3? Even more on point is Rule 11(c)(6) [11(c)(5) in restyled rules] (KS) (RP)

¹²⁶ Professor Saltzburg recommends deleting this language. Although existing Rule 20(b) refers to waiving venue, Rule 20(a) does not. There seems to be no reason for the lack of parallelism.

¹²⁷ The SSC added the phrase *in writing* to make this paragraph parallel with Rule 20(a). Also, Professor Saltzburg says this language was intended even though not explicitly stated.

¹²⁸ Professor Saltzburg recommended adding this "Clerk's Duties" paragraph to Rule 20(b) and to 20(d) to make them parallel to Rule 20(a).

(d) **Juveniles.** A juvenile (as defined in 18 U.S.C. § 5031) who is arrested, held, or present in a district other than that in which the juvenile is alleged to have committed an act in violation of a law of the United States not punishable by death or life imprisonment may, after having been advised by counsel and with the approval of the court and the United States attorney for each district, consent to be proceeded against as a juvenile delinquent in the district in which the juvenile is arrested, held, or present. The consent shall be given in writing before the court but only after the court has apprised the juvenile of the juvenile's rights, including the right to be returned to the district in which the juvenile is alleged to have committed the act, and of the consequences of such consent.

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 insert "juvenile". It is not appropriate to refer to the non-government party in a juvenile proceeding as a "defendant" since this is a non-criminal proceeding.
 See 18 U.S.C. § 5031 et seq.

(d) **Juveniles.**

(1) **Consent to Transfer.** A defendant may be prosecuted as a juvenile delinquent in the district where the juvenile is arrested, held, or present, if:

- (A) the defendant meets the definition of a juvenile under federal law;¹²⁹
- (B) the alleged offense that occurred in the other district is not punishable by death or life imprisonment;
- (C) the defendant has received an attorney's advice; *an attorney has advised + he juvenile*
- (D) the court has informed the defendant of the defendant's rights — including the right to be returned to the district where the offense allegedly occurred — and the consequences of waiving those rights;
- (E) the defendant, after receiving the court's information about rights, consents in writing to be prosecuted in the transferee district, and files the consent in the transferee district;
- (F) the United States attorneys for both districts approve the transfer in writing; and
- (G) the transferee court enters an order approving the transfer.

20 DW
 proceeded against DW
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(2) **Clerk's Duties.** After receiving the defendant's written consent and the required approvals, the clerk in the district where the alleged offense occurred must send the file, or a certified copy, to the clerk in the transferee district.¹³⁰

Consider whether Rule 20(a)(2), (b)(2), and (d)(2) concerning clerk's duties could be consolidated, e.g., 20(e) as follows: "... the clerk where the indictment or information or complaint is pending or where the alleged offense occurred must send" If so delete heading "(1)" because no heading "(2)" will exist. DW

¹²⁹ The SSC substituted *federal law* for the U.S. Code citation because "juvenile" may be defined under statutes other than 18 U.S.C. § 5031 if Congress enacts any of the pending bills relating to juvenile offenses.

¹³⁰ The SSC has added this paragraph on Professor Saltzburg's suggestion.

Rule 21. Transfer From The District for Trial.	Rule 21. Transfer for Trial
<p>(a) For Prejudice in the District. The court upon motion of the defendant shall transfer the proceeding as to that defendant to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.</p>	<p>(a) For Prejudice. Upon the defendant's motion, the court must transfer the proceeding to another district if the court is satisfied that so ^{much} great a prejudice ^{RP} against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial ^{+ here} in the transferring district. ^{ICS} ²⁴ ^{DW} ²³ ²⁵</p>
<p>(b) Transfer in Other Cases. For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to that defendant or any one or more of the counts thereof to another district.</p>	<p>(b) For Convenience. Upon a defendant's motion, the court may transfer the proceeding ^{as to} that defendant ^{of any count} to another district for the convenience of the parties and witnesses and in the interest of justice. ²⁷ ^{DW}</p>
<p>(c) Proceedings on Transfer. When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, and the prosecution shall continue in that district. ²⁹</p>	<p>(c) Proceedings on Transfer. When the court orders a transfer, the clerk must send to the transferee district the original or a copy of <u>all papers</u> in the case and any bail taken. The prosecution will ^{then} continue in the transferee district. ^{DW} ²⁹</p>
<p>Note that Rule 20 says: "the file" and requires that the copy be "certified." ^{ICS} ^{DW}</p>	<p>(d) Time to File a Motion to Transfer. A motion to transfer may be made at or before arraignment or at any other time ^{prescribed by the court or these rules} ¹³¹ prescribe. ^{DW} ³⁰</p>

Rule 22. Time of Motion to Transfer	Rule 22. Time to File a Motion to Transfer ¹³²
<p>A motion to transfer under these rules may be made at or before arraignment or at such other time as the court or these rules may prescribe.</p>	<p>Does this mean Rule 22 will be blank? ^{ICS} ³¹</p>

or one or more counts, ²⁶ ^{ICS}

¹³¹ This paragraph is old Rule 22, which the SSC suggests abrogating as a separate rule and including here because it is a subpart of Rule 21 — transfer for trial.

¹³² This rule has now become Rule 21(d). See fn. 130.

App. L

" L "

MEMO TO: Hon. W. Eugene Davis, Chair, Criminal Rules Advisory Committee
FROM: Professor Dave Schlueter, Reporter
RE: Procedures for Restyling Project
DATE: October 12, 1998

I. In General

The Style Subcommittee of the Standing Committee is currently working on a second draft of the proposed style changes to the Federal Rules of Criminal Procedure. The topic is currently on the agenda for the Committee's October 20th meeting and it might be helpful to set out some proposals for conducting the project over the next several years.

I understand the Professor Saltzburg is currently working on a number of research questions presented to him by Judge Parker, the Chair of the Subcommittee. Apparently, the Style Subcommittee will be a position to present many, if not all, of the proposed changes to the Committee by the end of the year. To that end, you may wish to think about setting some long-term and short term deadlines and goals and appointing the subcommittees to begin work on the Subcommittee's draft.

The following material briefly addresses several key topics for possible discussion at the upcoming meeting.

II. Proposed Schedules; Completion Date

Mr. Rabiej has drafted four options for conducting the restyling project. His proposed schedules, which are attached, assume that the Style Subcommittee will present its completed draft to the Committee on December 1, 1998.

The four options have different completion dates, depending on how many meetings the Committee holds and how many Rules are discussed at each meeting. The schedules assume that the Rules would be published in the time and manner other amendments are now handled through the Rules Enabling Act, i.e. in the months of August or September. The proposed effective dates for the amendments vary from as early as December 1, 2001 to as late as December 1, 2004. Mr. Rabiej's memo also presents several different scenarios concerning the number of extra meetings.

A. Projected Effective Date of Amendments

I believe that it would be helpful for the Committee to set a proposed ending date on the project. Although a completion date need not be set in stone, work on long-term projects tends to move along if everyone knows that the project has a projected due date. After the Committee has had an opportunity to work on some of the Rules it may decide to adjust the ending date. But as a starting point, it would be better to pick a date and work backwards from that point.

In selecting a date for completion, the attached schedules prepared by Mr. Rabiej should be helpful. Under Option A, the effective date of the changes would be on December 1, 2004. Under Option B, that date would be on December 1, 2002. Finally, under Options C and D, the effective date would be in 2001.

I recommend that the Committee's goal should be that the changes be effective in 2001. That date is in my view workable and keeps to a minimum the number of Committee members who will rotate off of the Committee while the project is under way. As the next sections point out, however, that due date would require the scheduling of several special meetings and envisions that the Committee's work on other substantive amendments would be minimal at the regularly scheduled meetings, discussed *infra*.

B. Use of Regularly Scheduled Committee Meetings

In reviewing the restyling proposals, it would help to keep to a minimum the number of substantive changes discussed at the regular meetings. Over the last several years, the Committee has at times approved amendments that were not time sensitive; in other instances the proposed changes were deferred until a time when the restyling project would begin and the proposed changes could be incorporated into that project. Rather than piecemeal amendments, it would be better to defer any substantive changes until that particular rule was discussed in the context of restyling changes. For example, there are proposed amendments to Rule 10 concerning the presence of the defendant at his or her arraignment on the upcoming meeting. Rather than finally approving that Rule for publication, it would be better to hold the Rule until it is discussed in the context of the restyling project.

If there are amendments that require prompt action, the Committee can deal with them in the usual manner—preferably with any style changes being made at the same time.

By using the regularly scheduled meetings to discuss restyling, the Committee should be able to develop some momentum and consistency in dealing with proposed style changes.

C. Use of Specially Scheduled Committee Meetings

To meet any sort of reasonable time line, extra meetings will be required. The number and timing of those meetings may be open to discussion, however. Under Mr. Rabiej's proposed time lines, extra meetings are noted for Options C and D. Under Option's A and B, no extra meetings are scheduled; but the effective date of the rules changes is extended to at least December 1, 2002.

Apparently, the other Advisory Committees have used extra meetings from time to time to focus on restyling issues. In theory, such meetings could be very effective for concentrating on that topic.

I recommend that at the meeting in Maine next week that at least one extra meeting be scheduled for 1999, preferably in June, as recommended in Mr. Rabiej's Option D.

III. Assignment of Subcommittees

In preparing for the restyling project, most agree that it would be helpful to form subcommittees to concentrate on selected Rules. The effectiveness of the Committee's consideration of the proposed changes will no doubt turn in large part how effectively the subcommittees are able to resolve ambiguities and address possible substantive changes in the Rules.

I recommend that the subcommittees be appointed in the near future and that they be asked to briefly review whatever drafts are in existence before December 1, 1998 and whatever research questions have been raised by Judge Parker's Subcommittee.

A. Number of Subcommittees

In considering the number of Rules to be considered and the proposed time line, I recommend that you appoint two subcommittees (Subcommittees A and B) to review the Rules. Each subcommittee would be responsible for at least two sets of Rules and would be responsible for presenting its particular Rules at the [proposed] designated meeting dates:

Subcommittee	Responsible for:	Meeting Date
Subcommittee A:	Rules 1 through 9 (10 Rules)	April 1999
Subcommittee B:	Rules 10 through 22 (17 Rules)	June 1999
Subcommittee A:	Rules 23 through 31 (13 Rules)	October 1999
Subcommittee B:	Rules 32 through 50 (21 Rules)	January 2000
Subcommittee A:	Rules 51 through 60 (10 Rules)	April 2000

Subcommittee A would be responsible for 33 Rules and Subcommittee B would be responsible for 38 Rules at two specially called meetings; but A would have three regular meetings for which it would be responsible for the restyling project.

This alignment assumes that the regularly scheduled meetings would be used to consider a number of Rules, but that a greater number of Rules might be covered at a specially called meeting where only the restyling project would be on the agenda.

The alignment also envisions two regular meetings and two special meetings between January 1, 1999 and April 2000. Although it might be possible to cover more Rules in any given meeting, it would be better to begin with a more conservative estimate on how many Rules might be reasonably covered at any one meeting, whether regularly scheduled or specially scheduled..

I recommend that each of the meetings focus on the Rules assigned to only one of the Subcommittees. It permits that particular Subcommittee to focus on its presentation only and not on what the other Subcommittee might have on the agenda. It also provides that each Subcommittee will have a break before they are responsible for presenting their next set of Rules to the full Committee.

B. Representation on Subcommittee Membership

If only two Subcommittees are appointed, there should be a good cross-section of members from the various segments represented on the Committee. It would be appropriate to appoint a Department of Justice representative to both Subcommittees.

C. Subcommittee Meetings

In the course of discussing the proposed style revisions, the Subcommittees should consider the possibility of meeting as a group to resolve any issues that might arise. Such meetings, even if for only one day, might be very effective in providing full and complete discussion by the Subcommittee and accordingly reduce the amount of time spent by the full Committee on that particular Subcommittee's proposed changes.

IV. Role of Reporter and Special Reporter; Members of Style Subcommittee of Standing Committee

I am fully prepared to provide whatever assistance each of the Subcommittees might need.

Professor Saltzburg has been retained to serve as a Special Reporter to advise the Style Subcommittee of the Standing Committee. I am not aware whether it is expected

that his contributions will end with that Subcommittee's work or whether it may continue. As the Criminal Rules Committee considers each block of Rules, it may be helpful to have Professor Saltzburg present at the full Committee meetings, especially if the discussion is to focus on the issues he is researching..

I assume that some or all of the members of the Standing Committee's Style Subcommittee will attend our meetings to provide assistance in the process and if necessary, comment on any changes offered at the meeting itself.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Restyling Project — Schedule

DATE: September 9, 1999

Attached are two memos addressing the issue of the schedule for the restyling project. The first is from John Rabiej to Judge Davis raising the issue of scheduling and the second, is Judge Davis' response.

Judge Davis has indicated that the question of the proposed schedule should be on the agenda for discussion at the October meeting.

At this point, the project appears to be on schedule. As noted in the original memo on the subject in October 1998, the proposed schedule was to have all of the rules restyled in time to present them to the Standing Committee in June 2000, with publication to follow in August or September 2000. Under that schedule (assuming a 6-month comment period) the rules would come back to the Advisory Committee in Spring 2001 for review and take effect on December 1, 2002.

Judge Scirica has asked that if possible, the restyled rules be submitted in parts to the Standing Committee. If the current schedule holds, we can submit Rules 1-31 to the Standing Committee for its January 2000 meeting, and the remainder at the June 2000 meeting. If the Committee decides not to maintain that schedule then the effective date would not be until 2003.

In deciding whether to maintain the current schedule it might be helpful to consider the following:

- This October, the Committee is losing two members who have worked on the project for the last year. Additional members are due to rotate off the Committee in 2000, including the Chair. It is difficult for new members to assume immediately the same momentum and expertise of the departing members.
- The Standing Committee's Style Subcommittee is losing several members and Bryan Garner will no longer be working with that Subcommittee.
- The current schedule would require at least one special Committee meeting in January 2000 and several additional Subcommittee meetings in Nov-December 1999 and possibly in the Spring 2000.

- The project is placing a heavy burden on the Reporter and the Rules Committee Support Office to coordinate the meetings, distribute materials, and update drafts of the rules and notes.
- The Committee and Subcommittees have developed some momentum on the project; each set of rules seems to go more smoothly than the last.
- At the end of the October meeting, the Committee will have reviewed at least half of the rules.

One final thought. If the Committee is inclined to maintain the current schedule, the amount of time spent in the restyling project can be adjusted to recognize a “minimalist approach” to substantive changes. In the normal course of Committee work, the Committee usually considers a written proposal from a source outside the Committee or from an individual member, who has given some thought and research to the proposal and has perhaps even drafted some suggested language. In the restyling effort, however, a number of substantive changes have been raised for the first time at either a subcommittee meeting or full committee meeting, and the research follows. The whole process might go more quickly if it is assumed that the current substantive language is still viable and focus primarily on whether the restyled language makes any unintended substantive changes.

I have also attached a proposed time frame, which is a modified version of John Rabiej’s proposal.

" M "

CIVIL RULES STYLE PROJECT: INTRODUCTORY QUESTIONS

Some of the generic questions that will recur throughout the Style Project can be anticipated. They range from simple needs for consistency to more important issues. The examples that follow are not ranked in order of importance, frequency of probable appearance, or interest. All deserve some attention. Specific examples — many of them drawn from a first review of Rules 1 through 7 — will be used to illustrate the choices.

Structure

The structure of the whole Civil Rules package is at times eccentric. Summary judgment is a pretrial device, but it appears as Rule 56 in the chapter dealing with judgments. It might make better sense to locate it after the discovery rules and before the trial rules. Rule 16, for that matter, occupies an odd place between the pleading rules and the party- and claim-joinder rules. For that matter, the counterclaim, cross-claim, and third-party claim rules seem to fit better between Rule 18 and Rule 19 than in their present place. Do we have any appetite for restructuring the whole?

One advantage of restructuring would be that we would be free to adopt, at least for the time being, a set of whole-number designations. No more Rule 4.1, 23.2, or (eccentrically) Rule 71A. We would no longer need to jump from Rule 73 to Rule 77.

These proposals almost inevitably will be defeated by the familiarity of Rule 56, Rule 13(a), and so on. The conservative inertia that has slowed procedural reform applies to the small as well as the large. And now we have a further argument: nothing can change, not ever, because that will foul up computer searches.

A much smaller-scale version of the structure question will arise when good style would rearrange subdivisions within a rule, or perhaps combine two or more subdivisions. If we combine subdivision (b) with subdivision (c), do we continue to describe subdivision (d) as (d), showing (c) as "abrogated," or do we re-letter (d) as new (c)?

Probably it is too late to consider the designation of subparts. Our limit has been Rule 15(c)(3)(D)(ii): (c) is subdivision, (3) is paragraph, (D) is subparagraph, and (ii) is item. Occasionally a rule might be easier to follow if we had further designations if after the subparagraph (D) we could have one more sequence of numbers and letters. But there are several arguments against adding further designations. One is conformity to other sets of rules. Another is the need to find words to describe them: sub-subparagraph is unattractive, and the alternatives are at least as unattractive. Still another arises from the indent style we have adopted; it is helpful to set each smaller item in further from the left margin. But by the time we get to items we are already left with very short lines. Still further inseting could lead to minuscule lines.

Sacred Phrases

It has been accepted that we must not tinker with some sacred phrases in the rules. "Transaction or occurrence" must be used to define the relationships that make a counterclaim compulsory under Rule 13(a). One challenge will be to be sure that we recognize all of the phrases that have taken on such settled elaborations that we must not change in the name of style.

This approach raises the question whether we can forgive ourselves for not asking why variations are introduced on these familiar phrases. "Transaction or occurrence" persists in Rule 14,

but in Rule 15(c)(2) it becomes "conduct, transaction, or occurrence." By Rule 20 it expands to "transaction, occurrence, or series of transactions or occurrences." What subtle distinctions are implied?

Rule 8(e)(1) says this: "Each averment of a pleading shall be simple, concise, and direct." Judge Posner says this: "Mr. Davis's complaint does not satisfy these requirements (themselves, be it noted, rather repetitious -- and is 'averment,' an archaic word of no clear meaning, simple, concise, and direct?)." *Davis v. Ruby Foods, Inc.*, 7th Cir.2001, 269 F.3d 818, 819.

Definitions

Definitions presented recurring tests in the Criminal Rules style project. As later rules were styled, the committee was driven to consider again, and yet again, the definitions adopted in earlier rules. There are more definitions in the Civil Rules than many of us realize. Rule 3 defines what it means to "commence" an action. The Rule 5(e) tag line is "Filing with the Court Defined," but the rule does not really define filing — it directs how filing is to be accomplished. At the same time, it does define an electronic "paper" as "written paper." Rule 7 defines what is a "pleading." Buried in Rule 28(a) is a definition of "officer" for purposes of Rules 30, 31, and 32. The Rule 54(a) definition of "judgment" presents questions so horrendous that we abandoned any attempt even to think about them in the recent revision of Rule 58. The District of Columbia is made a "state" by Rule 81(e), "if appropriate." Rule 81(f) sets out a curiously limited definition of "officer" of the United States (including, at least on its face, a beginning that includes reference to an "agency," followed by a definition only of "officer). Other definitions may lurk in the Rules. We may be stuck with the ones we have, except to the extent that we are prepared to make substantive amendments as part of the process. But at least we should be wary of adding new definitions. And perhaps we need to consider the need to reduce reliance on definitions.

"Legacy" Provisions

Old Practices Abolished. The Civil Rules have abolished many earlier procedural devices. The generic question is whether it is necessary to continue to abolish these things forever. Specific answers may vary.

Rule 7(c) is an example: "**(C) DEMURRERS, PLEAS, ETC., ABOLISHED.** Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used." We could spend some time debating whether devices are "abolished" by a rule that says only that they shall not be used. But why not abandon this subdivision entirely? Even if someone decides to describe an act as a demurrer rather than a Rule 12(b)(6) motion to dismiss, a 12(c) motion to strike an insufficient defense, a Rule 50(a) motion for judgment as a matter of law, or whatever, the court is likely to understand and respond appropriately.

A more familiar example is Rule 60(b), but it may be more complex. The final sentence says: "Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action." This one does abolish something. We may wonder whether there is much risk that a modern lawyer will think to reinvent these archaic procedures. Perhaps there is — the criminal law crowd continues to have questions about the persistence of coram nobis relief. However that may be, the last part of the sentence is a specific direction: relief from a judgment must be sought by motion or by independent action. We

may need to keep that (and perhaps to note that an appeal — surely neither a motion as prescribed in these rules nor an independent action — is not what we mean by "relief from a judgment"?).

A less familiar example is Rule 81(b), which abolishes the writs of scire facias and mandamus.

Old Distinctions Superseded. Less direct means may be used to supersede old practices. Rule 1 is a fine example: "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty * * *." "Suits"? "of a civil nature"? "cases" at law or in equity or in admiralty? The Style version uses "civil action" to replace suits of a civil nature, drops "cases," and raises the question whether we still need say "whether arising at law, in equity, or in admiralty." Merger of law and equity was accomplished in 1938; admiralty was brought into the fold in 1966. Is there a risk that the merger will dissolve without continued support? Whether or not we continue it, is "civil action" good enough? A very quick look at the subject-matter jurisdiction statutes that begin at 28 U.S.C. § 1330 show that "civil action" is the most common expression. But § 1333 refers to "any civil case of admiralty or maritime jurisdiction"; § 1334(a) refers to "cases" under title 11; § 1334(b) refers to "civil proceedings arising under title 11"; § 1337 refers to "any civil action or proceeding"; § 1345, covering the United States as plaintiff, refers to "all civil actions, suits or proceedings"; § 1346(a)(2) — the Little Tucker Act — refers to "[a]ny other civil action or claim against the United States"; § 1351 refers to "all civil actions and proceedings" against consuls, etc.; § 1352 refers to "any action on a bond"; § 1354 to "actions between citizens of the same state"; § 1355 to "any action or proceeding"; § 1356 to "any seizure"; § 1358 to "all proceedings to condemn real estate"; and § 1361 to "any action in the nature of mandamus" [this one is an interesting contrast with the abolition of mandamus by Rule 81(b)]. New Rule 7.1(a) refers to an "action or proceeding." Perhaps that is the phrase that should appear in Rule 1.

Familiar Terms and Concepts. Rule 4(*l*) provides for "proof of service." The Garner-Pointer draft says service must be proved to the court. Why abandon a familiar and well-understood term, substituting a phrase that may generate arguments that a different process is contemplated? There may be times when we should not abandon a well-understood term simply because it somehow seems archaic.

Familiarity goes beyond language to concept. Justice Jackson put it well: "It is true that the literal language of the Rule would admit of an interpretation that would sustain the district court's order. * * * But all such procedural measures have a background of custom and practice which was assumed by those who wrote and should be by those who apply them." *Hickman v. Taylor*, 1947, 329 U.S. 495, 518 (concurring). As time moves on, however, the shared background of custom and practice may fade away. Reading a rule today, we may fail to understand the intended meaning, and in rewriting seemingly clear language effect a change. An illustration is the provision in Rule 19(a) that a necessary party plaintiff "may be made a defendant, or, in a proper case, an involuntary plaintiff." It is easy to pick this illustration because it is familiar — the understanding that the "proper case" is much more restricted than the words might indicate has been preserved. The more meaningful illustrations will be those that we overlook because the original understanding has been lost. The ignorant assumption of a new meaning and its expression in contemporary style may be an improvement, but it still will be a change.

Ambiguities

The most common lament during the fabled Sea Island Style Festival was that time and again, ambiguity engulfs the meaning of a present rule. What to do?

An obvious approach is to exhaust the research possibilities that may dispel the ambiguity. If a clear present meaning is identified, the only remaining challenge is to express it clearly. How frequently this approach should be taken, all the way to the bitter and often disappointing end, is debatable. If indeed we find many ambiguities, we might slow progress more than we care to endure. The alternatives begin with identifying the ambiguity, and explaining in the Committee Note what has been done. One approach will be to carry the ambiguity forward — we do not know what it means, and we do not care to invest the energy to decide what clear meaning is better. Another approach will be to imagine a good clear answer and adopt that. No doubt each of these alternatives will be adopted in circumstances that seem appropriate.

Rule 4(d) — a relatively new rule — provides illustrations that tie to the discussion of Rule 4. The last sentence of (d)(2) refers to a plaintiff "located within the United States." (d)(3) refers to a defendant "addressed outside any judicial district of the United States." Rule 4(e) speaks of service "in any judicial district of the United States." Rule 4(f) refers to "a place not within any judicial district of the United States." Is there a difference between "within the United States" and "in any judicial district of the United States"? Are United States flag vessels, embassies, or other enclaves "within the United States" but outside any judicial district? Puerto Rico clearly is within a judicial district of the United States: is it within the United States? What subtle thoughts inspired these various phrases?

Rule 4(h)(1) is another illustration. Service on a corporation may be made by delivering process to "any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant." Is there a difference between "by law" and "by statute"? One possibility is that "by law" refers to federal law, while "statute" refers to the many state statutes on serving a corporation; see 4B Federal Practice & Procedure § 1116. Another possibility is that "law" is a broader reference to all manner of laws.

Substantive Change

There will be many occasions when a rule seems to cry out for substantive change. The answer can be direct when Advisory Committee capacity allows: the rule is revised in the ordinary way, adopting current style conventions. Rule 56 is a good example. We have long deferred the project to reopen Rule 56 following the Judicial Conference rejection of revisions that were slated to take effect along with the 1991 Rule 50 amendments. Simply restyling present Rule 56 and deferring the project still further until the entire Style Project is completed seems a shame.

Other changes of meaning may well be relatively trivial, and well within the charge given to the relevant style subcommittee. In this context, there is no meaningful line between resolving ambiguity and substantive change. Rule 27(a)(2) provides a good example. Rule 27(a)(2) now provides that notice of the hearing on a petition to perpetuate testimony must be served "in the manner provided in Rule 4(d) for service of summons and complaint." Rule 4 has been revised, and Rule 4(d) now provides for waiver of service. A look at current Rule 4 presents a puzzle. It is tempting to cross-refer to all of Rule 4, but that course may entail a change of meaning as to

defendants in other countries. Something must be done, and any choice may change the meaning. (A brief note is included in the October agenda materials.)

Such "small" changes present a question touched upon by Judge Higginbotham at the January 2002 Standing Committee meeting. He suggested that the style project presents the opportunity for "many small changes aimed at coherence and consistency, while bigger problems continue to be agitated." Is it proper to undertake a relatively large number of "small" changes that go beyond what can be justified in the name of style alone?

Redundant Reassurances

Time and again, we persuade ourselves that it is wise to add words we believe to be unnecessary. The purpose may be to anticipate and forestall predictable misreadings — predictable because we do not trust people to apprehend the "plain meaning," or because we do not trust people to admit to a plain meaning they do not like. Instead, the purpose may be to provide reassurance. Rule 4(j)(2), for example, provides for "[s]ervice upon a state, municipal corporation, or other governmental organization subject to suit * * *." There is no need to add "subject to suit": Rule 4 prescribes the method of service, and does not purport to address such matters as Eleventh Amendment immunity or "sovereign" immunity. But these words protect against arguments that Rule 4 somehow limits sovereign immunity, and reassures those who fear that the arguments will be made. Should we adopt a general policy that prohibits intentional redundancy? That sets a high threshold? Or that permits whenever at least a few of us fear that language plain to us may not be plain to all?

Integration With Other Rules: Style

How far are we bound to adhere to style conventions developed in the Appellate Rules and hardened in the Criminal Rules? The Standing Committee has long favored adopting identical language for rules that address the same subject unless a substantive reason can be shown for distinguishing civil practice from some other practice. But the approach has been relatively flexible: at times justification can be found in the view that somehow the civil problem feels different. The "plain error" provision in revised Civil Rule 51, for example, was redrafted in a number of steps that culminated in adoption of the plain error language of Criminal Rule 52. But the Committee Note states that application of the rule may be affected by the differences between criminal and civil contexts. Would it be better to adopt deliberately different language when different meanings may be appropriate, even though we cannot articulate the differences?

The question whether accepted style can continue to evolve is separate, and troubling. Unshakable stability has great virtue. But continued improvement is possible, and will be inevitable unless we erect an impermeable barrier. At first the Supreme Court did not want us to adopt new style conventions as we amended rules before taking on the Style project. Now we are writing "must" into rules with abandon. And we seem to be living well enough with the blend. How far should we attempt to adopt clear rules at the beginning, and adhere to them without fail unless we are prepared to revisit all of the earlier drafting?

Integration With Other Rules: Content

Rule 5(a) now requires service of every "designation of record on appeal." Appellate Rule 10 is a self-contained provision dealing with the record on appeal; it includes a service requirement;

and it does not seem to require designation. There may be archaic provisions like this that have to be weeded out. This prospect does not seem to present any distinctive policy question: we simply must be alert to the risk.

Internal Cross-References

Current editorial suggestions raise the question whether we are in the middle of another change in cross-reference style. Within the last few years we have been trained to cross-refer by full reference to "Rule 15(c)(2)," even in Rule 15(c)(1)(3): "if the requirements of Rule 15(c)(2) are satisfied and * * *," not "if the requirements of paragraph (2) are satisfied and * * *." I had supposed that this was because we were not confident that all readers can easily remember the distinctions between subdivisions, paragraphs, subparagraphs, and items. It also simplifies the question whether we should cross-refer to Rule 15(c)(1)(A), to subdivision (c)(1)(A), to paragraph (1)(A), or to subparagraph (A). After getting over initial shock, there is a good argument for adhering to "Rule 15(c)(2)."

"Committee Notes"

One of the central difficulties of the style enterprise is that new words are capable of bearing new meanings. Advocates will seize on every nuance and attempt to wring advantage from it. In the first years, the effort often will be wilful: the advocate knows what the prior language was, knows what it had come to mean, and knows that no change in meaning was intended. As time passes, memory of the style project will fade. New meaning will be found without any awareness of the earlier language or meaning. In part that will be a good thing: substantive changes will be made because the new meaning is better than perpetuating the old. We cannot effectively prevent that process, and we may not wish to. But the Committee Notes are a vehicle for attempting to restrain these impulses. No doubt the Notes will vanish from sight, and with them the reminders they might provide. How far should we elaborate on the limited purposes of style changes in each Note? Is it best simply to note the more important of the ambiguities consciously resolved? Should there be a prefatory Note that somehow is expected to carry forward with the entire 200X¹ body of restyled Rules?

The style project may justify a new approach to the rule that we cannot change a Note without amending the Rule. The involuntary plaintiff provision of Rule 19 is an example. This provision has a history that suggests a very narrow application. The face of the rule, however, has no apparent limit. Any attempt to revise the rule will encounter grave difficulty. But it might be sensible to attempt to reduce the occasions for inadvertent misapplication by explaining in the Note that no change has been made in the inherited language because it is difficult to state the intended limits, but that it is important to remember the intended limits. (Part of the difficulty lies in figuring out just what the intended limits were or are; it may be impolitic to say that in a Note.)

Forms

What should we do about restyling the forms? Many of the forms use antique dates for illustration — perhaps the most familiar is the June 1, 1936 date in Form 9. That date recurs throughout the forms. Fixing that is easy enough. Perhaps style changes are also desirable. But here

¹ A note of optimism here.

again we may face substantive concerns. The most obvious example is the Form 17 complaint for copyright infringement, which has not been amended since 1948 — long before the transformation of copyright law by the 1976 Copyright Act. There are similar grounds for anxiety about the Form 16 complaint for patent infringement, and some others. The Forms could be left for last. Or an attempt could be made to bring them into the regular process — most of them would attach to the bundle of Rules 8 through 15.

Statutory References

The Rules occasionally refer to specific federal statutes. The "applicability" provisions of Rule 81 provide many examples. The risks of this practice are apparent — it may be difficult to be sure that the initial reference is accurate, and statutes may change. But there may be real advantages. Specific statutory provisions may be the least ambiguous means of expression, particularly in the Rule 81 statements that identify proceedings that do — or do not — come within the Rules. The Criminal Rules Committee suggested that specific references might be helpful in pointing toward the proper statute, saving research time and reducing anxiety. Perhaps we can do no better than to resolve to be careful about this practice.

METHOD OF PROCEEDING

The style project was discussed at the January 2002 Standing Committee meeting. Some helpful guidance may be found in the reports on the Appellate Rules and Criminal Rules experiences, and in the more general suggestions. Unofficial notes on the discussion are added below. The questions, with variations, are summarized here.

Style Only?

The style project could be executed more promptly if nothing else is attempted at the same time. This approach would be welcomed for independent reasons by those who believe that it is desirable to provide some relief from a constant stream of rules changes every year.

The first difficulty with putting aside all substantive changes is that the style project will still take several years even if it is the Committee's only project. That may be too long to go without rulemaking. A second difficulty may be that all style and no substance is too dull to endure. But the most important difficulty may be something else: consideration of style reveals many substantive questions. Putting all of them aside, or generating substantive proposals that will be published only when the style package is complete, risks confusion when the time comes for publication.

The Criminal Rules Committee found several substantive changes as they worked through the rules, and eventually published on two "Tracks": a complete set of rules revised for style only, and a second set of substantive changes for some rules. That may work when there are not many substantive changes. If many changes should be found in the Civil Rules, however, simultaneous publication may demand more of the public comment period than it is fair to ask.

"Batching"

One statement was that approaching the rules in "batches" "is not a matter of preference; it is a matter of necessity." But there are a number of possible ways of doing things in batches.

One possibility is to work through all of the rules in stages, perhaps in numerical order and perhaps in some other order. Each batch could be polished and then set aside, waiting for the glorious day when a complete set of restyled rules is published as a single event. This approach would facilitate last-minute adjustments that reconcile style, cross-references, and other technical aspects of the rules first done with the rules last done. It also would avoid the static that must arise from simultaneous publication of style rules proposals and substantive rules proposals.

The great disadvantage of publishing a complete set of restyled rules all at once is the burden imposed on the public comment process. Even if the comment period were held open for a full year, few can bear the burden of retracing steps taken by the advisory committee over a period of perhaps several years and providing the careful review that is essential to reduce the number of unintended changes. To be sure, different rules will have different loyal constituencies that will provide significant help. But the many different bar groups and "public" or private interest groups that provide so much valuable information are likely to be overwhelmed.

The most obvious alternative is to publish in smaller sets. The apparent consensus at the Standing Committee meeting was that it is appropriate to publish in batches, but that it is not appropriate to attempt to adopt restyled rules in batches. Instead, public comments would be received on one set of proposals while another was being prepared. The public comments would be

integrated with the published rules by making all appropriate changes, but each successive batch would then be set aside. Only when all rules had been finished would a complete package be presented to the Standing Committee for final recommendation to the Judicial Conference and Supreme Court. This approach would facilitate running adjustments to the earlier published rules to meet unanticipated needs discovered in working through later rules. It could be decided whether any earlier rules need be republished at the time of publishing the final installment.

Res Judicata in Style

The style consultants provide important continuing help as the Committee works through the initial drafts. But it is important to ask that they do the great bulk of their work at the beginning. There may be a temptation to improve still further at every step, but the process cannot endure that. The same temptation will beset subcommittees and the Committee. Ideas explored and rejected will resurface. Again, it is important to call halt. The Committee must be prepared to be firm, even brutal, in refusing to revisit ideas that have been considered without earlier adoption.

Help Through Comments

It may be important to actively enlist the enthusiasm and support of the people and groups who volunteer enthusiastically when something like discovery or class action reform is on the table. We can readily identify bar groups, public interest firms, and the like from the lists of comments and testimony on the recent Rule 23 proposals. We might write to them before the first publication of the style project, suggesting that they might wish to prepare an organized way to consider the published rules and to make suggestions. Participating in this kind of project requires more discipline than many other proposals require, and we can warn them of that. We also can emphasize how important it is that we have at least preliminary advice on the ways in which lawyers are likely to seize on changes of language for their own advantage.

**Draft Restyling of Civil Rule 4(a)-(e):
Garner/Pointer Draft with Edits by Professor Kimble and Joseph Spaniol
and Comments from Professor Cooper**

September 13, 2002

Rule 4. Summons ^{1/}	4. SUMMONS ^{1/}
<p>(a) Form. The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint. The court may allow a summons to be amended.</p>	<p>(a) Form.</p> <p>(1) Contents. The summons must:</p> <ul style="list-style-type: none"> (A) name the court and the parties; (B) be directed to the defendant; (C) state the name and address of the plaintiff's attorney or — if unrepresented — of the plaintiff; (D) state the time within which the defendant must appear and defend; (E) notify the defendant that a failure to defend^{2/} will result in a default judgment against the defendant for the relief demanded in the complaint; (F) be signed by the clerk; and (G) bear the court's seal.^{3/} <p>(2) Amendments. The court may allow a summons to be amended.</p>

1. The left column contains the text of the present Civil Rule 4(a)-(e). The right column contains the restyled text of the same provisions as contained in the 1994 Garner/Pointer draft and further edited by Professor Kimble and Joseph Spaniol through August 21, 2002. Footnotes 2-23 contain comments on the edited style draft provided by Professor Cooper on September 6, 2002.
2. Present Rule 4(a) requires that the summons "state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default * * *." "Failure to do so" seems to refer to "appear and defend." The Rules do not define "appear." It is clear that default can be entered against a defendant who has appeared — a paper captioned "appearance" may be filed, or a preliminary motion may be made, without an answer ever being filed. A "failure to defend" may suffice: it is difficult to defend without doing something that constitutes an appearance.
3. One edit suggests omitting any reference to the court. Using the court's seal is impressive and, I think, important. Compare all the advice we got about class-action notices.

Another edit changes it from "be under the seal of the court" to "bear the court's seal." I am not sure whether there is a difference — whether "bear" can be satisfied by something that involves less official imprimatur than "be under." The conservative approach would be "be under the court's seal." Compare Rule 4(b) — the plaintiff presents the summons to the clerk for signature and seal.

<p>(b) Issuance. Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant. A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served.</p>	<p>(b) Issuance. Upon or after filing the complaint, the plaintiff may present a summons to the clerk^{4/} for signature and seal.^{5/} If the summons is in proper form, the clerk must sign, seal,^{5/} and issue it to the plaintiff for service on the defendant. A summons — or a copy of a summons that is addressed to multiple defendants^{6/} — must be issued for each defendant to be served.</p>
<p>(c) Service with Complaint; by Whom Made.</p> <p>(1) A summons shall be served together with a copy of the complaint. The plaintiff is responsible for service of a summons and complaint within the time allowed under subdivision (m) and shall furnish the person effecting service with the necessary copies of the summons and complaint.</p> <p>(2) Service may be effected by any person who is not a party and who is at least 18 years of age. At the request of the plaintiff, however, the court may direct that service be effected by a United States marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose. Such an appointment must be made when the plaintiff is authorized to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 or is authorized to proceed as a seaman under 28 U.S.C. § 1916.</p>	<p>(c) Service.</p> <p>(1) In General. A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served^{7/} within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service.</p> <p>(2) By Whom. Any person who is at least 18 years old and not a party may serve a summons and complaint.</p> <p>(3) Special Appointment. At the plaintiff's request,^{8/} the court may direct that service be made by a United States marshal or deputy marshal or by a person specially appointed for that purpose.^{9/} The court must make this appointment if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915 or as a seaman under 28 U.S.C. § 1916.</p>

4. It is puzzling that Rule 4(b) says that the plaintiff may present a summons to the clerk, etc. The apparent purpose is to put the initial clerical burden on the plaintiff, not the clerk. The authorization, moreover, begins "Upon or after filing the complaint." Nothing here tells the plaintiff whether there is any time limit after filing. The time limit appears in Rule 4(m), which tells us what happens if a defendant is not served within 120 days after the complaint is filed; Rule 4(c) picks up the cross-reference duty. Perhaps we should leave these minor mysteries as they are.
5. The editors suggest deleting the "seal." As in Rule 4(a)(1)(G), see note 3, it seems better to retain the seal requirement. In a modest way, this question tests the limits of what is "style."
6. Present Rule 4(b) refers to "a copy of the summons if addressed to multiple defendants." This implies that a single summons can be addressed to multiple defendants. If so, the style change is an improvement. We must watch for similar usages throughout Rule 4: often we say "a copy of the summons and of the complaint," but sometimes not.
7. A style edit changed this to "The plaintiff must have the summons and complaint served." That seems better style, but also seems to change the meaning: "is responsible" does not say that the plaintiff must do it. Rule 4(m) describes what happens if the plaintiff does not tend to it. Preliminary consideration led to dropping the style edit.
8. Present Rule 4(c)(2) speaks of appointments only at the request of the plaintiff. Why? Why not just "The court may direct"? Is this tied to the forma pauperis and seaman cases that come next?
9. Why "for that purpose?" The style consultants say it is too abrupt to end the sentence "or by a person specially appointed," and suggest that if a compromise must be made it should be "or by a person who is specially appointed." EHC prefers the abrupt.

<p>(d) Waiver of Service; Duty to Save Costs of Service; Request to Waive.</p> <p>(1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.</p> <p>(2) An individual, corporation, or association that is subject to service under subdivision (e), (f), or (h) and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request</p> <p>(A) shall be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment or law to receive service of process) of a defendant subject to service under subdivision (h);</p> <p>(B) shall be dispatched through first-class mail or other reliable means;</p> <p>(C) shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed;</p>	<p>(d) Waiving Service.</p> <p>(1) Requesting a Waiver. To avoid unnecessary costs,^{10/} the plaintiff may give notice of commencement of the action to a defendant that is an individual, a corporation, a partnership, or an association subject to service under Rule 4(e), (f), or (h)^{11/} and request that the defendant waive service of a summons. The notice and request must:</p> <p>(A) be in writing and be^{12/} addressed to the^{13/} individual defendant or — for a defendant subject to service under Rule 4(h) — to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process^{14/};</p> <p>(B) name the court where the action has been commenced and be accompanied by a copy of the complaint, an extra copy of the notice and request, and a prepaid means for returning the request^{15/};</p>
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10. Present Rule 4(d)(2) begins by stating that a defendant "has a duty to avoid unnecessary costs of serving the summons. To avoid costs," and so on. The style draft deletes the statement of duty, but carries forward "To avoid unnecessary costs, the plaintiff may give notice" The change goes only half way, and loses something along the way. As styled, it seems to shift the responsibility to the plaintiff. Why not simply delete this phrase too, so the rule begins: "The plaintiff may give notice * * *." The next paragraph — perhaps to be renumbered as 4(d)(2) — states the consequences for a defendant who fails to waive service. That seems enough; this concept is no longer new.
11. The lack of a comma after "association" confuses the reference to Rules 4(e), (f), and (h). An individual is subject to service under (e) or (f); the other entities under (h). One fix would be: "an individual subject to service under Rule 4(e) or (f), or a corporation, partnership, or association subject to service under Rule 4(h)." Another would bypass as unnecessary the references to any of these different categories of defendants: "a defendant subject to service under Rule 4(e), (f), or (h)."
12. Present Rule 4(d)(2)(A) prescribes notice "addressed directly to the defendant." I think — although I am not sure — that "directly" is not intended to apply to notice "to an officer or managing or general agent." That seems to offer a contrast, but a mildly puzzling one: an individual is addressed directly, but a corporation or other entity is addressed only through an officer or managing agent. Why not direct notice to the entity itself, even if the "address" must name a specific person as agent? (The 1993 Committee Note states that a request for waiver addressed to a corporate defendant must be addressed to a person qualified to receive notice; addressing the request to the organization without more is not adequate.) Deleting "directly" seems desirable.
13. "[T]he" individual defendant may be inapt. There may be multiple individual defendants. Why not "an" individual defendant? That may fit better with the alternative for a defendant subject to service under Rule 4(h). (And while we're at it, why is there no provision for an individual defendant who is subject to service through an agent? Authorization to be served does not extend to authority to waive service?)
14. Present Rule 4(d)(2)(A) specifically refers to an agent "of a defendant." This direct connection is omitted here, on the theory that it is supplied by the em-dashed material "for a defendant subject to service under Rule 4(h)." The direct tie between agent and defendant could be restored easily enough: "to the defendant's officer, managing or general agent, or other agent authorized by appointment or by law to receive service of process." This change has been resisted on the ground that it is awkward to speak of the "defendant's other agent * * *." An agent authorized by law may not seem the defendant's agent, but the theory manifestly is that in receiving service of process — or a request to waive service — this agent is acting as the defendant's agent.
15. Present Rule 4(d)(2)(G) requires the plaintiff to provide the defendant with "a prepaid means of compliance in writing." A means of returning seems nice, but see Note 16, Rule 4(d)(1)(C). Is it safe to delete "in writing"?

<p>(D) shall inform the defendant, by means of a text prescribed in an official form promulgated pursuant to Rule 84, of the consequences of compliance and of a failure to comply with the request;</p> <p>(E) shall set forth the date on which the request is sent;</p> <p>(F) shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from that date if the defendant is addressed outside any judicial district of the United States; and</p> <p>(G) shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.</p>	<p>(C) inform the defendant, using text prescribed in an official form promulgated under Rule 84, of the consequences of waiving and not waiving service^{16/};</p> <p>(D) state the date when the request is sent and give the defendant at least 30 days after that date^{17/} — or 60 days after that date if sent outside any judicial district of the United States^{18/} — to return the waiver; and</p> <p>(E) be sent by first-class mail or other reliable means.</p>
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16. Present Rule 4(d)(2)(D) requires the notice to state "the consequences of compliance and of a failure to comply with the request." "Compliance" emphasizes more the concept of a duty to avoid unnecessary costs; see note 10 above. Probably the style change is appropriate.
17. This resolves what may be an ambiguity in present Rule 4(d)(2)(F), which provides that the notice "shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent". The present provision can be read to require that in some circumstances the notice allow more than 30 days because 30 days is not reasonable. The style version is unambiguous — the plaintiff may give more than 30 days, but need not.
18. This phrase and variations recur in later parts of Rule 4. Present Rule 4(d)(2)(F) similarly refers to a "defendant addressed outside any judicial district of the United States." We need to decide what these phrases mean. There is an inescapable implication in "outside any judicial district" that there can be a place that is outside any judicial district of the United States but is not outside the United States. Otherwise "any judicial district of" is superfluous. The two most obvious questions are interdependent: what might be such a place? And why do we want to distinguish between such a place and places that are both outside any judicial district and also outside the United States? Enclaves, vessels at sea, or other places may somehow be conceptually "not outside" the United States — but, if so, why not allow the 60 days? Might some Indian reservations be not within a judicial district, and properly subject to a 30-day limit? ("In a foreign country" manifestly will not do — without more fanciful illustrations, Antarctica suffices.)

If a defendant located within the United States fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown.

(3) A defendant that, before being served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent, or 90 days after that date if the defendant was addressed outside any judicial district of the United States.

(4) When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and complaint had been served at the time of filing the waiver, and no proof of service shall be required.

(5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under subdivision (e), (f), or (h), together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.

(2) **Failure To Waive.** If a defendant located within the United States fails to return a waiver requested by a plaintiff located within the United States^{19/} and fails to show good cause for not returning it, the court must impose on the defendant the costs later incurred in making service, together with the costs, including a reasonable attorney's^{20/} fee, of any motion required to collect these service costs.

(3) **Time To Answer After a Waiver.** A defendant that, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the date when the request was sent — or until 90 days after the date when the request was sent to the defendant outside any judicial district of the United States.

(4) **Results of Filing a Waiver.** When the plaintiff files a waiver, proof of service is not required and, except as provided in (d)(3)^{21/}, these rules apply as if a summons and complaint had been served at the time of filing the waiver.

(5) **Objections to Jurisdiction Not Waived.**^{22/} Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.^{23/}

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19. This problem is similar to Rule 4(d)(1)(D), note 18. Again, the phrase carries over from current Rule 4(d)(2). As compared to the place where notice is addressed or sent, this provision focuses on where the defendant or plaintiff is located. "Located" might refer to concepts similar to domicile—a single "technically preeminent headquarters." It might refer to something slightly expanded, such as a principal place of business. It might be diluted still further—a local "establishment." (Interpreting it to mean "subject to personal jurisdiction" seems to go too far—it would impose sanctions whenever a foreign defendant is in fact subject to personal jurisdiction.) This is a fine example of the kind of puzzle we may not want to solve.
20. Professor Kimble notes that we should establish a style guide. He quotes Bryan Garner for the proposition that "attorney fee" is "inelegant but increasingly common." We used "attorney fee" in proposed Rule 23(h). "Attorney fees" is used in amended Rule 58(a)(1)(C) as transmitted by the Supreme Court to Congress on April 29, 2002. The reason for this style is that in most circumstances the right to an attorney fee belongs to the party, not to the attorney: it is not the attorney's fee.
21. We need to establish a clear convention. The old style was to refer to "subdivision," "paragraph," and like distinctions as if every rule user knew which was what. For the last few years we have gone the other way. This cross-reference would be to "Rule 4(d)(3)." Referring simply to "(d)(3)" relies on context—it is clear enough in a short rule with a reference to a nearby provision. It may not be as clear in a long and complicated rule.
22. Venue is not waived. The line might be "Jurisdiction and Venue not waived," or "Objections not waived."
23. There is a logic in the proposal to relocate the "no waiver" provision to the end of subdivision (d). But there was a reason for putting it first: there is an immediate reassurance that waiving service waives nothing else. Continuity with the present rule may justify resolving the question against relocation.

(e) Service Upon Individuals Within a Judicial District of the United States. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:

(1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or

(2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(e) Serving an Individual in a Judicial District of the United States. Unless federal law provides otherwise, an individual — other than an infant or an incompetent person — may be served in a judicial district of the United States:

(1) by following state law for serving a summons in an action brought in a court of general jurisdiction of the state where the district court is located or where service is made; or

(2) by delivering a copy of the summons and of the complaint to the individual personally; by leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who lives there; or by delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

MEMORANDUM

TO: Civil Rules Committee

FROM: Joe Kimble (and Joe Spaniol)

DATE: August 21, 2002

RE: **RULE 4**

We understand that Rule 4 will be used for a demonstration project at the October meeting. Enclosed is our proposed Rule 4.

The Style Subcommittee started with the 1994 Garner-Pointer redraft. At Professor Cooper's recommendation, we put our changes in handwriting so the Committee could see the differences from the 1994 version.

In June, we sent Professor Cooper our proposed Rules 1–7.1. He kindly took the time to make careful, extensive comments on the restyled version. (His comments on Rule 4 are enclosed.) I then reviewed his comments and incorporated many or most of them into the enclosed version of Rule 4.

In this memo, I will take up with Professor Cooper's comments by using the same numbering that he used. Where I say "Changed to" or "Change made," that means we made the change he recommended in the restyled version.

A general observation: when it's possible, but quite unlikely, that someone could argue that we have changed the meaning, aren't we covered by the standard Committee Note saying that the changes are stylistic only? I realize, though, that some of these are hard calls involving a delicate balance.

One other point: the Style Subcommittee added new headings at the third level of breakdown — the (1), (2), (3) level. Those headings are in italics. We think this will make a nice improvement in the rules.

Again, the comments below follow the numbering of Professor Cooper's comments. I identify in brackets the sections of the restyled version.

Rule 4(a)

- (1) [(a)(1)] EC agrees with our reordering.
- (2) [new (a)(1)(G)] Changed to *bear the court's seal*. A Committee decision whether to keep the seal requirement.
- (3) [new (a)(1)(E)] Changed to *a failure to defend*.

Rule 4(b)

- (1) A Committee decision whether to keep the seal requirement.
- (2) Changed to *or a copy of a summons that is addressed to multiple defendants*.
- (3) EC raises a question but does not recommend a change.

Rule 4(c)

- (1) Change made in heading to (c).
- (2) [(c)(1)] Changed back to *is responsible for service*; style edit withdrawn (erased).
- (3) [(c)(1)] Changed to *makes service*.
- (4) [(c)(2)] Changed to *18 years old*.
- (5) [(c)(3)] Changed heading to *Special Appointment*; style edit withdrawn (erased).

- (6) [(c)(3)] A Committee decision whether to omit *At the plaintiff's request*.
- (7) [(c)(3)] Change made; citations reversed.
- (8) [(c)(3)] Change not made; ending seems too abrupt. If anything, *by a person who is specially appointed*.

Rule 4(d)

- (1) [new (d)(5)] A Committee decision whether to relocate old (d)(1). I think it makes more sense to talk about the process for waiving before the consequences of waiving.
- (2) [new (d)(5)] Change made in heading; slightly different change that EC recommended.
- (3) [new (d)(5)] Changed to *any objection*.
- (4) [new (d)(1)] Change not made. Isn't the duty to avoid unnecessary costs implicit? And does it make a difference, given the possible consequences of not returning a waiver?
- (5) [new (d)(1)] Change not made. *To avoid costs* was in the original. I recommend *To avoid unnecessary costs*.
- (6) [new (d)(1)] Change not made. I think there is little chance of reading the cross-references to modify *association* only. Looking at Rules 4(e), (f), and (h) makes clear that the first two deal with individuals and the last one deals with corporations, partnerships, and associations. I would not drop the "details" about the cross-references, since the cross-references look forward. But this may not be a big point either way.
- (7) [new (d)(1)(A)] Changes not made. EC seems to agree with deleting *directly*. Also, the proposed series does not seem to work: *to the defendant's officer, managing or general agent, or other agent authorized*" This reads *defendant's . . . other agent authorized*" That doesn't seem right. I think it's pretty clear that the *defendant* in the em dashes modifies what follows. Would it help to break new (1)(A) into two parts — (i) and (ii)?

- (8) [new (d)(1)(B)] Changed from *filed* to *commenced*.
- (9) [new (d)(1)(B)] EC raises a question but does not suggest a change.
- (10) [new (d)(1)(D)] EC notes a possible ambiguity in the original that the restyled version resolves.
- (11) [new (d)(1)(D)] EC recommends against the change to *outside the jurisdiction of*, and that's fine. Also, he asks whether *within a judicial district of the United States* could be changed to *within the United States*. The Committee must decide.
- (12) [new (d)(2)] EC raises a question but does not recommend a change.
- (13) [new (d)(2)] Main changes made. Used *returning it* instead of *returning the waiver*. As for *attorney's fees*, Bryan Garner's *Dictionary of Modern Legal Usage* recommends it and says that it "appears to be prevalent." He says that *attorney fees* is "inelegant but increasingly common." I think we should have a style guide and try to follow it.
- (14) [new (d)(3)] The heading is revised.
- (15) [new (d)(3)] Changes made; EC's second version followed.
- (16) [new (d)(4)] The heading is revised. The provision is not broken into two parts.
- (17) [new (d)(4)] Change made.
- (18) [new (d)(4)] I think a reference within the same subdivision does not need to name the rule.
- (19) [new (d)(4)] Changed to *had been*.

Rule 4(e)

- (1) EC agrees with style change — deleting *from whom a waiver has not been obtained*.

- (2) [(e)(1)] Change not made to restore *upon the defendant*. EC seems to agree that this is a very close call.
- (3) [(e)(2)] *Effected* changed to *made*. Organizational changes not made. The logical order of (e)(2) seems to be individual, individual's dwelling, agent — not individual, agent, individual's dwelling.

Rule 4(f)

- (1) EC seems to agree with the restyled heading.
- (2) EC agrees with the restyled version — deleting *from whom a waiver has not been obtained and filed*.
- (3) [(f)(2)] EC agrees with the restyled version — deleting *applicable*.
- (4) [(f)(2)] Change made; the word *actual* deleted.
- (5) [(f)(2)(A)] Change not made. It seems highly unlikely that the provision could be read to refer to some other foreign country's law for service. This seems like a good example of when we can trust the Committee Note.
- (6) [(f)(2)(B)] Change not made. It seems odd to use *a* in (B) only. Isn't it pretty clear that all of (f) is directed to service in a foreign country, so that we can use *the* throughout?
- (7) [(f)(2)(C)(ii)] EC agrees with the style change to *individual*.

Rule 4(g)

- (1) Change made; *or other like process* is restored.
- (2) A Committee decision whether the reference to (f)(3) is "inevitable."

Rule 4(h)

- (1) A Committee decision whether to retain *other*.
- (2) EC agrees with the restyled version — deleting *and from which a waiver of service has not been obtained and filed*.
- (3) [(h)(1)(B)] EC raises a question for the Committee.

Rule 4(i)

- (1) [(i)(1)(B)and(C)] The technique may be a little unconventional, but *a copy of each* can only refer to *a copy of the summons and of the complaint*.
- (2) [(i)(2)and(3)] I think the use of headings is an improvement.
- (3) [(i)(3)] A Committee decision whether *in connection with* and *regarding* are the same. The Style Subcommittee tries to avoid so-called compound prepositions.
- (4) [(i)(4)(B)] I think that because of the cross-reference, we are already talking about *an officer or employee*, so this second time it should be *the officer or employee*.

Rule 4(j)

- (1) [(j)(1)and(2)] Changes not made. The original was passive; there is no switch. The *to serve* construct would involve repetition. And I'm not sure that the revised versions are better. Maybe they are. I did break (j)(2) into two parts.
- (2) [(j)(1)] Change not made. I honestly don't see the trouble.
- (3) [(j)(1)] A Committee decision whether to restore *subject to suit*.

Rule 4(k)

- (1) [(k)(1)(C)] Change made; *the* deleted.
- (2) [(k)(1)(B)] EC raises a question for the Committee.
- (3) [(k)(2)] Revised along the lines suggested by EC in his second example. *With respect to* is restored.

Rule 4(l)

- (1) [(l)(1)] Change made.
- (2) [(l)(2)] EC's revised version adopted, with slight changes.
- (3) [(l)(3)] A Committee decision whether to add *or contradicted*.

Rule 4(m)

- (1) Changes not made. Putting a comma after the word *own* would seem to make *after notice to the plaintiff* modify the first item — *on motion*. Is that the intent? I'd guess that the answer is no. As for the proposed revisions, I think we should generally try to put short conditions up front, using the word *if*. See Garner's *Guidelines*, 2.4.A. Also, the proposed revisions throw things out of chronological order.
- (2) Again, I think there is no need to cite the rule when we are within the same subdivision.

Rule 4(n)

- (1) [(n)(2)] Change made; the substitution of *in accordance with* for *under the circumstances*, etc. is withdrawn (erased).
- (2) [(n)(2)] Change not made. The revised version omits *Upon a showing that*. I believe that it would also need to add *where the action is brought* after *assets found within the district*. It also throws things out of chronological order. I'm not sure that it's an improvement, but I did change the restyled version to *local state law*, as EC suggests.

Rule 4. Summons	4. SUMMONS
<p>(a) Form. The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint. The court may allow a summons to be amended.</p> <p><i>(They come last ON THE SUMMONS. OTHER ITEMS ARE IN THE ORDER - THEIR APPEARANCE.)</i></p>	<p>(a) Form.</p> <p>(1) Contents. The summons must.</p> <p>F (A) be signed by the clerk; and ^{BEAR THE COURT'S} and ^(OMIT?)</p> <p>G (B) be under seal of the court.</p> <p>A (C) name the court and the parties,</p> <p>B (D) be directed to the defendant;</p> <p>C (E) state the name and address of the plaintiff's attorney or — if unrepresented — of the plaintiff;</p> <p>D (F) state the time within which the defendant must appear and defend, and ^{A FAILURE TO DEFEND}</p> <p>E (G) notify the defendant that failure to appear ^{will} result in a default judgment against the defendant for the relief demanded in the complaint.</p> <p>(2) Amendments. The court may allow a summons to be amended.</p>
<p>(b) Issuance. Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant. A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served</p>	<p>(b) Issuance. Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature ^(and seal) and issue it to the plaintiff for service on the defendant. A summons — or a copy of the summons ^{if that is} addressed to multiple defendants — must be issued for each defendant to be served.</p> <p><i>OMIT?</i></p>
<p>(c) Service with Complaint; by Whom Made</p> <p>(1) A summons shall be served together with a copy of the complaint. The plaintiff is responsible for service of a summons and complaint within the time allowed under subdivision (m) and shall furnish the person effecting service with the necessary copies of the summons and complaint.</p> <p>(2) Service may be effected by any person who is not a party and who is at least 18 years of age. At the request of the plaintiff, however, the court may direct that service be effected by a United States marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose. Such an appointment must be made when the plaintiff is authorized to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 or is authorized to proceed as a seaman under 28 U.S.C. § 1916.</p>	<p>SERVICE</p> <p>(c) Serving with Complaint; by Whom Served.</p> <p>(1) In General. A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person effecting service. <i>WHO MAKES</i></p> <p>(2) By Whom. Any person who is at least 18 years ^{old} age and not a party may serve a summons and complaint.</p> <p>(3) Exceptions. The court may ^{At} on the plaintiff's request, direct that service be made by a United States marshal, ^{OR} deputy marshal, or other person ^{by a} specially appointed for that purpose. The court must make this appointment if the plaintiff is authorized to proceed ^{OR} as a seaman under 28 U.S.C. § 1916 ^{or} in forma pauperis under 28 U.S.C. § 1915. <i>(THE SERIES DOESN'T WORK)</i></p> <p><i>SPECIAL APPOINTMENT</i></p>
<p>(d) Waiver of Service; Duty to Save Costs of Service; Request to Waive.</p> <p>(1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant</p> <p><i>OBJECTIONS TO</i></p>	<p>(d) Waiving Service; Requesting Waiver.</p> <p>(5) ^(A) Jurisdiction Not Affected. ^{WAIVED} Waiving service of a summons does not waive ^{any} an objection to personal jurisdiction or ^{to} venue.</p> <p><i>(Put this last under (d)?)</i></p>

Requesting a Waiver

To avoid unnecessary costs?

(2) An individual, corporation, or association that is subject to service under subdivision (e), (f), or (h) and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request

(A) shall be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment or law to receive service of process) of a defendant subject to service under subdivision (h);

(B) shall be dispatched through first-class mail or other reliable means;

(C) shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

(D) shall inform the defendant, by means of a text prescribed in an official form promulgated pursuant to Rule 84, of the consequences of compliance and of a failure to comply with the request;

(E) shall set forth the date on which the request is sent;

(F) shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from that date if the defendant is addressed outside any judicial district of the United States; and

(G) shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

(1) ~~(A)~~ ~~In General:~~ The plaintiff may give notice of commencement of the action to a defendant that is an individual, a corporation, a partnership, or an association subject to service under Rule 4(c), Rule 4(f), or Rule 4(h) and request that the defendant waive service of a summons. The notice and request must:

(A) be in writing and be addressed to the individual defendant or — for a defendant subject to service under Rule 4(h) — to an officer, managing or general agent, or ~~other agent~~ ^{ANY OTHER} authorized by appointment or law to receive service of process;

(E) ~~(B)~~ be sent by first-class mail or other reliable means;

(B) ~~(C)~~ name the court ^{WHERE} in which the action has been ~~filed~~ ^{(K) (7)(A) & (C)} and be accompanied by a copy of the complaint, an extra copy of the notice and request, and a prepaid means for returning the request;

(C) ~~(D)~~ inform the defendant, using text prescribed in an official form promulgated under Rule 84, of the consequences of waiving and not waiving service; ~~and~~

(D) ~~(E)~~ state the date when the request is sent and give the defendant at least 30 days after that date — or 60 days after that date if sent outside any judicial district of the United States — to return the waiver; ~~and~~

(CF. 4(c)(1)(B))

COMMENCED

(CAN THIS BE "OUTSIDE THE JURISDICTION OF" IF SO, CHANGE IT THROUGHOUT.)

(Prof. COOPER SAYS AN ENCLAVE OR A VESSEL AT SEA MAY BE OUTSIDE A JUDICIAL DISTRICT BUT NOT OUTSIDE U.S. JURISDICTION. SO NO CHANGE?)

If a defendant located within the United States fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown.

(3) A defendant that, before being served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent, or 90 days after that date if the defendant was addressed outside any judicial district of the United States

(4) When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and complaint had been served at the time of filing the waiver, and no proof of service shall be required.

(5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under subdivision (e), (f), or (h), together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service

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RESULTS OF FILING A WAIVER
OUTSIDE?
HAD BEEN *THOSE RULES*
APPLY

(e) **Service Upon Individuals Within a Judicial District of the United States.** Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:

(1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or

(2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process

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(e) **Serving Individuals In a Judicial District of the United States.** Unless federal law provides otherwise, an individual — other than an infant or an incompetent person — may be served in a judicial district of the United States:

(1) by following state law for serving a summons in an action brought in courts of general jurisdiction of the state either where the district court is located or where service is effected; or *MAD*

(2) by delivering a copy of the summons and of the complaint to the individual personally; by leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who lives there; or by delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

<p>(f) Service Upon Individuals in a Foreign Country. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States:</p> <p>(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or</p> <p>(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice</p> <p>(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or</p> <p>(B) as directed by the foreign authority in response to a letter rogatory or letter of request; or</p> <p>(C) unless prohibited by the law of the foreign country, by</p> <p>(i) delivery to the individual personally of a copy of the summons and the complaint; or</p> <p>(ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or</p> <p>(3) by other means not prohibited by international agreement as may be directed by the court.</p>	<p><i>AN</i></p> <p>(f) Serving Individuals Outside All Judicial Districts of the United States. Unless federal law provides otherwise, an individual — other than an infant or an incompetent person — may be served at a place <u>not</u> <i>outside?</i> <u>within</u> any judicial district of the United States. <i>ON</i></p> <p>(1) by any internationally agreed means reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, <i>ON</i></p> <p>(2) if there is no internationally agreed means or an international agreement allows other means of service, by a method <i>of service</i> reasonably calculated to give actual notice: <i>THAT IS</i></p> <p>(A) as prescribed by the foreign country's law for service in an action in its courts of general jurisdiction;</p> <p>(B) as the foreign authority directs in response to a letter rogatory or letter of request, or</p> <p>(C) unless prohibited by the foreign country's law, by</p> <p>(i) delivering a copy of the summons and of the complaint to the individual personally; or</p> <p>(ii) using any form of mail requiring a signed receipt, addressed and sent by the clerk to the individual; or</p> <p><i>ANY</i> (3) by other means, not prohibited by international agreement, as the court directs.</p>
<p>(g) Service Upon Infants and Incompetent Persons. Service upon an infant or an incompetent person in a judicial district of the United States shall be effected in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state. Service upon an infant or an incompetent person in a place not within any judicial district of the United States shall be effected in the manner prescribed by paragraph (2)(A) or (2)(B) of subdivision (f) or by such means as the court may direct</p>	<p><i>AN</i> <i>OR AN</i></p> <p>(g) Serving Infants and Incompetent Persons. An infant or incompetent person may be served in a judicial district of the United States by following state law for serving a summons on such a defendant in actions brought in that state's courts of general jurisdiction. An infant or incompetent person may be served at a place <u>not</u> <i>outside?</i> <u>within</u> any judicial district of the United States in the manner prescribed by Rule 4(f)(2)(A), Rule 4(f)(2)(B), or Rule 4(f)(3). <i>OR OTHER LIKE PROCESSES</i></p> <p><i>AN ACTION (cf. 4(e)(1) side?</i></p>

(h) Service Upon Corporations and Associations.
 Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:

(1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or

(2) in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.

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(h) Serving Corporations, Partnerships, and Associations.
 Unless federal law provides otherwise, a domestic or foreign corporation, or a partnership or unincorporated association subject to suit under a common name, may be served:

(1) in a judicial district of the United States,

(A) in the manner prescribed by Rule 4(e)(1) for serving an individual, or

(B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process — and, if the agent is one authorized by statute and the statute so requires, by also mailing a copy of each to the defendant; or

outside? (2) at a place not within any judicial district of the United States, in any manner prescribed for serving an individual by Rule 4(f), except personal delivery under Rule 4(f)(2)(C)(i)

OK
Other
cf.

(i) Service Upon the United States, and Its Agencies, Corporations, or Officers.

(1) Service upon the United States shall be effected

(A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and

(B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and

(C) in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to the officer or agency.

(2) (A) Service on an agency or corporation of the United States, or an officer or employee of the United States sued only in an official capacity, is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by also sending a copy of the summons and complaint by registered or certified mail to the officer, employee, agency, or corporation

(B) Service on an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States — whether or not the officer or employee is sued also in an official capacity — is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by serving the officer or employee in the manner prescribed by Rule 4(e), (f), or (g).

(3) The court shall allow a reasonable time to serve process under Rule 4(i) for the purpose of curing the failure to serve:

(A) all persons required to be served in an action governed by Rule 4(i)(2)(A), if the plaintiff has served either the United States attorney or the Attorney General of the United States, or

(B) the United States in an action governed by Rule 4(i)(2)(B), if the plaintiff has served an officer or employee of the United States sued in an individual capacity.

AMENDED IN 2000

(i) Serving the United States and Its Agencies, Corporations, Officers, and Employees

(1) *United States.* To serve the United States, the plaintiff must.

(A) (i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought — or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk — or

(ii) send a copy of the summons and of the complaint by registered or certified mail addressed to the civil-process clerk at the United States attorney's office;

(B) send a copy of each by registered or certified mail to the Attorney General of the United States in Washington, D.C.; and

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

(2) *Agency; Corporation; Officer or Employee Sued in an Official Capacity.* To serve an agency or corporation of the United States, or an officer or employee of the United States sued only in an official capacity, the plaintiff must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee

(3) *Officer or Employee Sued Individually.* To serve an officer or employee of the United States sued in an individual capacity regarding duties performed on behalf of the United States (whether or not the officer or employee is also sued in an official capacity), the plaintiff must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

(4) *Time Extension.* The court must allow the plaintiff a reasonable time to cure its failure to:

(A) serve ~~someone~~ ^{a DEFENDANT} under Rule 4(i)(2), if the plaintiff has served either the United States attorney or the Attorney General of the United States; or

(B) serve the United States under Rule 4(i)(3), if the plaintiff has served the officer or employee of the United States sued in an individual capacity.

EXTENDING TIME

<p>(j) Service Upon Foreign, State, or Local Governments.</p> <p>(1) Service upon a foreign state or a political subdivision, agency, or instrumentality thereof shall be effected pursuant to 28 U.S.C. § 1608.</p> <p>(2) Service upon a state, municipal corporation, or other governmental organization subject to suit shall be effected by delivering a copy of the summons and of the complaint to its chief executive officer or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.</p>	<p>(j) Serving Foreign, State, or Local Governments.</p> <p>(1) A foreign state ^{OR} and its political subdivisions, agencies, or instrumentalities must be served in accordance with 28 U.S.C. § 1608.</p> <p>(2) A state, municipal corporation, or ^{any} other governmental organization may ^{MUST} be served by ^(A) delivering a copy of the summons and of the complaint to its chief executive officer, ^(B) or by serving a copy of each in the manner prescribed by state law for serving summons or like process upon such a defendant.</p>
<p>(k) Territorial Limits of Effective Service.</p> <p>(1) Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant</p> <p>(A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located, or</p> <p>(B) who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues, or</p> <p>(C) who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335, or</p> <p>(D) when authorized by a statute of the United States.</p> <p>(2) If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.</p>	<p>(k) Territorial Limits of Effective Service.</p> <p>(1) In General. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant.</p> <p>(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;</p> <p>(B) who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place where the summons issues;</p> <p>(C) who is subject to the ^{WAS} federal interpleader ^{ISSUED} jurisdiction under 28 U.S.C. § 1335; or ^{(CF.}</p> <p>(D) when authorized by a federal statute. ^{4-1(B).}</p> <p>(2) Federal Claims. If exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service also establishes, with respect to claims arising under federal law, ^{ARISE} personal jurisdiction over a defendant not subject to jurisdiction in a court of general jurisdiction of any state. ^{IF:}</p> <p>(A) the defendant is not subject to jurisdiction in any state court of general jurisdiction; ^{THE DEFENDANT IS NOT SUBJECT TO JURISDICTION IN ANY STATE COURT OF GENERAL JURISDICTION;} AND</p> <p>(B) exercising jurisdiction is ^{EXERCISING JURISDICTION IS}</p>
<p>(l) Proof of Service. If service is not waived, the person effecting service shall make proof thereof to the court. If service is made by a person other than a United States marshal or deputy United States marshal, the person shall make affidavit thereof. Proof of service in a place not within any judicial district of the United States shall, if effected under paragraph (1) of subdivision (f), be made pursuant to the applicable treaty or convention, and shall, if effected under paragraph (2) or (3) thereof, include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court. Failure to make proof of service does not affect the validity of the service. The court may allow proof of service to be amended.</p>	<p>(l) Proving Service. ^{CONSISTENT WITH THE UNITED STATES CONSTITUTION AND LAWS.}</p> <p>(1) Affidavit Required. ^{PROOF OF SERVICE MADE} Service, unless waived, must be proved to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit. ^{MUST BE PROVED AS FOLLOWS:}</p> <p>(2) Service Outside the United States. Service outside a federal judicial district, if made under Rule 4(f)(1), ^(A) must be proved under an applicable treaty or ^(B) convention; ^{PROOF OF SERVICE MADE} proof of service under Rule 4(f)(2) or Rule (f)(3) must include a receipt signed by the addressee, or other evidence satisfying the court that the summons and complaint were delivered to the addressee.</p> <p>(3) Validity of Service. Failure to prove service does not affect the validity of service. The court may allow proof of service to be amended.</p>

(COMPARE 5(C)(1))

<p>(m) Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).</p>	<p>(m) Time Limit for Service. If a defendant is not served within 120 days after the filing of a complaint, the court must, on motion of its own after notice to the plaintiff, dismiss the action without prejudice against that defendant or direct that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country under Rule 4(f) or Rule 4(j)(1).</p> <p>ON</p> <p>ASSERTING JURISDICTION OVER PROPERTY OR ASSETS</p>
<p>(n) Seizure of Property; Service of Summons Not Feasible.</p> <p>(1) If a statute of the United States so provides, the court may assert jurisdiction over property. Notice to claimants of the property shall then be sent in the manner provided by the statute or by service of a summons under this rule.</p> <p>(2) Upon a showing that personal jurisdiction over a defendant cannot, in the district where the action is brought, be obtained with reasonable efforts by service of summons in any manner authorized by this rule, the court may assert jurisdiction over any of the defendant's assets found within the district by seizing the assets under the circumstances and in the manner provided by the law of the state in which the district court is located.</p>	<p>(n) Seizing Property; Serving Summons Not Feasible.</p> <p>(1) Notice PROPERTY. The court may assert jurisdiction over property if authorized by a federal statute. Notice to claimants of the property must be given in the manner specified by the statute or by serving a summons under this rule.</p> <p>(2) Seizing Assets IF? Upon a showing that personal jurisdiction over a defendant cannot, in the district where the action is brought, be obtained with reasonable efforts by serving a summons under this rule, the court may assert jurisdiction over the defendant's assets found within the district by seizing the assets under the circumstances and in the manner provided by the law of the state where the district court is located.</p> <p>LOC CAL STATE</p>

Prof. Cooper's Comments

Rule 4(a)

(1) The reordering of the summons contents seems sensible.

(2) "[B]e under the court's seal" in what is to become (G) may mean something different from "bear the seal of the court." It seems clear enough that "bear the seal" can be satisfied by the clerk's act. To "be under the court's seal" might imply greater court involvement. Why not "bear the court's seal"? [The edit on Rule 4(b) suggests we might dispense with the "seal" requirement. My inclination is to keep it — it gives a more serious air to the summons.]

(3) The summons now must state the time to "appear and defend," and state "that failure to do so will result in" a default judgment. It changes the meaning to translate this as "failing to appear will result in a default judgment." Appearance does not defeat a default judgment; Rule 55(a) provides for default when a defendant fails "to plead or otherwise defend." A defendant may appear without pleading or otherwise defending. This point is underscored by the provision in Rule 55(b)(2) directing notice to a defaulting defendant who has appeared in the action. The correct drafting is a bit tricky because nothing in the rules specifies what is an "appearance." We might say "notify the defendant that failing to appear and defend" results in default. But we also might say that "failing to defend" does it: to defend is to appear. (And why do we prefer "failing" rather than "failure"? I cannot give a technical argument, but to my eye "failing" implies an ongoing inaction; "failure" speaks to the end of the time to defend.)

Rule 4(b)

(1) So long as we keep the seal requirement in Rule 4(a), I would leave "seal" in 4(b).

(2) The editing leaves unchanged an ambiguity in the present rule. The third sentence refers to a summons "addressed to multiple defendants." The apparent

sense is that a single summons may name multiple defendants — hence the need for a "copy" of the summons. If indeed that is the meaning, would it be better to say: "or a copy of a summons that is addressed to multiple defendants"? (This question reappears throughout Rule 4 — often we say "a copy of the summons and of the complaint," but sometimes not. We need to pay attention to this usage to see whether there is some mysterious underlying reason.)

(3) It is puzzling that Rule 4(b) says that the plaintiff may present a summons to the clerk, etc. The apparent purpose is to put the initial clerical burden on the plaintiff, not the clerk. The authorization, moreover, begins "Upon or after filing the complaint." Nothing here tells the plaintiff whether there is any time limit after filing. That appears in Rule 4(m), which tells us what happens if a defendant is not served within 120 days after the complaint is filed; Rule 4(c) picks up the cross-reference duty. I suppose we might as well leave these minor mysteries as they are.

Rule 4(c)

(1) The tag line is awkward, but so is the rule. Perhaps we should just describe (c) as "Service." (Or, if style dictates, "Serving.") "Serving with the complaint" may be more than we need; and when we go that far we have to add something like "by whom." "Serving * * * by whom" is awkward. We got into this trouble by combining these things in one subdivision, but it would be a bad idea to designate still more subdivisions in a rule that already runs through (n) subdivisions.

(2) "The plaintiff must have the summons and complaint served" does not mean quite the same thing as "The plaintiff is responsible for service." The present "is responsible" does not tell the plaintiff that service must be made. Since Rule 4(m) allows relief — and in some circumstances requires relief — I am not sure the new style is an improvement.

(3) Why not furnish copies "to the person who ~~effects~~ makes service"?

(4) I can understand saying only "at least 18," but I feel better saying "at least 18 years old."

(5) The line for paragraph (3) is too long. It also is misleading unless we intend that the court can appoint a person younger than 18. How about "Special appointment"?

(6) A substantive query: Why is present Rule 4(c)(2) limited to special appointments at the plaintiff's request? Why not just: "The court may direct"? Does this tie to the forma pauperis and seaman cases, see (7)?

(7) Why did we reverse the natural order of § 1915 and § 1916? I would have guessed that forma pauperis actions are more frequent than seaman actions, so

putting them first makes double sense.

(8) Do we need "for that purpose": "or by a person specially appointed ~~for that purpose~~"?

Rule 4(d)

(1) I do not have any objection to relocating the "no waiver" provision to the end. But some may believe that it is better to leave it where it is — not only for continuity, but also to reassure defendants at the very beginning.

(2) The line "Jurisdiction not affected" may not be quite right — it may imply that objections are automatically preserved. How about "Objection[s] not waived"?

(3) I wonder whether this is a place to bypass drafting in the singular. The present rule says that the defendant does not waive "any" objection as a matter of emphasis. There may be multiple objections both to personal jurisdiction and to venue. If we have decided not to retain "any" as a word of emphasis, why not "does not waive objections to"?

(4) Present 4(d)(2) stated that the defendant "has a duty to avoid unnecessary costs of serving the summons" for a reason. But that was when the rule was new, in 1993. Perhaps this has become an antiquity already — the important part is the court's duty to impose costs on the defendant under present (d)(2), recaptioned here as (d)(2) "Failure To Waive." But we need it in new (d)(2); what is to be (d)(1) does not state a consequence, and even if we restore "has a duty" language we need to state the consequence. (The 1993 Committee Note states in the second sentence that the purpose of the new 4(d) waiver system is "to foster cooperation among adversaries and counsel." We lose some of the flavor of cooperation by omitting the duty to avoid unnecessary costs....)

(5) I would not add "To avoid costs" at the beginning of new (d)(1), whether or not we state that a defendant has a duty to avoid unnecessary costs.

(6) It may be a good idea to add "partnership" to the list in new 4(d)(1), but it points to an ambiguity of comma style that is difficult to draft around. An individual is subject to service under 4(e) or 4(f). A corporation, partnership, or association is subject to service under Rule 4(h). As a series, "individual" stands apart from the other three. As styled, "an individual, a corporation, a partnership, or an association subject to service under Rule 4(e), (f), or (h)" might seem to refer "an association" to service under 4(e), (f), or (h), leaving the others stranded. Inserting a comma after association does not do it either. I think the cure is to drop all the details: "notice * * * to a defendant that is subject to service under Rule 4(e), (f), or (h) and request * * *." I do not think we need to spell out individual, corporation, or the rest of it. The cross-reference takes care of it.

(7) 4(d)(1) deletes "directly" from present 4(d)(2): "shall be addressed directly to the defendant, if an individual, or else to an officer" etc. of a defendant. I suppose that "directly" was inserted as a contrast: if the defendant is an individual, notice is directed to the defendant; if the defendant is a corporation, association, or partnership, notice is directed to its agent. If that is right, I think it safe enough to delete directly: notice is "addressed to the individual defendant." But perhaps it should be "an the individual defendant." There may be several defendants, mixing individuals and entities. I am not as confident about deleting a tie between the agent and the defendant. One possibility of restoring it: "to the defendant's officer, managing or general agent, or other agent authorized * * *." (The 1993 Committee Note states that a request for waiver addressed to a corporate defendant must be addressed to a person qualified to receive service; addressing the request to the organization without more is not adequate.)

(8) Present 4(d)(2)(C) requires the notice to identify the court in which the complaint has been filed. New 4(d)(1)(B) requires the notice to name the court where the action has been filed. In Rule 3 language, a complaint is filed; an action is commenced. Should we say "commenced" in 4(d)(2)(C)?

(9) 4(d)(1)(B) also raises an issue that is underscored in (d)(1)(C). The present rule speaks of "compliance" and the costs of failure to comply. It seems better style to refer to the means of returning the request, or the consequences of waiver. But "compliance" surely was chosen deliberately, to emphasize the duty aspect. See (4) above.

(10) There may be an ambiguity in present 4(d)(2)(F); if so, it is resolved in new (d)(1)(D). The present rule requires that the notice allow the defendant "a reasonable time to return the waiver, which shall be at least 30 days * * *." This could mean that 30 days is the shortest period that is ever reasonable, but that in some circumstances 30 days is not enough time to be reasonable. The new provision is unambiguous — it leaves it to the plaintiff to decide whether to give more than 30 days. This a question that we have to flag.

(11) You raise the question whether the reference to notice "sent outside any judicial district of the United States" should be restyled as "outside the jurisdiction of the United States. The change should not be made if there are places within the jurisdiction of the United States but outside any judicial district. Enclaves, vessels at sea, or the like may in some sense not be outside the jurisdiction of the United States. We should be wary of making this change in the name of style. (The recurring question whether to refer to "within a judicial district," "not within a judicial district," "outside a judicial district," or variations, is noted by several editing marks. In 4(k)(1)(B) there is a nice illustration: why not just "within the United States"?)

(12) Present 4(d)(2) refers to a defendant "located within the United States"; this

is continued in new 4(d)(2). It is not clear why this expression is different from the earlier reference to a defendant "addressed outside any judicial district of the United States." Something may turn on what "located" means: a foreign defendant may have such contacts with the United States as to be "located" here. Until someone can provide a good explanation, we are probably well advised to continue the present language, even though it presents a puzzle on its face.

(13) New (d)(2) does not carry through the change made in new (d)(1), which deletes the reference to "compliance" with a request for waiver. The closest substitute is found in new 4(d)(1)(D): "return the waiver." Perhaps we should do 4(d)(2) like this:

If a defendant located within the United States fails to return the waiver ~~comply with a request for [a] waiver made requested~~ by a plaintiff located within the United States and fails to show good cause for not returning the waiver ~~complying~~, the court must impose on the defendant the costs later incurred in effecting makng ~~service under Rule 4(e), (f), or (h)~~, together with the costs — including a reasonable attorney fee — of any motion required to collect the service costs. [To be consistent with the newer rules, we should refer throughout to "attorney fee." This improvement was too hard won to abandon it now.]

(14) The new (d)(3) tag line does not need "serve an."

(15) There is an unintentional change of meaning in (d)(3). The present rule is clear that the 90-day answer period applies only to the defendant addressed outside the United States. As restyled, could be read to say that so long as a defendant was addressed outside the United States, all defendants get the 90 days. The original version may help redraft this: " — or, for a defendant addressed outside any judicial district of the United States, until 90 days after the date when the request was sent." The present style version could be changed to do almost the same thing: " — or until 90 days after the date when the request was sent to the defendant outside any judicial district * * *."

(16) The new (d)(4) tag line is incomplete. Perhaps we should separate the provisions: one for "Proof of Service Not Required" and one for "Rules Apply" [See (17).]

(17) It is awkward to render the present "shall" as "must" when we only want to say that the rules apply. How about: "and, except as provided in Rule 4(d)(3), these rules apply as if * * *."

(18) The suggestion in 17 raises a question: I have been drilled for a couple of years into the habit of always saying Rule 4(d)(3), not "subdivision (d)(3)" and not (d)(3). Are we adopting a different convention?

(19) Clearly it was a deliberate choice to change from "as if summons and

complaint had been served" to "as if a summons and complaint were served." "Were" seems a bit too fancy to me.

Rule 4(e)

(1) On balance, I think it better to delete "from whom a waiver has not been obtained." A plaintiff who has requested waiver may decide to serve the defendant before the time to respond. My guess is that this phrase in the present rule will be viewed as a cautionary reminder of the waiver provisions in 4(d), not as a limit on the right to make service while a request for waiver remains outstanding.

(2) In my mild redraft below, I restore "upon the defendant" in (1) — state law may provide different means for serving different categories of defendants. Surely the new draft requiring that state law be "follow[ed]" invokes those distinctions — I would have drafted as the new draft without thinking about "upon the defendant." But the precaution seemed desirable once, and may deserve to continue.

(3) How about:

Unless federal law provides otherwise, an individual — other than an infant or an incompetent person — may be served in a judicial district of the United States by:

(1) by following state law for serving a summons on the defendant in an action brought in a court of general jurisdiction of the state where the district court is located or [the state?] where service is effected made;

(2) by delivering a copy of the summons and of the complaint to:
(A) the individual personally, or
(B) an agent authorized by appointment or by law to receive service of process; or

(3) by leaving a copy of the summons and complaint at the individual's dwelling or usual place of abode with someone of suitable age and discretion who lives there.

[We could combine (2) and (3) by finding a suitable common introductory phrase. "Delivering" may be too much of a change for leaving a copy with someone at the defendant's home. "Leaving with" may work in place of delivery: "leaving a copy of the summons and of the complaint with: (A) the individual personally, (B), etc.."]

Rule 4(f)

(1) Curiously, present (f)(1) refers in the tag line to service "in a foreign country," while the rule refers to service "not within any judicial district of the United States." This is a clue to intended meaning, but it seems better to have a tag line that mirrors the rule. A place not within any judicial district of the United States may include a place that is not technically a foreign country — Antarctica comes to mind. Perhaps we are deleting an ambiguity. But the issue returns in (f)(2), where both versions speak of a foreign country — present (f)(2)(A) speaks directly of service in a foreign

country.

(2) As with 4(e), I guess it is proper to delete "from whom a waiver has not been obtained and filed."

(3) Perhaps "applicable" is redundant in present (f)(2), so properly deleted: "or the applicable international agreement allow other means."

(4) I am a bit confused by the marks: It would flow properly to say: "if there is no internationally agreed-on means or if an international agreement allows other means, by a method that is reasonably calculated to give actual notice." But adding "actual" may be inviting trouble. The present rule reads only "reasonably calculated to give notice." The general view is that actual notice is not required. Adding "actual" to a conventional phrase may confuse the issue because of the convention. (To compound the confusion, former Rule 4(i)(1)(B) clearly said that service directed by a foreign authority in response to a letter rogatory must be "reasonably calculated to give actual notice," and — although the drafting is bad — seemed to apply the actual notice test also to service in the manner prescribed by foreign law for service in the foreign country.)

(5) Present (f)(2)(A) supplies an antecedent for "foreign country," although afterward — "for service in that country." It may not be safe to rely on inference as the new version does. How about: "(A) as prescribed by the law of the country where service is made for service in an action in its courts of general jurisdiction"? The same approach could be used in: "(C) unless prohibited by the law of the country where service is made, by:"

(6) The missing antecedent may be supplied in (f)(2)(B) by changing "the" to "a": "(B) as a the foreign authority directs * * *."

(7) The change in (C)(ii) seems proper: it is difficult to understand why the present rule refers to "the party to be served," rather than "the individual," since all of (f) is limited to service on an individual.

Rule 4(g)

(1) The new rule omits reference to state-law provisions for service of "other like process." I suspect it is not wise to delete this catch-all. Not only may a state generally allow an action to be initiated with notice but without summons, but there may be special procedures for initiating an action against an infant or incompetent defendant.

(2) Present (g) allows service on an infant or incompetent person outside the United States "by such means as the court may direct." The redraft incorporates 4)(f)(3), which allows the court to direct only such means as are not prohibited by

international agreement. That is a change. Perhaps it is an inevitable change, but we must reckon with it.

Rule 4(h)

(1) An edit suggests restoring "other" — "upon a partnership or other unincorporated association that is subject to suit under a common name." This is a tough call: I believe that ordinarily a partnership is not thought of as an "association," so "other" should go. But it is there now. Just a bad idea?

(2) Again, probably we can delete "and from which a waiver of service has not been obtained and filed."

(3) There is a curious distinction in present (h)(1), carried forward in new (h)(1)(B): we refer first to service on an agent authorized by appointment or "by law," and then to an agent "authorized by statute." I suppose that was intentional. There is some indication that "by law" was at one time meant to refer to federal law, while "statute" was meant to refer to the many state statutes that designate "agents" who may stand in for the corporation. See 4B Federal Practice & Procedure § 1116.

Rule 4(i)

(1) In both 4(i)(1)(B) and (C) the drafting relies on (A) as the antecedent for "of each," referring to the summons and complaint. I do not think this works.

(2) A general style question is posed by the decision to change from the present division of Rule 4(i)(2) into subparagraphs (A) and (B). If we were starting afresh, using two paragraphs — (2) and (3) — to accomplish the same division seems fair. But we are not starting afresh. Maintaining continuity is an advantage. Why disrupt continuity when so little is gained?

(3) The language adopted in 2000, after extensive haggling and negotiation, was "for acts or omissions occurring in connection with the performance of duties on behalf of the United States." Translating this as "regarding duties performed on behalf of the United States" puts enormous weight on "regarding." The basic function is to separate out personal actions. There is no need to serve the United States when suing a federal employee for divorce. We should be careful before deciding that this is a mere style change and also a style improvement.

(4) The change from "an" to "the" in Rule 4(i)(4)(B) seems a mistake.

Rule 4(j)

(1) Why do we switch to the passive? Why not, for example, the "to serve" construct of 4(i)? Or a better passive structure:

Service must be made on a foreign state or {its} [a foreign state's — see (2)] political subdivision, agency, or instrumentality in accordance with [according to?] 28 U.S.C. § 1608.

And the same for a state, etc.:

"Service must be made on a state by:

- (A) delivering a copy * * *, or
- (B) serving a copy * * *

(2) We may be inviting difficulty in the style change that refers to a foreign state "or its" political subdivision. Some may infer that we are addressing only the case in which a foreign state is a party. "Thereof" can be deleted, but we might do better with "Service on a foreign state or a foreign state's political subdivision, agency, etc."

(3) Present 4(j)(2) limits service by an ambiguously placed "subject to suit." This language may seem to accomplish nothing — if the defendant is not subject to suit, it makes no difference how it is served; the determination whether it is subject to suit is made after service and on grounds that have nothing to do with the method of service. But it may be a valuable bit of rhetoric: it reassures states that we are not implying anything about the Eleventh Amendment, general immunity, or whatever. Nor are we proposing to determine whether a "governmental organization" enjoys a status that allows it to be treated as a suable entity at all.

Rule 4(k)

(1) Why not delete: "subject to ~~the~~ federal interpleader jurisdiction"?

(2) (1)(B) carries forward a problem in the present rule: literally, we say that filing a waiver of service establishes personal jurisdiction over a defendant served at a place, etc. The point of the waiver is that there is no need to serve. What we mean is a defendant "who could have been served." And it is awkward to say that, because it opens up the fact issue whether the defendant could have been served at a place...

(3) I wonder whether it would be better to reverse the sequence of ideas in (k)(2):

If a defendant is not subject to jurisdiction in any state's court of general jurisdiction, serving a summons or filing a waiver of service [also] establishes personal jurisdiction [with respect to]{for} a claim arising under federal law if the exercise of personal jurisdiction is consistent with the United States Constitution and laws.

Instead, we might choose to begin with the central idea that we are dealing with federal claims:

Personal jurisdiction to adjudicate a claim arising under federal law is established by serving a summons or filing a waiver of service if the defendant is not subject to jurisdiction in any state's court of general jurisdiction and the exercise of jurisdiction is consistent with the United

States Constitution and laws.

(The change from the present "with respect to claims arising under federal law" to "for claims arising under federal law" may generate some difficulty with respect to supplemental personal jurisdiction: "for" seems to focus and limit the jurisdiction to the federal claim; "with respect to" may support a more open approach that allows pendent, ancillary, or supplemental personal jurisdiction for factually related state-law claims. This problem is avoided by the second variation.)

Rule 4(f)

(1) "Proof of service" is a traditional term, referring to a one-sided stylized presentation. "Proved to the court" may seem to suggest something more. We could say "Proof of service, unless waived, must be made to the court."

(2) Whatever we do about "not within any judicial district," we should do the same thing in 4(f) and 4(l). In any event, we may be able to do better in capturing the proposition that service under all three paragraphs of Rule 4(f) is made outside the United States:

(2) Service outside the United States must be proved:

(A) if made under Rule 4(f)(1), as provided in the [applicable] international agreement, or

(B) if made under Rule 4(f)(2) or (3), by a receipt signed by the addressee or other evidence satisfying the court that the summons and complaint were delivered to the addressee.

(As an aside: why do we often refer to serving "a copy of the summons and of the complaint," while here we say more directly "the summons and complaint"?)

(3) It may go too far beyond style, and may invite problems we do not want to resolve, but why not add to (f)(3): "The court may allow a proof of service to be amended or contradicted"? It used to be the rule that the sheriff's return could not be challenged. I suppose no one adheres to that now. Why not say it?

Rule 4(m)

(1) There are not enough commas in the present rule. We need a few more: If the defendant is not served within 120 days after the complaint is filed, the court — on motion or on its own, after notice to the plaintiff — must dismiss the action against that defendant without prejudice, or direct that service be made within a specified time. But if * * *.

We might go further:

On motion or on its own, after notice to the plaintiff, the court must dismiss without prejudice an action against a defendant that is not served within 120 days after the complaint is filed, or [must] direct that service be made within a specified time. But if * * *

Or:

The court, on motion or on its own, after notice to the plaintiff, must dismiss without prejudice * * *

Or:

The court must dismiss without prejudice or direct that service be made within a specified time as to a defendant that is not served within 120 days after the complaint is filed, acting on motion or on its own and after notice to the plaintiff.

(2) Why are we now referring to "subdivision"? Why not "[This] Rule 4(m) does not apply * * *"?

Rule 4(n)

(1) There are a couple of reasons to wonder about substituting "in accordance with" state law for "under the circumstances and in the manner provided by" state law. Rule 4(n) is limited to assets within the district — the state law is not likely to draw that distinction. And I suspect that state law often says that "a court of this state" may seize assets. Defendants' lawyers in those states will say that seizure by a federal court is not "in accordance with" the state statute.

(2) The awkwardness of the present rule is carried forward. Can we do better? A court may assert jurisdiction over a defendant's assets found within the district by seizing the assets under the circumstances and in the manner provided by local state law when personal jurisdiction over the defendant cannot be obtained in the district by reasonable efforts to serve a summons under this rule.



Professor Kimble's and Joseph Spaniol's Edits to Rule 4
Submitted to Professor Cooper
for Review



Rule 4

Rule 4. Summons	4. SUMMONS
<p>(a) Form. The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint. The court may allow a summons to be amended.</p> <p><i>(THEY COME LAST ON THE SUMMONS. OTHER ITEMS ARE IN THE ORDER OF THEIR APPEARANCE.)</i></p>	<p>(a) Form.</p> <p>(1) Contents. The summons must:</p> <ul style="list-style-type: none"> F (A) be signed by the clerk; and <i>the court's</i> (omit?) G (B) be under seal of the court; A (C) name the court and the parties; B (D) be directed to the defendant; C (E) state the name and address of the plaintiff's attorney or — if unrepresented — of the plaintiff; D (F) state the time within which the defendant must appear and defend; and E (G) notify the defendant that failing to appear will result in a default judgment against the defendant for the relief demanded in the complaint. <p>(2) Amendments. The court may allow a summons to be amended.</p>
<p>(b) Issuance. Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant. A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served.</p>	<p>(b) Issuance. Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons — or a copy of the summons if addressed to multiple defendants — must be issued for each defendant to be served. (omit?)</p>
<p>(c) Service with Complaint; by Whom Made.</p> <p>(1) A summons shall be served together with a copy of the complaint. The plaintiff is responsible for service of a summons and complaint within the time allowed under subdivision (m) and shall furnish the person effecting service with the necessary copies of the summons and complaint.</p> <p>(2) Service may be effected by any person who is not a party and who is at least 18 years of age. At the request of the plaintiff, however, the court may direct that service be effected by a United States marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose. Such an appointment must be made when the plaintiff is authorized to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 or is authorized to proceed as a scaman under 28 U.S.C. § 1916.</p>	<p>(c) Serving with Complaint; by Whom Served?</p> <p>(1) In General. A summons must be served with a copy of the complaint. The plaintiff is responsible for <i>MUST HAVE</i> having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person effecting service. <i>who effects</i></p> <p>(2) By Whom. Any person who is at least 18 years of age and not a party may serve a summons and complaint. <i>age</i></p> <p>(3) Incapacities. The court may ^{at} on the plaintiff's request direct that service be made by a United States marshal, deputy marshal, or other person <i>or</i> specially appointed for that purpose. The court must make this appointment if the plaintiff is authorized to proceed as a scaman under 28 U.S.C. § 1916 or in forma pauperis under 28 U.S.C. § 1915. <i>By other persons as the court directs</i> (THE SERIES DOESN'T WORK)</p>
<p>(d) Waiver of Service; Duty to Save Costs of Service; Request to Waive.</p> <p>(1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.</p>	<p>(d) Waiving Service; Requesting Waiver.</p> <p>(5) Jurisdiction Not Affected. Waiving service of a summons does not waive an objection to personal jurisdiction or venue. <i>to</i></p> <p><i>(PUT THIS LAST UNDER (d)?)</i></p>

REQUESTING a WAIVER

To AVOID COSTS, ?

Rule 4

(2) An individual, corporation, or association that is subject to service under subdivision (c), (f), or (h) and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. (To avoid costs) the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request

(A) shall be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment or law to receive service of process) of a defendant subject to service under subdivision (h);

(B) shall be dispatched through first-class mail or other reliable means;

(C) shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

(D) shall inform the defendant, by means of a text prescribed in an official form promulgated pursuant to Rule 84, of the consequences of compliance and of a failure to comply with the request;

(E) shall set forth the date on which the request is sent;

(F) shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from that date if the defendant is addressed outside any judicial district of the United States; and

(G) shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

(1) (2) ~~In General~~ The plaintiff may give notice of commencement of the action to a defendant that is an individual, a corporation, a partnership, or an association subject to service under Rule 4(c), Rule 4(f), or Rule 4(h) and request that the defendant waive service of a summons. The notice and request must:

(A) be in writing and be addressed to the individual defendant or — for a defendant subject to service under Rule 4(h) — to an officer, managing or general agent, or other agent authorized by appointment or law to receive service of process;

(E) (B) be sent by first-class mail or other reliable means;

(B) (C) name the court in which the action has been filed and be accompanied by a copy of the complaint, an extra copy of the notice and request, and a prepaid means for returning the request;

(C) (D) inform the defendant, using text prescribed in an official form promulgated under Rule 84, of the consequences of waiving and not waiving service; and

(D) (E) state the date when the request is sent and give the defendant at least 30 days after that date — or 60 days after that date if sent outside any judicial district of the United States — to return the waiver; and

(CF 4(h)(1)(B))

ANY OTHER

WHERE (CF 4(e)(1)) (K)(1)(A), E(C.)

(CAN THIS BE "OUTSIDE THE JURISDICTION OF" IF SO, CHANGE IT THROUGHOUT.)

Rule 4

<p>If a defendant located within the United States fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown.</p> <p>(3) A defendant that, before being served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent, or 90 days after that date if the defendant was addressed outside any judicial district of the United States.</p> <p>(4) When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and complaint had been served at the time of filing the waiver, and no proof of service shall be required.</p> <p>(5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under subdivision (e), (f), or (h), together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.</p>	<p>(2) (3) <i>Failure To Waive.</i> If a defendant located within the United States fails to comply with a request for a waiver made by a plaintiff located within the United States and fails to show good cause for not complying, the court must impose on the defendant the costs later incurred in effecting service (under Rule 4(e), Rule 4(f), or Rule 4(h)), together with the costs, including a reasonable attorney's fee, of any motion required to collect these service costs.</p> <p>(3) (4) <i>Time To Answer Extended.</i> A defendant that, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the date when the request was sent — or until 90 days after the date when a request was sent to a defendant not within any judicial district of the United States. <i>OUTSIDE?</i></p> <p>(4) (5) <i>Proof of Service Not Required.</i> When the plaintiff files a waiver of service, proof of service is not required and the action must proceed, except as provided in (4), as if a summons and complaint were served at the time of filing the waiver.</p> <p>(4) (3)</p>
<p>(c) Service Upon Individuals Within a Judicial District of the United States. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States: <i>(CF. 4(K)(1)(A).)</i></p> <p>(1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or</p> <p>(2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.</p>	<p>(e) <i>AN</i> Serving Individuals in a Judicial District of the United States. Unless federal law provides otherwise, an individual — other than an infant or an incompetent person — may be served in a judicial district of the United States:</p> <p>(1) by following state law for serving a summons in an action brought in court of general jurisdiction of the state either where the district court is located or where service is effected; or</p> <p>(2) by delivering a copy of the summons and of the complaint to the individual personally, by leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who lives there, or by delivering a copy of each to an agent authorized by appointment or by law to receive service of process.</p>

Rule 4

(f) Service Upon Individuals in a Foreign Country. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States:

- (1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or
- (2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:
 - (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or
 - (B) as directed by the foreign authority in response to a letter rogatory or letter of request; or
 - (C) unless prohibited by the law of the foreign country, by
 - (i) delivery to the individual personally of a copy of the summons and the complaint; or
 - (ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or
- (3) by other means not prohibited by international agreement as may be directed by the court.

(f) Serving Individuals Outside All Judicial Districts of the United States. Unless federal law provides otherwise, an individual — other than an infant or an incompetent person — may be served at a place not ^{outside?} within any judicial district of the United States:

- (1) by any internationally agreed means reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; ^{ON}
- (2) if there is no internationally agreed means or an international agreement allows other means of service, by a method ^{ON} ~~of service~~ ^{if} reasonably calculated to give actual notice: **THAT IS**
 - (A) as prescribed by the foreign country's law for service in an action in its courts of general jurisdiction;
 - (B) as the foreign authority directs in response to a letter rogatory or letter of request; or
 - (C) unless prohibited by the foreign country's law, by
 - (i) delivering a copy of the summons and of the complaint to the individual personally, or
 - (ii) using any form of mail requiring a signed receipt, addressed and sent by the clerk to the individual; or
- ^{ANY} (3) by other means, not prohibited by international agreement, as the court directs.

(g) Service Upon Infants and Incompetent Persons. Service upon an infant or an incompetent person in a judicial district of the United States shall be effected in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state. Service upon an infant or an incompetent person in a place not within any judicial district of the United States shall be effected in the manner prescribed by paragraph (2)(A) or (2)(B) of subdivision (f) or by such means as the court may direct.

(g) Serving Infants and Incompetent Persons. An infant or incompetent person may be served in a judicial district of the United States by following state law for serving a summons on such a defendant in ~~actions~~ ^{actions} brought in that state's courts of general jurisdiction. An infant or incompetent person may be served at a place not within any judicial district of the United States in the manner prescribed by Rule 4(f)(2)(A), ~~Rule~~ ^{Rule} 4(f)(2)(B), or ~~Rule~~ ^{Rule} 4(f)(3). ^{AN ACTION (cf. 4(e)(2) out-side?}

Rule 4

<p>(h) Service Upon Corporations and Associations. Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected.</p> <p>(1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or</p> <p>(2) in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.</p>	<p>^a (b) Serving Corporations, Partnerships, and Associations. Unless federal law provides otherwise, a domestic or foreign corporation, or a partnership or unincorporated association subject to suit under a common name, may be served: ^{OR} ^{OTHER}</p> <p>(1) in a judicial district of the United States,</p> <p>(A) in the manner prescribed by Rule 4(c)(1) for serving an individual, or</p> <p>(B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process — and, if the agent is one authorized by statute and the statute so requires, by also mailing a copy of each to the defendant; or</p> <p>^{outside?} (2) at a place <u>not within</u> any judicial district of the United States, <u>in any manner prescribed</u> for serving an individual <u>by Rule 4(f)</u>, except personal delivery under Rule 4(f)(2)(C)(i). ^{cf.}</p>
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Rule 4

(i) Service Upon the United States, and Its Agencies, Corporations, or Officers.

(1) Service upon the United States shall be effected

(A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and

(B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and

(C) in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to the officer or agency.

(2) (A) Service on an agency or corporation of the United States, or an officer or employee of the United States sued only in an official capacity, is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by also sending a copy of the summons and complaint by registered or certified mail to the officer, employee, agency, or corporation.

(B) Service on an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States — whether or not the officer or employee is sued also in an official capacity — is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by serving the officer or employee in the manner prescribed by Rule 4(e), (f), or (g).

(3) The court shall allow a reasonable time to serve process under Rule 4(i) for the purpose of curing the failure to serve:

(A) all persons required to be served in an action governed by Rule 4(i)(2)(A), if the plaintiff has served either the United States attorney or the Attorney General of the United States, or

(B) the United States in an action governed by Rule 4(i)(2)(B), if the plaintiff has served an officer or employee of the United States sued in an individual capacity.

AMENDED IN 2000

(i) Serving the United States and Its Agencies, Corporations, Officers, and Employees

(1) United States. To serve the United States, the plaintiff must:

(A) (i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought — or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk — or

(ii) send a copy of the summons and of the complaint by registered or certified mail addressed to the civil-process clerk at the United States attorney's office;

(B) send a copy of each by registered or certified mail to the Attorney General of the United States in Washington, D.C.; and

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

(2) Agency; Corporation; Officer or Employee Sued in an Official Capacity. To serve an agency or corporation of the United States, or an officer or employee of the United States sued only in an official capacity, the plaintiff must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.

(3) Officer or Employee Sued Individually. To serve an officer or employee of the United States sued in an individual capacity regarding duties performed on behalf of the United States (whether or not the officer or employee is also sued in an official capacity), the plaintiff must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

(4) Time Extension. The court must allow the plaintiff a reasonable time to cure its failure to:

(A) serve someone under Rule 4(i)(2), if the plaintiff has served either the United States attorney or the Attorney General of the United States; or

(B) serve the United States under Rule 4(i)(3), if the plaintiff has served the officer or employee of the United States sued in an individual capacity.

a DEFENDANT

EXTENDING TIME

Rule 4

<p>(j) Service Upon Foreign, State, or Local Governments.</p> <p>(1) Service upon a foreign state or a political subdivision, agency, or instrumentality thereof shall be effected pursuant to 28 U.S.C. § 1608.</p> <p>(2) Service upon a state, municipal corporation, or other governmental organization subject to suit shall be effected by delivering a copy of the summons and of the complaint to its chief executive officer or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.</p>	<p>(j) Serving Foreign, State, or Local Governments.</p> <p>(1) A foreign state ^{OR} and its political subdivisions, agencies, or instrumentalities must be served in accordance with 28 U.S.C. § 1608.</p> <p>(2) A state, ^{or} municipal corporation, or other governmental organization may be served by delivering a copy of the summons and of the complaint to its chief executive officer, or by serving a copy of each in the manner prescribed by state law for serving summons or like process upon such a defendant.</p>
<p>(k) Territorial Limits of Effective Service.</p> <p>(1) Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant</p> <p>(A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located, or</p> <p>(B) who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues, or</p> <p>(C) who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335, or</p> <p>(D) when authorized by a statute of the United States.</p> <p>(2) If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.</p>	<p>(k) Territorial Limits of Effective Service.</p> <p>(1) <i>In General.</i> Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:</p> <p>(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;</p> <p>(B) who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place where the summons issues;</p> <p>(C) who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335; or</p> <p>(D) when authorized by a federal statute.</p> <p>(2) <i>Federal Claims.</i> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service also establishes, with respect to claims arising under federal law, personal jurisdiction over a defendant not subject to jurisdiction in a court of general jurisdiction of any state.</p>
<p>(l) Proof of Service. If service is not waived, the person effecting service shall make proof thereof to the court. If service is made by a person other than a United States marshal or deputy United States marshal, the person shall make affidavit thereof. Proof of service in a place not within any judicial district of the United States shall, if effected under paragraph (1) of subdivision (f), be made pursuant to the applicable treaty or convention, and shall, if effected under paragraph (2) or (3) thereof, include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court. Failure to make proof of service does not affect the validity of the service. The court may allow proof of service to be amended.</p>	<p>(l) Proving Service.</p> <p>(1) <i>Affidavit Required.</i> Service, unless waived, must be proved to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit.</p> <p>(2) <i>Service Outside the United States.</i> Service outside a federal judicial district, if made under Rule 4(f)(1), must be proved under an applicable treaty or convention. Proof of service under Rule 4(f)(2) or Rule (f)(3) must include a receipt signed by the addressee, or other evidence satisfying the court that the summons and complaint were delivered to the addressee. <i>IN ACCORDANCE WITH THE ?</i></p> <p>(3) <i>Validity of Service.</i> Failure to prove service does not affect the validity of service. The court may allow proof of service to be amended.</p>

Rule 4

(COMPARE 5(C)(1).)

<p>(m) Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).</p>	<p>(m) Time Limit for Service. If a defendant is not served within 120 days after the filing of a complaint, the court must, on motion or <u>of its own</u> after notice to the plaintiff, dismiss the action without prejudice against that defendant or direct that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country under Rule 4(f) or Rule 4(j)(1).</p>
<p>(n) Seizure of Property; Service of Summons Not Feasible.</p> <p>(1) If a statute of the United States so provides, the court may assert jurisdiction over property. Notice to claimants of the property shall then be sent in the manner provided by the statute or by service of a summons under this rule.</p> <p>(2) Upon a showing that personal jurisdiction over a defendant cannot, in the district where the action is brought, be obtained with reasonable efforts by service of summons in any manner authorized by this rule, the court may assert jurisdiction over any of the defendant's assets found within the district by seizing the assets under the circumstances and in the manner provided by the law of the state in which the district court is located.</p>	<p>(n) Seizing Property; Serving Summons Not Feasible.</p> <p>(1) Notice. Notice The court may assert jurisdiction over property if authorized by a federal statute. Notice to claimants of the property must be given in the manner specified by the statute or by serving a summons under this rule.</p> <p>(2) Seizing Assets. Upon a showing that personal jurisdiction over a defendant cannot, in the district where the action is brought, be obtained with reasonable efforts by serving a summons under this rule, the court may assert jurisdiction over the defendant's assets found within the district by seizing the assets under the circumstances and in the manner provided by the law of the state where the district court is located.</p> <p style="text-align: right;">IN ACCORDANCE WITH</p>

ASSERTING JURISDICTION OVER PROPERTY OR ASSETS

PROPERTY

ON

PROPERTY

REVIEW OF GARNER'S ORIGINAL EDITS TO RULE 4
SHOWING REDUCTION IN NUMBER OF WORDS
AFTER STYLIZATION

RULE 4. PROCESS	ISSUANCE OF RULE 4. PROCESS
<p>(a) Summons: Issuance. Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint. Upon request of the plaintiff separate or additional summons shall issue against any defendants.</p> <p>[56 words]</p>	<p>(a) Issuance of Summons. When a complaint is filed, the clerk shall promptly issue a summons and deliver it to the plaintiff or the plaintiff's attorney, who is responsible for having the summons and a copy of the complaint promptly served. At the plaintiff's request, the clerk shall issue separate or additional summonses against any defendants.</p> <p>[54 words]</p>
<p>(b) Same: Form. The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify the defendant that in case of the defendant's failure to do so judgment by default will be rendered against the defendant for the relief demanded in the complaint. When, under Rule 4(e), service is made pursuant to a statute or rule of court of a state, the summons, or notice, or order in lieu of summons shall correspond as nearly as may be to that required by the statute or rule.</p> <p>[137 words]</p>	<p>(b) Form of Summons.</p> <p>(1) The summons must:</p> <ul style="list-style-type: none"> (A) be signed by the clerk; (B) be under seal of court; (C) name the court and the parties; (D) be directed to the defendant; (E) state the plaintiff's attorney's name and address if the plaintiff is represented — otherwise the plaintiff's address; (F) state when, under these rules, the defendant must appear and defend; and (G) notify the defendant that failing to appear and defend will result in the court's rendering a default judgment against the defendant for the relief demanded in the complaint. <p>(2) When, under Rule 4(e), service is made under a state statute or state rule, the summons, notice, or order in lieu of summons must follow that statute or rule as closely as possible.</p> <p>[116 words]</p>
<p>(c) Service.</p> <p>(1) Process, other than a subpoena or a summons and complaint, shall be served by a United States marshal or deputy United States marshal, or by a person specially appointed for that purpose.</p> <p>[33 words]</p>	<p>(c) Service.</p> <p>(1) Process other than a subpoena, or a summons and complaint, must be served by a United States marshal, deputy marshal, or a court-appointed person.</p> <p>[26 words]</p>
<p>(2)(A) A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this paragraph, be served by any person who is not a party and is not less than 18 years of age.</p> <p>[34 words]</p>	<p>(2) (A) Any person who is at least 18 years old and not a party may serve a summons and complaint, except as provided in (B) and (C).</p> <p>[26 words]</p>

<p>(B) A summons and complaint shall, at the request of the party seeking service or such party's attorney, be served by a United States marshal or deputy United States marshal, or by a person specially appointed by the court for that purpose, only—</p> <p>(i) on behalf of a party authorized to proceed in forma pauperis pursuant to Title 28, U.S.C. §1915, or of a seaman authorized to proceed under Title 28, U.S.C. §1916,</p> <p>(ii) on behalf of the United States or an officer or agency of the United States, or</p> <p>(iii) pursuant to an order issued by the court stating that a United States marshal or deputy United States marshal, or a person specially appointed for that purpose, is required to serve the summons and complaint in order that service be properly effected in that particular action.</p> <p>[133 words]</p>	<p>(B) A United States marshal, deputy marshal, or a server specially appointed under (c)(3) shall, at the request of the party or attorney seeking service, serve a summons and complaint only:</p> <p>(i) on behalf of a party authorized to proceed in forma pauperis under 28 U.S.C. § 1915, or of a seaman authorized to proceed under 28 U.S.C. § 1916;</p> <p>(ii) on behalf of the United States or its officer or agency; or</p> <p>(iii) on behalf of any party when the court so orders to ensure proper service in that particular action.</p> <p>[90 words]</p> <p>Rule 4</p>
<p>(C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule—</p> <p>(i) pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or</p> <p>(ii) by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).</p> <p>[160 words]</p>	<p>(C) A summons and complaint may be served upon a defendant of any class referred to in (d)(1) or (3) —</p> <p>(i) under the law of the State where the district court sits, for serving a summons or like process in an action brought in that state's courts of general jurisdiction; or</p> <p>(ii) by mailing a copy of the summons and the complaint to the person served. This service must be by first-class mail, postage prepaid, and must include two copies of a notice, an acknowledgment substantially following form 18-A, and a return envelope, addressed to the sender, with prepaid postage. If the sender does not receive the defendant's acknowledgment of service within 20 days after the mailing date, then service must follow (A) or (B) in the manner prescribed in (d)(1) or (3).</p> <p>[136 words]</p> <p>Rule 4</p>
<p>(D) Unless good cause is shown for not doing so the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing, the notice and acknowledgment of receipt of summons.</p> <p>[45 words]</p>	<p>(D) If the person served does not complete and return the notice and acknowledgment of receiving the summons within 20 days of mailing, then the court shall order the person served to pay the costs of personal service, unless good cause is shown for doing otherwise.</p> <p>[44 words]</p>

<p>(E) The notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.</p> <p>[17 words]</p>	<p>(E) The person served shall execute under oath or affirmation the notice and acknowledgment.</p> <p>[13 words]</p> <p style="text-align: right;"><i>Rule 4</i></p>
<p>(3) The court shall freely make special appointments to serve summonses and complaints under paragraph (2)(B) of this subdivision of this rule and all other process under paragraph (1) of this subdivision of this rule.</p> <p>[33 words]</p>	<p>(3) The court may freely appoint persons to serve summonses and complaints under (c)(2)(B) and all other process under (c)(1).</p> <p>[22 words]</p>
<p>(d) Summons and Complaint: Person to Be Served. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:</p> <p>[35 words]</p>	<p>(d) Summons and Complaint: Method of Serving. The summons and complaint must be served together. The plaintiff shall furnish all necessary copies to the server, who shall serve as follows:</p> <p>[29 words]</p>
<p>(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.</p> <p>[78 words]</p>	<p>(1) <i>upon an individual other than an infant or incompetent person</i>, by delivering copies to the individual personally, by leaving copies at the person's dwelling house or usual place of abode, with someone of suitable age and discretion who lives there, or by delivering copies to an agent authorized to receive service of process;</p> <p>[53 words]</p>
<p>(2) Upon an infant or an incompetent person, by serving the summons and complaint in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.</p> <p>[55 words]</p>	<p>(2) <i>upon an infant or incompetent person</i>, by following state law for serving a summons or like process upon any such defendant in an action brought in that state's courts of general jurisdiction;</p> <p>[32 words]</p>
<p>(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.</p> <p>[83 words]</p>	<p>(3) <i>upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name</i>, by delivering copies to an officer, to a managing or general agent, or to any other agent authorized to receive process. If the agent is authorized by statute to receive service, the server must mail copies to the defendant if the statute requires;</p> <p>[66 words]</p>

<p>(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.</p> <p>[130 words]</p>	<p>(4) <i>upon the United States</i>, by delivering copies to the United States Attorney or an assistant United States Attorney for the district in which the action is filed, or by delivering copies to an assistant of the United States Attorney or to a clerical employee that the United States Attorney has designated in a writing filed with the district clerk. The server must send copies by registered or certified mail to the United States Attorney General in Washington, D.C. If the action attacks the validity of an order of a nonparty officer or nonparty agency of the United States, the server must send a copy of both the summons and the complaint by registered or certified mail to that officer or agency;</p> <p>[122 words]</p>
<p>(5) Upon an officer or agency of the United States, by serving the United States and by sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.</p> <p>[57 words]</p>	<p>(5) <i>upon an officer or agency of the United States</i>, by serving the United States and by sending copies by registered or certified mail to that officer or agency. If the agency is a corporation, (3) governs delivery; and</p> <p>(d)</p> <p>[38 words]</p>
<p>(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.</p> <p>[61 words]</p>	<p>(6) <i>upon a state or municipal corporation or other governmental organization subject to suit</i>, by delivering copies to the chief executive officer or by following state law governing service upon any such defendant.</p> <p>[32 words]</p>
<p>(e) Summons: Service Upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to such a party to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of the party's property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.</p> <p>[201 words]</p>	<p>(e) Summons: Serving a Party Neither Residing Nor Found in State. When a federal statute or court order under a federal statute provides for serving a summons, notice, or an order in place of summons upon a party neither residing nor found in the state where the district court sits, service may follow the statute or order. If the statute or order does not prescribe the manner of service, then service may follow this rule. Service may be made under the circumstances and in the manner prescribed in a state statute or rule if it provides:</p> <ol style="list-style-type: none"> (1) for serving a summons, notice, or order in lieu of summons upon a party not living or found in that state; or (2) for serving or notifying a party to appear and respond to or defend an attachment, garnishment, or similar seizure of the party's property in the state. <p>[143 words]</p>

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<p>(f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or cross-claim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1)–(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places. A subpoena may be served within the territorial limits provided in Rule 45.</p> <p>[163 words]</p>	<p>(f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere in the state where the district court sits — and, if a federal statute or these rules so authorize, beyond that state’s territorial limits. In addition, the following persons may be served as prescribed by (d)(1)–(d)(6), anywhere inside or outside the United States within 100 miles either from the place where the plaintiff filed suit or from the court to which it is assigned or transferred for trial:</p> <ol style="list-style-type: none"> (1) persons brought in as parties under Rule 14; (2) persons added, under Rule 19, as parties to a pending action or to a counterclaim or cross-claim in a pending action; and (3) persons who must respond to a commitment order for civil contempt. <p>A subpoena may be served within the territorial limits that Rule 45 specifies.</p> <p>[135 words]</p>
<p>(g) Return. The person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process. If service is made by a person other than a United States marshal or deputy United States marshal, such person shall make affidavit thereof. If service is made under subdivision (c)(2)(C)(ii) of this rule, return shall be made by the sender’s filing with the court the acknowledgment received pursuant to such subdivision. Failure to make proof of service does not affect the validity of the service.</p> <p>[101 words]</p>	<p>(g) Return. The server shall prove service to the court promptly — at least within the time specified for the person served to respond. If the server is not a United States marshal or deputy United States marshal, then the server must prove by affidavit. If service follows (c)(2)(C)(ii), the sender must file the acknowledgment received. Failure to prove service does not affect its validity.</p> <p>[66 words]</p>
<p>(h) Amendment. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.</p> <p>[50 words]</p>	<p>(h) Amendment. The court may at any time, in its discretion and upon terms it considers just, allow a party to amend process or proof of service, unless the party served would be materially prejudiced.¹</p> <p>[34 words]</p>

¹ The original speaks of *material prejudice to substantial rights*. The revision refers to a party’s being *materially prejudiced in its rights*. The phrase *substantial rights* strikes me as redundant. Could *material* prejudice result from a deprivation of insubstantial rights? — BAG.

<p>(i) Alternative Provisions for Service in a Foreign Country.</p> <p>(1) <i>Manner.</i> When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to the individual personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.</p> <p>[257 words]</p>	<p>(i) Alternative Provisions for Service in a Foreign Country.</p> <p>(1) <i>Manner.</i> When the federal or state law referred to in (e) of this rule authorizes service upon a party neither living in nor found within the state where the district court sits, and when a party must be served in a foreign country, service suffices if made:</p> <p>(A) in the manner prescribed by the foreign country's law governing service in an action in any of its courts of general jurisdiction;</p> <p>(B) as the foreign authority directs in response to a letter rogatory, when service is reasonably calculated to give actual notice;</p> <p>(C) upon an individual, by delivering the process personally — or, upon a corporation, by delivering the process to an officer, managing agent, or general agent;</p> <p>(D) by any form of mail that requires a signed receipt, as long as the court addresses and sends the process to the party; or</p> <p>(E) as a court order directs.</p> <p>(2) <i>Who May Serve.</i> Any nonparty individual who is at least 18 years old — or whom the district court or foreign court designates by order — may serve under (C) or (E). At the plaintiff's request, the clerk shall deliver the summons to the plaintiff, who may then send it to the foreign court or officer who will serve it.</p> <p>[209 words]</p>
<p>(2) <i>Return.</i> Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country, or by order of the court. When service is made pursuant to subparagraph (1)(D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.</p> <p>[63 words]</p>	<p>(3) <i>Return.</i> A party may prove service as prescribed:</p> <p>(A) in (g);</p> <p>(B) by the law of the foreign country; or</p> <p>(C) by court order.</p> <p>When service follows (1)(D) of this subdivision, the party must include a receipt signed by the addressee or other evidence of delivery that satisfies the court.</p> <p>[49 words]</p>

<p>(j) Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.</p> <p>[92 words]</p>	<p>(j) Time Limit for Serving Summons. If the summons and the complaint are not served upon a defendant within 120 days after the complaint is filed, and the party on whose behalf service was required cannot show good cause for the failure, then the court shall, on its own initiative or upon motion, dismiss the action against that defendant without prejudice and notify the party who failed to effect service. This subdivision does not apply to service in a foreign country under (i).</p> <p>[82 words]</p>
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[2,074 words in original]

[1,614 words in revision — 22% reduction]



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ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

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WASHINGTON, D.C. 20544

Rules Committee Support Office

August 22, 2002

MEMORANDUM TO CIVIL RULES COMMITTEE

SUBJECT: *Proposed Timetable Governing Style Project*

Judge Levi believes that it would be helpful for the committee, while it begins its planning, to have before it a proposed timetable for completing the style project. He asked me to prepare the attached timetable based on my experiences with the Appellate and Criminal Rules stylization projects.

It is not possible to predict the committee's rate of progress in reviewing the rules nor draw firm timetables until the committee actually begins working through the rules. But the following rough timetable, though tentative and subject to change, does suggest the amount of work and number of meetings that would be required to complete the project.

RULES ASSIGNMENTS

Subcommittee "A" is chaired by Judge Thomas Russell and consists of Judge Lee Rosenthal, Judge Brent McKnight, Professor Jeffrey Jeffries, Sheila Birnbaum, and Andrew Scherffius. Professor Tom Rowe will assist the subcommittee. Subcommittee "B" is chaired by Judge Paul Kelly and consists of Judge Shira Scheindlin, Judge Richard Kyle, Justice Nathan Hecht, Professor Myles Lynk, and Bob Heim. Professor Rick Marcus will assist the subcommittee.

Subcommittee "A" is assigned the following rules for their review: Rules 1 - 7; Rule 16 - 25; Rules 38 - 53; and Rules 64 - 71A.

Subcommittee "B" is assigned the following rules for their review: Rules 8 - 15; 26 - 37 & 45; Rules 54 - 63; and Rules 72 - 85.

DRAFT TIMETABLE

- April 2003** Full committee meets and approves Rules 1-7 (A) and Rules 8-15 (B)
Subcommittee (A) preliminarily reviews Rules 16-25
Subcommittee (B) preliminarily reviews Rules 26-37 & 45
- Mar. 14, 2003 Professor Cooper submits to Subcommittees “A” and “B” footnoted Rules 16-37 & 45 identifying major issues, ambiguities, outstanding issues, and controversial matters
- Mar. 2003 Subcommittees “A” and “B” holds conference calls, if needed, to approve edits to Rules 1-15
- Feb 2003 Standing Style Subcommittee reviews Professors Rowe’s and Marcus’s research results, makes appropriate changes, and submits Rules 16-37 & 45 to Judge Levi who transmits draft to Judges Russell and Kelly for their preliminary review
- Jan. 22-23, 2003 Subcommittee “A” meets to review Rules 1-7
Subcommittee “B” meets to review Rules 8-15
- Dec. 23, 2002 Professor Marcus submits research results on Rules 26-37 & 45 (B) to Standing Style Subcommittee
- Dec. 15, 2002 Professor Cooper submits to Subcommittees “A” and “B” footnoted Rules 1-15 identifying major issues, ambiguities, outstanding issues, and controversial matters
- Dec. 1, 2002 Professor Kimble and Spaniol submit edits to Rules 26-37 & 45 (B) to Standing Style Subcommittee for review and transmission to Professor Marcus for research
- Nov. 22, 2002 Professor Rowe submits research results on Rules 16-25 (A) to Standing Style Subcommittee
- Nov. 8, 2002 Standing Style Subcommittee reviews Professors Rowe’s and Marcus’s research results on Rules 1-15, makes appropriate changes, and submits it to Judge Levi who transmits draft to Judges Russell and Kelly for their preliminary review
- Nov. 1, 2002 Professor Kimble and Spaniol submits edits to Rules 16-25 (A) to

- Standing Style Subcommittee for review and transmission to Professor Rowe for research
- Oct. 11, 2002 Professors Marcus and Rowe submit research results on Rules 1-15 to Standing Style Subcommittee (copy sent Professor Cooper)
- Oct 2, 2002 Rules 1-7 (A) submitted to Professor Rowe for research review
- Oct 2002** Full committee discusses scope of project
- Sept. 30, 2002 Professor Kimble and Joe Spaniol submit edits to Rules 1-15 to Standing Style Subcommittee for review and transmission to Professors Marcus and Rowe for research
- Sept. 11, 2002 Rules 8-15 submitted to Professor Marcus for research review (to be reviewed again to account for Professor Kimble and Spaniol edits)



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To: Advisory Committee on Civil Rules
From: Bob Niemic & Tom Willging
FJC Project Team: Shannon Wheatman, George Cort, Dean Miletich,
Nicholle Reisdorff¹
Date: September 9, 2002
Subject: Effects of *Amchem/Ortiz* on the Filing of Federal Class Actions: Report to
the Advisory Committee on Civil Rules²

A. Summary

The Class Action Subcommittee of the Advisory Committee on Civil Rules asked the Federal Judicial Center (FJC or Center) to examine the impact, if any, of the Supreme Court decisions in *Amchem*³ and *Ortiz*⁴ on the rate at which plaintiffs file class actions in federal courts. The subcommittee's question also implicates whether, post-*Amchem/Ortiz*, defendants more frequently removed class actions from state to federal court and whether class actions in federal courts ended in settlements less often than before the *Amchem* and *Ortiz* decisions. Similarly, for securities cases, we analyzed filing patterns before and after the 1995 and 1998 securities legislation.

This report describes trends in federal class action filings, removals, settlements, and dismissals during the period from January 1994 through June 2001 and identifies certain discernible changes after the two decisions.

1. We also thank David Rauma for performing the time-series analyses and authoring subsections B and C of Appendix II; Tim Reagan for helpful comments on drafts and advice on statistical methods; Professor Edward H. Cooper, Professor Richard L. Marcus, and Laural Hooper for their helpful comments on drafts of this report; and Vashty Gobinpersad and Estelita Huidobro for their help in data collection.

2. This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. The views expressed are those of the authors and not necessarily those of the Federal Judicial Center.

3. See *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997) [hereinafter *Amchem*].

4. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) [hereinafter *Ortiz*].

Data collected on federal class actions for this study show that

- filings of nonsecurities class actions increased over our study period (January 1994 through June 2001), including an increase during the two years following the *Ortiz* decision;
- filings of personal injury class actions more than doubled from 1994 through June 2001, including an increase during the two years or so following the *Ortiz* decision;
- removals of personal injury and property damage class actions decreased briefly after the *Amchem* decision and increased during 2000–2001—removals of such case types quadrupled from 1994 through June 2001;
- removals of class actions other than personal injury and property damage actions doubled from 1994 through 1996 and then remained at approximately the same level from 1996 through June 2001;
- class actions filed in or removed to federal court with jurisdiction based on diversity of citizenship more than doubled from 1994 through June 2001; and
- the proportion of class actions that settled within 2.5 years of filing changed only within a narrow range for class actions filed from 1994 through 1999 (the last year for which we could study dispositions).

We cannot say with any certainty that either decision caused the changes observed. The report, however, discusses the results of a time-series analysis that tested whether there were any statistically significant relationships between the two decisions and the filing/disposition patterns we found. We found that certain of the changes we observed were not likely to have occurred by chance. In other words, they were statistically significant. Because many other factors might have affected filings, we cannot say what caused the observed changes.

B. Background

The Class Action Subcommittee of this Committee asked the FJC to obtain various kinds of caseload data and other information with which to assess whether *Amchem* and *Ortiz* had any discernible effects on the rate and type of class action filings in federal district courts. The subcommittee's primary purpose is to determine whether there has been any notable decrease in the filing of federal class actions after the Supreme Court decisions in *Amchem* and *Ortiz*. The subcommittee also expressed an interest in whether settlements of such actions decreased or dismissals increased post-*Amchem/Ortiz*.

In *Amchem*, the Supreme Court affirmed a Third Circuit decision that vacated the order of the district court certifying a class of individuals with asbestos injury claims against a number of defendants and approving a Fed. R. Civ. P. 23(b)(3)

opt-out settlement. The district court had combined in one class action plaintiffs with present asbestos injuries and future claimants (absent and unknown) who might discover an asbestos injury in the future. According to the Court, the district court's ruling had allowed a settlement of a "sprawling" class action that failed to adequately protect the rights of the injured, particularly those in whom a disease had not yet manifested itself.

In *Ortiz*, the Court reversed a Fifth Circuit decision that had affirmed an asbestos settlement with similar features to those the Court criticized in *Amchem*. The settlement in *Ortiz*, however, focused on a single manufacturer of products containing asbestos and used a mandatory "limited fund" settlement class certified under Rule 23(b)(1)(B).⁵

The Supreme Court found that neither of the two class action settlements complied with Federal Rule of Civil Procedure 23 because each allowed classes too large and varied to meet federal standards governing class actions. Various commentators have predicted that, after *Amchem/Ortiz* and other developments, plaintiffs will file fewer federal class actions than before. Reasons given include that federal courts will

- pay more attention to the breadth of a class;
- be less willing to certify classes;
- require that plaintiffs more fully support that a case qualifies as a class action;
- be less willing to approve settlement even if the class is suitably narrow; and
- be more likely to exclude scientific evidence.

Certain commentators have forecasted that the effects of *Amchem* and *Ortiz* will include much more frequent filing of class actions in state courts.⁶ We did not include in this report any analysis of state court class action filings because we could not locate a suitable database of such filings. The attorney survey discussed in the next subsection, however, will ask a sample of lead class counsel to comment on why they did or did not file in state court. The survey results will not provide comprehensive information on state-court filing rates over time, but questionnaire responses should shed some light on the subject of state filings.

C. Two-part Study

We are conducting this research in two parts by collecting and analyzing statistical data on class action filings and by preparing, administering, and analyzing

5. *Ortiz*, 527 U.S. at 821.

6. See, e.g., Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?*, 74 Tul. L. Rev. 1709 (2000) (stating "many class counsel have abandoned the federal courts in favor of what are perceived to be more receptive state court forums").

results from a survey of counsel in class actions. This memorandum deals only with the statistical data on class action filings that we collected from existing databases and a discussion of whether one might attribute any changes in class action filings to litigants' understanding of the interpretations of Rule 23 announced in *Amchem/Ortiz*.

A second memorandum, which we will mail to Committee members prior to the October 2002 meeting, will present a proposed survey design and a revised draft questionnaire for class action counsel. We designed the survey, at the subcommittee's request, to explore factors affecting decisions about filing class actions in state or federal court. The subcommittee had asked us to analyze whether or to what extent *Amchem* and *Ortiz* had generally affected the terms under which federal courts could approve class-wide settlements. The subcommittee also requested that we analyze whether the two decisions might deter litigants from filing in, or removing cases to, federal court.

D. Hypotheses

For part one of the study, we reformulated the subcommittee's questions into statements that could be tested empirically (hypotheses) and we gathered and analyzed data to test those hypotheses. We formulated four hypotheses, viz., that after the decisions in *Amchem* and *Ortiz*:

- the volume of class action filings in federal court would decline;
- removals of class actions from state court would decline;
- class action settlement rates would decline; and
- dismissals of class actions, voluntary and otherwise, would increase.

Filings in this report include cases removed from state court to federal court. See subsections F.3 and F.5–6 below for data showing original filings and removals broken out separately.

E. Database Description

This report shows data on national filing frequencies and trends in class actions from January 1, 1994, through June 30, 2001, in 82 federal district courts. We could not gather data for all 94 federal districts. For 12 districts,⁷ Public Access to Court Electronic Records (PACER) or other data sources did not provide us with the data we needed at the time of our data gathering. All case counts in the report exclude prisoner and pro se class actions.

7. Alabama Middle, Alaska, Arkansas Western, Guam, Indiana Southern, Mariana Islands, Nevada, New Mexico, North Carolina Eastern, Oklahoma Eastern, Virgin Islands, and Wisconsin Western.

We used the period from January 1, 1994, through June 30, 2001, because it covers at least two years before the Third Circuit's May 1996 *Amchem* decision and about three years before the Supreme Court's June 1997 *Amchem* decision. At the other end, we decided to use the most recent data available, which at the study's inception brought us to about two years after the Supreme Court's June 1999 *Ortiz* decision.

Unless otherwise indicated, the analyses in this report used our class action database, which contains the following:

- consolidated lead class actions (1,648 lead class actions from intradistrict consolidations);
- multidistrict litigation (MDL) lead class actions (192 lead class actions from interdistrict (or MDL) consolidations); and
- cases filed as class actions that were not consolidated or transferred to MDL (13,197 "unique class actions," as we call them).

These case categories total 15,037, which is the total number of class actions in our study database.

We did not include the following counts in our final database for the analyses described in this report:

- 8,335 member class action cases from the 1,648 intradistrict consolidations listed above;
- 4,182 member class action cases from the 192 interdistrict or MDL consolidations also listed above; and
- 1,850 "undetermined" cases, as described in Appendix I.

We identified class action filings through the LexisNexis CourtLink database plus additional cases found on the FJC's Integrated Data Base (IDB). The IDB includes statistical records for all civil cases filed in the federal courts. The methods and limitations related to our data gathering are explained in Appendix I.

We derived data for the graphs and analyses in this report from all federal district courts that participate in the PACER system. We also used FJC and private databases to systematically identify missing cases and exclude duplicate cases. For example, for consolidated and MDL data, we removed from our study case counts "member" cases that had been consolidated with a lead case, either in a consolidation within a single district or a consolidation among districts by the Judicial Panel on Multidistrict Litigation (JPML). In so doing, we eliminated what would otherwise have been duplicative case counts. In other words, we aggregated member cases into their respective lead cases and counted only the lead case.

As we collected data, we identified certain relevant characteristics of those filings, which we describe in the next subsections.

F. Findings and Data Analysis

This subsection describes our findings on the frequency of class action filings over time, before and after *Amchem* and *Ortiz*, and examines certain relevant characteristics of those filings as follows:

- frequencies for all class action filings (subsection F.1);
- nature of suit (subsections F.2–4);
- origin of the case: original proceeding or removal from state court (subsections F.5 and F.6);
- jurisdiction: federal question or diversity (subsection F.7); and
- disposition: settled, voluntarily dismissed, or other dismissal, but excluding dismissals after trials (subsections F.8–10).

Each subsection below provides some background discussion and an overview of six-month-interval data in Charts 1–10, with references to monthly data which we graphed in Appendix II as part of our time-series analysis. As we discuss the data, we note filing patterns before and after *Amchem* and *Ortiz* where appropriate. We also assess, where appropriate, whether observed differences in filing patterns can be attributed to the two decisions or whether the differences are likely the result of chance or other extraneous factors. Likewise for securities cases, we evaluate whether the 1995 and 1998 federal securities acts had any statistically significant relationship to observed changes in filing patterns. Even where these tests (time-series analyses) could not detect statistical significance in the observed changes, the changes shown in the charts may be of interest to the Committee.

Numerous events may have had some effect on class action filing and disposition patterns. These events include, of course, the Supreme Court decisions in *Amchem* and *Ortiz* and the 1995 and 1998 securities acts. We have made no attempt to account for any other factors—such as those related to the general economy, financial markets, or the frequency of detectable unlawful behavior—which might have had competing or enhancing effects on the findings discussed below. Nor have we made any attempt to evaluate how these many factors may have interacted with each other and with the effects of the *Amchem/Ortiz* decisions.

1. Class actions, generally (excluding securities cases)

We first looked at frequencies for all class action filings generally, to give a global view of any change after the two decisions. The case counts in this and most other subsections exclude securities class actions. Text and charts will make specific mention when securities cases are included. We decided to analyze separately securities class actions because we assumed that legislative changes in 1995 and 1998 would overshadow any impact that *Amchem* and *Ortiz* might have. See subsection F.4.

For the 82 districts in our study, Chart 1 graphs the six-month frequencies for class action filings (excluding securities). We identify the timing of the decisions

in the charts below by adding broken vertical lines in the six-month period immediately following each decision. We use these because the Supreme Court decided both *Amchem* (June 1997) and *Ortiz* (June 1999) at the end of a six-month, January to June period. Graphs of monthly data are in Appendix II, with vertical lines indicating the timing of each decision.

a. Overview of findings

There was a fairly steady increase in nonsecurities filings until approximately the time of the *Amchem* decision. At this point, monthly filings began a steady decline of about 10% until approximately the time of the *Ortiz* decision. See Table 2 in Appendix II (monthly data). Filings then began to increase slowly and then leveled off. The time-series analysis does not establish definitively that either change in filings began exactly at the time of a court decision; these changes may have begun before the decisions were issued. Nevertheless, the changes in monthly filings are clear and the decline after *Amchem* may be more than coincidental to the Court's decision.

b. Time-series analysis

As described in more detail in Appendix II, we conducted a time-series analysis to test the statistical significance of any relationship between changes in filing rates and *Amchem* or *Ortiz*. It is clear that something is happening around the time of the two decisions, but the data do not allow the timing of these changes to be determined with precision. Statistically significant changes were obtained but only when each decision was moved back three months. This makes us less confident that the observed changes were the result of the two decisions. These findings could have resulted from other extraneous variables we did not measure. Nevertheless, the patterns over time clearly change from pre-*Amchem* to post-*Amchem* and pre-*Ortiz* to post-*Ortiz*. The change after *Ortiz*, however, is an increase in class action filings, not the decrease the Committee anticipated.

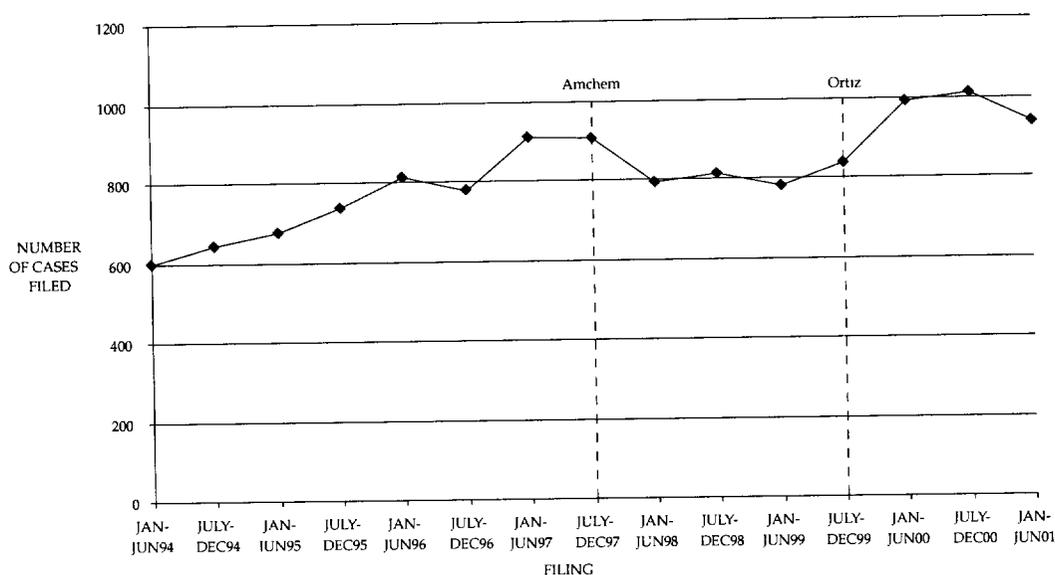
c. Further analysis

We compared filing patterns for all civil cases to class actions filing patterns. Nonsecurities class action filings generally followed the trend curve for all nonsecurities civil case filings. Most likely, various other factors were at work to create the variations in overall civil case filing rates, and at least some of those factors probably also affected nonsecurities class action filings. See Appendix III for more on this methodology.

We used Chart 1 and other graphs to examine the magnitude of any effect overall civil filing patterns may have had on our class action data (excluding securities). We found that adjusting our class action data to remove the fluctuations in overall civil case filing patterns did not have a great impact on our graph of unadjusted class action filing patterns. In other words, it appears that the nonse-

curities class action filing fluctuations we observed in this study cannot be traced to the fluctuations we observed for overall filing patterns for nonsecurities civil cases. Further, the filing patterns for nonsecurities class action filings remain similar to the overall filing patterns for all nonsecurities civil cases, even after adjusting our class action data for overall civil filing patterns.

**Chart 1: Class action filing frequencies
(excluding securities cases)**
(six-month totals with connecting lines)

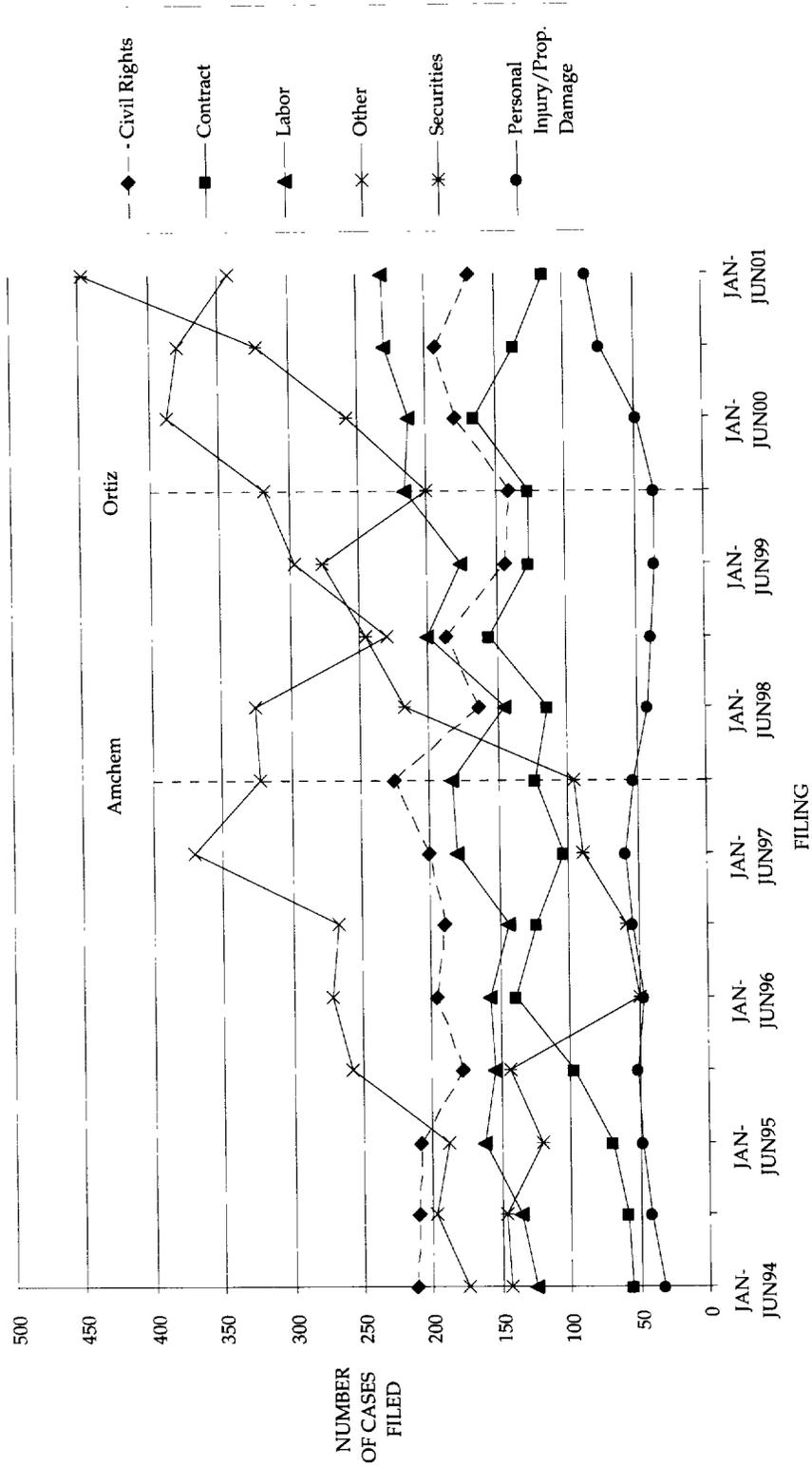


2. Nature of suit

a. Generally

We identified nature of suit for all class action filings in our database. We did this to address whether the Supreme Court decisions, if they had an effect, affected certain types of cases more than others. Changes in sixth-month filing totals are shown in Chart 2.

Chart 2: Number of class action filings by nature of suit
 (six-month totals with connecting lines)



b. Overview of findings

The bottom line on Chart 2 shows the sum of personal injury and property damage filings. Because *Amchem* and *Ortiz* were personal injury cases, we describe torts cases in detail in subsection F.3. Other nature-of-suit categories include:

- *Civil rights*. A post-*Amchem* declining trend appears to have reversed itself after *Ortiz*, only to fall off again toward the end of the study period.
- *Contracts*. Filings increased somewhat after *Amchem* but, by the end of the study period, they were about the same as they were at the time of *Amchem*.
- *Labor*. Filings continued their upward trend with minor interruptions between *Amchem* and *Ortiz*. Given that these cases generally relate to various federal statutes, the changes seen were likely not related to *Amchem* or *Ortiz*.
- *Other statutes*. After having doubled from 1994 through the time of *Amchem*, these cases slumped between *Amchem* and *Ortiz*. But they then exceeded their prior high point, before falling off some at the end of the study period. Given that these cases generally relate to various federal statutes, the changes seen were likely not related to *Amchem* or *Ortiz*.
- *Securities*. A pre-*Amchem* slump was followed by unprecedented growth during the rest of our study period. See subsection F.4.

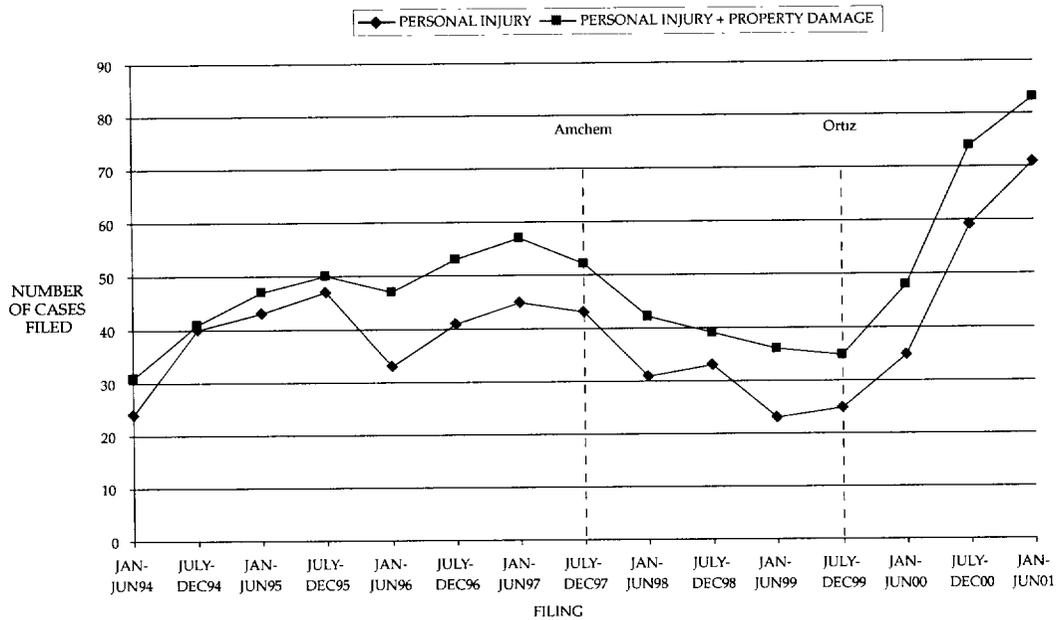
3. Personal injury & property damage

a. Generally

Because both *Amchem* and *Ortiz* were asbestos personal injury cases, personal injury and property damage class actions (PI/PD) may have been more likely affected by *Amchem/Ortiz* than other case types. Given this, we discuss them separately from the others. Most of the PI/PD cases were personal injury cases. The nature-of-suit category “personal injury” also includes product liability cases.

Chart 3a below displays sixth-month filing frequencies for PI/PD class actions. The top line in Chart 3a contains the combined total of personal injury and property damage cases. The lower line (personal injury only) shows that a large majority of these tort cases involved personal injury. Property damage class action filings in all 82 districts combined were generally fewer than three per month.

**Chart 3a: Personal injury & property damage
class action filing frequencies**
(six-month totals with connecting lines)



b. Overview of findings

Our time-series analysis indicates a statistically significant, but short-lived, change in filings after the *Amchem* decision. This decline in filings lasted through just after the *Ortiz* decision. While the graph shows a steady increase in filings after *Ortiz*, this could be interpreted as a return to the pre-*Amchem* trend line.

c. Time-series analysis

The time-series model proved to be somewhat unstable, possibly a result of the small number of cases. The effect associated with the *Amchem* decision was short-lived and ended at approximately the time of the *Ortiz* decision. The filing increase after *Ortiz*, which was not found to be statistically significant, runs counter to the effect we hypothesized. As we found in subsection F.1, the timing of the observed effects could not be precisely linked to the two decisions, therefore we cannot determine if the decisions are associated with the changes in filing rates or if some other extraneous variables are the cause.

d. Further analysis

The time-series analysis for PI/PD shows a long-term filing curve similar to that for nonsecurities class action filings. PI/PD class action filings, however, decreased by about 30% after *Amchem* until around the time of *Ortiz*. This is compared to a decline of approximately 10% for nonsecurities class actions and a decline of approximately 19% for nonsecurities *civil* cases during that same time period.

PI/PD class action filings also roughly followed the directions of the trend curve for all nonsecurities *civil* case filings, but with a greater percentage decline post-*Amchem* and a far greater percentage increase post-*Ortiz*. We cannot say, however, whether the more pronounced changes we observed for PI/PD class actions were caused by *Amchem*, by overall filing trends, or by something else. See Appendix III.

e. Removals, personal injury & property damage cases

For the purposes of this study, we examined the basis for federal jurisdiction in terms of whether a case had been filed originally in federal court or removed from state court to federal court. We reasoned that any changes we might find in removals could indicate, for example, a change in the preference of defendants to litigate class actions in federal court. Such changes also might indicate, indirectly, any changes in plaintiffs' preferences for filing class actions in state courts.

Recall that removals of state court cases to federal court are counted as case filings in our database and in the previous charts. In Charts 3b and 5, we show removals as a separate category.

i. Overview of findings

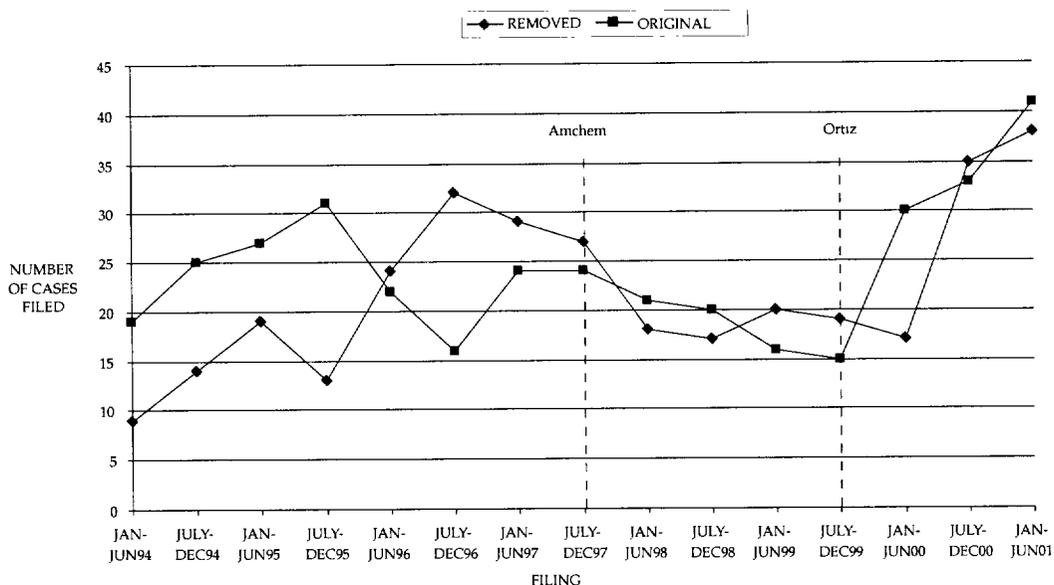
Removals of PI/PD cases have been erratic over time. The decrease in removals seen in the years between *Amchem* and *Ortiz* was temporary, followed by post-*Ortiz* increases through the end of our study period. Over the entire study period, the overall direction of removal frequencies has been upward. Removals increased more than fourfold over the study period. However, the six-month removal frequency counts are relatively small.

ii. Further analysis

After a mostly upward removal pattern during the first three years in Chart 3b, removals decreased by nearly half over the first year or so after *Amchem*, leveled off just before and after *Ortiz*, and then increased during the last year of the study period.

For a graph of these frequencies in the context of all class action removals, see subsection F.5 below.

Chart 3b: Class action removal and original frequencies, personal injury & property damages cases
(six-month totals with connecting lines)



f. Original proceedings, personal injury & property damage

To round out our discussion of removals for personal injury and property damage cases, we discuss original proceedings here separately. See Chart 3b above.

Original proceedings decreased in the two years after *Anchem*. However, an increase in original proceedings occurred immediately following *Ortiz* and continued through the end of the study period.

For a graph of original proceedings for all class action filings, see subsection F.6 below.

4. Securities

Before presenting more data for all nature-of-suit categories, we examine securities class actions separately. We did not expect to see an impact from *Anchem/Ortiz* on these filings, but we were interested in observing any impacts after the effective dates of the

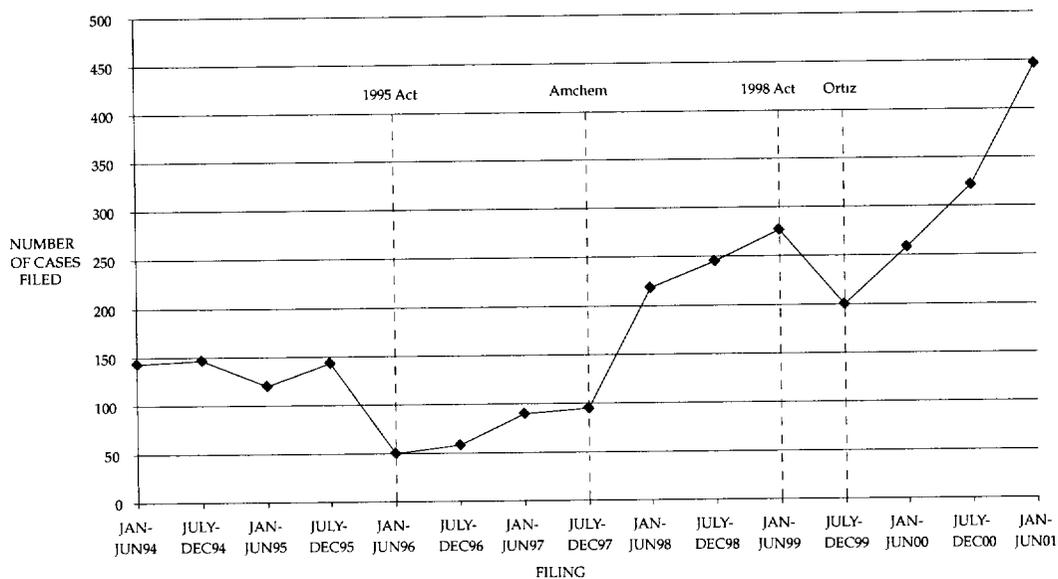
- Private Securities Reform Act of 1995 (1995 Act)⁸ (which generally made it more difficult for plaintiffs to prove a securities violation); and

8. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of the U.S.C.) (affecting pleading standards and substitut-

- Securities Litigation Uniform Standards Act of 1998 (1998 Act) (which channeled securities-related cases into federal courts).⁹

Chart 4 graphs securities case filing frequencies in six-month totals. We highlight the effective dates of the 1995 Act (December 22, 1995) and the 1998 Act (November 3, 1998) by adding broken vertical lines in the six-month period subsequent to each effective date. We did this because the effective dates each fell near the end of their respective six-month periods. See Table 1 in Appendix II for monthly data.

Chart 4: Securities class action filing frequencies
(six-month totals with connecting lines)



a. Overview of findings

The time-series analysis showed that a marked decrease in the number of securities filings occurred in January 1995, the month after the 1995 legislation became effective. This statistically significant decrease was followed by an at first slow rise in monthly filings from that low-point until the filings were far above pre-1995 levels by the effective date of the 1998 legislation. Six months later, securities filings began to increase at a faster rate. However, this latter increase began

ing proportionate liability for joint and several liability).

9. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified in scattered sections of the U.S.C.) (requiring most private class actions alleging fraud in the sale of nationally traded securities to be based on federal law and brought in federal court).

before the 1998 legislation became effective and, according to the time study analysis, cannot be associated definitively with the legislation. Neither *Amchem* nor *Ortiz* appear to have affected securities filing rates.

b. Time-series results

The statistically significant, abrupt decrease after the effective date of the 1995 Act cannot be fully seen in Chart 4 for two reasons. First, Chart 4 displays six-month, not monthly, intervals. The underlying monthly data used in the time-series analysis, however, clearly indicate a statistically significant decrease in securities filings in January 1996 after the 1995 Act became law. See Table 1 in Appendix II.

Second, in Chart 4, we inserted the dotted, vertical line in the six-month period *after* the Act's December 22, 1995, effective date. Chart 4 may make it appear to some that the decrease in filings occurred in the July–December 1995 period, whereas the abrupt decrease actually occurred in January 1996.

Among all the time-series analyses completed for this report, this decrease is the only change whose onset coincided precisely with the date of the hypothesized intervention, that is the effective date of the 1995 Act.

Changes following the 1998 legislation were not consistent, especially when observed by month. The time-series analysis found nothing statistically significant about the post-1998 Act changes.

c. Further analysis

An objective of the 1998 Act was to channel securities class actions into federal courts. From January 2000 to June 2001, filings increased at a relatively high rate to the highest point of the study period. We have, however, no way to determine what part of this increase is related to the 1998 Act and what part is related to increasing volatility, losses, or a burst of filings during this period that were related to initial public offerings (IPOs) in the equity markets.

5. Removals of class actions from state courts (nonsecurities & securities)

Subsection F.3 above discusses removal of personal injury and property damage cases. Here, we show removals for all class actions. Chart 5 graphs the frequencies of removed class actions in six-month totals. As explained in more detail in the text below, Chart 5 displays separate lines for

- securities and nonsecurities, i.e., total removals for all class actions (top line);
- personal injury and property damage removals (bottom line); and
- nonsecurities (middle line).

a. Overview of findings

Removals of class actions doubled from January 1994 through June 1996. After that, removal activity generally held at about the same level for the remainder of the study period.

b. Total removals for all class actions (securities & nonsecurities)

A fairly rapid rate of increase for total removals (top line in Chart 5) nearly leveled off about a year before *Amchem*. But total removals (primarily nonsecurities removals) dropped by over 35% during the five or so months before the Supreme Court decided *Ortiz*. Then removal frequencies increased again after *Ortiz* and within a year removals were back up to around pre-*Ortiz* levels.

c. PI/PD removals

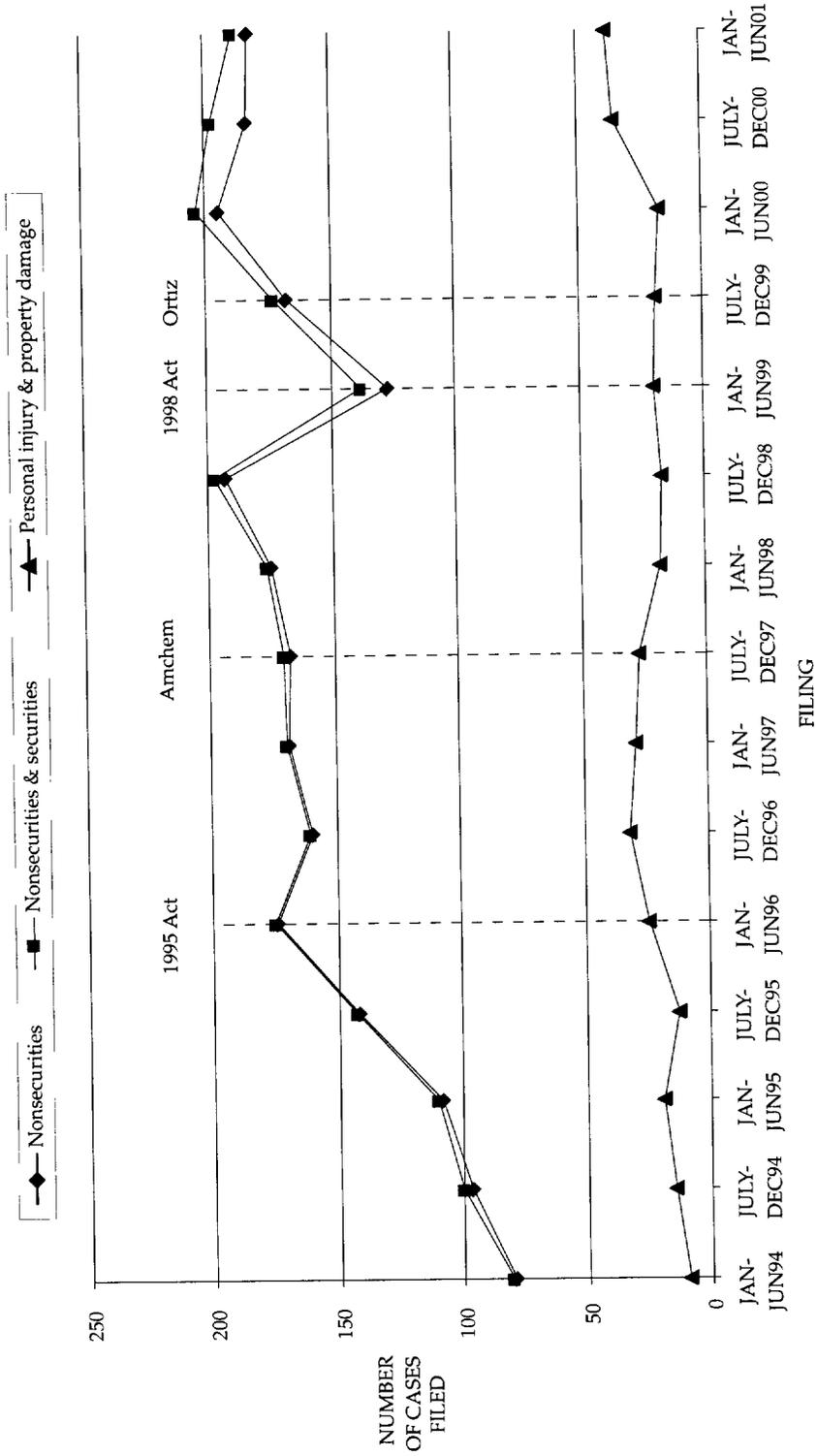
The bottom line on Chart 5 shows PI/PD removals, which we showed on a different scale in Chart 3b above. These removals were small in number, though not as small as securities removals. The PI/PD removal frequencies ended the study period with a six-month total about four times the comparable total in January–June 1994. Chart 3b shows a downturn in removals after *Amchem* and an upturn that began shortly after *Ortiz*. See Chart 3b and accompanying text for a more detailed analysis of these same data.

d. Securities removals

Securities cases are generally filed in federal court as original proceedings. After the 1995 and 1998 Acts, however, some cases appear to have been removed from state to federal court.

Chart 5's small gap between the top line (nonsecurities and securities removals—i.e., all class action removals) and the line just below it (nonsecurities removals only) demonstrates that most of the removed class actions were nonsecurities cases and that a relatively small number of securities cases were removed. Removal frequencies for securities cases stayed within the range of 3–15 (mean of 7.1) cases per six-month period from right after *Amchem* until the end of the study period. Prior to *Amchem*, removals were within the range of 1–3 (mean of 1.4) cases per six-month period. Notice, though, that the number of removed securities class actions began to increase to about 5–15 (mean of 9.4) cases per month beginning with the six-month interval after the 1998 Act.

**Chart 5: Class action removal frequencies:
nonsecurities, nonsecurities & securities, and PI/PD cases**
(six-month totals with connecting lines)



6. Original class action proceedings (nonsecurities & securities)

The cases discussed in this subsection are class actions originally filed in U.S. district courts. Chart 6 graphs the frequencies of these original proceedings in six-month totals, displaying PI/PD, securities and nonsecurities, and nonsecurities cases, as separate lines.

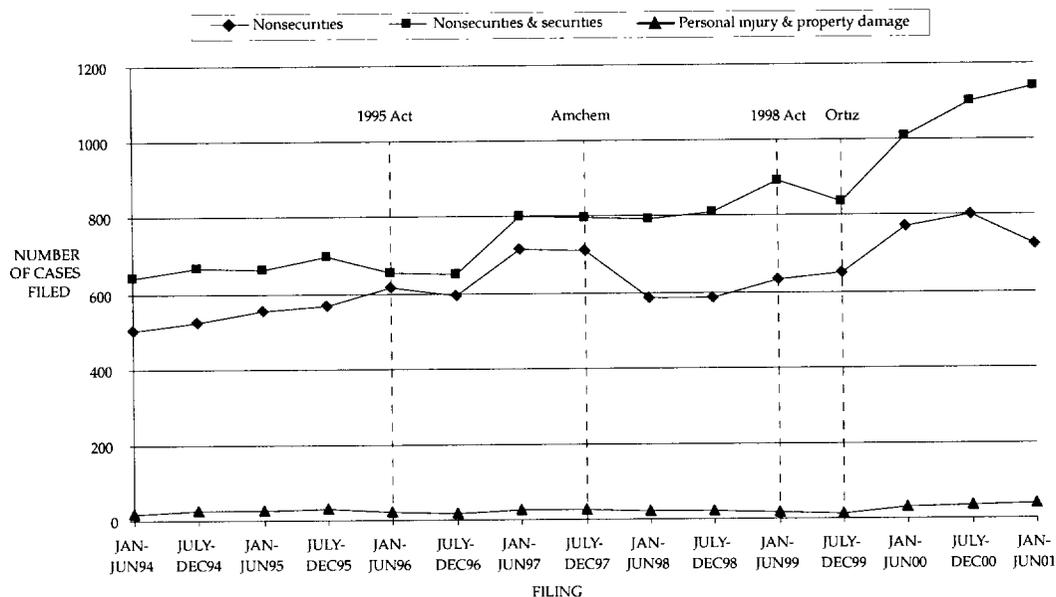
a. Overview of findings

Total class action original proceedings nearly doubled over the study period. In particular, securities cases began a general increase in 1997 from the low levels that immediately followed the 1995 Act.

b. Total original proceedings (securities & nonsecurities)

Looking at monthly data (not shown here), filings of original-proceedings class actions appear to show greater volatility (month-to-month variation) post-*Amchem* and even greater volatility post-*Ortiz* than in periods before these decisions.

Chart 6: Class action original proceedings frequencies: nonsecurities, nonsecurities & securities, & PI/PD cases (six-month totals with connecting lines)



c. PI/PD original proceedings

Personal injury and property damage original cases were relatively small in number. Trends cannot be seen on Chart 6. Chart 3b and accompanying text above, however, provide a more detailed analysis of these same PI/PD original proceeding data. Chart 3b shows a decrease in original proceedings after *Amchem* and an increase beginning shortly after *Ortiz*.

d. Securities original proceedings

Not unlike Chart 5 for removals, Chart 6 shows that most of the original proceedings class actions were not securities cases. The reader can observe this by looking at the relative size of the gap between the top line (nonsecurities and securities) and the line just below it (nonsecurities only). As seen in Chart 6, securities "original" class actions began to decrease just after the 1995 Act, as discussed more broadly in subsection F.4. The increases that followed became greater during the second half of the study period.

7. Federal question and diversity jurisdiction (excluding securities)

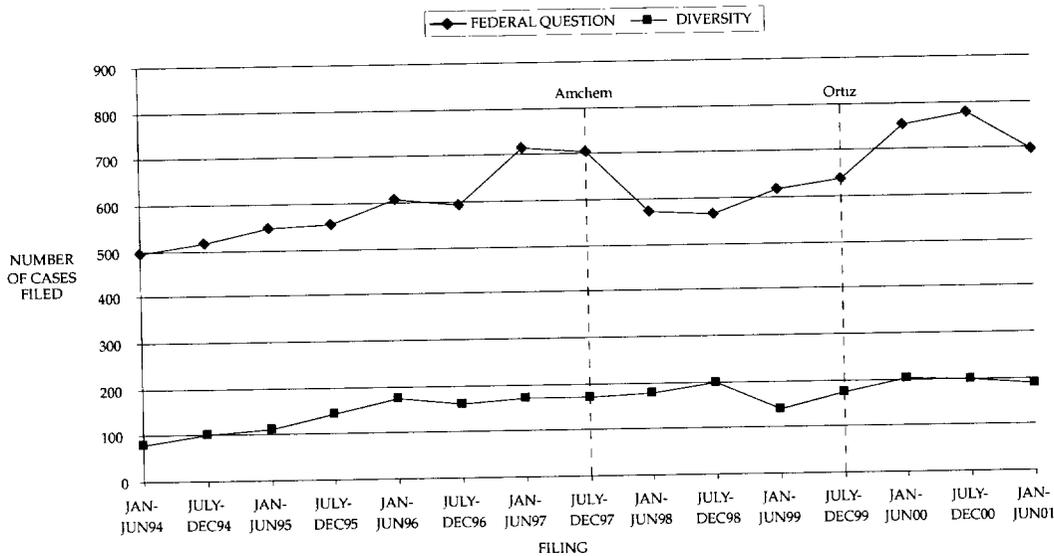
a. Generally

Amchem and *Ortiz* were asbestos product liability class actions based on diversity jurisdiction. Chart 7 below shows federal question and diversity frequencies for all nonsecurities class action filings. Subsection F.4 above discusses securities filings, which are usually based on federal question jurisdiction.

b. Overview of findings

The filings of nonsecurities class actions based on federal question jurisdiction saw an overall rate of increase during the study period, with higher increases in 1997 and 2000. The 1997 increase came pre-*Amchem*. The number of filings moved downward after *Amchem*, only to increase again after *Ortiz* in the second half of 1999 and 2000. The filings based on diversity jurisdiction approximately doubled over the 90-month study period.

Chart 7: Class action filing frequencies federal question and diversity jurisdiction (nonsecurities cases)
(six-month totals with connecting lines)



8. Settled cases (excluding securities cases)

a. Methodology for disposition data

To see whether *Amchem* had any effect on the approval of class settlements, voluntary dismissals, and other nontrial dismissals, we gathered data on dispositions that occurred within 2.5 years of case filing. We could not gather disposition data for cases filed toward the end of our study period, because most class actions are not concluded until years after filing.¹⁰ To adjust for this feature of our data, we compiled disposition data from our study database, but only for cases that had been open for at most 2.5 years after their respective filing dates. In Charts 8, 9, and 10, we used nonsecurities filing data from the start of the study period through June 1999 (two years prior to the end of the study period). We did not collect disposition data for cases filed after July 1, 1999, to ensure that we had 2.5 years of such data—given that we only had disposition data available for periods through December 31, 2001.

To account for variations over time in filing frequencies, we graphed the proportion of settled cases to total filings for each six-month interval shown in Chart 8. More precisely, for each six-month period, the numerator for the pro-

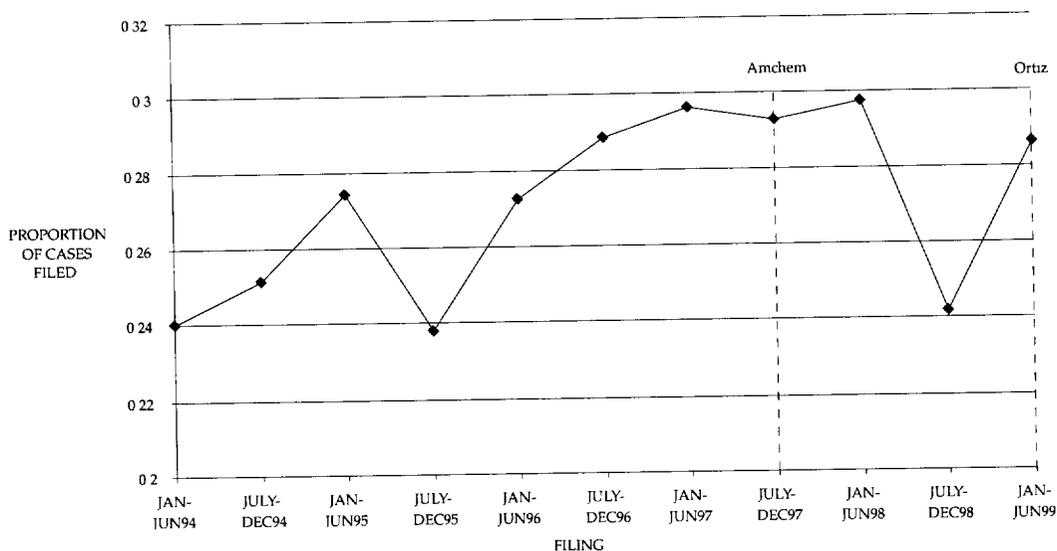
10. See Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 28, 61–62 (Federal Judicial Center 1996).

portion was the number of cases filed in that period that settled within 2.5 years of the filing date. The denominator for the proportion was the total of class action filings in that six-month period. Subsections 9 and 10 discuss frequencies for cases voluntarily dismissed and other nontrial dismissals. The only effects we could analyze were from the *Amchem* decision; the *Ortiz* decision was issued at the very end of the time period we used for Charts 8–10.

b. Overview of findings on settlements

Based on monthly data, the proportion of filed cases that settled within 2.5 years of filing varied greatly over time, but within a fairly small range. The proportion levels just before and after *Amchem* remained somewhat steady. Exceptions were the dip and subsequent resurgence in the last two six-month periods shown on Chart 8. The frequency of settled cases ranged from 596–911 (mean of 766) cases per six-month interval.

Chart 8: Class action filings that settled within 2.5 years of filing as a proportion of class actions filed (nonsecurities cases)
(six-month totals with connecting lines)



c. Time-series analysis

The time-series analysis showed no clear, statistically significant post-*Amchem* changes in the proportion of nonsecurities class actions that settled within 2.5 years of filing. We found the same result for PI/PD cases settled within 2.5 years. The same can be said about the analysis for such cases that were voluntarily dismissed within 2.5 years of filing. See Appendix II, subsection C.4.

9. Voluntarily dismissed (excluding securities cases)

We also compiled data on cases voluntarily dismissed. We recognized that voluntary dismissal of class actions does not signify a settlement of *class* claims, which must be approved by the court. We also recognized that there are different interpretations concerning whether individual dismissals require court approval under the current version of Rule 23. See Chart 9. See subsection F.8 for a description of the methodology we used for Chart 9.

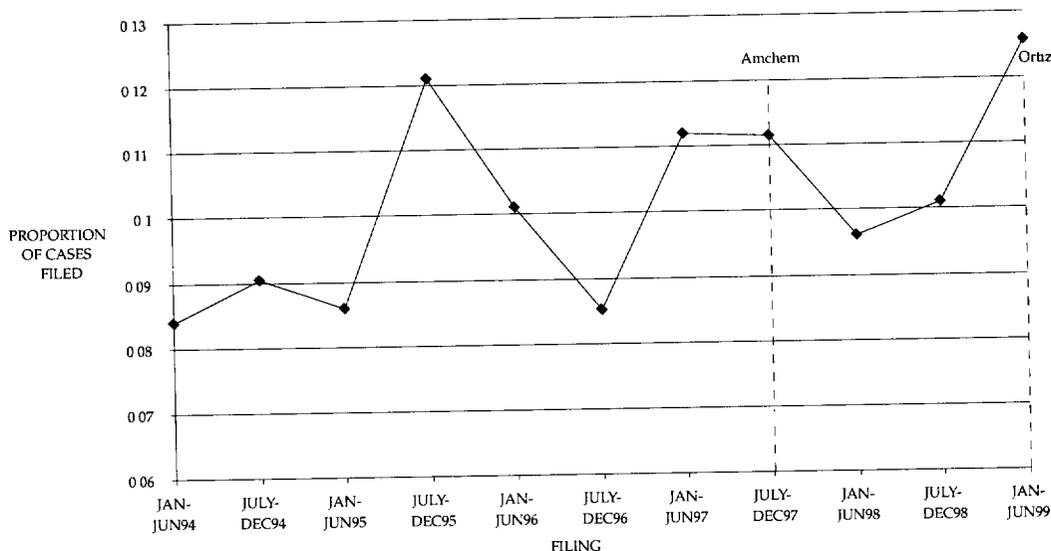
a. Overview of findings

The proportion of filed cases that were voluntarily dismissed within 2.5 years of filing changed erratically over time, but within a fairly small range. The overall trend has been an increasing one. The frequency of voluntarily dismissed cases ranged from 50–102 (mean of 78) cases per six-month interval.

b. Time-series analysis

See subsection 8.C above for a description of the time-series analysis.

Chart 9: Class action filings voluntarily dismissed within 2.5 years of filing as a proportion of class actions filed (nonsecurities cases)
(six-month totals with connecting lines)



10. Other dismissed (excluding securities cases)

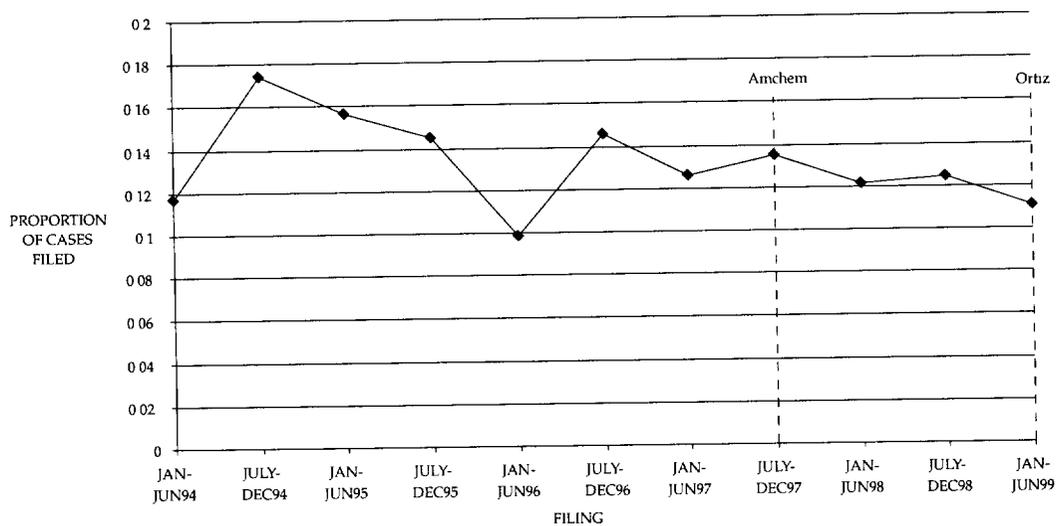
a. Generally

Finally, the category “other dismissed” includes dismissals other than settled, voluntarily dismissed, dismissed for want of prosecution, and dismissed for lack of jurisdiction. This category does not include dismissals after trial. See Chart 10. See subsection 8 above for a description of the methodology we used for Chart 10.

b. Overview of findings

The proportion of filed cases with other dismissals within 2.5 years of filing appears to have declined slightly over the data-collection time period. The six-month levels after *Amchem* were generally lower than those before *Amchem*. The frequency of other-dismissed cases ranged from 50–277 (mean of 144) per six-month interval.

Chart 10: Class action filings other dismissed within 2.5 years of filing as a proportion of class actions filed (nonsecurities cases)
(six-month totals with connecting lines)



G. Conclusions

Statistical data from the entire 1994–2001 study period indicate that most of the relevant indicators of class action activity that are of interest to the Advisory Committee have increased. That is true of all filings and personal injury filings (including removals). Separate examinations of trends in removals and in diversity filings indicate that both have increased. Within the limits of the study, we

found no evidence that the proportion of class actions that settle within 2.5 years has changed notably over the years.

Appendix I

Methods for Report on the Effects of *Amchem/Ortiz* on the Filing of Federal Class Actions

A. Introduction

We first determined the population of class action filings for the period January 1, 1994, through June 30, 2001. The database covers at least two years before the Third Circuit's May 1996 *Amchem* decision and about three years before the Supreme Court's June 1997 *Amchem* decision. At the other end, we decided to use the most recent data available, which at study inception brought us to about two years after the Supreme Court's June 1999 *Ortiz* decision. Because the Supreme Court's decisions in *Amchem* and *Ortiz* both occurred in mid-year (June), we decided to look at six-month intervals to discern filing patterns both before and after *Amchem/Ortiz*.

For this research, we broadly defined class action filings to be cases where a class allegation was either considered or made at some point in the life of the case but not necessarily certified by the court. To give equal weight to all cases, we identified which cases had been consolidated, either within a district or across districts by consolidation orders or by orders of the Judicial Panel on Multidistrict Litigation (JPML). We then aggregated these "member" cases to the lead case for that consolidation.

We could not gather data for all 94 federal districts. For 12 districts,¹¹ PACER or other data sources did not provide us with the data we needed at the time of our data gathering. Our study results include data for the other 82 districts.

B. Population of Class Action Filings

We searched for class action identifiers using the online services of LexisNexis CourtLink. This service maintains a database of docket sheets for nearly all the federal district courts. CourtLink's service allows full text searching capabilities of the electronic docket files maintained in its "CaseStream Historical" database. We supplemented this approach with data from the Federal Judicial Center's Integrated Data Base (IDB), an historical database of all federal cases drawn from the Administrative Office's federal case statistics, but with corrections and re-

11. Alabama Middle, Alaska, Arkansas Western, Guam, Indiana Southern, Mariana Islands, Nevada, New Mexico, North Carolina Eastern, Northern Oklahoma Eastern, Virgin Islands, and Wisconsin Western.

finements. We also obtained data from the JPML to cross-check our listing of multidistrict litigation (MDL) cases.

1. Search of the CourtLink database

CourtLink has its own method of identifying and flagging class action cases in its database. The company performs electronic searches of the litigants' name field for the terms "similarly situated" and "representative of the class" and also searches electronically the first five docket entries of each docket sheet for the term "class action complaint." If either of these conditions is met, the case is flagged as a class action.

In past FJC projects involving class actions, we discovered that CourtLink's flagging scheme overlooks many class action filings. After performing a review of the language on the docket entries of a sample of class action cases, we formulated an expanded version of CourtLink's method of identifying these cases. We searched the CourtLink database for the following terms *anywhere within the entire docket sheet*:

- "similarly situated"
- "representative of the class"
- "class action complaint"
- "class counsel"
- "class representative"
- "class allegation"
- "class certification"
- "class certify" and
- "class settlement."

The search engine also allowed us to use "word-stemming" to find words that have a common root, such as class representative, class representatives, and class representation. Using this expanded search, we created a database of possible class action filings that we called "Unadjusted CourtLink Cases."

2. CourtLink database limitations

a. Description of "updating problem"

One inherent problem with CourtLink's searching service is that not all of the docket sheets on its system are up-to-date. We will first discuss here the limitations and extent of the so-called "updating problem." We will then describe how we addressed that problem.

In CourtLink's current business model, all new cases filed in the federal district courts are downloaded each night and added to its database. Those cases remain as they were first retrieved until one of two things happens: (1) a customer asks CourtLink to obtain an updated docket sheet from the court or (2) a customer identifies a case for "tracking" (i.e., regular, automated updates of the

case's CourtLink docket sheet from court records). Both of these options require the customer to pay an additional fee for this service. Customers can "view" a docket sheet in the CourtLink database at no additional charge, but the case information is only as current as the last time CourtLink updated it. When a customer makes an inquiry about a case, CourtLink tells the customer when CourtLink last downloaded the case so the customer can determine if the last update is current enough for the customer's purposes.

CourtLink initially "seeded" its database several years ago when it downloaded all docket sheets from the PACER system of all the courts that had them available on PACER during the period from November 1997 to February 1998. Because of the huge cost, CourtLink does not employ a regular or programmatic system for "updating" its docket sheets. The problem that results from this is that, for all cases that are not the subject of recent or frequent customer requests for "updating" or "tracking," the docket sheet information can be outdated. As a result, it is not possible for CourtLink to identify cases for us where the court added any of our search terms to the court's docket entries on a date after CourtLink's last update of that case. For the FJC to perform these searches on the PACER databases in all districts would far exceed our available resources. Likewise, it would be cost-prohibitive for the Center to pay CourtLink for an update of its entire docket sheet database.

b. Extent of updating problem

The special search CourtLink performed for us, as described above in section 1 of this Appendix, yielded 31,252¹² class action cases. We used another resource to determine if we were missing any class action cases in our population because of the CourtLink updating problem. We used the FJC's Integrated Data Base (IDB) to search for cases that were identified on the Civil Action Cover Sheet as class actions at the time of filing or later upon termination. This exercise yielded 3,334 additional cases that our expanded CourtLink search had not identified as class actions.

We reviewed a random sample of 93 docket sheets of the 3,334 additional cases from the IDB to find out the extent of the updating problem.¹³ We compared the most recent docket sheet obtained through PACER with the docket sheet maintained by CourtLink. We found that the expanded CourtLink search had missed 19% of these docket sheets because one of our search terms appeared in a docket sheet entry that occurred after the most recent update of the CourtLink's docket sheet. We also discovered a small percentage of our sample (2%)

12. The original number was 31,303 cases; however, we excluded 51 Court of Federal Claims cases from study because we wanted to examine only class action activity within Article III courts.

13. We determined that given our population of 3,334 IDB cases we would need to sample 93 cases in order to have a 95% confidence level with a +/- 10 confidence interval.

had the term “similarly situated” in the header of the docket sheet but CourtLink’s header field was truncated and, thus, the search term was not present in the truncated version. We also found that 8% of the sample of IDB cases had original filing dates outside our study period. These latter cases were most likely reopened cases (see section 5 of this Appendix for a discussion of reopened cases).

In the 93-case sample of IDB cases, 71% had docket sheets with none of our search terms anywhere in the docket sheet. These are cases that the IDB flagged as class actions based on the “check-off” box on the Civil Action Cover Sheet but that had no other references to class action activity in the text of the docket sheets. We presumed that they were class actions and included them in the database as “undetermined” cases (see section 5 of this Appendix for our count of “undetermined” cases). We did not, however, include these cases in the final database and analyses for this report.

3. Addressing “updating problem” and verifying data

a. Adding cases from IDB

We developed ways to address CourtLink’s “updating problem.” As we recorded information on consolidations from the docket sheets of cases we found through CourtLink and the IDB, we made note of any cases that were related to the consolidation but that were not in our original population of class action cases. When we finished making notes on these cases, we had a list of 1,597 “notes cases.” Again these were cases that were not found in the CourtLink or IDB search. We downloaded the docket sheets for notes cases for six districts,¹⁴ a total of 305 cases, and reviewed those docket sheets to see whether these cases were also class actions that were not captured by our initial text search. We found that 96% of the notes cases for these six districts were class action cases. We also found that the information we had already obtained—from the docket sheets that mentioned those notes cases—contained all of the information we needed. Based on these findings, we felt comfortable adding all 1,597 notes cases to our database, without reviewing the rest of the docket sheets for the notes cases.

b. Verifying MDL cases

The Judicial Panel for Multidistrict Litigation (JPML) offered us assistance in cross-checking our MDL cases.¹⁵ The clerk’s office for the JPML matched all of the

14. Alabama Northern, Alabama Southern, Arizona, Arkansas Eastern, California Central, and California Eastern.

15. We would like to thank Michael Beck, clerk of the JPML, as well as Ariana Estariel and Alfred Ghiorzi in the clerk’s office for their detailed assistance.

cases we had in our database with all MDL cases in their database.¹⁶ The office was able to match 1,950 cases in our database. From this matching we found that 262 cases we had originally thought were “unique” (single) class action cases were actually MDL member cases. This miscategorization most likely occurred because the MDL transfer came *after* the last update of docket sheets at CourtLink. With the information we received from the clerk’s office, we were also able to verify that each of our MDL cases was only counted once—that is, counted only for the final transferee district. This enabled us to eliminate our concerns about double counting of MDLs that would have occurred if MDLs were counted in both the transferor and transferee districts.

c. Verification from IDB

The IDB also contains information that helped us to verify the data in our database. We looked at the IDB origin and disposition codes for all cases. If a “unique” class action case had an IDB origin code of “case transferred to this district by MDL Panel Order,” we determined our database was not up-to-date because of the CourtLink updating problem. We recoded such cases in our database as MDL member cases. Likewise, if a unique class action case had a disposition code of “MDL transfer,” the case was recoded as an MDL member case.¹⁷

Lastly, all cases that were coded as unique class actions and had a disposition of “transfer to another district” were recoded as “undetermined” and not included in our database or analyses. By doing this, we excluded from our database cases that were transferred to another district and then given a new case number in the transferee district. Such a transfer would have produced duplicates had we not recoded them.

4. Intradistrict consolidations and interdistrict MDL transfers

Once our population of class action case filings was determined, we attempted to identify which of those cases were consolidated within a district (usually intradistrict consolidations) and which were transferred to the Judicial Panel on Multidistrict Litigation (interdistrict consolidations). Recall that we wanted to aggregate intradistrict and MDL consolidations to the lead case for that consoli-

16. The clerk’s office reported that it does not always receive case data for all MDL member cases.

17. Even after these adjustments, we realize that there still may be “unique” class action cases left in our database that, rather than being unique, are really MDL member cases. This might include cases where the only MDL identifier in the docket sheets is the MDL number, such as 95-MD-1234. Our search for MDLs did not include the search term “MD.” Such a search term would have produced too many cases that were not true MDLs. Given the adjustments described above, we conclude that we have no practical way to find any remaining MDL member cases that we might have improperly coded as unique class actions.

ation in order to count each lead case (and its associated member cases) as a single filed class action. Once again we used the LexisNexis CourtLink searching service to identify which of our cases had terms in its docket entries relating to consolidations and multidistrict litigation. Upon reviewing a sample of the dockets to identify possible search terms, we finalized a search strategy that searched for the terms:

- “consolidate”
- “member case”
- “lead case”
- “related case”
- “relating case”
- “relatedness”
- “42(a)”¹⁸
- “MDL”
- “M.D.L.”
- “Judicial Panel”
- “Multidistrict”
- “Multi-District”
- “Multi District”
- “JPML”
- “J.P.M.L.”
- “conditional transfer order” and
- “28 U.S.C. Section 1407.”

Again we allowed for “word-stemming”—case, cases, case(s), etc. Based on our search results, we determined that our provisional population of 31,252 cases contained approximately 18,275 “unique” class action filings that contained no mention of consolidation or MDL transfer. The remaining cases we estimated were comprised of approximately 3,656 MDL member cases and 9,321 intradistrict member consolidations, after doing these searches for all the 82 districts for which we have data.

a. Reviewing the docket sheets

After identifying these cases, we proceeded to download the PACER docket sheets for CourtLink-identified cases that we believed were MDL member cases and intradistrict member consolidations based on the search terms listed above. We reviewed each docket sheet for any mention of consolidation or MDL transfer. If a docket sheet contained a lead case or MDL number, that information was recorded. If a docket sheet included information on a lead case or other consolidated member cases we verified that these cases were already in our database. If the case was not in our database, we recorded the docket number to determine

18. Referring to Fed. R. Civ. P. 42(a).

later whether the case was a class action that should be included in our study (these cases were referred to as “notes cases” in section 3 of this Appendix). We coded information from each docket sheet so that lead cases, member cases, and MDL lead cases could be counted and identified by district and identified chronologically over our time period.

b. Filing dates

In this study, the filing date represents the date the case was originally filed in or removed to federal district court. These dates are used to categorize case filings into six-month intervals or monthly intervals over the study’s time period. The filing date of the lead consolidated case and consolidated member case represents the date those cases were filed within our study period. However, for MDL’s, because we could not always identify the “true” lead MDL case, we chose the earliest filed MDL case to represent the MDL filing date.

5. Other excluded cases

We excluded approximately 3,400 reopened cases from our database. If a case was originally filed *outside* our study time period then reopened *within* our time period, we did not include the case in the study’s database. If a case was originally filed within our time period, then reopened during our time period, we included only the original filing in our database. We did this to avoid double counting because the IDB contains a separate record for each reopening in addition to the record for the original proceeding.

We also excluded all prisoner cases. We decided it is highly unlikely that *Amchem* and *Ortiz* would have an effect on prisoner class actions because they are generally actions for injunctive relief rather than actions for damages and because they rarely survive as class actions.

We also excluded pro se cases because, if a case is a true class action, counsel must represent the class. A nonlawyer who is unassisted by counsel cannot represent a class without, by that representation, engaging in the unauthorized practice of law. In total, we excluded approximately 3,900 prisoner and/or pro se class actions.

We had to exclude six districts (Alaska, Guam, Northern Mariana Islands, Nevada, Virgin Islands, and Wisconsin Western) from the study, because they were not linked to PACER at the time of our search.

We also had to exclude six additional districts (Alabama Middle, Arkansas Western, Indiana Southern, New Mexico, North Carolina Eastern, and Oklahoma Eastern). The docket sheets for these six districts could only be retrieved via CourtLink; they do not participate in WebPACER. CourtLink identified a total of 1,083 class actions in these districts. Because of the updating problem with CourtLink, we decided to eliminate these districts from our study, thus reducing to 82 the total number of districts in our study database.

6. Final database

After excluding all these cases, our final database contains the following number of class action cases:

- 13,197 “unique” class actions;
- 1,648 lead class actions among all intradistrict consolidations; and
- 192 lead class actions among all interdistrict (or MDL) consolidations.

We did not include the following counts in our final database for the analyses described in this report:

- 8,335 member consolidations;
- 4,182 MDL member cases; and
- 1,850 “undetermined” cases.¹⁹

Unless otherwise noted, the analyses in this report used only the first three groups of cases: “unique,” lead consolidations, and lead MDL cases.

19. The 1,850 “undetermined” cases are IDB cases that had no mention of any of the search terms.

Appendix II

Time-series Analysis Report on the Effects of *Amchem/Ortiz* on the Filing of Federal Class Actions

A. Background

Social scientists commonly use interrupted time-series designs to assess possible causes and effects of legal and policy changes.²⁰ In this report, we examine the effects that two Supreme Court decisions had on class action filing rates. Using an interrupted time-series model with monthly data from January 1994 through June 2001, we test the hypothesis that *Amchem* and *Ortiz* reduced the filings of class actions in federal courts.

1. Use in policy analysis generally

An interrupted time-series research design allows an evaluation of the effect of a Supreme Court decision (e.g., *Amchem*, *Ortiz*) on a dependent variable of interest (e.g., class action filings). This type of quasi-experiment has been used widely in research that evaluates the impact of legal policies and decisions because it allows statistical testing of the impact of the decision over time.²¹

2. Specification of the intervention model

Two issues concern the researcher when specifying an intervention in an interrupted time-series model.²² One issue focuses on when and how the intervention occurred. Was the onset of the intervention immediate or gradual? The second issue focuses on whether and how the intervention (e.g., the *Amchem* decision) influenced, for example, class action filing rates. Was the influence temporary or permanent?

Prior to our analysis we hypothesized that the impact of *Amchem* and *Ortiz* on class action filing rates would be gradual and permanent. We assumed that any effect of the two decisions would be gradual because change in the legal system in general—and in lawyer and client decision making in particular—typically follows a gradual course. We expect that awareness of the impli-

20. Abraham R. Tennenbaum, *Influence of the Garner Decision on Police Use of Deadly Force*, 85 J. Crim. L. & Criminology 241 (1994).

21. Malcolm D. Holmes et al., *Plea Bargaining Policy and State District Court Caseloads: An Interrupted Time Series Analysis*, Law & Soc'y, 139, 143 (1992).

22. Barbara G. Tabachnick & Linda S. Fidell, *Using Multivariate Statistics* 837–900 (4th ed. 2000).

cations of Supreme Court decisions like *Amchem* and *Ortiz* filters down to lawyers and clients over a period of months as opposed to having an immediate impact. We assumed that the Advisory Committee would be interested primarily in testing for a permanent effect of the decisions because the Committee's mission is to write rules designed to remain in effect indefinitely, if not permanently.

B. Methodology for Data Analysis

Interrupted time-series models were estimated for the monthly series described in this report. This class of models is frequently used to assess the over-time impact of changes in public policy and/or related events on some outcome.²³ These models take the form:²⁴

$$y_t = \mu + \sum_i \frac{\omega_i(B)}{\delta_i(B)} I_{it} + \frac{\Theta(B)}{\Phi(B)} a_t$$

- y_t represents the time series of interest, such as the number of securities cases filed monthly (the subscript t denotes time periods). It is composed of three parts: a mean or expected value for the series, one or more policy changes (again which social scientists call interventions), and an error process.
- μ represents the mean of the time series y .
- $\frac{\omega_i(B)}{\delta_i(B)} I_{it}$ represents the impact of the i th intervention I on y .
- $\frac{\Theta(B)}{\Phi(B)} a_t$ represents an error component that includes a random error a_t .

This model is similar to a standard regression model, which represents a dependent variable as the function of dependent variables and an error process. In conceptual terms, an important difference between the time-series model and the regression model is that the temporal ordering of the time series—the dependent variable—creates the possibility of effects over time in both the impact of the interventions and the error process. The result of this difference is an iterative process of identifying, estimating, evaluating, and, if necessary, re-estimating the over-time processes using a variety of diagnostic tools unique to time-series analysis.

23. See G.E.P. Box & G. Jenkins, *Time Series Analysis: Forecasting and Control* (1976); G.E.P. Box & G.C. Tiao, *Intervention Analysis with Applications to Economic and Environmental Problem*, *J. Am. Stat. Ass'n* 70 (1975).

24. Interrupted time-series models are a subset of a larger class of models in which other time series may be used to model the outcome series.

Five time series were analyzed here:

- the number of securities class action cases filed monthly from January 1994 to June 2001;
- the number of nonsecurities class action cases filed monthly from January 1994 to June 2001;
- the number of tort class action cases²⁵ filed monthly from January 1994 to 2001;
- the proportion of nonsecurities class action cases filed each month that were settled or voluntarily dismissed within two and one-half years of filing, for the period January 1994 to June 1999; and
- the proportion of tort class action cases filed each month that were settled within 2.5 years of filing, for the period January 1994 to June 1999.

Four interventions were tested. The effective dates of the 1995 and 1998 securities acts were tested for their impact on securities class action filings in federal courts. The Supreme Court's decisions in *Amchem* and *Ortiz* were tested for their impact on nonsecurities and tort class action filings. However, because the series did not extend far enough in time²⁶ only the *Amchem* decision was tested for its impact on the proportion of nonsecurities class action cases settled or voluntarily dismissed. These four interventions are described in more detail in the body of the study report.

Monthly data were used for the time series reported below. All series begin in January 1994. The filings data end in June 2001; the settled and voluntarily dismissed data end in June 1999. The four interventions are represented by dummy or binary variables coded 0 before the month the legislation took effect or the Supreme Court decision was issued and 1 afterward. One feature of these models is that different effects of the interventions on the outcome series mean can be modeled, including the following: abrupt, permanent changes to a new level; gradual over-time changes to a new level; and abrupt changes in level followed by gradual decline in that change. All of these changes were found among the five time series analyzed and are shown graphically below.

25. This category consists of property damage and personal injury cases. It is a subset of nonsecurities cases.

26. These two series could only be calculated through June 1999, in order to calculate the proportion of cases settled or voluntarily dismissed within 2.5 years after the last month in the series.

C. Results

A word of caution is necessary. With one exception, the onset of the interventions in these models could not be determined to be unique. In other words, changes in the outcome time series were associated with the onset of the intervention, but could also have begun earlier than the intervention. Whether this is due to the behavior of litigants or to the construction of reporting periods (months) is not known. As a result, *the estimated models use the "theoretical" starting points of the interventions, and little emphasis will be placed on the exact values of the estimated changes. Instead the direction and nature of the estimated changes will be emphasized and supported graphically.* Finally, all of the reported models passed the time-series diagnostic tests for stationarity and serial correlation.

1. Securities filings: effects of 1995 and 1998 legislation

Before we turn our analysis to the effects of *Amchem* and *Ortiz*, we discuss the effects of the 1995 and 1998 securities legislation. (See also subsection F.4 in the main body of this report.) Table 1 below contains the results for the analysis of securities filings. Two interventions were tested: the 1995 legislation (I_{1t}) and the 1998 legislation (I_{2t}). Following Table 1 below in this Appendix is a graph of the series and its estimated value based on the model.²⁷ The graph contains two lines going from left to right over time. The smoother line denotes the estimated values for the model; the jagged line denotes the actual monthly filings.

The two vertical lines indicate the beginning of the interventions. The first line denotes the 1995 legislation; the second line denotes the 1998 legislation.

The estimated model shows that there was an abrupt shift downward in filings after the onset of the 1995 legislation, followed by a gradual return to a higher level of filings. Overall, this change is represented by $\frac{\omega_{10}}{(1 - \delta_{11} B)}$. The *esti-*

mates for the shift parameter (ω_{10}) and the change parameter (δ_{11}) are statistically significant. This over-time change is clearly seen in the graph following the table. Among the analyses reported in the tables below in this Appendix II, this is the only change whose onset clearly coincides with the intervention. No such abrupt change followed the 1998 legislation.

27. The estimated values are actually forecasted values using the observed values of the time series and the interventions.

The shift parameter is small and not statistically significant; however, after the 1995 Act, the change parameter is statistically significant and denotes a gradual increase over the time period from the 1995 Act to the 1998 Act. This effect is represented by $\frac{\omega_{20}}{(1-\delta_{21}B)}$. The gradual change is also evident in the graph of the observed and estimated series.

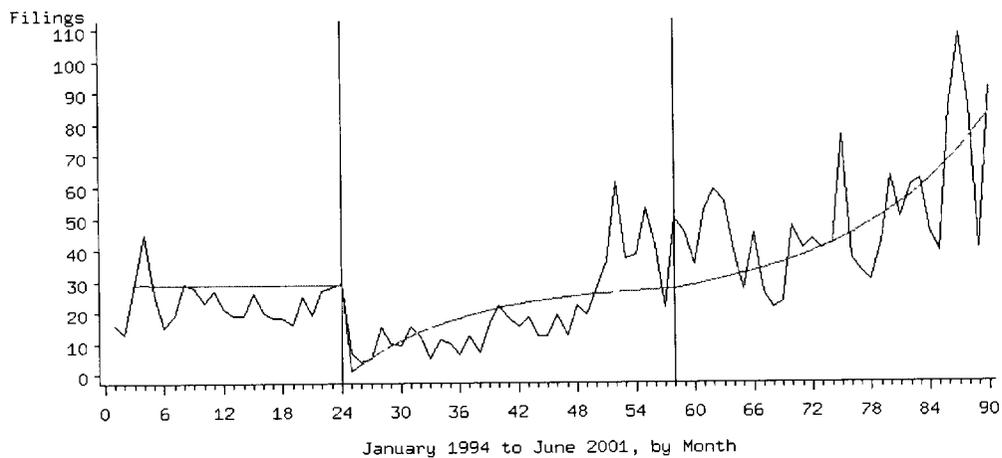
Table 1
Securities Class Action Filings

$$y_t = \mu + \frac{\omega_{10}}{(1-\delta_{11}B)}I_{1t} + \frac{\omega_{20}}{(1-\delta_{21}B)}(1-B)I_{2t} + \frac{a_t}{(1-\phi B)}$$

Coefficient	Estimate	t-value
μ	28.84	7.53*
ω_{10}	-27.99	-2.92*
δ_{11}	0.92	17.03*
ω_{20}	0.46	1.29
δ_{21}	1.07	24.78*
ϕ	0.37	3.62*

*Statistically significant at the .05 level for a two-tailed test.

Securities Class Action Filings



2. Nonsecurities filings

Table 2 below contains the estimated results for nonsecurities filings, all of which are statistically significant. As shown in the graph following Table 2, nonsecurities filings were increasing prior to the Supreme Court's *Amchem* decision (I_{1t} in the table and the first vertical line in the graph). At approximately that time, nonsecurities filings began to steadily decrease, until the *Ortiz* decision (I_{2t} in the table, and the second vertical line). At approximately the time of the *Ortiz* decision, nonsecurities filings began to increase, but that increase gradually slowed over time. At the end of the observed series, these filings appear to have reached a plateau or even began to decline. These patterns are reflected in the model's estimated values (smooth line).

The timing of the two interventions could not be determined with precision. Statistically significant changes were obtained when the beginning of each intervention was moved back several time periods, making it less likely that each intervention caused the observed change. Nevertheless, the over-time patterns clearly change from pre-*Amchem* to post-*Amchem*/pre-*Ortiz* to post-*Ortiz*. It is clear that something is happening, but the time-series data do not allow the timing of these changes to be determined exactly.

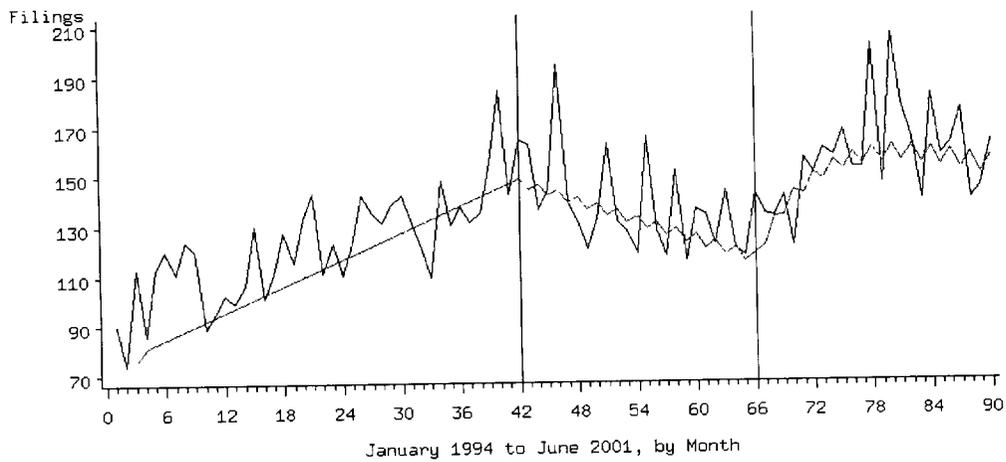
Table 2
Nonsecurities Class Action Filings

$$y_t = \mu + \frac{\omega_{10}}{(1 - \delta_{11}B)} I_{1t} + \frac{\omega_{20}}{(1 - \delta_{21}B)(1 - B)} I_{2t} + \frac{(1 - \theta B)a_t}{(1 - B)}$$

Coefficient	Estimate	t-value
μ	1.76	5.42*
ω_{10}	-6.20	-4.87*
δ_{11}	-1.01	-34.63*
ω_{20}	9.09	2.82*
δ_{21}	0.87	15.98*
θ	0.91	18.27*

*Statistically significant at the .05 level for a two-tailed test.

Nonsecurities Class Action Filings



3. Torts filings

The results for the analysis of torts filings are reported in Table 3. The Supreme Court's decisions in *Amchem* (I_{1t} in the table and the first vertical line in the graph) and *Ortiz* (I_{2t} in the table and the second vertical line in the graph) are again tested as interventions. The results for this analysis are slightly more difficult to interpret, because the natural log of filings rather than filings was analyzed. The torts filing series showed a great deal of variability over time, and the degree of that variability changed. As a result of this variability, a stationary model could not be estimated. Instead, a model was estimated for the natural log of series $[\ln(y_t)]$.²⁸ The estimated values were exponentiated²⁹ and plotted against filings in the graph accompanying the table.

The over-time pattern for torts filings resembles that of nonsecurities filings. There are differences however. Apart from the mean, the only statistically significant estimate for the effect of the interventions is the change parameter (δ_{11}) for the *Amchem* decision. This indicates there was not an immediate effect of the *Amchem* decision, but a gradual decline in the number of filings after the decision. This was a change from the steadily increasing filings prior to the *Amchem* decision.

Neither the shift (ω_{20}) nor the change (δ_{21}) parameter for the *Ortiz* decision is statistically significant. While the graph shows a steady increase in filings after the *Ortiz* decision, this may be interpreted as a return to the pattern before *Amchem*. In other words, the effect associated with the *Amchem* decision was short-lived and ended at approximately the time of the *Ortiz* decision.

Once again, the timing of these interventions could not be precisely determined, but the over-time patterns suggest that changes occurred that coincided with at least the *Amchem* decision.

28. This is a standard and recommended solution when the variance of the time-series changes over time. Logging the series compresses the variance and may allow a model to be estimated.

29. The estimated values were also corrected for the standard error of forecast.

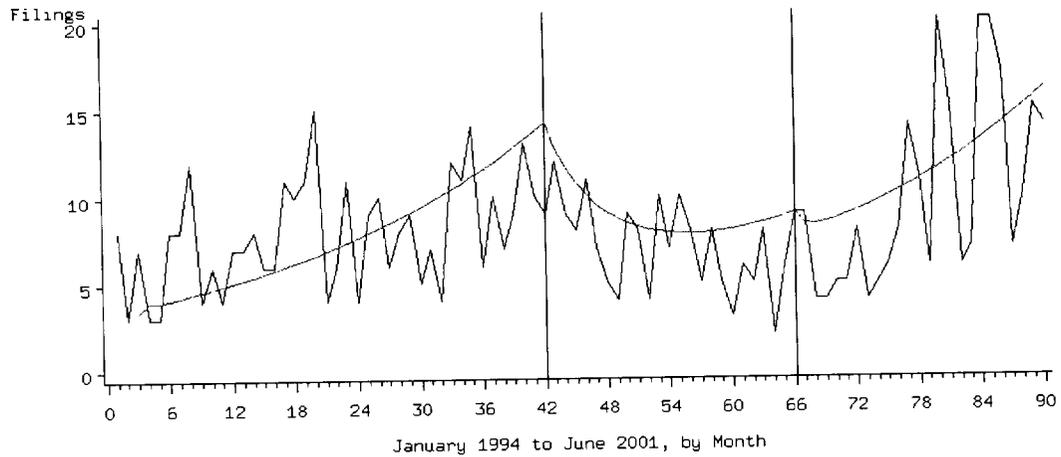
Table 3
Torts Class Action Filings

$$\ln(y_t) = \mu + \frac{\omega_{10}}{(1 - \delta_{11}B)} I_{1t} + \frac{\omega_{20}}{(1 - \delta_{21}B)} I_{2t} + \frac{(1 - \theta B)a_t}{(1 - B)}$$

Coefficient	Estimate	t-value
μ	0.03	2.96*
ω_{10}	-0.14	-1.89
δ_{11}	0.90	12.16*
ω_{20}	-0.09	-0.25
δ_{21}	0.38	0.15
θ	0.85	14.43*

*Statistically significant at the .05 level for a two-tailed test.

Torts Class Action Filings



4. Nonsecurities cases settled or voluntarily dismissed

Table 4 reports results for the analysis of the proportion of nonsecurities cases settled or voluntarily dismissed within 2.5 years of filing. The only intervention tested for this series was the *Amchem* decision (I_t in the table and the vertical line in the graph); the *Ortiz* decision was issued at the end of the period covered by this series and could not be tested. The results are straightforward. There was a small but statistically significant increase (denoted by ω_0) in the mean proportion of cases settled or voluntarily dismissed. However, the timing of this change cannot be determined precisely; it could have begun several months earlier, making it less likely that *Amchem* caused the change. Nevertheless, there was a shift upward at about the time of the *Amchem* decision. Nearly identical results were obtained for separate analyses of voluntarily dismissed and settled cases.

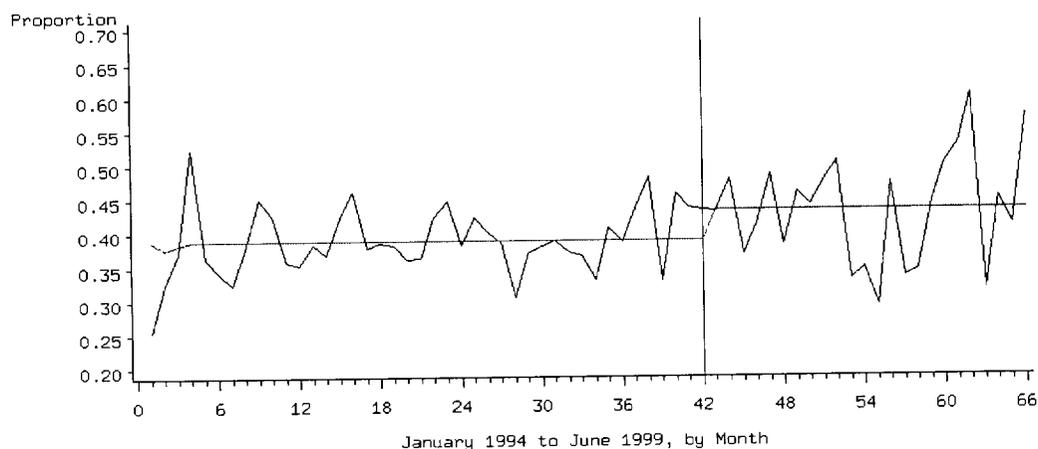
Table 4
Nonsecurities Cases Settled or
Voluntarily Dismissed

$$y_t = \mu + \omega_0 I_t + a_t$$

Coefficient	Estimate	t-value
μ	0.39	39.73*
ω_0	0.04	2.69*

*Statistically significant at the .05 level for a two-tailed test.

Nonsecurities Cases Settled or Voluntarily Dismissed



5. Torts cases settled

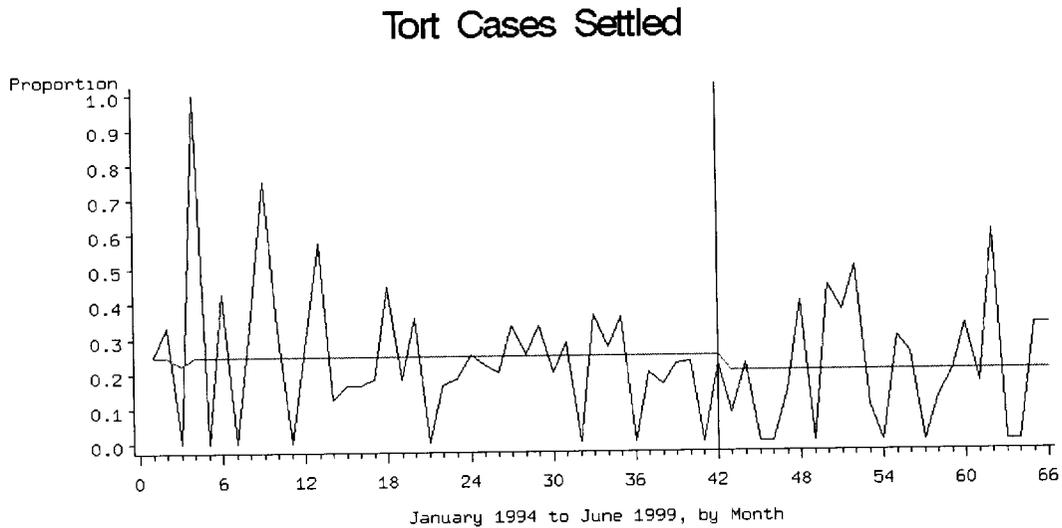
Table 5 contains the results for the analysis of the proportion of torts cases settled. As with prior analysis, only the *Amchem* decision (I_t in the table and the vertical line in the graph) could be tested as an intervention. The results show no statistically significant change at the time of that decision. There is one caveat for this analysis. The series shows the same problem as the torts filing series—changes in the variability of the series over time. Because of the presence of zeros in the time series, it could not be logged.³⁰ Therefore, these results on settled torts cases must be considered with caution.

Table 5
Tort Cases Settled

$$y_t = \mu + \omega_0 I_t + (1 - \theta B)a_t$$

Coefficient	Estimate	t-value
μ	0.25	11.62*
ω_0	-0.04	-1.22
θ	0.27	2.25*

*Statistically significant at the .05 level for a two-tailed test.



30. As a test, zeros in the series were changed to very small positive values and the series logged. The analysis of this logged series yielded the same results as reported in Table 5—no significant change following the *Amchem* decision.

D. Conclusions

Overall, the time study analysis indicates that the decline in class action filings in the two-year period between *Amchem* and *Ortiz* may be more than coincidental to the Court's decision in *Amchem*. Said another way, the analysis found that *Amchem* was associated with reduced class action filing rates during that two-year time period. After *Ortiz*, filing frequencies returned to their pre-*Amchem* pattern of increases. We found no long-term effect of *Amchem* or *Ortiz* on filing rates or settlements of class actions. We also found a statistically significant relationship between the Private Securities Litigation Reform Act of 1995 and the filing of federal securities class actions.

An interrupted time-series design is susceptible to history effects.³¹ Our results cannot rule out the possibility that the patterns we might attribute to the impact of the Supreme Court decisions or the securities acts may have actually resulted from the influence of other collinear or unmeasured influences. Events other than the decisions could have influenced filing.

The interrupted time-series design is a good research method to determine causal inferences, but the external validity of most interrupted time-series design is problematic in many applications.³² For this study we have reduced the external validity concern and feel comfortable generalizing our findings to all federal districts, based on data from 87% of all federal districts.

31. *See supra* note 21 at 155.

32. *Id.*

Appendix III

Trend and Proportion Analysis Report on the Effects of Amchem/Ortiz on the Filing of Federal Class Actions

We wanted to remove from our class action data the effects of general trends in the filing of federal civil actions during the study period. In other words, we wanted to adjust our class action study data to account for filing patterns for federal civil case filings for each month of our study period.

A. Overview

We looked to see if the filing patterns we observed in filing rates for class actions (Chart 1) were also present in the filing patterns for all civil cases generally. When we did this comparison, we observed that nonsecurities class action filings generally followed the trend curve for all nonsecurities civil case filings. This was our finding still, even after we adjusted Chart 1 data to proportion data, effectively removing from Chart 1 data the increases and decreases in nonsecurities civil case filing patterns during our study period. To accomplish this, we reviewed a scatter plot of the monthly proportion of nonsecurities class action filings to all federal nonsecurities civil case filings. We then looked at a computer-generated trend curve for these adjusted proportions. We observed that the adjusted curve is very similar to the unadjusted curve.

B. Calculations

We chose not to include these proportion charts in this report in the interests of clarity and brevity. The method for computing these proportions is as follows. We took the data for monthly filings and computed "Proportion of Cases Filed." We calculated "Proportion of Cases Filed" by dividing the number of class actions filed by the number of federal civil cases filed for each month of our study period. The data used for the numerator is taken from the class action database we created for this study and the data for the denominator is from civil case counts on the FJC's Integrated Data Base (IDB).

In calculating the proportion, the data in the numerator excludes securities, prisoner, and pro se cases but includes consolidated class action member cases. The data in the denominator excludes securities, prisoner, and pro se cases but includes consolidated class action member cases and MDL member cases. We had no way of identifying all class action MDL member cases to add them to the numerator or to subtract them from the denominator. Based on the relatively small number of such cases compared to the relatively large denominator, we

assume that having those cases in the denominator does not have a significant effect on the calculated proportions.

C. Analysis and Conclusion

Based on Chart 1 and other graphs, we determined that adjusting our class action data to remove the filing patterns for civil case filings had no significant effect on unadjusted trend curves for our study's class action data. One of the reasons is that nonsecurities civil case filings did not vary greatly, relatively speaking, over our study period. In calculating these proportions, the number of class actions (the numerator) was very small compared to the total number of civil case filings. As a result, changes in the denominator would have to be quite large before they would begin to significantly change the calculated proportion.

We concluded that, even after adjusting for nonsecurities civil case filing patterns, class action filings generally followed the trend curve we observed for all nonsecurities civil case filings. This leaves open the question of whether the influences we observed at play for all civil case filings might have been at play for class action filings as well.

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September, 2002

INQUIRY FROM DISCOVERY SUBCOMMITTEE
ADVISORY COMMITTEE ON CIVIL RULES
REGARDING DISCOVERY OF ELECTRONIC MATERIALS

Dear E-discovery Enthusiasts:

This letter invites reactions that would be helpful to the Discovery Subcommittee of the U.S. Judicial Conference Advisory Committee on Civil Rules as it considers whether to develop proposals to amend the Federal Rules of Civil Procedure to address special features of discovery of electronic, or computer-based, information. At the outset, however, it should be emphasized that the Subcommittee has not considered any specific amendment, and may determine it is not appropriate to do so.

This letter is being sent to you in hopes that you can provide helpful advice to the Subcommittee about some of the issues introduced in this letter and the enclosed memorandum. Any responses should be sent to Peter McCabe of the Administrative Office of the United States Courts at the address set forth at the end of this letter. We would appreciate receiving a response by December 10, 2002.

Some to whom this letter is being sent have already assisted the Subcommittee in its consideration of this area. That assistance has been invaluable; this letter seeks to elicit further insights and to determine whether ongoing developments regarding electronic discovery have changed previous opinions expressed to the Subcommittee. The recipients' list is intended to include many with experience and views on this topic, and is not meant to be exclusive. Thus, if you are aware of others whose views might be of assistance to the Subcommittee, please feel free to send a copy of this letter and the enclosed memorandum to them.

This inquiry is the latest part of an ongoing consideration of the issues presented by discovery of computer-based materials. In recent years the Subcommittee has monitored the issues

presented by this form of discovery, including hosting two mini-conferences on this subject in 2000. In addition, it has obtained research assistance from the Federal Judicial Center, which is completing a two-year project on electronic discovery. Interest in the topic has continued in the bar; since January 1, 2001, there have been at least 120 continuing legal education programs focusing mainly or in part on this form of discovery.

Reviewing this material, the Subcommittee has learned that there are several possibly distinctive characteristics of discovery of electronic materials, including: (1) increased volume of responsive material, but perhaps also increased ability to search for responsive items where electronic material can be searched by computer; (2) increased concern about alteration of these materials, but also increased potential access to interim drafts and other items thought to be discarded; (3) issues related to disclosure of embedded data and difficulties encountered in trying to access legacy data; and (4) possibly heightened privacy concerns.

Assessing the significance of these differences in regard to litigation in federal courts raises questions on which your response would be informative. For example: Does the volume of electronic materials actually require discovery response efforts that are qualitatively different from those necessary to respond to requests for voluminous hard copy materials? Has the advent of computers sometimes eased the burden of responding to discovery? How often is discovery of embedded data actually important? How often is access to legacy data actually ordered? Are difficulties some litigants encounter in responding to this form of discovery the result of their choice to employ certain systems rather than others, and if so should the courts accommodate those choices by relieving parties of discovery response responsibilities?

Potentially significant legal developments have begun to emerge. Besides caselaw, there have been some statutory and rulemaking developments. Texas has a civil rule specifically keyed to discovery of electronic materials. See Tex. R. Civ. P. 196.4. At least two districts have local rules keyed to this form of discovery. See E. & W. Dist. Ark. L.R. 26.1(4); D. Wyo. L. R. 26.1(d)(3)(B). Meanwhile, the American Bar Association has adopted discovery standards including provisions directed toward electronic discover. See ABA Discovery Standards 29 and 30. Copies of these materials should be attached to the enclosed memorandum for your information. Other similar statutory or rulemaking efforts may well exist; if you are aware of any, please bring them to our attention.

For the Subcommittee, the overarching question is whether the time has come to give serious consideration to rulemaking on a national level to address discovery of electronic materials.

The issues raised by that possibility are explored in greater detail in the enclosed memorandum, which itself raises a number of questions to which we would appreciate receiving responses. In brief, there seem to be alternatives to national rulemaking -- judicial education, relying on caselaw, and the alternative of a manual -- that might be sufficient or more fruitful. And the volatility of technological change in this area may make rulemaking, which takes a minimum of three or four years, a poor tool.

Rule amendments might take a number of forms. As suggested in the enclosed memorandum, they might include (1) directing the parties and the court to consider electronic discovery in the discovery planning process, (2) prescribing preservation obligations, (3) conditioning the duty to obtain information from back-up media or unearth deleted material on a showing justifying the effort, (4) amplifying rule provisions regarding costs, (5) regulating the form of production of computer-based material, or (6) addressing privilege waiver problems. Questions about these possibilities are raised in the enclosed memorandum.

As noted at the outset, it would be most helpful if responses to this inquiry were received by December 10, 2002. They should be sent to:

Peter McCabe
Secretary
Committee on Rules of Practice and Procedure
Federal Judiciary Building
Washington, D.C. 20544

In closing, it is important to reiterate that neither the Discovery Subcommittee nor the Advisory Committee on Civil Rules has begun considering specific rule changes in this area, and that they may determine that no changes are appropriate. But whatever decisions they make will be informed by the responses they receive to this letter. We therefore look forward to hearing your views.

Sincerely,



Richard L. Marcus
Special Consultant,
Discovery
Subcommittee

Encl.: Memorandum "Is There A Need for Rule Changes to Address Distinctive Features of Discovery of Electronic Materials?"

Is There a Need for Rule Changes to Address Distinctive Features of Discovery of Electronic Materials?

Richard L. Marcus
Special Consultant, Discovery Subcommittee
Advisory Committee on Civil Rules
September, 2002

Although the photocopier undoubtedly changed document discovery in important ways, no discovery rule amendments were proposed to cope with it. On the other hand, there already has been an amendment to Rule 34 to address computer-based material - the 1970 change to Rule 34(a) recognizing that "data compilations from which information can be obtained" could be subject to discovery under that rule. Similarly, initial disclosure under Rule 26(a)(1)(B), first added in 1993, includes "data compilations." For present purposes, the question is whether the distinctive features of discovery of electronic materials can be adequately addressed without rule changes.

This memorandum is designed to identify the issues raised by this question and to explore topics to which rule amendments might be directed. It is being distributed along with a letter inviting recipients to provide advice for the Discovery Subcommittee, and includes a number of inquiries on which these experienced lawyers could assist the Subcommittee. It includes appendices containing rules or related directives developed by others to address this form of discovery.

Is serious consideration of rule changes appropriate in light of alternatives?

Judicial education: One recurrent report from lawyers who communicated with the Subcommittee in the past has been that too few judges appreciate the singular features of electronically stored material. Too many judges, it was said, believe that "All you have to do is push a button and you'll get the information." If so, would judicial education be the most effective way to address the problem?

Judicial education efforts have been made and are ongoing. For example, we are informed that every district judge and every magistrate judge has by now had an opportunity to attend an introductory session on electronic discovery at a workshop sponsored by the Federal Judicial Center. At least some have done so and learned, sometimes citing the presentations in their decisions. And more focused follow-up judicial educational programs by the FJC are contemplated. It would be helpful to learn whether attorneys have found that federal judges have exhibited improved appreciation of the issues involved in electronic discovery over the past five years. Do state-court judges seem more conversant with these issues?

Relying on caselaw: In the abstract, federal judges already have many tools to solve discovery problems, and as they confront new problems they can adapt those tools and memorialize their results in decisions that can guide other judges. With at least some potential issues, it seems that this sort of development has occurred. Thus, much as one might raise questions about whether some types of electronic information (e.g., embedded data) actually are discoverable, there does not seem to be any doubt in the caselaw that electronic information falls within the current scope of discovery.

The question is whether judicial decisionmaking will likely clarify other points. Inevitably, discovery management involves context-specific decisions that can't readily be captured in fixed rules, or to be foreseeable with certainty by litigants. And new problems are likely to produce at least a transitional period during which -- at least for a while -- uncertainty about how judges will resolve discovery questions will be higher than with familiar problems.

Against this background, is it likely that current and future judicial decisionmaking in this area will be deficient in a way that calls for rulemaking? Commentators and courts sometimes say that relatively clear applications of the existing rules to electronic discovery have not emerged, and that there are no leading cases. But recently there have been some instances in which courts said that they found other decisions instructive. Keeping in mind that the rule amendment process takes three or four years, can the Subcommittee forecast whether caselaw will lead to reasonably predictable rules or practices?

The alternative of a manual: The Civil Litigation Management Manual appeared in a new edition in the Fall of 2001, and included suggested methods for handling discovery of electronic materials. The Manual for Complex Litigation is currently being revised, and we understand that it will include expanded coverage of electronic discovery. To the extent these manuals do not themselves do the job that needs to be done, would this sort of format be preferable to amending rules?

The problem of a moving technological target: In some ways, computer technology changes very quickly. Rule changes cannot be accomplished quickly; from start to finish the formal process takes a minimum of about three years after drafting begins. Is there a significant risk that technological change would eclipse any rule amendment developed in the near future?

Possible areas for rule amendments

The discovery rules have been amended several times over the past quarter century. In fact, there have been quite a few amendments that might be useful in dealing with the challenges of

electronic discovery even though they were added to deal with concerns about conventional discovery. For example, Rule 26(b)(2) includes "proportionality" considerations that might provide a touchstone in determining how much effort should be expended on unearthing and producing electronic information. Rule 26(a)(1)(B) calls for initial disclosure of data compilations upon which the disclosing party may rely in the action. Rule 26(f) requires a discovery planning conference, during which counsel might discuss the management of expected discovery of electronic information. Rule 16(b) calls for the court to enter an order governing discovery thereafter, and that order might also address electronic discovery. Courts dealing with electronic discovery issues have invoked these provisions as guidance in resolving the disputes before them.

The question, then, is whether further, targeted amendments would achieve a valuable objective if these recent changes don't suffice for electronic discovery. In order to facilitate advice to the Subcommittee, therefore, this memorandum will turn to several areas on which amendments might focus.

(1) Directing the parties and the court to consider electronic discovery in the discovery planning process: As noted above, recent amendments to Rule 26 mandate some early planning for discovery and involve the court to some extent in regulating that activity. As some courts have noted, this planning should include consideration of management of electronic discovery if that is likely to occur. At least some district court local rules appear to require that activity. See E.D. Ark. L.R. 26.1(4); D. Wyo. L.R. 26.1(d)(3).

Rule 26(f) could be revised to mandate consideration of electronic discovery, and Rule 16(b) could be changed to encourage or require that the court's scheduling order address the subject. This might be preferable to trying to prescribe the content of a regime to regulate the handling of this form of discovery. If sensible arrangements often depend on the specifics of individual parties, it might be unwise to try to devise solutions that apply to all in rules. This sort of rule would require the parties to discuss and arrange a reasonable solution to their particular problems, and the court could become involved as part of the Rule 16(b) case management process. Perhaps this approach could profitably include an expansion of initial disclosure regarding electronic materials.

But it might be that amending Rule 26(f) would not be necessary because lawyers are addressing these topics where pertinent under the current rule, and mandatory discussion of these topics might cause undesirable complications in cases in which it is not needed. Are lawyers now addressing this topic when it is appropriate without the prompting of a rule amendment? On balance, this change would be quite modest because it would

build on the existing Rule 26(f) conference and leave the particulars to the parties.

(2) Prescribing preservation obligations: It is apparent that one major concern in this area is data preservation. Some distinctive aspects of computerized information partly explain this concern. "Dynamic" databases used by businesses and other institutions are designed to be modified regularly, and any modification might be said to destroy as well as create data. And some data may be changed by innocuous activities even including turning on the computer. Ordinarily in litigation the question whether discarded materials should have been retained is addressed in hindsight -- the court determines whether a party accused of improperly discarding data should be sanctioned for spoliation. For those who manage data, it would be very desirable to have a prescribed set of obligations and a clear trigger for those obligations. Some have suggested that this could be called a "safe harbor."

Before turning to providing a safe harbor by rule, it is worth noting that case-specific prescriptions about preservation of electronic data could be included in the required planning that would be included in expanded Rule 26(f) and 16(b) treatment. Indeed, local rules already point in that direction. See E.D. Ark. L.R. 26.1(4)(d); D. Wyo L.R. 26(d)(3)(B). That sort of case-specific tailoring by the parties might have advantages over trying to design a rule that prescribed a regime for all cases.

Providing for preservation by rule would present a number of challenges. An initial one is that there is currently no provision in the Civil Rules directly about preservation of discoverable materials; all law on that topic comes from some other source. Whether the topic should be included in the rules for the first time, and if so whether it should be addressed in the rules solely with regard to electronic materials, could be debated. Perhaps it is worth noting that ABA Civil Discovery Standard 29 (regarding preservation of computer-based materials) invokes the earlier provision articulated in the ABA's Civil Discovery Standard 10, which sets out the preservation duty with regard to hard copy materials.

In the same vein, there is a body of statutory and regulatory law about what records various sorts of enterprises must retain and for how long. Should a Civil Rule attempt to displace those retention requirements? If not, would the "safe harbor" that might be provided by a rule really be safe?

There are at least two issues that might be addressed in a rule. The first is when the duty to preserve arises. Various formulations of this standard exist under other bodies of law, generally looking to the likelihood or foreseeability of

litigation in which the material would be evidence. One approach might be found in Rule 26(b)(3), which provides protection against routine discovery for materials generated "in anticipation of litigation," including those created before the suit was filed. Borrowing the "in anticipation of litigation" standard from Rule 26(b)(3) is one possibility; as soon as it is possible to anticipate litigation one might be said to have a duty to preserve evidence. But it may be that the actual operation of that provision of Rule 26(b)(3) could move the date too early; often litigation preparation materials are protected even though they were prepared without a lawyer's involvement and before a lawyer was involved. To direct that a duty to preserve that would normally be known only to a lawyer attach at that point could be inappropriate.

The second issue is to describe what must be done to preserve evidence once the obligation to preserve is triggered. It is likely that a rule could not go much beyond requiring "reasonable steps." A Note might explore the specific application of that concept in relation to electronically stored material. But again it is unclear why this directive should be limited to electronic material. One distinctive feature of electronic material, indeed, is that the storage space it requires is minimal. Some have suggested to the Subcommittee that limited storage space is therefore not a reason for discarding computerized data, which might lead to the conclusion that for this type of material everything should be preserved. Is it true that storage space is not an issue, even with regard to backup tapes that cannot be reused if they are preserved? Is cost nonetheless a consideration? Are there other concerns, such as privacy, that would warrant discarding electronic materials?

A final area that might be addressed in the rules, although it is not now, is the question of entry of preservation orders after litigation has begun. The Subcommittee has been advised by some lawyers that ex parte orders are a problem, although others expressed surprise that federal courts would enter such orders ex parte. Are there a significant number of ex parte preservation orders issued by federal courts? Do extraordinary circumstances explain the entry of those orders?

The need for an order (except, perhaps, pursuant to the parties' agreed preservation regime as part of their discovery plan under Rule 26(f)) depends in part on the strength of the preservation requirement that exists without the order. If there is no duty to preserve until there is a preservation order, there is potentially a strong need for an order. But cases appear to recognize that spoliation sanctions can be imposed in the absence of a preservation order. So perhaps a rule amendment or Committee Note accompanying a rule change could address the propriety of preservation orders, and the factors pertinent to whether to enter them.

Alternatively, perhaps the Subcommittee could provide a valuable service by developing a form preservation order that would suitably protect both plaintiff and defense interests, either for inclusion in the official forms attached to the Civil Rules or elsewhere.

(3) Conditioning the duty to obtain information from back-up media or unearth deleted material on a showing justifying the effort: There certainly seems to be a difference between electronic material and hard copy material in terms of whether it could be located with heroic efforts by a party that regards it as discarded or unavailable. Hard copies that have been discarded are usually gone for good. "Deleted" electronic materials are often not, partly because backup regimes often capture them before they are deleted.

If the customary search obligation of a party providing initial disclosure or responding to discovery includes obtaining all responsive materials that could be found on backup media or by forensic efforts to extract "deleted" items from hard disks, it would be onerous indeed. But it is not clear that courts actually require such efforts, or that parties routinely make them. To the contrary, at least some courts say or imply that there is no such routine obligation. Are there cases that impose an obligation to search such materials in the absence of a threshold showing of either misconduct by the party required to do the search or a very strong need for the material being sought?

A rule amendment might try to address these questions. See E.D. Ark. L.R. 26.1(4)(d); D. Wyo. L.R. 26(d)(3)(B)(iii) & (iv); cf. ABA Civil Discovery Standard 29 a. iii. To adopt a rule regarding the search burden might magnify the importance of addressing preservation in the rules since a rule saying there is no need to search certain materials that are (theoretically) available until the court so orders might also provide the court with the flexibility so to order at a later time. If the materials no longer exist at that later point, that opportunity seems hollow. Is the need to address these questions by rule sufficient to justify the difficulties of doing so?

(4) Amplifying rule provisions regarding costs: In large measure the concern about search burden is a cost concern. More generally, many have proposed adapting the rules regarding the handling of costs to operate in a more suitable way in regard to discovery of electronic materials.

Concerns about discovery cost are not new; nearly twenty years ago they resulted in the addition of the proportionality principles now found in Rule 26(b)(2). In addition, Rule 26(c) authorizes protective orders to guard against "undue burden or expense." At least some cases seem to view these rules as viable

methods for protecting those responding to discovery requests for electronic material from undue expenses. Are there significant recent examples of federal courts failing to heed the directions of Rule 26(b)(2) or to provide the protections authorized by Rule 26(c)?

Explicit provision for shifting or limiting the cost of responding to discovery of computer-based materials could be added to Rule 26(b)(2) or Rule 26(c). If so, it would probably be necessary to state in the rule what triggers the cost-affecting consequences. Should all discovery of these materials result in cost shifting? That might seem odd, given that much discoverable material reportedly exists only in electronic form, and that searching computer-based materials may sometimes be easier than searching hard copies. The notion that there should be limits on requiring a party to search materials that it does not ordinarily access implies that cost-shifting need not follow with regard to accessing the materials it does use on a routine basis. One approach, suggested on ABA Discovery Standard 29 b. iii. and Tex. R. Civ. P. 196.4, would be to limit cost-shifting to "special expenses" or "extraordinary steps" imposed on the responding party. Would this sort of focus be helpful in a rule regarding cost-shifting? To what extent should the shifting of such expenses depend on whether the responding party would likely have undertaken the activities generating special expenses anyway in preparation for trial, or at least whether the responding party would seem to be benefitted in trial preparation by undertaking the additional effort?

Alternatively, it might be preferable to defer the shifting of these costs until the end of the case. Some have suggested that the costs of responding to this kind of discovery be added to those recoverable by the prevailing party under Rule 54(d)(1). That might be preferable to a "pay as you go" regime, but also might not adequately attend to the possibility that the party found to be prevailing inappropriately inflicted such costs on the losing party. In addition, it might magnify attention to the question who is the prevailing party, which has sometimes proved difficult in connection with other matters.

Some courts have responded to the question of cost-bearing for searches of electronic materials -- generally backup or otherwise inaccessible items -- by invoking a series of factors and determining who should bear those costs in the circumstances of the given case. Can such a multi-factor approach be improved upon in a rule? Would additional considerations in Rule 26(b)(2) be helpful?

Reconsidering the basic thrust of the rules that the responding party should ordinarily shoulder the cost of responding to discovery would be a dramatic shift; is there a reason for doing so with electronic materials? And if so, should

attention also focus on whether a party's choice of computer systems significantly affected the cost of responding? Could enhanced cost-bearing prompt parties to select more cumbersome computer systems? Should the efficiency of a party's computer system be more important in determining whether to order cost-bearing than the efficiency of the party's hard copy storage system?

(5) Regulating the form of production of computer-based materials: For hard copy materials, the form of production does not seem to present difficult problems. Rule 34(b) was amended in 1980 to direct that parties to produce documents "as they are kept in the usual course of business" unless they were labeled to correspond to the categories in the request, but this change was made in response to concerns about rearrangement of documents that might make important materials harder to find.

With materials that are stored electronically, there is a greater range of possible forms of production. Some assert that e-mail and other types of electronic materials have usually been produced in hard copy form. If produced in electronic form, these materials could be provided in a number of different formats, so that producing them in the form in which they are kept by the producing party might not assist the receiving party unless it could make use of the materials in that form. To make the materials usable by the receiving party might require that they be reformatted (possibly costly to the producing party) or that the producing party provide computer programs (perhaps subject to legal protections) to the receiving party.

One response to this situation would be to encourage the parties to discuss the form of production and arrange a method that makes sense in the circumstances of the individual case. That might be assisted by revisions to Rule 26(f) or 16(b) as noted above. Have parties begun discussing these issues early in the litigation? Have agreements about form of production proved effective? Have producing parties incurred significant costs in reformatting materials for delivery to opposing parties? Have receiving parties had significant difficulties in using materials produced electronically?

Alternatively or additionally, one could amplify the provisions of Rule 26(a)(1) regarding initial disclosure to mandate provision of specifics about the nature of electronic materials relevant to the case. Already there is some caselaw regarding the application of Rule 26(a)(1)(B)'s provision regarding "data compilations" to the fact that a party had certain materials in electronic form. Would a more insistent provision in Rule 26(a)(1) requiring each party to describe its electronic records be desirable? Would such mandatory disclosure be unduly costly or threaten important confidentiality interests?

Alternatively, the rules could prescribe the form of production. Could that be done in a way that would be specific enough and also take account of changes in technology that might make today's specifics passe? Would directing that electronic material be produced "in the same form in which it is stored" be a helpful provision? Should the rules also provide specifically for making available necessary computer technology? Would this endanger proprietary interests in the technology?

(6) Addressing privilege waiver problems: The task of reviewing large quantities of hard copy material to determine whether some items can be withheld on grounds of privilege has long seemed wasteful. But the costs of privilege waiver have often seemed greater than the costs of review. For some time, the Subcommittee has reflected on whether Rule 34(b) could be productively amended to implement court orders insulating some initial disclosure to the other side against the waiver consequence, thereby hopefully focusing the responding party's privilege review on a much smaller collection of materials deemed relevant by the discovering party. The rulemaking power operates under some limits in the privilege area. See 28 U.S.C. § 2074(b); compare Tex. R. Civ. P. 193.3(d).

Electronic materials arguably present even greater difficulties for privilege review; some cases report very high projected costs for reviewing e-mails. One reason may be sheer quantity. Beyond that, E-mail communications could, due to their informality, present particular difficulties. Is privilege review of electronic material significantly more difficult than a similar review of hard copy material? Could that review be eased significantly by implementing procedures to make it easier, such as having the legal department use a single server and directing employees to indicate whether a communication is privileged as part of the process of generating the communication?

Have parties found ways to minimize the delay and cost that would attend full review for privilege of all requested electronic materials? One method might be an agreement under which the requesting party initially reviews the responsive materials and designates those it wants copied, thereby limiting the need to review to those materials. There is some indication in cases involving electronic materials that such a "quick look" approach has been employed. Has it been successful? Have nonparties later asserted that such an agreement does not sanitize what would otherwise be a waiver, and that this initial review undermines the privilege-holder's claim the materials are privileged? Would a rule change facilitate this method?

Are there other methods for improving the situation regarding privilege waiver that could be accomplished by rule amendments?

(7) Other possible areas for amendment: The foregoing discussion focuses on the topics that appear to be most frequently raised in discussions of electronic discovery. But other topics surely might be raised. For example, one might seek by rule to provide guidance on the circumstances in which one party should have access to another party's computer system or hard drive, or the extent to which a party can insist on formulating queries for another party's computer system. Some courts have used court-appointed experts to act in effect as intermediaries for such purposes. Is there a need for or value to considering rule changes along these lines?

Appendix A: Excerpts from the Texas Civil Procedure Rules re electronic discovery

Appendix B: Local Rule 26.1, E.D. Ark

Appendix C: Local Rule 26.1, D. Wyo.

Appendix D: Excerpts from the ABA Civil Discovery Standards re electronic discovery

APPENDIX A

Texas Rules of Civil Procedure

Rule 193.3(d) Privilege not waived by production.

A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if – within ten days or a shorter time ordered by the Court, after the producing party actually discovers that such production was made – the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.

[...]

Notes and Comments

Comments to 1999 change:

[...]

4. Rule 193.3(d) is a new provision that allows a party to assert a claim of privilege to material or information produced inadvertently without intending to waive the privilege. The provision is commonly used in complex cases to reduce the costs and risks in large document productions. The focus is on the intent to waive the privilege, not the intent to produce the material or information. A party who fails to diligently screen documents before producing them does not waive a claim of privilege. [...] The ten-day period (which may be shortened by the court) allowed for an amended response does not run from the production of the material or information but from the party's first awareness of the mistake.

(from 61 Texas Bar Journal 1140, 1151-1153 (December 1999))

[...]

Rule 196.4 Electronic or Magnetic Data.

To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot – through reasonable efforts – retrieve the data or information

requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

[...]

Notes and Comments

Comments to 1999 change:

[...]

3. A party requesting production of magnetic or electronic data must specifically request the data, specify the form in which it wants the data produced, and specify any extraordinary steps for retrieval and translation. Unless ordered otherwise, the responding party need only produce the data reasonably available in the ordinary course of business in reasonably useable form.

(from 61 Texas Bar Journal 1140, 1158-1159 (December 1999))

APPENDIX B

United States District Court for the Eastern District of Arkansas

LOCAL RULE 26.1 OUTLINE FOR FED.R.CIV.P. 26(f) REPORT

The Fed.R.Civ.P. 26(f) report filed with the court must contain the parties' views and proposals regarding the following:

- (1) Any changes in timing, form, or requirements of mandatory disclosures under Fed.R.Civ.P. 26 (a).
- (2) Date when mandatory disclosures were or will be made.
- (3) Subjects on which discovery may be needed.
- (4) Whether any party will likely be requested to disclose or produce information from electronic or computer-based media. If so:
 - (a) whether disclosure or production will be limited to data reasonably available to the parties in the ordinary course of business;
 - (b) the anticipated scope, cost and time required for disclosure or production of data beyond what is reasonably available to the parties in the ordinary course of business;
 - (c) the format and media agreed to by the parties for the production of such Data as well as agreed procedures for such production;
 - (d) whether reasonable measures have been taken to preserve potentially discoverable data from alteration or destruction in the ordinary course of business or otherwise;
 - (e) other problems which the parties anticipate may arise in connection with electronic or computer-based discovery.
- (5) Date by which discovery should be completed.
- (6) Any needed changes in limitations imposed by the Federal Rules of Civil Procedure.
- (7) Any Orders, e.g. protective orders, which should be entered.

(8) Any objections to initial disclosures on the ground that mandatory disclosures are not appropriate in the circumstances of the action.

(9) Any objections to the proposed trial date.

(10) Proposed deadline for joining other parties and amending the pleadings.

(11) Proposed deadline for completing discovery. (Note: In the typical case, the deadline for completing discovery should be no later than sixty (60) days before trial.)

(12) Proposed deadline for filing motions other than motions for class certification. (Note: In the typical case, the deadline for filing motions should be no later than sixty (60) days before trial.)

(13) Class certification: In the case of a class action complaint, the proposed deadline for the parties to file a motion for class certification. (Note: In the typical case, the deadline for filing motions for class certification should be no later than ninety (90) days after the Fed.R.Civ.P. 26.(f) conference.)

Effective December 1, 2000.

Amended and effective May 1, 2002.

APPENDIX C

United States District Court District of Wyoming

LOCAL RULE 26.1 **DISCOVERY** (excerpts)

(a) Applicability. This Rule is applicable to all cases filed in this District except where modified by Court order.

(b) Stay of Discovery. Formal discovery, including oral depositions, service of interrogatories, requests for production of documents and things, and requests for admissions, shall not commence until the parties have complied with Fed.R.Civ.P. 26(a)(1).

(c) Initial Disclosure (Self-Executing Routine Discovery Exchange). It is the policy of this District that discovery shall be open, full and complete within the parameters of the Federal Rules of Civil Procedure.

(1) Initial Disclosures. [Excerpted from Fed.R.Civ.P. 26(a)(1)(A)-(O)]. Except in categories of proceedings specified in Fed.R.Civ.P. 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment. In cases where it is impractical due to the volume or nature of the documents to provide such copies, parties shall provide a complete description by category and location in lieu thereof;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under

which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

d) Rule 26(f) Meeting of Counsel; Initial Disclosure Exchange. The Court will set an initial pretrial conference no sooner than thirty-five (35) days after the last pleading pursuant to Fed.R.Civ.P. 7 or a dispositive motion is filed with the Court.

(1) Counsel must meet and confer in person or by telephone in accordance with Fed.R.Civ.P.26(f) no later than twenty (20) days after the last pleading pursuant to Fed.R.Civ.P. 7 or a dispositive motion is filed with the Court. (See Appendix D)

(2) Counsel on behalf of the parties must exchange the initial disclosures (self-executing routine discovery) pursuant to Local Rule 26.1(c)(1) above, no later than thirty (30) days after the last pleading filed pursuant to Fed.R.Civ.P. 7 or a dispositive motion is filed with the Court.

(3) Prior to a Fed.R.Civ.P. 26(f) conference, counsel should carefully investigate their client's information management system so that they are knowledgeable as to its operation, including how information is stored and how it can be retrieved. Likewise, counsel shall reasonably review the client's computer files to ascertain the contents thereof, including archival and legacy data (outdated formats or media), and disclose in initial discovery (self-executing routine discovery) the computer based evidence which may be used to support claims or defenses.

(A) Duty to Notify. A party seeking discovery of computer-based information shall notify the opposing party immediately, but no later than the Fed.R.Civ.P. 26(f) conference of that fact and identify as clearly as possible the categories of information which may be sought.

(B) Duty to Meet and Confer. The parties shall meet and confer regarding the following matters during the Fed.R.Civ.P. 26(f) conference:

(i) Computer-based information (in general). Counsel shall attempt to agree on steps the parties will take to segregate and preserve computer-based information in order to avoid accusations of spoliation;

(ii) E-mail information. Counsel shall attempt to agree as to the scope of e-mail discovery and attempt to agree upon an e-mail search protocol. This should include an agreement regarding inadvertent production of privileged e-mail messages.

(iii) Deleted information. Counsel shall confer and attempt to agree whether or not restoration of deleted information may be necessary, the extent to which restoration of deleted information is needed, and who will bear the costs of

restoration; and

(iv) Back-up data. Counsel shall attempt to agree whether or not back-up data may be necessary, the extent to which back-up data is needed and who will bear the cost of obtaining back-up data.

(4) Counsel may either submit a written report or report orally on their discovery plan at the initial pretrial conference.

[...]

[Adopted November 30, 1996; amended February 10, 1998; amended effective August 20, 2001.]

[...]

**APPENDIX D.
RULE 26(f) CONFERENCE CHECKLIST**

Counsel shall be fully prepared to discuss in detail all aspects of discovery during the mandatory Rule 26(f) Conference. The subject matters to be discussed during the Rule 26(f) Conference shall include, but are not limited to, the following:

- Jurisdiction;
- Service of process;
- Initial disclosures (self-executing routine discovery) pursuant to L.R. 26.1(c);
- Formal written discovery--interrogatories, requests for production, requests for admission;
- Computer data discovery pursuant to L.R. 26.1(d)(3);
- Identity and number of potential fact depositions;
- Identity and number of potential trial depositions;
- Location of depositions, deposition schedules, deposition costs;
- Identify the number and types of expert witnesses to be called to present testimony during trial (including the identity of treating medical/psychological doctors);

- Discovery issues and potential disputes;
- Protective orders;
- Potential dispositive motions;
- Settlement possibilities and a settlement discussion schedule.

[Effective August 20, 2001.]

APPENDIX D

American Bar Association Section of Litigation Civil Discovery Standards (August 1999)

VIII. TECHNOLOGY

29. Preserving and Producing Electronic Information.
 - a. Duty to Preserve Electronic Information.
 - i. A party's duty to take reasonable steps to preserve potentially relevant documents, described in Standard 10 above, also applies to information contained or stored in an electronic medium or format, including a computer word-processing document, storage medium, spreadsheet, database and electronic mail.
 - ii. Unless otherwise stated in a request, a request for "documents" should be construed as also asking for information contained or stored in an electronic medium or format.
 - iii. Unless the requesting party can demonstrate a substantial need for it, a party does not ordinarily have a duty to take steps to try to restore electronic information that has been deleted or discarded in the regular course of business but may not have been completely erased from computer memory.
 - b. Discovery of Electronic Information.
 - i. A party may ask for the production of electronic information in hard copy, in electronic form or in both forms. A party may also ask for the production of ancillary electronic information that relates to relevant electronic documents, such as information that would indicate (a) whether and when electronic mail was sent or opened by its recipient(s) or (b) whether and when information was created and/or edited. A party also may request the software necessary to retrieve, read or interpret electronic information.
 - ii. In resolving a motion seeking to compel or protect against the production of electronic information or related software, the court should consider such factors as (a) the burden and expense of the discovery; (b)

the need for the discovery; *(c)* the complexity of the case; *(d)* the need to protect the attorney-client or attorney work product privilege; *(e)* whether the information or the software needed to access it is proprietary or constitutes confidential business information; *(f)* the breadth of the discovery request; and *(g)* the resources of each party. In complex cases and/or ones involving large volumes of electronic information, the court may want to consider using an expert to aid or advise the court on technology issues

iii. The discovering party generally should bear any special expenses incurred by the responding party in producing requested electronic information. The responding party should generally not have to incur undue burden or expense in producing electronic information, including the cost of acquiring or creating software needed to retrieve responsive electronic information for production to the other side.

iv. Where the parties are unable to agree on who bears the costs of producing electronic information, the court's resolution should consider, among other factors:

(a) whether the cost of producing it is disproportional to the anticipated benefit of requiring its production;

(b) the relative expense and burden on each side of producing it;

(c) the relative benefit to the parties of producing it; and

(d) whether the responding party has any special or customized system for storing or retrieving the information.

v. The parties are encouraged to stipulate as to the authenticity and identifying characteristics (date, author, etc.) of electronic information that is not self-authenticating on its face.

Comment

Subsection (a). Fed. R. Civ. P. 34(a) and various state rules, e.g., Va. Sup. Ct. R. 4:9(a), provide that the term "documents" includes "data compilations from which information can be obtained [or] translated, if necessary, by the respondent through detection devices into reasonably usable form." See also Fed. R. Civ. P. 34(a), 1970 Advisory Committee Note. The 1993 amendment to Fed. R. Civ. P. 26 also makes "data compilations" subject

to mandatory disclosure. Tex. R. Civ. P. 196.4 also calls for the production of data or information in electronic or magnetic form, but only if it is specifically requested.

This Standard makes it clear that (a) information contained or stored in an electronic medium or format should be produced pursuant to a “document” request and (b) a party has the same duty when it is aware of potential or pending litigation to take reasonable steps to preserve potentially relevant electronic information as it does to preserve “hard” copies of documents.

Subsection (a)(iii). Attempting to retrieve previously deleted electronic information can be time-consuming and costly. Just as a party ordinarily has no duty to create documents, or to re-create or retrieve previously discarded ones, to respond to a document request, it should not have to go to the time and expense to resurrect or restore electronic information that was deleted in the ordinary course of business. E.g., Tex. R. Civ. P. 196.4 (duty to produce applies only to electronic data that is “reasonably available to the responding party in its ordinary course of business”); *Strasser v. Yalamanchi*, 669 So. 2d 1142 (Fla. Dist. Ct. App. 1996) (plaintiff may search defendant’s computer for purged information only if the plaintiff shows the likelihood of retrieving it and there is no less intrusive way to obtain it; any search must have defined parameters of time and scope and ensure that the defendant’s information remains confidential and its computer and databases are not harmed).

Subsection (b). The Standard contemplates that whether and, if so, how much electronic information is subject to discovery, along with the allocation of the cost of producing it, depends on the factors specific to each case. See, e.g., Tex. R. Civ. P. 196.4 (if objected to, no out-of-the-ordinary efforts to retrieve electronic information are required unless the court orders them; if it does so, the requesting party must pay for them); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94-C-897, MDL 997, 1995 U.S. Dist. LEXIS 8281 (N.D. Ill. June 13, 1995) (weighing whether to compel a company to retrieve and produce electronic mail messages at its expense); *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94 Civ 2120, 1995 U.S. Dist. LEXIS 16355, at *4 (S.D.N.Y. Nov. 3, 1995) (neither the fact that material was available in hard copy nor the need for the responding party to create the computerized data necessarily precluded production of the information in computerized form); *PHE, Inc. v. Department of Justice*, 139 F.R.D. 249, 257 (D.D.C. 1991) (requiring production of computerized records where no program existed to obtain the requested information because the response would require “little effort” and “modest additional expenditures”); *National Union Elec. Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1257, 1262 (E.D. Pa. 1980) (requiring production of information on computer-readable magnetic tape in addition to hard copy; the discovering parties were required to pay for making the tapes); *In re Air Crash Disaster at Detroit Metro. Airport*, 130 F.R.D. 634, 635-36 (E.D. Mich. 1989) (party required to produce simulation data on computer-readable tape in addition to hard copy); *Armstrong v. Executive Office of the President*, I F.3d 1274, 1280 (D.C. Cir. 1993) (printouts were not acceptable substitute because they did not reveal various information such as

directories, distribution lists, acknowledgments of receipts and similar materials); see also Federal Judicial Center, Manual for Complex Litigation, 3d § 21.446 (1995).

An issue arises when responsive information required to be produced is part of a much larger database and no software exists to retrieve only the responsive information. A large database, e.g., the transaction history for every customer of a business, should not be made available as if it was a single “document.” The parties should confer in this situation and attempt to agree on what will be produced, the format and who will bear the cost of extracting the information.

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6B



A Qualitative Study of Issues Raised By the Discovery of Computer-Based Information in Civil Litigation

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This Federal Judicial Center report was undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. The views expressed are those of the authors and not necessarily those of the Federal Judicial Center.

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I. Introduction and Background

Since the fall of 1999, the Federal Judicial Center (FJC) and the Discovery Subcommittee of the Judicial Conference Advisory Committee on Civil Rules have sought to learn more about discovery of computer-based information in civil litigation. Among other things, the Subcommittee is considering whether to propose amendments to the Federal Rules of Civil Procedure to accommodate distinctive issues raised by discovery of computer-based information. FJC research staff conducted a multipart study to shed light on these issues as well as to identify the problems and advantages associated with the discovery of computer-based evidence as it becomes more commonplace in civil litigation. This report presents the results of that study.

The Subcommittee did not ask the FJC to obtain precise base-rate data on the frequency with which discovery of computer-based information occurs—both because it is evident that such discovery will increase and because the need for potential rule changes does not necessarily hinge on the absolute frequency of occurrence of such discovery. Instead, the Subcommittee wanted to gain a better understanding of the nature of specific issues relating to computer-based discovery, including (but not limited to)

- the preservation or spoliation of computer-based evidence;
- costly, “heroic” efforts to retrieve computer-based information for purposes of discovery;
- the use of computer experts to assist with computer-based discovery; and
- privilege waiver in the context of computer-based discovery.

A more thorough understanding of how these issues arise and are handled in individual cases will help the Subcommittee determine whether rule changes are warranted. An underlying question is the extent to which computer-based evidence is qualitatively different from more traditional hard-copy evidence.¹

In this report, we present descriptions of and results from three research approaches used in the study:

1. a survey of magistrate judges, designed to learn about their experiences with computer-based discovery and to obtain their suggestions of cases illustrating various computer-based discovery issues that warranted in-depth study;
2. a survey of computer consultants who are frequently hired by parties to assist in cases involving discovery of computer-based evidence; and
3. detailed case studies of ten selected cases involving computer-based evidence.

1. See Kenneth J. Withers, White Paper on Computer-Based Discovery (Federal Judicial Center, October 4, 2002), for a discussion of this question.

Because the study is by design not based on data representative of all experiences with computer-based discovery in federal civil cases, *no general conclusions about federal court experiences with such discovery can be drawn from these results*. The data do, however, provide some insight into both the frequency of federal court experiences with computer-based discovery and the nature of some of its associated problems and advantages.² In addition, the case studies provide the views of participants (primarily magistrate judges and attorneys) as to whether any problems are amenable to rule-based solutions, and what form such solutions might take.

In April 2002, we provided a preliminary report to the Advisory Committee, based on the surveys and three completed case studies. This report provides all ten case studies and some additional analysis, primarily of information obtained through the case studies.

II. Summary of Findings

In summary, we found the following:

- About three out of five magistrate judges who handle discovery disputes have had a case in which a question surrounding discovery of computer-based evidence was brought to their attention.
- The most frequent types of cases in which computer-based discovery issues reportedly have arisen are single-plaintiff employment cases, general commercial litigation, and intellectual property cases. These types of cases, particularly the first two, are also relatively frequent in the general population of case filings.
- The issues or problems most frequently reported by magistrate judges regarding computer-based discovery were the hiring of computer experts by one or more parties; inadvertent disclosure of privileged computer-based information; on-site inspection of a party's computer system by an opposing party; preservation or spoliation of computerized data while a lawsuit is pending; and parties' sharing of the costs of retrieving computerized information.
- Most of the ten judges and seventeen attorneys interviewed for the case studies did not think that the Civil Rules had a major effect (positive or negative) on how the computer-based discovery issues were resolved in those cases.
- Among participants interviewed for the case studies, attorneys generally favored rule changes to accommodate specifically computer-based discovery more than judges did.

2. Because the Subcommittee is interested in whether rule changes are warranted to accommodate discovery of computer-based evidence, our investigation focuses mostly on problems raised by such discovery. We have also, however, gathered some data on instances in which the computer-based nature of certain evidence provided an advantage over traditional hard-copy evidence.

- Rule changes suggested by participants primarily relate to disclosure of computer-based information, form of production, data preservation or spoliation, volume of computer-based evidence, on-site inspections of computers, cost allocation, and handling of confidential or privileged information.³
- Some magistrate judges in the case-study cases used innovative case-management techniques, within the existing rules, to manage computer-based discovery.
- Several attorneys and judges suggested further education of both attorneys and judges regarding computer technology issues relevant to discovery in addition to or as an alternative to rule changes.

III. Research Approaches

This section briefly describes how we designed and carried out our survey of magistrate judges, survey of computer consultants, and case studies of ten selected cases. Appendix A provides more detail about the research methodology.

A. Survey of Magistrate Judges

In spring 2000, FJC staff surveyed magistrate judges, via the Internet, about their experiences with discovery of computer-based information (see Appendix B for a copy of the questionnaire). In addition to asking about the extent of their experience with such discovery and the types of problems they had encountered, the questionnaire asked for suggestions of cases with computer-based discovery issues that might warrant further attention as case studies.

The response rate to this Web-based survey was low (28%), making it difficult to determine if the responses were representative of magistrate judge experience with computer-based discovery in general, or if many magistrate judges chose not to respond because they had no experience with computer-based discovery. To answer this question, we mailed a one-page hard-copy questionnaire to nonrespondents, asking only why they had not answered the first questionnaire. This question was followed by several response options, including that the magistrate judge had no experience with computer-based discovery and therefore did not think his or her responses would be useful. Between the two surveys, we received an 83% response rate to the question whether a magistrate judge had any experience with computer-based discovery. The other substantive questions were answered only by the 28% of magistrate judges who responded to the Web-based survey.

3. For a listing of potential rule changes suggested by case-study participants, see *infra* section VI.B.

B. Survey of Computer Consultants

In 2001, FJC research staff undertook a survey of consultants in the fields of computer forensics and electronic discovery who subscribed to an Internet discussion group for professionals in these fields. The survey solicited general information about the work the consultants had done on behalf of clients involved in federal civil litigation. The questions in this survey were designed to be similar to those asked in the magistrate judge survey.

Even with a follow-up mailing, the overall response rate to this survey was poor; there were only ten usable questionnaires. It appears that, despite the general nature of our questions, the low response rate may have been due in part to confidentiality agreements with clients or court orders preventing the consultants from sharing the requested information.

C. Case Studies

To help the Subcommittee gain a more thorough understanding of how various computer-based discovery issues are manifested in specific cases, FJC staff designed a study to look at selected cases illustrating these issues. Some of the cases were identified by magistrate judges responding to our Web-based survey as having involved computer-based discovery issues of interest to the Subcommittee, while others were identified through a case law search on this topic. The study of each case involved reviewing and coding the court files and interviewing the participants (attorneys and judges) who handled the discovery of computer-based evidence in the case.

In addition to asking participants about the computer-based discovery problems involved in each case, we asked them about the role of the Civil Rules and whether they thought rule changes were necessary to accommodate computer-based discovery. In the course of the interviews, participants often mentioned questions or problems regarding computer-based discovery that they had encountered in other cases, and we recorded that information as well.

The nine magistrate judges and one district judge we interviewed had been on the bench from 7 to 16 years at the time of our interviews, and had an average (mean) of 10.8 years of service. The seventeen attorneys reported that, on average, 85% of their practice was devoted to federal civil litigation. They also reported experience with an average of 13.3 cases involving computer-based discovery; the range was from 4 to 30 such cases.

IV. Limitations of the Data

It is important to note that, for two reasons, the information obtained through our various research approaches cannot be taken as representative of all federal court experiences with computer-based discovery, or of all views of judges and attorneys with respect to such discovery and related potential rule revisions. First, two of our approaches—the magistrate judge survey and the case studies—focus primarily on cases managed and issues encountered by magistrate judges rather than district judges. We restricted our survey to magistrate judges

because we believed they would have more experience managing computer-based discovery. The types of cases and issues handled by district judges, however, might differ qualitatively or quantitatively from those handled by magistrate judges.

Second, the cases we studied in depth were those that magistrate judges identified as having involved computer-based discovery issues that were brought to their attention or that mentioned computer-based discovery in reported decisions. Although we also asked attorneys about their experiences with computer-based discovery issues in other cases, data from the current study cannot tell us how frequently such issues arise or how frequently computer-based discovery problems are resolved without the courts' involvement.

V. Survey Results

A. Survey of Magistrate Judges

The results of the magistrate judge survey reported in this section include the responses of 110 magistrate judges who responded to our Web-based survey and reported that they do handle discovery disputes.

1. Percentage of responding judges with experience handling computer-based discovery disputes

According to the combined results of our Web-based survey and the follow-up survey, about 60% of magistrate judges experienced a case raising computer-based discovery issues in the two years preceding our surveys.

If we add the number of judges who indicated on the Web-based survey that they had no experience with computer-based discovery (29) to the number who indicated the same in response to the follow-up survey (111), we find that 39% of our 355 respondents to the surveys reported that they had not had experience with computer-based discovery in their cases in the two years preceding the study.⁴ Thus, it appears that approximately three out of five magistrate judges have had experience with computer-based discovery issues in civil cases.

Note that this information does not directly indicate the frequency with which computer-based discovery occurs in civil cases. District judges do not always choose to delegate the handling of discovery disputes to magistrate judges. In addition, many computer-based discovery issues can be handled by attorneys without being brought to the attention of the judge (in fact, attorneys in our case-study interviews noted that this happens frequently, at least in some districts). What the data tell us at a minimum, however, is that computer-based discovery occurs in more than just a tiny proportion of cases, and the majority of magistrate judges have had cases in which such discovery has been brought to their attention.

4. Normally it is not sound research practice to combine results from separate surveys. In this instance, however, we surveyed the same population on the same topic in the two surveys, and thus report the results together on the limited question of the extent of magistrate judge experience with discovery of computer-based evidence.

2. Types of cases in which disputes involving computer-based discovery arise

We asked magistrate judges to report how many cases of various types they had handled in which discovery of computer-based evidence had been brought to their attention for action on their part. We then calculated the proportion of responding magistrate judges who reported having at least one case of each case type that involved computer-based discovery and the percentage of all cases reported involving such discovery that were of each case type. These figures are displayed in Table 1.

Although the respondents to our questionnaire might not represent all magistrate judges, a few general observations can be made based on Table 1. First, it appears that computer-based discovery problems that are brought to the attention of a magistrate judge are spread widely across the federal docket, and are not limited to large-scale litigation between corporate parties.

Table 1. Frequency of case types involving computer-based discovery (CBD) issues brought to the attention of magistrate judges for action

Case type	Percentage of magistrate judges reporting at least one case of this case type that raised CBD issues (N = 81)	Percentage of all cases reported by magistrate judges as having raised CBD issues (N = 489)
Employment—Individual plaintiff	59	26
General commercial litigation	55	23
Patent or copyright	44	18
Employment—class action	25	8
Products liability	24	6
Other ⁵	23	9
Construction litigation	10	3
Securities litigation	10	5
Antitrust	8	2

5. "Other" case types noted by participants included personal injury tort, breach of contract, *qui tam*, insurance, and toxic tort cases. None of these case types, however, was identified by more than three respondents.

Second, the large differences in relative frequency in the table suggest that computer-based discovery is brought to a magistrate judge's attention in employment cases involving an individual plaintiff, general commercial litigation, and patent or copyright cases with greater frequency than in other types of cases. Employment and commercial litigation cases are relatively frequent in the overall case population of the federal courts as well (they each constituted more than 9% of federal civil case filings in 1998), so the greater frequency with which computer-based discovery issues are raised in these cases may be due solely to the fact that there are a greater number of these cases in the federal courts.

In contrast, patent or copyright cases, employment class actions, and securities litigation cases are filed less frequently (in 1998, they accounted for 3.1%, 0.02%, and 1.1% of federal civil case filings, respectively), yet 10% or more of responding magistrate judges reported being made aware of a problem with computer-based discovery in each of these types of cases. This suggests that computer-based discovery problems arise disproportionately in these types of cases, although that may be simply because discovery problems in general arise more often in these cases, something we cannot determine based on the current data.

For a variety of reasons, we cannot draw firm conclusions about whether computer-based discovery problems arise in some case types more frequently than one would expect relative to their filing rates. For example, the respondents to our questionnaire were given a small number of case types to rate with respect to frequency of encountering computer-based discovery issues, whereas individuals filing a federal case have a large number of case types to choose from in designating the case. In addition, our questionnaire focused on discovery disputes brought to the attention of a magistrate judge, whereas this type of discovery might frequently occur without the knowledge of a judge. Finally, we do not have specific data on the frequency with which general discovery disputes, as opposed to disputes over computer-based discovery, are brought to the attention of a judge in each type of case.

3. Types of computer-based discovery issues most often brought to the attention of the magistrate judge

We asked magistrate judges to report how many cases they had had in which particular issues relating to computer-based discovery had occurred. Table 2 indicates how many magistrate judges reported having experienced each issue at least once, and what percentage of cases overall (across all respondents) were reported to have included each issue.

As shown in Table 2, more than two-thirds of responding magistrate judges with computer-based discovery experience reported having been involved in at least one case in which a computer expert was hired, making that activity by far the most frequent. Of all the cases with which respondents reported having computer-based discovery experience, a quarter had involved the hiring of computer experts.

Table 2. Frequency of computer-based discovery (CBD) issues in cases in which a CBD issue was brought to a magistrate judge for action

Issue	Percentage of respondents reporting at least one case with this issue (N = 81)	Percentage of total CBD cases reported involving this issue (N = 489) ⁶
Hiring of computer experts by one or more parties	69	25
Problems regarding privilege waiver when computerized information was produced	49	15
On-site inspection of a party's computer system by an opposing party	48	15
Parties' sharing the costs related to retrieving computerized information	48	15
Alleged spoliation (intentional or inadvertent destruction) of computer-based evidence by one or more parties	47	13
Issuance of a preservation order forbidding deletion of computer-based information	35	10
Parties' sharing the costs related to the form of production	35	9
Substantially increased efficiency in discovery owing to the computer-based nature of the information	21	13

Four situations—privilege waiver problems, on-site inspection of a party's computer system by the opposing party, alleged spoliation, and parties' sharing the costs of retrieval—had been experienced by about half of the magistrate judges responding to the survey. Two situations—issuance of a preservation order and the parties' sharing of costs related to the form of production—had been experienced by about one-third of respondents.

Less than a quarter of responding magistrate judges reported having had experience with a case in which the efficiency of discovery was substantially increased as a result of the computer-based nature of the information. Because most of the questions on the questionnaire were answered only by magistrate

6. The percentages in this column add to more than 100% because each case can involve multiple issues.

judges who reported handling *disputes* related to computer-based discovery, however, this percentage most likely underestimates the frequency of cases in which computer-based discovery increases efficiency and raises no problems, or has no effect.⁷

B. Survey of Computer Consultants

The results of the consultant survey reported in this section are limited to the responses of the ten computer consultants who returned questionnaires with usable data.

1. Number of cases handled by consultants

The ten usable questionnaires indicated that the number of civil cases in which computer consultants were involved per year varied tremendously, from one to 400. The average was 85 cases per year. The wide range reflects the wide variety of consultants involved in this field, including individual computer investigators working alone or in very small firms, computer forensics and electronic discovery departments of large accounting and data management firms, and nationwide electronic discovery firms with multiple offices and scores of employees.

2. Types of cases in which computer forensics and electronic discovery consultants are involved

Computer-based discovery consultants are involved in many different types of federal civil cases. Their involvement is not confined to those types conventionally considered “big cases,” such as antitrust cases or employment class actions. The types of cases in which consultants reported the most frequent involvement correspond roughly to the types of cases in which the magistrate judges most frequently reported disputes, although we cannot draw any cause-and-effect inferences. The presence of disputes could create the need for consultants, or the hiring of consultants could produce disputes (or a third factor could affect both the use of consultants and the presence of disputes).

In our survey, we asked the consultants to report how many federal cases of various case types they worked on in the past two years. As we did with the magistrate judge survey, we then calculated the number of consultants reporting at least one case of each case type and the percentage of all reported cases represented by each case type. Some of the respondents did not provide a number, but simply checked off the case type. We counted those responses as “1” for tabulation purposes. Table 3 displays the case types and frequencies reported by consultants.

7. Magistrate judges who reported having no cases with disputes concerning this type of discovery were directed to skip the remaining questions on the questionnaire.

Table 3. Frequency of case types involving computer-based discovery (CBD) issues, as reported by computer forensics and electronic discovery consultants

Case type	Number of consultants reporting at least one case of this case type that raised CBD issues (N = 10)	Percentage of all cases reported by consultants as having raised CBD issues (N = 191)
General commercial litigation	6	31
Securities litigation	6	18
Patent or copyright	6	17
Employment—individual plaintiff	5	18
Antitrust	4	6
Products liability	4	4
Other ⁸	4	3
Construction litigation	3	2
Employment—class action	2	2

Although it is difficult to make direct comparisons between the results of the two surveys, most of the case-type frequencies reported by consultants are roughly similar to those reported by the magistrate judges in Table 1. The consultants reported a higher percentage of cases in the securities and antitrust areas than the judges did. Because of the low number of respondents to the consultant survey, however, this could represent an unusually high level of involvement of one or two consultants in these types of cases rather than a more general pattern.

3. Types of computer-based discovery issues encountered by consultants

We asked the consultants to report how often they encountered particular issues relating to computer-based discovery in the federal cases in which they were involved. We then calculated the number of consultants with at least one case with each issue and the percentage of cases overall in which each issue was raised. The results are displayed in Table 4. Again, when respondents simply checked off an issue instead of reporting a frequency, we counted that response as “1” for tabulation purposes.

8. This category comprises civil cases involving computer hacking, child pornography, and counterfeiting.

Table 4. Frequency of computer-based discovery (CBD) issues reported by computer forensics and electronic discovery consultants

Issue	Number of consultants reporting at least one case with this issue (N = 10)	Percentage of total CBD cases reported involving this issue (N = 191) ⁹
An effort by one party to limit or prevent deletion of e-mail or other computer-based information by another party, pending discovery	9	79
A demand for on-site inspection of a party's computer system by an opposing party	9	48
An offer or demand to share costs required to locate and retrieve computerized information	9	41
Alleged spoliation	9	27
An ex parte order from the court forbidding deletion of e-mail or other computerized information by the other party, pending discovery	7	14
An offer or demand to share costs of production	6	13
A request that the court impose sanctions on a party for alleged misconduct in discovery of computerized information	6	9
An order from the court requiring that the party seeking production of computer data pay all or part of the costs of production	5	16
Problems regarding the inadvertent disclosure or production of privileged computerized information	5	12

9. As in Table 2, the percentages in this column add to more than 100% because cases can involve multiple issues.

Because of differences in the wording of the two surveys, the list of issues presented in Table 4 differs from the list of issues presented in the survey of magistrate judges and reported in Table 2. Direct comparison of these two sets of results is therefore difficult. Still, some comparisons can be made that point to common elements in both sets of results. For example, the consultants and the magistrate judges both reported a relatively high frequency of three issues or activities: on-site inspection, efforts to share computer-based discovery costs, and allegations of spoliation.

The issue most frequently encountered by consultants, occurring in 79% of the cases in which they worked, was an effort by one party to require another party to preserve computer-based information (such as e-mail) pending discovery. Magistrate judges were not asked about this specific issue, but consultants and magistrate judges reported similar percentages for cases in which a preservation *order* was issued (10% of magistrate judges' cases with computer-based discovery; 14% of consultants' cases).¹⁰

We also asked the consultants to add any computer-based discovery issues they had encountered that were not specifically listed. Problems identified by consultants that were not specifically mentioned in the list include the following:

- difficulty acquiring data from obsolete systems;
- late hiring of consultants, minimizing the time for their analysis of computerized information;
- inadvertent destruction of evidence owing to parties' lack of understanding of computer systems;
- discovery produced on defective computer media or in a form that cannot be read by the opposing party; and
- other problems related to clients' lack of understanding of computer system functioning.

VI. Case-Study Results

For the ten case studies, we reviewed the dockets and the specific filings that appeared to be most relevant to computer-based discovery. We also attempted to interview the attorneys on each side and the judge or judges who oversaw discovery in each case, although in a limited number of instances attorneys declined to be interviewed.

In this section, we summarize the data from the case studies, focusing specifically on participants' views of the existing Civil Rules as they apply to computer-based discovery; participants' suggestions for potential changes to the rules to accommodate this type of discovery; case-management techniques judges have used under the existing rules to manage computer-based discovery; the perceived need for greater education of attorneys and judges regarding computer-

10. At the request of the Subcommittee, the question for consultants asked about *ex parte* data preservation orders, whereas the magistrate judges were asked about all orders of this nature. Thus, consultants probably encountered data preservation orders more frequently overall.

technology issues relevant to discovery; and potential benefits of computer-based discovery. The detailed case studies follow this analysis.

A. Participants' Views of the Existing Civil Rules As They Apply to Computer-Based Discovery

Overall, seven of the ten judges interviewed for our case studies (nine magistrate judges and one district judge) believed no rule changes are necessary. Of the seventeen attorneys interviewed, twelve suggested that the rules be changed to address specifically computer-based discovery.

The cases reported were litigated between 1993 and 2000, when Rule 26(a) still allowed districts to opt out of its disclosure provisions and when Rule 26(f) contemplated that districts would exempt a limited set of cases by local rule from its provisions for a discovery conference before the initial pretrial conference. Several participants suggested that these provisions—which require early disclosure of information relevant to discovery, and an early plan for discovery—would have been useful in the case in which they were involved. Thus, one rule change thought to be useful for computer-based discovery has already been implemented.

Most judges and attorneys did not believe that the rules had a major effect on how the computer-based discovery issues in their case-study cases were handled or resolved, and did not believe that the existing rules caused problems for the case. In reaching this conclusion, several participants noted that the rules already cover computer-based discovery; as one magistrate judge said, “It’s pretty clear that documents in other forms are covered by the rules, and we don’t need a whole lot more detail than that.” Other participants said that the attorneys were able to work out the computer-based discovery questions on their own, without resort to the court and the rules. In addition, almost half of the participants believed that the problems they encountered in the case-study cases would have arisen even if the information sought were in hard-copy form: When asked about this specifically, five out of ten judges and eight out of seventeen attorneys said the discovery problems were not attributable to the computer-based nature of the evidence.

While some participants did suggest rule changes that might be useful to accommodate computer-based discovery (see the next section), others argued against changing the rules. For example, one attorney noted that the context in which computer-based discovery issues arise “varies so much that you need to do things on a case-by-case basis.” Another attorney said that changing the rules to address specifically this type of discovery would “add complication, increase costs, and send litigants to state court.” A third attorney said he thought “the rules need to be broad enough to allow for just about any kind of development that you can think of.” A magistrate judge said he believes that the courts need more experience with computer-based discovery before determining whether rule changes are necessary.

Overall, then, most participants in the case-study cases did not see the rules as having a major effect on those cases, and a few argued against any rule changes. Others had ideas for rule revisions that might help in future cases with

this type of discovery, based on both experience in the case-study cases and more general experience. These suggestions are discussed in the next section.

B. Participants' Suggestions for Potential Civil Rules Changes to Accommodate Computer-Based Discovery

Most participants acknowledged that they had not given a great deal of thought to how the rules might be changed to accommodate specifically computer-based discovery. In addition, a few participants seemed not to realize that the existing rules are intended to cover computer-based information in discovery. For example, one attorney suggested amending the definition of "document" to specifically include computer-based items and spelling out that e-mail and electronic documents are included under Rule 34. Several other participants, both attorneys and judges, noted vaguely that the rules should be changed to apply to computer-based discovery as well as traditional discovery. It was not clear from the context of their responses whether these participants were familiar with the fact that "other data compilations" is included in Rule 34(a)'s definition of "documents" and that the Committee notes clarify that computer data are intended to be covered by this rule.

Of those judges and attorneys who did suggest rule changes, most based their opinions regarding the need for such changes not only on the case-study case, but also on their more general experience with computer-based discovery. The following are their specific suggestions for rule changes and the number of participants who made each suggestion.

Form of production

- In suitable cases, requiring or allowing the court to order that all discovery be done in electronic form (two attorneys);
- Allowing a producing party to determine the form of production (one attorney).

Data preservation or spoliation

- Explicitly allowing judges to issue an early data preservation order requiring parties to "freeze" (but not necessarily produce) relevant data early in a lawsuit, pending later arguments about discoverability (two attorneys);
- Allowing a party who believes computerized information is being hidden by an opposing party to hire a computer expert to search for the information, and issuing sanctions if the information is found by the expert (one attorney).

Disclosure of computer information

- Specifying more explicitly that computer-based information should be included in Rule 26(a) disclosures (one magistrate judge, one attorney);
- Including computer-based discovery in Rule 26(f) plans and Rule 16 orders (two magistrate judges, two attorneys);

- Requiring a producing party to provide information about file nomenclature and organization of relevant computer files as part of its Rule 26(a) disclosures (one magistrate judge);
- Clarifying parties' obligations to review electronic documents for purposes of disclosure or discovery (e.g., what does "reasonably available" mean in the realm of electronic information?) (two attorneys).

Miscellaneous suggestions

- Providing more guidance for judges on how to handle privilege claims in the context of computer-based information, and on evaluating parties' claims regarding difficulties in extracting information from computer files (one magistrate judge);
- Allowing for appointment of a neutral discovery referee to conduct searches of parties' computer systems (one attorney);
- Allowing more depositions in lieu of Rule 34 discovery of computerized information (one attorney);
- Allowing an attorney who creates a database solely for his or her own purposes to not disclose the existence of the database to the other party (one attorney);
- Examining the rules with respect to e-mail, particularly when large amounts of e-mail must be retrieved from individual hard drives, and providing guidance about allocating related costs (one judge).

C. Case-Management Techniques Judges Used to Manage Computer-Based Discovery in Case-Study Cases

Working within the existing rules, the magistrate judges who handled computer-based discovery disputes in the case-study cases employed or suggested several interesting case-management strategies. These include the following, most of which they used in the case under study:

- Using a questionnaire to determine how many of a company's employees transmitted discoverable e-mail, and ordering that a "spot check" of the company's computer systems be conducted, which involved checking the computer systems of fifteen employees of the company to determine whether all relevant material had been produced in discovery;
- Holding a one-day computer "summit" with attorneys and computer experts for both sides, so that the judge could be educated about the technical problems and disputes and help the parties formulate a plan for completing the computer-based discovery;
- Holding regular telephone conferences with attorneys to keep on top of the discovery problems;

- In a case involving privilege claims relating to e-mail, ordering that the requesting party be provided with a printout of the “header” information from all e-mail messages (title and date of message, names of sender and recipient), so it could be sure all relevant, unprivileged e-mails were being produced;
- When an on-site inspection of a party’s computers was warranted, ordering that a mirror image of the hard drive be created, and the inspection be done on that image, to avoid inadvertent destruction of computer-based information that could be caused by the search itself.

D. Perceived Need for Further Education of Attorneys and Judges Regarding Computer-Technology Issues Relevant to Discovery

A number of participants said that further education of attorneys and judges regarding computer-based discovery issues would be more appropriate than rule changes. Two judges thought it would be useful for judges to have access to experts who were well versed in both computer and legal issues, whom they could consult when questions arose in an individual case.

Several attorneys noted that judges often do not understand computer-based evidence and how it is handled; for example, one attorney said, “Judges don’t realize that you can’t just produce all things electronically as easily as hard-copy documents, which leads to a lot of discussion about burden.” Another said, “The problem with electronic data is that you often get . . . judges . . . [who] don’t understand how the data is manipulated and where it comes from.” A third attorney commented that “there’s a bias among the courts in favor of paper; they distrust computer information.” He added, however, that “this will change as courts and attorneys get more comfortable with computers.”

In three cases, attorneys stated that the magistrate judge overseeing discovery did not fully understand the implications of the computerized nature of the evidence. One of these attorneys said, “The court didn’t understand that [my client] didn’t keep paper records,” and another said, “[The other side] put just enough computer language gibberish in their memorandum of law, so that the judge just threw his hands up. Judges don’t understand these computer issues.” A third attorney said, “The magistrate judge had a hard time understanding why [the defendant] couldn’t just print out the information. . . . [T]he courts have to understand that the systems are not designed to be printed out.”

Magistrate judges we interviewed also noted that computer issues are difficult for judges to understand thoroughly. As one magistrate judge said, “We [judges] are all busy, and can’t learn all of this [computer] stuff. When parties argue that something will be very expensive, or that something can’t be accessed, we can’t know if they’re telling the truth.” Similarly, another magistrate judge observed that, as “end users” of the technology, it is sometimes “hard [for judges] to know what can be extracted easily.” In response to similar concerns,

the Federal Judicial Center has been providing education on computer-based discovery to judges and others since 1999.¹¹

Finally, several magistrate judges noted that attorneys have different levels of sophistication regarding computers, and that a lack of knowledge on the part of an attorney might make it easier for the other side to hide computerized information or make it difficult for that attorney to know what to ask for with respect to computerized information.

E. Potential Benefits of Computer-Based Discovery

Several participants in our case-study interviews noted real or potential benefits of computerized information in the context of discovery. For example, in Case Study #1, the parties' exchange of information from computerized databases helped greatly in determining the class size. According to the magistrate judge and both attorneys we interviewed, the fact that this information was computerized was critical to the parties' ability to reach a settlement. Similarly, in Case Study #3, the magistrate judge observed that the fact that both companies had computerized records "allowed for a more efficient exchange of documents." And an attorney noted that "it's easier to deliver a CD or two than lots of hard-copy documents."

In Case Study #2, the magistrate judge said that the electronic nature of the evidence "made a massive case more manageable." He also believed that the jury's verdict in favor of the plaintiff was in part due to the electronic nature of the evidence, noting that if all the information had been in hard-copy form, "there would have been just too much paper for the jury to digest."

11. Center staff have made presentations and organized mock hearings on computer-based discovery at the Center's national workshops for district judges and for magistrate judges and at Center circuit workshops for district and circuit judges. We are also updating materials from Center educational programs, as well as sample discovery orders and an annotated bibliography, for publication on the FJC Web site. Center staff published an introductory article with a "Rule 16 Conference Checklist" in the *Federal Courts Law Review*, the on-line publication of the Federal Magistrate Judges Association. Staff members have made presentations at numerous educational programs sponsored by bar associations and other groups, and requests for such presentations continue.

F. Individual Case Studies

The following sections present detailed descriptions of each case for which we did a case study. Table 5 highlights particular issues involved in each case.

Table 5. Index of issues raised in case studies

Issue	Identification # of the case study in which the issue was raised or mentioned by the participant									
	1	2	3	4	5	6	7	8	9	10
Privilege/confidentiality/work product/privacy concerns	x		x	x		x	x		x	
Data preservation		x		x				x	x	x
Party-employed computer experts	x	x		x	x					
Problems with volume of computer-based evidence		x		x		x			x	x
Form-of-production issues			x					x	x	x
On-site inspection of computers					x		x	x		
Legacy problems (obsolete computer systems)		x								x
Costly data retrieval efforts		x		x	x					x
Cost sharing or shifting			x		x					x
Spoilation claims	x	x		x	x					
Judicial management of computer-based discovery		x	x			x				
Increased efficiency through use of computerized data	x	x	x					x		

1. Case Study #1

a. Summary of case

Case Study #1 was a class action involving consumers' allegations of fraud, under RICO and the Federal Debt Collection Practices Act, against a corporation that financed automobile loans. Smaller defendants settled early, leaving the lender. The case was extremely contentious and included multiple hearings on the computer-based discovery issues and several intermediate appeals, although it eventually settled.

b. Computer-based discovery issues

1. Access to attorney work product data; destruction of data in the ordinary course of business

The primary computer-based discovery dispute in this case centered on an electronic database maintained by the defendant's law firm. The database contained certain fields of information, relevant to the case, that had been extracted from hard-copy files about each loan (e.g., vehicle I.D. number, date of repossession). The plaintiffs filed a motion to compel production of this database. The defense attorney claimed that he had created the database for his own use in preparing the case, and not for use at trial, and therefore it should not have to be turned over to the plaintiffs, since the same information was available in hard-copy form.

The plaintiffs asserted that at least some of the information in the defendant's electronic database had been computerized before the litigation began, and therefore was not attorney work product. In support of their motion to compel discovery, they cited the defendant's response to an earlier request for the electronic data, in which the defendant said that producing the information requested would be too burdensome, as the defendant had been through at least three computer systems since the time the electronic data had begun being entered, and that much of the data had been destroyed in the ordinary course of business. At that time, the defendant had further argued that it would be a "Herculean" task to determine which specific information had and had not been deleted from the original databases on these various computer systems.

The plaintiffs argued that, despite the defendant's claim that the information could not be retrieved, the defendant was using the same data in a related case as evidence in support of a motion for summary judgment. The defendant admitted that some of the information *had* previously been computerized, but claimed that those computerized records had been destroyed in the ordinary course of business before litigation began and that the data used in the related case were from the database compiled from hard-copy files by the defendant's attorney. The plaintiffs disputed the claim that the information was no longer available in computerized form.

The magistrate judge handling discovery in the case ordered that the database created by the attorney be filed under seal for in camera inspection, and the judge subsequently denied the motion to compel discovery, finding that the da-

tabase fell within attorney work product. He apparently did not credit the plaintiffs' argument that the original electronic database was still in existence.

2. *Cost savings and efficiencies from using computer-based data to determine class size*

When the trial was scheduled, this case came before a different magistrate judge for a settlement conference. During this conference, the judge determined that "a major problem prohibiting settlement of this matter is the inability of either side to discuss, with clarity, the precise size of the class." At this point, both parties had developed electronic databases concerning various loan transactions from the hard-copy files maintained by the defendant. The settlement judge ordered the parties to share specific data from these databases that were relevant to determining class size. With the exchange of these data, the parties were able to identify several hundred claimants about whom there was no dispute in terms of their entitlement to compensation, as well as a number of claims for which more evidence was needed.

3. *Cost and usefulness of party-employed computer experts*

When the motion to compel production of the defendant's attorney's electronic database was denied, the plaintiffs hired accounting experts to create electronic databases using information extracted from the hard-copy files. According to the plaintiffs' attorney, they spent \$100,000 for this work, most likely increasing the cost of discovery by "a factor of 8 to 10." The defendant also hired a computer consultant, who reviewed the database created by the plaintiffs to determine "whether there were any problems with how that database was put together." Both sides reported that, although the use of experts and consultants increased the cost of discovery significantly, the cost was justified by the assistance the experts and consultants provided.

c. *General observations by participants*

1. *Magistrate judge who handled discovery disputes*

The magistrate judge who handled discovery in this case and denied the plaintiffs' motion to compel discovery said that "there was nothing about the fact that the discovery was in computer form that affected my decisions, [though] that's not to say counsel weren't motivated by that."

2. *Magistrate judge who handled settlement*

The magistrate judge who held the settlement conference in this case and ordered the parties to exchange electronic data to determine class size said that "the case could not have settled if the information was not available in computerized form," and that the computer-based nature of the evidence "facilitated [the parties'] ability to deal with the claims." In a situation like this, he indicated, computerized discovery is "a means for attorneys to save a lot of time."

3. *Plaintiffs' attorney*

Work product and preservation of data. The plaintiffs' attorney did not believe the defendant's claim that the electronic database that previously contained the

information fields the plaintiffs were interested in no longer existed and had been destroyed in the ordinary course of business prior to the litigation. He observed that “the ‘defense du jour’ is to say the computerized information no longer exists,” adding that “it’s very hard to disprove a claim that information doesn’t exist in electronic form.”¹² This attorney also believed that the magistrate judge who oversaw discovery did not completely understand the computer issues in the case and that his failure to understand the issues led to his denial of the plaintiffs’ motion to compel discovery. He said, “They put just enough computer language gibberish in their memorandum of law, so that the judge just threw his hands up. Judges don’t understand these computer issues.”

Use of computer-based data to determine class size. With respect to the electronic data exchanged during settlement negotiations, the plaintiffs’ attorney said that the computerized nature of the evidence “absolutely” had an effect on the ability to settle the case. He said, “We couldn’t try to settle without information from the database.”

4. Defendant’s attorney

Work product and preservation of data. At the hearing on the motion to compel discovery, the defendant’s attorney argued that the contents of his electronic database were analogous to notes taken by an attorney on a yellow legal pad while reviewing hard-copy files. When interviewed, he acknowledged that one difference between these two types of data would be the extent to which they could be searched.

The defendant’s attorney believed that he should not have had to disclose the existence of the electronic database he created, since he had no plans to use it at trial. He had “erred on the side of disclosing its existence,” but resented that he had to do this, as he believed the database was attorney work product. As he described it, even though the contents of the database were not ordered to be disclosed, “[t]he plaintiffs very effectively used [the existence of] that database as a touchstone for the theme that we were hiding things.”

Use of electronic data to determine class size. Regarding the use of electronic data to determine class size, the defendant’s attorney agreed that these data were “absolutely” critical to settlement of the case. He said, “[They] enabled us to determine with clarity that there were very few people actually in the class. This substantially affected settlement.”

d. Role of Civil Rules

Both of the attorneys interviewed, but neither of the magistrate judges, believed that modifications to the rules would have helped in this case.

1. Plaintiffs’ attorney

The plaintiffs’ attorney believed that the rules should contemplate that a party who is told that electronic records can’t be retrieved should be able to hire computer experts—by rule—and “go into the [other party’s] computer opera-

12. The same could be said of hard-copy data, but the attorney did not comment on whether one type of claim was more difficult to prove than the other.

tions.” If the party finds the data that were claimed to be unavailable, the judge should issue sanctions against the other party, including paying the costs of the requesting party’s computer consultants. He did not specify how he believed such a rule change should be implemented.

2. Defendant’s attorney

The defendant’s attorney, who created the electronic database at issue in this case, believed that the rules should provide that an attorney who prepares a database for his or her own purposes (and not for use at trial) should not have to disclose its existence.

3. Magistrate judge who oversaw settlement

The magistrate judge who oversaw settlement said that the current discovery rules were adequate in terms of allowing him to order the exchange of electronic information to determine class size. He does not see a need for rule changes to accommodate these situations, even if the computerized nature of the evidence clearly plays a large role in settling the case.

2. Case Study #2

a. Summary of case

Case Study #2 was an antitrust case in which the plaintiffs, a group of independent boat builders, accused the defendant, a marine engine manufacturer, of monopolizing the market for certain boat engines, engaging in unreasonable restraint of trade, and substantially reducing competition in the engine market. Because of the nature of the suit, many documents were filed under seal in order to preserve the confidentiality of company business plans. After three years of discovery, the case went to trial, and the jury ruled in favor of the plaintiffs. The judgment was overturned on appeal, however, by the appeals court on issues unrelated to the subject of discovery. No further action was taken.

b. Computer-based discovery issues

1. Volume of e-mail requested; legacy issues; spoliation

The majority of the computer-based discovery disputes in this case centered around the scope of discovery and primarily focused on e-mail. In response to the plaintiffs’ motion to compel production of all e-mail files, including current ones and backups, the magistrate judge proposed a questionnaire to determine how many of the defendant’s employees transmitted discoverable information via e-mail. The magistrate judge ordered those employees who responded “yes” or “maybe” on the questionnaire to retain all e-mail.

While the e-mail questionnaire was being constructed and completed, the magistrate judge ordered a spot check of the computer systems of fifteen of the defendant’s employees to determine whether the defendant had provided the plaintiffs with all the relevant electronic materials. The spot check encompassed all of the computer files (including sent and received e-mail) of the named employees, excluding only the privileged matter (the defendant was permitted to screen all materials for privileged matter and maintain a privilege log). As a re-

sult of this spot check, several business-related e-mails were found, leading the plaintiffs to claim that the defendant had withheld and destroyed relevant e-mails during the original document sweep; the plaintiffs asked for a spoliation instruction for the jury. The defendant countered by stating that its company had switched from one e-mail system (Fisher) to another (Lotus Notes) while discovery was taking place. Because the new e-mail system was easier to operate, it was used for business-related communication, whereas the previous e-mail system had not been. It was those Lotus Notes e-mails that were uncovered in the spot check, and the defendant claimed there was no evidence that the missing Fisher e-mails had contained business-related information.

The district court judge ruled that, although it seemed likely that many things on the defendant's Fisher e-mail system had been destroyed, those e-mails were unlikely to be highly significant because the system was more cumbersome than its replacement and therefore was rarely used for business-related e-mail. The request for a spoliation jury instruction was denied, as the judge ruled that the deletion of e-mail "was not the result of an intentional or bad faith effort to destroy evidence," and that "even if the deleted e-mails were relevant to the Plaintiffs' case, Plaintiffs have not suffered the requisite prejudice necessary for the giving of an adverse inference instruction." Further e-mail discovery was permitted on a limited basis—the defendant was ordered to search the existing system for responsive e-mails, but was not required to restore backup tapes to search for deleted Fisher e-mails.

2. *Preservation of data in the ordinary course of business; costly data retrieval efforts*

In response to the plaintiffs' motion to compel production of electronically stored information, the magistrate judge ordered the defendant not to destroy electronically stored materials. After the defendant argued that preserving every piece of electronic information constituted an undue burden, the magistrate judge narrowed the preservation order, permitting the "destruction of irrelevant material or materials whose cost of preservation substantially outweighs their relevance." The defendant was ordered to file a list of categories of materials it wished to destroy, and the other side was given eleven days to file any objections. The plaintiffs also requested that the defendant restore and produce all deleted and destroyed documents from the past five years; this motion was denied by the magistrate judge.

3. *Role of the court in managing discovery*

The magistrate judge played an active role in managing the discovery. Although he became involved in the case relatively late, he educated himself about the computer issues involved and held a one-day computer "summit" involving both sides' attorneys and computer experts. During the summit the parties explained what they wanted from discovery and the technical problems involved in answering the discovery requests. The summit resulted in the formulation of a general plan for conducting further computer-based discovery. Thereafter, the lawyers from both sides and the magistrate judge held regular telephone conferences to resolve discovery issues.

4. *Cost and usefulness of party-employed computer experts*

The plaintiffs brought in outside computer experts to help frame their discovery by providing guidance about what materials to request from the defendant. A separate expert in computer forensics was also brought in by the plaintiffs at trial to testify about the discovery disputes regarding computer data. The expert planned to testify that the defendant had deleted relevant e-mail and that a search of the old e-mail system should have been done earlier, thereby preventing the destruction of potentially relevant messages. The defendant objected to the use of the plaintiffs' expert in testifying at trial about matters relating to discovery and brought in its own outside expert to rebut the plaintiffs'. The district judge denied the defendant's motion to strike the plaintiffs' expert, but forbade the expert from talking about the destruction of e-mail without making it relevant to the substantive issues in the case.

c. *General observations by participants*

1. *Magistrate judge*

The magistrate judge who handled discovery thought that the use of computer-based information was "a double-edged sword" in this case. He said that, on the one hand, the electronic discovery made a massive case more manageable, and "the plaintiffs got more information and a jury verdict, which they probably wouldn't have done in the paper days. There would have just been too much paper for the jury to digest." On the other hand, difficulties arose because some of the computer-based information "was not as well organized as it might have been."

Alleged spoliation. According to the magistrate judge, alleged spoliation of computer-based information was a "big problem" with regard to e-mail, largely because of the defendant's change in e-mail systems. As he stated, the defendant "allegedly destroyed vitally important e-mails. They had changed their e-mail systems around this same time and maintained that they had preserved the relevant e-mail. A spot check proved inconclusive, and the plaintiffs were not able to demonstrate that the missing information would have been discoverable."

Role of the court in managing discovery. The magistrate judge stressed the importance of early disclosure by the parties and early intervention by the court. He reported that in a subsequent case involving computer-based discovery, he took a lesson from this case, got involved much earlier, and "managed the dickens out of it."

2. *Plaintiffs' attorneys*

Two plaintiffs' attorneys were interviewed regarding this case. The two had similar opinions about the computer-based discovery issues.

Alleged spoliation. One attorney said that obtaining potentially deleted e-mails from the Fisher system was a "serious problem that was never really resolved." He stated that, despite the defendant's claim that the Fisher system was not used to conduct business, "we got at hundreds of relevant e-mail," that had been printed out, "but not enough." The e-mail issue highlighted one of the differences between computer-based discovery and traditional paper-based discovery.

As one attorney noted, “[W]hen it is electronic information [you are asking for], one side can come up with all sorts of reasons why they cannot provide that information, and the courts will listen to that argument. Once you get past that issue, however, the disputes that arise apply to both computer-based and hard-copy documents.”

Role of the court in managing discovery. Both attorneys praised the magistrate judge’s handling of discovery, stating that the weekly conferences to “hash out a lot of the problems” were “very useful.” One attorney said the magistrate judge was “really excellent” and did an admirable job of understanding what the computer issues were.

Cost and usefulness of computer experts. The plaintiffs’ attorneys relied on outside consultants to help them frame discovery. The attorneys said that the consultants helped them determine “what to ask for and how to define it, how to understand whether the responses we got from the defendant were excuses or real reasons, and how to ‘unlock’ electronic discovery.” Although the outside consultants were expensive, both attorneys agreed that they were “definitely” worth the money and “probably didn’t add significantly to the overall cost” of the case. The attorneys said that in-house consultants were also used, but on a smaller scale and in a more limited capacity, “primarily helping to find purchase records” on personal computers.

3. Defendant’s attorney

Alleged spoliation. The defendant’s attorney believed that the plaintiffs relied disproportionately on computer-based discovery. Instead of using it to obtain all relevant information, he believed the plaintiffs, “used electronic discovery to highlight e-mail that was not produced and to make an issue of that.” In his opinion, the expense and burden of discovery was disproportionate to its relevance; he claimed that the plaintiffs’ strategy was to make the case one of spoliation, rather than a case on the merits. Part of the problem regarding the e-mail issue was the relative recency of e-mail as a means of communicating. The defendant’s attorney acknowledged that, “now it’s routine to look for e-mail, but it wasn’t then.”

Role of the court in managing discovery. With regard to the court’s role in managing discovery, the defendant’s attorney believed that while the weekly telephone conferences solved many problems before they became overwhelming, the availability of a forum for discovery disputes may have increased the number of disputes. He said, “I think many things became issues because we had this ready forum, and without that forum, those things wouldn’t even have come up.”

Cost and usefulness of computer experts. The defendant used in-house computer consultants to determine “factual information,” such as what data were on the computers, how backups were made and where they were stored, and how to resolve format issues. The defendant’s attorney said that these in-house consultants were “definitely worth” their minimal cost and were more useful than the outside consultant hired to rebut the plaintiffs’ expert.

d. Role of Civil Rules

The district in which this case was handled was an opt-out district at the time, and no Rule 26(f) discovery plan was filed. Most participants (magistrate judge, defendant's attorney, one plaintiff's attorney) believed that a Rule 26(f) plan would have been beneficial in this case, and would have forced the parties and the court to think about discovery issues sooner.¹³ Although the magistrate judge's handling of the discovery prompted the parties to consider these issues to some extent, a more formal rule may have gone farther.

1. Magistrate judge

The magistrate judge recommended that the Civil Rules be changed to account "specifically for the discovery of computer-based information," though he did not specify how such a change could be made. He also believed that a Rule 26(f) plan would "absolutely" have helped in this case. He said, "The case would have been ready earlier. It would have forced both parties to exchange information about computer systems earlier. As it was, neither side had a good grasp of what was there and how to get at it."

2. Plaintiffs' attorneys

The two plaintiffs' attorneys had differing views on the role of the Civil Rules. One attorney thought that having a Rule 26(f) plan covering computer-based discovery would have helped in this particular case by getting the court and the parties to think about these things "before disputes arise." He also thought that the Civil Rules governing discovery did not need to be changed to accommodate computer-based discovery because "the context varies so much that you really have to do things ad hoc," on a case-by-case basis. In his opinion, educating district judges and magistrate judges to take a more active role is far more important.

The other plaintiffs' attorney took the opposite viewpoint, indicating that a Rule 26(f) plan would have been useless because "everyone skirts it." However, he did advocate altering the Civil Rules to "amend the definition of 'document' to specifically include computer-based items" and to spell out that "requests of e-mail and electronic documents" are included under Rule 34.¹⁴

3. Defendant's attorney

Although the defendant's attorney indicated that a Rule 26(f) plan might have helped in this case, he also acknowledged, "[W]e had the equivalent of a plan with the judge's oversight, and it probably would have been contentious regardless of whether there was a rule." With regard to changing the Civil Rules, he observed, "[W]e would have benefited from a principle limiting what the

13. Rule 26(f) no longer allows for exemption of cases by local rule, so if the case were filed now, a Rule 26(f) plan would be required.

14. Although "e-mail and electronic documents" are not specifically mentioned in Rule 34(a)'s definition of documents, the phrase "other data compilations" encompasses electronic data compilations, as clarified in the Committee Notes to the 1970 amendments to that section.

plaintiffs could ask for," but he acknowledged the difficulty of imposing limitations before knowing what is available.

3. Case Study #3

a. Summary of case

Case Study #3 was a patent infringement case in which a computer manufacturing corporation claimed that the defendant computer corporation's widely sold computer system violated several of its patents. Five years after the suit was filed, the plaintiff corporation was bought by another computer corporation, and the case eventually settled a year later. Although neither side admitted fault, the defendant paid the plaintiff an undisclosed sum, and both sides agreed on a five-year moratorium on patent suits.

An examination of the docket indicated that most of the discovery disputes revolved around the scope of discovery. Specifically, the plaintiff requested documents regarding one of the defendant's computer systems, but the defendant claimed that the system had been announced publicly after the date the suit was filed and was therefore not included in the discovery. The magistrate judge denied the plaintiff's motion to compel discovery and denied the subsequent request for reconsideration.

b. Computer-based discovery issues

1. Form of production

The type of information sought during discovery led to disputes regarding the form of production. Much of the information regarding systems design needed during discovery was stored in large on-line databases. The plaintiff requested drawings of the defendant's relevant projects, but the defendant had no paper designs to provide, since its engineers did all of their work on line. According to the defendant's attorney, "nothing was designed to be printed or downloaded onto a user-friendly file." The defendant eventually produced electronic files in a format the plaintiff could access, but the files were so large that a dedicated server was required.

Both sides also produced e-mails in both hard-copy and electronic form; neither side indicated that this was particularly problematic.

2. Privilege; confidentiality

Because the defendant's engineers created and modified their designs on line, many of the designs contained privileged information in the form of engineers' notes. At the beginning of the discovery process, the magistrate judge issued an order establishing which document imaging and database services would deal with confidential documents for both sides, and how those services would treat the confidential documents.

Additionally, a protective order issued in the case covered inadvertent production of privileged information, providing that such production did not constitute a waiver of privilege.

c. General observations by participants

1. Magistrate judge

The magistrate judge firmly believed that the types of problems that arose were not specific to electronic discovery. He said, overall, “the problems weren’t electronic—they were the same things we’d see in non-computer-based discovery . . . and my approach was the same as it would have been in paper-based cases.”

He did note, however, that “there were fewer problems because [discovery] was computer-based.” The fact that both parties were computer companies meant that they had computerized records, which allowed for a more efficient exchange of documents. He hypothesized that “having all those documents electronically stored and retrievable, allowing immediate access, may have helped to settle the case.”

Form of production; shifting of costs. There were, however, a few problems arising from form of production. The magistrate judge indicated that he “had to intervene a few times” to resolve issues when “electronic stuff had to be printed out and paper things had to be scanned.” Additionally, one request from the defendant necessitated the plaintiff’s changing the format of the data before the defendant could access it. The process was costly, and the magistrate judge said that he required the defendant to pay the costs, since the defendant requested the information.

Privilege; confidentiality. Because of the nature of the case, there were many privileged documents involved. The magistrate judge issued orders to deal with problems as they arose, but he thought that he would have done the same even if the discovery were completely paper-based. He said, “There were some questions about confidential and highly confidential documents, but they were the same issues that would have arisen with paper-based discovery.”

2. Plaintiff’s attorney

Form of production. In general, the plaintiff’s attorney did not have many complaints about the computer-based nature of discovery in this case, but thought that having discovery items in different forms was “the most difficult problem . . . you can’t deal with discovery if half of it is in hard copy and half is in computer-based form.” To remedy this, the plaintiff expended time and money to make sure that everything was in electronic form, but the plaintiff’s attorney was still wary about the process, saying “it was not so reliable that you could treat electronic discovery the same as you would paper discovery, because you knew at the back of your mind that there were always things that were not in the database.” He cautioned, however, that the size of the case permitted him to devote more resources to the discovery phase than usual; he said, “we couldn’t normally do electronic discovery in such detail.”

3. Defendant’s attorney

Form of production. Like the plaintiff’s attorney, the defendant’s attorney identified form of production as the biggest problem associated with discovery, although for a different reason. Much of the information that the plaintiff re-

requested from the defendant was “in huge databases” that “were not designed to do what [the plaintiff] wanted them to do.” Even supplying hard copies of this information was difficult, as there were many steps involved before the data could be printed out. The defendant encountered problems with the magistrate judge with regard to this issue. The defendant’s attorney said, “[T]he magistrate judge had a hard time understanding why [the defendant] couldn’t just print out the information . . . the courts have to understand that the systems are not designed to be printed out and were not designed for litigation.”

Privilege; confidentiality. Confidentiality was another issue that the defendant’s attorney had to address. When the magistrate judge wanted to give the plaintiff permission to search through the defendant’s systems, the defendant’s attorney objected, saying “there are all sorts of trade secrets and privileged information [the plaintiff] could access, and [the defendant] would never allow it.”

d. Role of Civil Rules

The participants had different opinions about the role of the Civil Rules with regard to this case. Although there was no formal Rule 26(f) discovery plan, the magistrate judge reported that both parties “worked out the protocol among themselves for producing documents, and I intervened when there were any disagreements.” This discovery plan did, according to the defendant’s attorney, “vaguely cover computer-based discovery” in the sense that the parties worked out the protocol for electronic discovery issues.

1. Magistrate judge

The magistrate judge reported that, because of the volume of information involved, he played an active role in implementing the discovery plan formulated by the parties and intervened in times of disagreement. He had frequent meetings to keep on top of “any potentially delaying problems,” which resulted in the parties’ attempting to work things out among themselves and avoid appearing before him. He did not believe that the current provisions of the Civil Rules had any effect on how computer-based discovery issues were handled in this case, and he did not think that the rules needed to be changed to accommodate computer-based discovery.

2. Plaintiff’s attorney

Like the magistrate judge, the plaintiff’s attorney believed the current provisions of the Civil Rules neither helped nor hindered the way computer-based discovery issues in this particular case were handled. However, he did believe that the rules should be altered to take the form of production into account. He said, “The most important thing to include in the rule is that the court can require that all discovery should be electronic for cases that are suited for it. . . . It would make things more reliable, and the parties could be more confident that they had a complete set of discovery in electronic form.”

3. Defendant’s attorney

The defendant’s attorney also believed that the Civil Rules should be changed to acknowledge form of production, but in a different way. The rules, he

stated, “should allow the producing party the option of saying what form the information will be produced in, either hard-copy or electronic.” He said that even a “draconian” rule would be helpful to the parties and the judge, because “at least you’d know what you were dealing with. In my experience, judges want something firm to look at.”

4. Case Study #4

a. Summary of case

Case Study #4 was a class action securities case in which the plaintiff shareholders claimed that the defendant computer software manufacturer misled investors and portrayed the company’s financial health as falsely optimistic. Executives of the software company allegedly used non-public information to sell off millions of dollars’ worth of shares, at artificially inflated prices, before the stock began to slide. Shortly after this case was filed in the district court, the Securities and Exchange Commission (SEC) began a parallel investigation into the company’s financial practices. A large part of discovery centered around e-mails exchanged within the company with regard to the preparation of financial statements. The case settled during the discovery phase.

b. Computer-based discovery issues

1. Volume and retrieval of e-mail messages

The primary discovery dispute concerned the volume of e-mail requested by the plaintiffs and the manner in which that e-mail was retrieved from backup tapes of the defendant’s computer system. The parties settled on a complex system that allowed the plaintiffs to review e-mail messages while still protecting the defendant’s privileged documents. The backup tapes containing the e-mail were sent to the plaintiffs’ outside computer consultant, who created a program that printed out the header information from the e-mails. The defendant was given copies of the header information and the actual e-mail messages, and the plaintiffs were given only the printout with the header information. The defendant then produced all of the relevant e-mails, and the plaintiffs used the header information to ensure that everything they requested was being produced.

2. Preservation or spoliation of information on hard drives

In addition to e-mail correspondence, the plaintiffs requested the production of relevant documents from the hard drives of individuals at the defendant’s workplace. Because the defendant’s practice was to wipe clean the hard drives of employees who had left the company, some information was lost. The court had earlier issued a preservation order targeted at that practice, but the defendant argued that the company could not be expected to “freeze” its business by maintaining all the hard drives of people who were no longer in its employ. The magistrate judge sanctioned the defendant for violating the court’s order, and ordered the defendant to pay \$5,000 to the court for failure to obey the order and \$10,000 to the plaintiffs for attorney fees.

3. *Privilege; confidentiality*

Toward the end of the discovery phase, the plaintiffs filed a motion to compel production of e-mail documents that the defendant had listed on its privilege log. Citing the court's previous order that routine distribution of documents to an attorney "does not automatically qualify the documents for protection," the plaintiffs alleged that the e-mail documents were only on the privilege log because carbon copies had been e-mailed to the defendant's general counsel. The magistrate judge ordered that the documents in question be provided to him in camera. After reviewing them, the judge ruled that they were communications for the purposes of obtaining legal advice, and thus did fall under his definition of privileged attorney-client communication.

4. *Use of party-employed experts*

The plaintiffs hired a computer consulting firm to download responsive e-mails from the backup tapes of the defendant's computer system and to provide printouts of the header information to the plaintiffs as a way of ensuring that all responsive documents were produced. According to the plaintiffs' attorney, the process "was very expensive and time-consuming." He did, however, indicate that the cost of using the consultants was justified by the assistance they gave.

The defendant, a computer software company, did not hire outside experts to help with computer-based discovery, but instead relied on in-house computer technicians to help them "figure out options for how to go about getting [responsive] e-mails." The in-house experts were used only at the beginning of the discovery phase; according to the defendant's attorney, as soon as the plaintiffs brought in their computer consulting firm, "they pretty much took over." The defendant's attorney estimated that the use of in-house computer experts did not add significantly to the cost of discovery, but cautioned that "it's hard to quantify cost because they were all in-house."

c. *General observations by participants*

All of the participants indicated that the discovery problems in this case were largely due to the computer-based nature of the information.

1. *Magistrate judge*

Volume and retrieval of e-mail messages. The judge recalled that the volume of e-mail requested was the primary focus of discovery disputes. He said, "it was a fairly broad-ranging request." Because most of the disputed information was "electronically stored and backed up on software that made it not readily accessible at the time of the request," disputes arose over how the information should be accessed. He summarized the discovery problems by saying, "the problem was the e-mail, and it was tough to figure out how to retrieve it and how to make it available to both sides." He said that the plaintiffs bore the greater share of the costs—"not the attorney time costs, but the costs of reducing the pile of data to something more manageable."

2. Plaintiffs' attorney

Volume and retrieval of e-mail messages. Like the magistrate judge, the plaintiffs' attorney identified the sheer volume of e-mail as one of the key problems that arose during discovery. He said, "There was so much e-mail out there, it became a big problem to figure out how to go through it all." Looking back on the case, he would not recommend the process they used to obtain the defendant's e-mail, saying it was "too convoluted."

For the plaintiffs' attorney, the problem of volume of electronic documents was not a new one. He has been involved in many computer-based discovery cases, and he said, "many judges treat computer-based discovery like they would hard-copy discovery . . . but I disagree with that. Judges don't realize that you can't just produce all things electronically as easily as hard-copy documents, which leads to lots of discussions about burden."

Maintenance of information on hard drives. The other issue noted by the plaintiffs' attorney was the missing hard-drive information. He said, "Information on individuals' hard drives is just like hard-copy documents, but companies don't see it that way . . . when a person leaves a job, the computer is wiped clean, whereas paper document files would not be destroyed." In his experience, "information stored on computers is not maintained."

Privilege; confidentiality. Privilege was a concern for both sides with regard to the e-mail messages produced. According to the plaintiffs' attorney, "the issue was how the defendant's e-mail would be produced to use and still protect privilege." Once it had been decided that the outside consultant would provide the header information, the plaintiffs' attorney said there were no problems regarding privilege waiver when the computerized information was produced.

3. Defendant's attorney

Volume and retrieval of e-mail messages. Like the others involved in this case, the defendant's attorney identified the volume of e-mail messages as the primary discovery problem. As she recalled, "there was a large amount of e-mail that was potentially responsive, and the question was, given the volume, how to review and produce that e-mail." She noted that volume was one of the defining characteristics of cases involving computer-based discovery; she said, "you would never have that much information in hard-copy form."

Privilege; confidentiality. The defendant's attorney believes that privilege is always a concern when dealing with large volumes of e-mail. She said, "One way to deal with all the e-mail is to give the other side a dump of all of it, but that raises all sorts of questions of privilege." She said that the manner in which the e-mail messages were screened for this case was effective, and that privilege "wasn't a big problem in this case."

d. Role of Civil Rules

The district in which this case was handled was an opt-out district at the time, and no Rule 26(f) discovery plan was filed. The plaintiffs' attorney suggested that having such a plan would have been beneficial and would have helped "spell things out more clearly," although the defendant's attorney cautioned that the

plan's effectiveness would "depend on how assertive the judge was in enforcing it."

Both the magistrate judge and the plaintiffs' attorney agreed that the explicit inclusion of electronic media in the Civil Rules' definition of "document" was beneficial in this case. As the magistrate judge stated, it is "pretty clear that documents in other forms are covered by the rules, and we don't need a whole lot more detail than that."

The sheer volume of documents available in electronic form raised concerns for attorneys for both sides. The defendant's attorney mentioned that the current provisions of the rules "presume that you will review everything, and in this day, that's just not feasible. There's simply too much information." In her opinion, the rules "need to provide guidelines about parties' obligations to review documents." The plaintiffs' attorney suggested that the rules "should be modified to address volume" of e-mail, in particular. He said that e-mail is so prevalent that "even a small company can have one million e-mails, but that shouldn't relieve [it] of the necessity of producing discovery."

Although the magistrate judge did not see the need for any specific changes to the Civil Rules, he did suggest that a "compendium of what other judges do in situations regarding computer-based discovery" would be quite helpful to him.

5. Case Study #5

a. Summary of case

Case Study #5 was an unfair trade practices case in which the defendant, a large retail chain, was accused of the unauthorized sale of clothing items bearing the trademark of the plaintiff, a clothing manufacturer. Several other manufacturers had joined with the plaintiff in the suit, but agreed to a settlement with the defendant toward the end of discovery, leaving only one manufacturer as a plaintiff. Early in the discovery process, the plaintiffs requested computerized sales records from the defendant, which the defendant's attorney said were no longer available. After almost a year, during which the plaintiffs sought the information in other ways, it was revealed that the records had been available at the time of the original request, but had been routinely destroyed in the interim. The defendant was sanctioned by the court for misleading the plaintiffs about its computer capacity and was ordered to pay the plaintiffs' attorney fees and expenses related to obtaining the computerized sales information. The defendant paid a total of \$109,753.81 to the plaintiffs.

b. Computer-based discovery issues

1. Spoliation of data in the normal course of business

The primary discovery dispute in this case involved the destruction of computerized sales records. At the beginning of the discovery process, the plaintiffs requested that the defendant produce local sales information for the past year to determine whether trademarked goods were being sold in the defendant's stores. Based on information provided by one of the defendant's executives, the defendant's attorney told the court that such records had been routinely destroyed, and only five weeks' worth of sales data could be produced. The plaintiffs then

attempted to obtain the sales information in other ways, including requesting a physical search of existing paper documentation relating to the goods at issue in the case. Over a year into the discovery process, the defendant's attorney reported that, contrary to what he had originally told the court, "some sales information may be available." Ensuing depositions with executives at the defendant's company showed that although the sales information requested by the plaintiffs had been available at the time of the original request, it was no longer available, having been destroyed during the normal course of business in the intervening year. A review of court records indicates that no specific data preservation order was in place at the time the computer records were destroyed.

2. Party-employed computer experts; on-site inspection of computers

After being told that the requested sales information was no longer on the defendant's computer system, the plaintiffs hired a computer expert to determine whether the destroyed records could be retrieved. In an attempt to prevent the expert's on-site search of its system, the defendant offered to provide an employee to testify to the contents of the computer system. This motion was denied by the court, and the plaintiffs' expert conducted an on-site search.

The expert's report stated that the defendant's computer system routinely overwrites data every sixty-five weeks, and that this process "effectively obscures the underlying data." The expert concluded that the information the plaintiffs sought did not exist "on the active, on-line system and there are no backup copies of such data in existence."

c. General observations by participants

[We were unable to speak with either the defendant's attorney or the plaintiffs' attorney in this case.]

1. District judge

The judge indicated that the discovery problems in this case arose largely because the information was computer-based. According to him, "there was a failure [on the part of the defendant's attorney] to acknowledge that the data was computer-based." As a result, the "plaintiff lost the benefit of the computer-based information."

He went on to state that this particular case was "unusual. Most of my cases involve e-mail discovery, and the problems surrounding that," whereas the problems that arose with this case were the result of "outside counsel depending on what he was told" by the defendant.

d. Role of Civil Rules

According to the judge, the Civil Rules regarding computer-based discovery did not have any effect on how discovery issues were handled in this particular case. Additionally, the judge does not believe the rules should be changed, because "they already cover computer-based discovery."

He did, however, suggest that an examination of the rules with regard to e-mail might be profitable. In other cases over which he has presided, he said, e-mail has been "the biggest problem" during the discovery process. He also noted

that because companies have different storage policies for e-mail, it is occasionally necessary to retrieve data from individual hard drives, which can be an “extremely expensive” process. He said that in his experience, “a lot depends on the methodology for retrieval” and how to allocate related costs, and that it “might be helpful to examine the rules with that in mind.”

6. Case Study #6

a. Summary of case

Case Study #6 was a pharmaceutical patent suit in which the plaintiff, a pharmaceutical company, sought a declaratory judgment invalidating a patent held by a major university. The original patent was based on joint research by two scientists employed by the university, one in the United States and one in Sweden. Both scientists were named, along with the university, as codefendants. The case was highly contentious and involved extensive conventional document discovery; over 128 boxes of paper documents were eventually produced. The Swedish scientist initially challenged the court’s jurisdiction over him. Early discovery focused on the large volume of e-mail between the two scientists, which the plaintiff planned to use to establish personal jurisdiction. The jurisdiction question was mooted when the Swedish scientist filed an answer with counterclaims. The parties reached a confidential settlement of the case before trial.

b. Computer-based discovery issues

1. Privacy; confidential nature of personal e-mail

Many of the e-mail messages sought to be discovered in this case contained confidential and potentially embarrassing information and comments, such as negative comments by the scientists about their publisher and discussion of personal health problems. The magistrate judge and attorneys for both sides in this case agreed that there is something fundamentally different about e-mail as a record. Production of the e-mail was resisted by the codefendants, resulting in several objections to production and motions to compel. Some of the objections were based on claims of privilege, which the judge ruled on after in camera review. But most of the resistance was based on the embarrassing language and tone of the e-mails, which could not be easily separated from the relevant substance.

2. Use of U.S.-based electronic data to establish jurisdiction

While there was a significant issue of personal jurisdiction over one of the codefendants, a foreign national, and extensive e-mail discovery played an important part in resolving that issue, this was not an “Internet jurisdiction” case. The use of e-mail and the Internet was not a factor in considering jurisdiction. It was the volume and the content of the e-mail, discovered through a codefendant in the United States, which lent weight to the personal jurisdiction argument.

The e-mail was obtained from the U.S. codefendant, over whom the court had unchallenged personal jurisdiction, which made the expensive and cumbersome document discovery procedures of the Hague Convention unnecessary. The U.S. codefendant’s e-mail messages also contained the messages from the Swedish codefendant, as is often the case when people respond to messages from

each other. Thus, discovery of one codefendant's e-mail effectively served as discovery of the other codefendant's e-mail.

3. *Intensive judicial management of discovery*

The magistrate judge and both attorneys agreed that this was a contentious and hard-fought case. The Rule 16 pretrial conference did not address electronic discovery, because according to the judge, it was too early in the case for senior counsel on either side to be aware of it. When it became apparent that discovery was becoming contentious, the judge instituted regular weekly telephone status conferences. After an initial dispute as to which attorneys on each side were "trial counsel" for the purposes of representing the parties with authority in these status conferences, the conferences helped resolve the disputes and moved the case along.

c. *General observations by participants*

In general, the magistrate judge and counsel in this case believed that the electronic discovery issues did not raise unique problems, and that there were few disputes in the case directly related to the electronic nature of the evidence. The plaintiff's attorney saw nothing unusual about the fact that there was electronic discovery in this case or the procedures that were used to obtain it, in comparison with his overall caseload. "[It was] just a standard discovery situation," he said. "We made [a] motion to compel and we got e-mail discovery." The defendants' attorney stated that electronic discovery issues came up in "100%" of his cases. "In today's . . . corporate world this is an ongoing problem," he said.

1. *Magistrate judge*

Embarrassing nature of e-mail correspondence. In discussing the e-mail messages involved in this case, the magistrate judge said, "I think there's something . . . about the nature of e-mail that makes it significantly different than, say, a fax. It's more like a telephone conversation." She noted that "[t]he e-mail in this case could have forced settlement on the embarrassment value." The judge added, however, that the discovery of e-mail in this case was just one aspect of a larger discovery effort.

The judge attempted to limit the scope of e-mail production by narrowly defining relevance. She said, "What attorneys might see as relevant, you might not. So when they ask for things, I try to get them to tell me why they think it's relevant." Even in the absence of an explicit motion for a protective order, the judge was always mindful of Rule 26(c)'s language regarding protecting a party from "annoyance, embarrassment, [or] oppression."

Use of e-mail to support personal jurisdiction. The volume and content of the e-mail lent support to the argument that the Swedish codefendant had extensive business and personal contacts in the United States. The magistrate judge characterized the codefendants as "e-mail-aholics" who discussed all manner of personal and business matters. In addition, although the judge tried to limit the scope of e-mail production as described above, she noted that the codefendants could not be completely protected from the consequences of their own use of e-

mail in the past. As she put it, "It was personal vitriol that gave rise to personal jurisdiction."

2. Plaintiff's attorney

Embarrassing nature of e-mail correspondence. The plaintiff's attorney noted that "[t]here were some aggressive and embarrassing e-mails that I think [the Swedish codefendant] sent, and that was a problem. I imagine one of the reasons why he didn't want to turn them over [was] because these things would be incredibly prejudicial to a jury and . . . he wasn't going to show up at trial. The way a jury would visualize him would be through these e-mails and [they] made him look really bad."

The plaintiff's attorney postulated that his opponent faced a difficult challenge to either resist the production of potentially embarrassing e-mail or minimize its effect, but that he would have had the same problem with potentially embarrassing paper documents.

Use of e-mail to support personal jurisdiction. The plaintiff's attorney commented, "[T]here is no way that you can use the Hague convention especially as applied to Sweden; it was pretty much useless to discover anything including e-mail [B]ut [the Swedish codefendant] couldn't escape from the e-mails that he sent to the [United States]."

Intensive judicial management of discovery. According to the plaintiff's attorney, the weekly telephone conferences implemented by the magistrate judge were "a big pain, but [they] turned out to be helpful."

3. Defendants' attorney

Embarrassing nature of e-mail correspondence. The defendants' attorney said, "people use e-mail both as a means to communicate information and as a means to communicate their feelings about certain things that's very conversational, unlike paper correspondence. [The codefendants in this case] created some correspondence which was a product for potential embarrassment." He added, "You would see things that showed up in the [e-mail] correspondence that normally no one would ever commit to writing."

Use of e-mail to support personal jurisdiction. With respect to the use of e-mail to support the court's jurisdiction over the defendant, the defendants' attorney said, "I think that there were certain things that were said in those e-mails that may have made a judge more likely to extend jurisdiction." He added, "If they had exchanged the same information via telephone, I don't think that a judge would [have been] as likely to extend jurisdiction."

Intensive judicial management of discovery. The defendants' attorney characterized the weekly telephone conferences to discuss discovery as "absolutely helpful."

d. Role of Civil Rules

This case was filed in an "opt out" district and settled before the December 1, 2000, amendments to the Federal Rules of Civil Procedure went into effect. There was no initial disclosure under Rule 26(a) or disclosure conference under Rule 26(f). The parties and magistrate judge agreed that the rules had little effect,

positive or negative, on how this case was conducted and provided little specific guidance.

1. *Magistrate judge*

The magistrate judge who handled discovery in this case believes that an early meet-and-confer requirement with a specific electronic discovery component would have reduced the contentiousness of later discovery. She now routinely asks litigants about electronic discovery early in her cases, as part of the first Rule 16 conference. She also encourages stipulations at that time regarding the form of production, data preservation, and the consequences of inadvertent waiver.

When asked whether the Civil Rules should be changed to accommodate computer-based discovery specifically, she said “perhaps,” and suggested that questions about whether there will be electronic discovery in a case “should be asked under Rule 26(f) or Rule 16.”

2. *Plaintiff's attorney*

According to the plaintiff's attorney, electronic discovery is now, and should be, routinely handled under Rules 34 and 26. Rules specifically addressing electronic discovery would add complication, increase costs, and send litigants to state court.

The plaintiff's attorney stated that electronic discovery under Rule 34 is generally costly and unproductive, and that litigants may be better off developing their case through deposition discovery than “spending tons of money trying to track down e-mails that somebody probably destroyed.” He believes that “you've got to increase the number of depositions to way more than ten. I mean it could take you two or three depositions just to get through the computer people to find out what . . . they have.”

3. *Defendants' attorney*

The defendants' attorney suggested that an early conference, in which the judge is given explicit powers to “set an appropriate scope for electronic discovery,” might help. According to the defendants' attorney, the lack of “particularized options and requirements relating to electronic discovery leads to more disputes and therefore hinders the discovery process.”

The defendants' attorney identified two aspects of electronic discovery, distinct from conventional document discovery, that could be addressed in the Federal Rules of Civil Procedure. The first is that responding parties often lack the technical skills necessary to answer electronic discovery requests. The second is that computer files are large and seldom organized in a way that facilitates efficient searching. The defendants' attorney said that these two aspects result in an attorney's “very low level of comfort” with opposing counsel's ability to produce the requested information. The solution, according to the defendants' attorney, is to allow for appointment of a neutral discovery referee to conduct searches of the parties' computer systems. The defendants' attorney voiced vehement opposition to any special procedures, particularly on-site inspections, for electronic discovery. He said, “I think it would have to be an extreme situation for a judge to al-

low you to go into somebody's computers and look around for relevant documents. It's analogous to getting a court order saying that you can literally invade a company's files with your own people, looking through them all instead of letting them look through their own files." As for the level of discomfort the opposing party might feel, the attorney said, "you never know if you have all the e-mails . . . but you never know if the other side turns over all their documents."

7. Case Study #7

a. Summary of case

Case Study #7 was an unfair trade practices case involving allegations that a salesman who left the plaintiff company (a manufacturer of electrical generating equipment) to join a competitor had misused company computers and data and had stolen proprietary sales information. The defendants were the salesman and his new company. Discovery, both traditional and electronic, was complicated by the sensitive and proprietary nature of the information sought to be discovered. Shortly after the plaintiffs' on-site inspection of the defendants' computers, the case settled.

b. Computer-based discovery issues

1. Screening and proprietary nature of information sought to be discovered

The plaintiff sought detailed sales information—including some that was in computer files—from the defendant and his new company. The defendant claimed that much of this information was proprietary or involved privileged communications, and that the defendant company would be harmed by producing it. The magistrate judge overseeing discovery ordered the defendant to keep a privilege log that listed files he believed were not discoverable and that stated his reasons.

2. On-site inspection of defendants' computers

According to the defendants' attorney, the plaintiff sought "broad access" to the computers of the defendant salesman and his new company. In response to the plaintiff's requests, the magistrate judge allowed an on-site inspection of those computers and issued a detailed order establishing the protocol regarding how that inspection should be carried out (the order is Appendix A to this case study). Under this protocol, the plaintiff and its experts were allowed access to the defendants' computers, and could view all directories and lists of files and restore any deleted directories or files. Before the actual files were viewed, however, the defendants were permitted to contend that certain files contained non-discoverable information, and the plaintiff was denied access to those files during the on-site inspection, subject to a later ruling by the magistrate judge as to the information's discoverability.

Under the protocol, the plaintiff was allowed to copy all files not claimed as privileged, and was "entitled to access codes or other information necessary to fully accomplish the purpose of this order."

The magistrate judge explained that he issued the on-site inspection order because the plaintiff company, according to affidavits attached to its discovery

motions, had inspected its own computers and found evidence that the former employee had compressed some files regarding jobs that he was working on for the plaintiff and sent them to his personal computer. The magistrate judge believed that, based on the affidavits, "there was enough there to justify a search regarding customers he might have taken with him and trade secrets."

According to the defendants' attorney, the on-site inspection took place on a Saturday, to minimize disruption to the defendants' new business. The parties followed the protocol during the on-site inspection, which according to the defendants' attorney "took a long time."

3. *Third-party privacy issues*

Although it did not generate a major dispute in this case, one of the computers that was inspected by the plaintiff was the defendant salesman's home computer, which was also used by his wife. According to the defendants' attorney, "[the plaintiff] copied things like Christmas card lists and family financial information."

c. *General observations by participants*

[We were unable to interview the plaintiff's attorney in this case.]

1. *Magistrate judge who handled discovery disputes*

The magistrate judge who handled discovery in this case said that he would have handled the on-site inspection differently in his order if the same issue arose again. In particular, he has learned since the time of this case that the process of inspecting a computer can alter the information on a computer and lead to possible spoliation problems. Thus, if he believed an on-site inspection was warranted in another case, he would order that a mirror image of the hard drive be created and the inspection done on that, rather than risk having files altered or destroyed as a result of the inspection itself.

2. *Defendants' attorney*

The defendants' attorney believed that the on-site inspection was very disruptive to the defendants' business and that the magistrate judge allowed the plaintiff "free rein" with respect to discovery of computer-based information. She believes there is not enough guidance in the case law to inform judges about the appropriate scope of these computer searches, and she said that the judge "accepted the plaintiff's saying that, in this day of computers, this is the only way we can test what [the defendants] are saying [about what information is available]." She believed the plaintiff's inspection of the defendants' computers was "very heavy-handed and out of proportion."

Based on this case and others, the defendants' attorney believes that courts tend to "punt" when a party says it will pay its own expert to go in and look at the other side's computerized information. According to this attorney, courts see no harm in allowing the inspection if the other side won't have to pay.

d. Role of Civil Rules

At the time of this case, the district in which it was filed had opted out of Rule 26(a).

1. Magistrate judge

The magistrate judge believed it would have helped to have disclosure in this case and for him to be made aware of the computer issues at an earlier stage. His district has since adopted a local rule that, among other things, requires an initial report from the parties to specify whether there will be computer-based discovery issues in the case (see Appendix B to this case study).

When asked whether rule changes are necessary to accommodate computer-based discovery specifically, the magistrate judge said, "I don't think so at this point; we need to get further down the road." He explained that "the considerations have changed, but the framework is still there, balancing need against cost, burden, etc."

One problem the judge has run into in other cases is a situation in which a company was unable to extract certain computerized information previously, but because of evolving technology is now able to extract it. This raises "the issue of whether they were trying to hide the ball or really couldn't access it." Although he does not think rule changes would necessarily help in this situation, he does believe courts "need someone who knows both law and technology" to consult when such problems arise. He did not, however, suggest a specific mechanism through which such an expert could be made available to courts. He said, "We [judges] are all busy, and can't learn all this [computer] stuff. When parties argue that something will be very expensive (e.g., retrieving archived data) or that something can't be accessed, we can't know if they're telling the truth."

2. Defendants' attorney

Based on her experiences in this and other cases, the defendants' attorney believes it would be useful for the rules to clarify what is meant by "reasonably available" with respect to computer-based information. She explained that "once something's on your computer, it's never gone," but it might take major efforts to recover it. She said that the rules should give guidance (equivalent to the level of guidance that is given for Rule 26(c) protective orders) that is specific regarding how to determine what is "reasonably available" in the realm of computerized information. She added, "There's got to be some middle ground between business disruption and spoliation problems [and] a party's need to get information."

This attorney noted that in many cases, attorneys in her district are able to reach agreements on computer-based discovery issues without involving the court. She explained that she normally produces e-mails in hard-copy form and tells the other side that if they want more (e.g., a computer search), she will ask the court to have them pay for it. In her experience, in employment cases, "they seem to back off at this point," but in cases involving allegations of trade secret theft or commercial fraud, "people seem to be more willing to pay [for more access]."

e. Appendix A to Case Study #7: Order Establishing Protocol for On-Site Inspection of Defendants' Computers

Issues have arisen regarding Plaintiff's inspection of Defendants' computers under the order of [date], and a teleconference was held [date] to discuss them. Defendants say that allowing a full search as contemplated in that order will allow access to privileged communications as well as to materials the Court has to this point found not discoverable. In response, Plaintiff has filed a letter requesting further discovery and requesting an order to compel Defendants to comply with the Court's previous discovery order. This letter has been docketed as a motion, and Defendants shall have to and including [date] to respond. The parties have set [date] as a date for production and search of Defendants' computers. A further search may be needed, depending upon the Court's ruling on Plaintiff's request for further discovery.

Defendants' counsel stated on the record that the computer used solely by the bookkeeper does not contain any material deemed discoverable at this point. This computer will not be accessed during the search on [date].

Plaintiff shall not access any files containing attorney-client privileged materials. Defendants shall designate those files which they say contain such materials and produce a privilege log complying with Fed. R. Civ. P. 26(b)(5). Of course, Plaintiff shall have the right to challenge the applicability of privilege as to any file so designated.

Plaintiff's counsel and computer expert shall have access to all drives, storage media, etc. upon which any information is stored. They shall be entitled to view all directories or other lists of files so that they may gain an understanding of the organization and location of all files in the computers. They may search for and restore any deleted directories or files. However, should there be specific files, whether existing or restored, which Defendants contend include information ruled non-discoverable, Plaintiff's access to those files shall be denied at this time except as necessary to the restoration process. Defendants shall list withheld files by file name and location and shall prepare a log describing the nature and content of the files in a manner that, without revealing information itself protected, will enable Plaintiff and the Court to determine whether they should be entitled to protection. The Court expects Defendants to act in good faith in so designating files.

Plaintiff shall not access the "___ system" during the search on [date], but the court will further consider its discoverability. This specific file was not discussed in [counsel's] letter of [date], and the Court would benefit from further input from the parties as to its nature and why it should or should not be discoverable.

The intent of this order is to allow Plaintiff the widest access possible at this time and to ensure that Plaintiff learns of all files in existence in the computers and the nature of those files, though it may not have present access to the actual contents of all files at this time. Plaintiff may copy all files falling in the categories set forth in the order of [date], and shall be entitled to access codes or other information necessary to fully accomplish the purpose of this order. The term "files" includes files of all types and is not restricted to data or document files.

. . . It is so ordered this [date].

f. Appendix B to Case Study #7: Excerpt from Local Rule Adopted by the District After This Case

LOCAL RULE 26.1

OUTLINE FOR FED.R.CIV.P. 26(f) REPORT

The Fed.R.Civ.P. 26(f) report filed with the court must contain the parties' views and proposals regarding the following:

• • •

(4) Whether any party will likely be requested to disclose or produce information from electronic or computer-based media. If so:

(a) whether disclosure or production will be limited to data reasonably available to the parties in the ordinary course of business;

(b) the anticipated scope, cost and time required for disclosure or production of data beyond what is reasonably available to the parties in the ordinary course of business;

(c) the format and media agreed to by the parties for the production of such data as well as agreed procedures for such production;

(d) whether reasonable measures have been taken to preserve potentially discoverable data from alteration or destruction in the ordinary course of business or otherwise;

(e) other problems which the parties anticipate may arise in connection with electronic or computer-based discovery.

8. Case Study #8

a. Summary of case

Case Study #8 was a patent infringement action brought by a manufacturer of bicycle components against a smaller manufacturer. Virtually all of the defendant company's records were computerized. In response to the plaintiff's motion to compel discovery, the court issued an order requiring the defendant to respond fully to the plaintiff's discovery requests, and specified that any responses should be in hard-copy form, even if the data were originally in electronic form. The defendant produced the information in hard-copy form and shortly after this, the case settled.

b. Computer-based discovery issues

1. Claims that defendant was withholding information

In response to the plaintiff's discovery requests, the defendant company produced some computer files but few hard-copy documents. The plaintiff was convinced that the defendant was hiding some relevant information and filed a motion to compel discovery, which was granted by the judge. The defendant's attorney said that his client had produced all relevant information, but because both the plaintiff and the judge did not believe there were so few hard-copy documents maintained by the defendant company, they thought the defendant was trying to hide something. According to the defendant's attorney, "The court didn't understand that these people didn't keep paper records."

2. *On-site inspection of defendant's computers*

The defendant allowed a paralegal representing the plaintiff to have access to its computers, which contained almost all of its relevant files. The defendant's attorney said that an executive of the defendant's company was present at the inspection to "help guide [the plaintiff's representative] through the computer files." According to the defendant's attorney, "We made a good faith effort to give them whatever they wanted—a viewing of the screen, hard copy, electronic media, whatever." The plaintiff, however, claimed that during the on-site inspection, the paralegal was not given access to all relevant computer files and was not permitted to copy files. In addition, a disk provided by the defendant to the plaintiff was unreadable by the plaintiff, and the defendant did not provide a means for reading the disk.

3. *Production of electronic documents in hard-copy form*

After having difficulty obtaining the electronic documents from the defendant, the plaintiff filed a motion to compel discovery. In response, the magistrate judge ordered the defendant to produce all relevant documents in hard-copy form, even if they had originally been in electronic form. He said he did this "out of an abundance of caution," because the defendant had delayed its discovery responses in the beginning and he was concerned the defendant might be trying to hide information that was stored electronically.

In addition to concerns that not all relevant information was being produced, the plaintiff's attorney pointed out that in some instances hard-copy production of electronic files is preferable; "for example, a spreadsheet might be fifteen to twenty feet long, and you can't see it all at once on a computer."

c. *General observations by participants*

1. *Magistrate judge who handled discovery disputes*

The magistrate judge who handled discovery in this case and granted the plaintiff's motion to compel production said that the defendant's computer "was where everything was," noting that this is common in patent cases involving product designs, because virtually everyone uses computer-assisted design software programs these days rather than designing freehand. He believes this reliance on computerized designs will make it easier for companies to destroy relevant information.

When asked whether the problems that arose in this case were due to the computer-based nature of the evidence, the magistrate judge said that "if a party would delay by not giving computerized evidence, it would delay anyway (i.e., even if the information were in hard-copy form)." On the other hand, he said, although the computer-based nature of the evidence did not create problems in this case, owing to the sophistication of the attorneys, "lots of people don't understand computers," and that might make it easier for a party to hide computerized information from the other side.

2. *Plaintiff's attorney*

The plaintiff's attorney said that the defendant company did virtually all of its business on computers, so "when we got the [hard-copy] documents from them, we got almost nothing." He also claimed that "they were definitely hiding the information on their computer; we could tell we had incomplete records." For example, the plaintiff was able to access e-mail messages produced by the defendant, but not attachments that went with them.

The plaintiff's attorney said that the plaintiff did not hire computer consultants, but used in-house information technology (IT) experts, who "talked to the defendant's IT people to make sure we were getting everything." Although the plaintiff did not have to pay a consultant, the plaintiff's attorney noted that it was time-consuming and costly to check the hard-copy documents against the computer system to ensure that all relevant files were being produced.

3. *Defendant's attorney*

According to the defendant's attorney, the fact that the defendant maintained all of its records in computerized form could have made discovery very efficient in this case. He said, "This made it easier to turn over information as it was kept in the ordinary course of business." He added, "I believe in electronic discovery. It's easier to deliver a CD or two than lots of hard-copy documents. If both sides are cooperative, this can be very efficient." However, he said, in this case, "the other side became convinced that we were hiding something, [so] we were ordered to print everything out, which was inefficient." He added that he thinks that "there's a bias among the courts in favor of paper—they distrust computer information," but that "this will change as courts and attorneys get more comfortable with computers."

d. *Role of Civil Rules*

1. *Magistrate judge*

The magistrate judge explained that he "just used [the rules] as they're there," and thinks the traditional rules have been fine in this type of case. According to him, "the handling of computer-based discovery is more for the parties to do; I just handle disputes based on whether a party is trying to comply." He thinks the real problem lies with the sophistication of the attorneys and whether they know what to ask for in the realm of computer-based evidence. In this case, he said, both sides were competent in that respect.

In cases in which the attorneys are not sophisticated regarding computer-based discovery, the magistrate judge thinks the only way to protect them would be to specify more about computer-based information in the rules regarding initial disclosures. He said that perhaps being more explicit in the rules, by specifying that relevant computerized information must be disclosed, would "prevent [parties from] trying to get away with something." According to this judge, "people are looking for ways not to turn over information in the initial disclosures." Rather than revising the rules, however, he believes the best approach would be more education in law school, bar review, and CLE courses on these issues.

Although it was not a major problem in this case, the magistrate judge believes that perhaps more thought should be given in the rules regarding how to handle on-site inspections, especially when privileged information is involved.

2. Plaintiff's attorney

According to the plaintiff's attorney, during the on-site inspection "[w]e worked off Rule 34, which was fairly adequate in covering what we needed." Although there was a Rule 26(f) discovery plan in the case, he said, "early on, we didn't know the mother lode was on their computer, so [this type of information] wasn't covered." This attorney believes it would be an "excellent idea" and would "eliminate a lot of delay" to spell out in Rule 26(a)(1)(B) that computer documents are covered and to build this into Rule 26(f).

3. Defendant's attorney

When asked about whether the rules need to be changed to accommodate computer-based discovery, the defendant's attorney noted that "it's nice that the rules [already] recognize that computer information is 'documents.'" This attorney believes, although not based on experiences in this case, that it would "make sense" to have a rule that would allow a judge to issue an order very early in a case requiring the parties to preserve or "freeze" electronic data and keep the data in a safe place for later discovery. He said that the order would require "not production, but preservation," and would allow the parties to "argue about it later," without potentially relevant information being destroyed while the lawsuit was pending. While acknowledging that there is nothing in the current rules preventing a judge from issuing a preservation order, he said "this is more the exception now; you have to come in and make a specific request." He believes it would be useful to have a rule that would make this type of order more routine.

9. Case Study #9

a. Summary of case

Case Study #9 was a diversity breach of contract case removed from state court. The defendant, a software vendor, had provided a custom software package to the plaintiff, a manufacturer of aircraft components, and the plaintiff claimed the software did not perform as represented by the defendant. Discovery, both conventional and electronic, was extensive. The case went to trial, and the jury returned a verdict in favor of the plaintiff. Some evidence was also presented electronically at trial.

b. Computer-based discovery issues

1. Screening and proprietary nature of information sought to be discovered

In attempting to establish that the defendant's computer software did not function as intended, the plaintiff sought e-mail and earlier versions of the software as it was being developed. The defendant claimed that producing the requested versions of the software would reveal proprietary information. The judge issued a protective order that allowed the defendant to designate certain items as confidential, subject to challenge by the plaintiff.

2. *Volume and “searchability” of computer-based information*

According to the plaintiff’s attorney, the defendant’s software company had “used a single layman’s term to designate a broad class of products.” In other words, the names of files that were unrelated to the software at issue in this case contained the same term as those relevant to the action. The plaintiff’s attorney indicated that “this made it extremely difficult to determine what was relevant.”

3. *Deletion of data in the ordinary course of business*

Most of the discovery in this case, both traditional and electronic, was focused on the status of the defendant’s design efforts at different times while the custom software was being developed. Thus, the plaintiff sought copies of earlier versions of the software. The defendant, however, had a deletion policy in which only the most recent versions of software were preserved and earlier versions were deleted. The fact that the defendant could not produce earlier versions, however, was not a major source of dispute between the parties.

c. *General observations by participants*

Although the magistrate judge identified this case as one in which disputes over discovery of computer-based evidence (especially e-mail) played a major role, attorneys for both sides, as well as the district judge’s law clerk, did not agree with this assessment. As the plaintiff’s attorney explained, “This was more of a fraud case that happened to have computer-based discovery issues.” The district judge’s law clerk concurred that, although “[the parties] had their squabbles about discovery, I don’t think they really got into the computer-based discovery issues.”¹⁵

The magistrate judge who handled discovery in this case said that, although the same problems would probably have arisen if all the evidence was in hard-copy form, the electronic form of the evidence “might have made it easier to argue; [the electronic form] added another level of argument.” He added that, as an “end user,” it is sometimes difficult for a judge to determine whether to credit parties’ arguments about the accessibility of computer-based information, and that it’s “hard [for judges] to know what can be extracted easily.”

1. *Magistrate judge who handled discovery disputes*

Screening and proprietary nature of information sought to be discovered. The magistrate judge explained that, given the proprietary nature of much of the computer-based information sought to be discovered, it was difficult to determine “how to give them a character [file name] that identified whether the information was discoverable or not.” He added that “you need an expert to explain what it is they’re trying to discover and determine whether it’s relevant.”

Volume and searchability of computer-based information. With respect to the question whether it was difficult to search the defendant’s computer-based information to extract the relevant files, the magistrate judge noted that, because

15. The district judge’s law clerk had assisted him at trial in this case, and the judge referred us to her. Because she did not believe the case involved major computer-based discovery issues and did not remember details about these issues, we did not conduct a complete interview with her.

judges are not computer experts, parties “can hide behind the technology [in their arguments]. They can say [searching and extracting relevant information] will cost hundreds of thousands of dollars. It seems to me that computers should actually make this easier—but I don’t really know.”

2. *Plaintiff’s attorney*

Screening and proprietary nature of information sought to be discovered. According to the plaintiff’s attorney, “there were lots of items [sought to be discovered] that opposing counsel redacted; I thought that, with the protective order in place, he had no right to restrict things this way.” He added, however, that “this issue isn’t a computer-based discovery one; it comes up in myriad cases.”

Volume and searchability of computer-based information. The plaintiff’s attorney noted that when file designations are controlled by the party resisting discovery, as in this case, it is “profoundly difficult” to formulate discovery requests in a limited fashion. He added that “you need a round of depositions or interrogatory answers to get a good understanding of what’s there and minimize the risks that they could play games by [naming files similarly].”

3. *Defendant’s attorney*

Deletion of data in the ordinary course of business. According to the defendant’s attorney, the plaintiff “wanted old copies of software that we didn’t have anymore. Software is always changing, and we can’t keep copies of every version that’s been made. Normally, you just keep the most recent version of software and one other.” This attorney did not think, however, that the other side “thought we weren’t producing things that we had,” so there was not a major dispute about items that had been deleted by the defendant in the ordinary course of business.

d. Role of Civil Rules

The district in which this case was filed had opted in to Rule 26(a), and there was a Rule 26(f) discovery plan in place for the case.

1. *Magistrate judge*

The magistrate judge believed that “the rules provided no definitions or guidance” on the computer-based discovery issues, adding that “we had no experience with this and nothing to go on.” He thinks it would be helpful for the rules to cover computer-based discovery more explicitly, “especially attorney–client or attorney-work-product issues that arise” in the context of computer-based discovery. He said, in particular, it “would help to have rules that anticipate” parties’ arguments about whether certain information is discoverable, and how difficult it is to extract computer-based information, since judges with little computer experience are not in a good position to evaluate such arguments.

The magistrate judge added, “We can all help ourselves by getting someone who knows both legal and computer information to help us understand [these arguments].” When asked whether he thought an expert appointed under Federal Rule of Evidence 706 could be used for these purposes, he said, “I’m not

much for court-appointed experts, but I could see a case down the line where one would be needed.”

2. *Plaintiff's attorney*

The plaintiff's attorney indicated that he has not seen the application of the rules to computer-based discovery as a major problem, because “so much of the discovery difficulties in this district are anticipated and agreed to by counsel, overseen by strong magistrate judges.” Given the problems with the vague nomenclature used by the defendant for computer files, however, he thought it might be useful to have “an obligation imposed on the party against whom discovery is sought to volunteer this type of information as part of automatic Rule 26 disclosures.”

3. *Defendant's attorney*

The defendant's attorney said that he “thought the traditional rules worked well [in this case]” and that “the definition of ‘documents’ in the rules was sufficient.”

Based on experience in other cases, this attorney thought it would be useful to have a rule that said “giving a disk to the other side, using a standard format, should be sufficient” for purposes of discovery. He mentioned another case he was working on in which he has “huge files of documents that traditionally [he'd] have to print out somewhere and have Bates numbered.” He thinks a producing party in such a case “should be able to forward an electronic file to the other side and say, ‘Here you go.’” The attorney acknowledged that such production might be possible under the existing rules, but noted that “someone not computer-savvy might balk at getting the documents that way. An explicit rule saying that this form of production is okay would help.”

10. Case Study #10

a. *Summary of case*

Case Study #10 was a class action suit by a group of hospitals alleging the misallocation of funds by a business insurance company. In addition to extensive conventional discovery, including over one million pages of documents and 100 depositions, the parties sought computer discovery. Most of the disputes regarding computer-based evidence were resolved by the parties and did not require intervention from the magistrate judge. The parties settled the case before trial.

b. *Computer-based discovery issues*

1. *Volume of computer-based documents*

As described by the defendant's attorney, “The case involved a substantial amount of accounting records and insurance-related claims information, most of which had been either originally recorded or later stored on electronic media . . . the volume of information standing alone was a problem, given the cost to retrieve it.”

2. *Legacy data; costly data retrieval efforts*

Much of the financial data sought to be discovered by the plaintiffs was stored by the defendant on magnetic tapes and other back-up storage systems. This resulted in logistical problems and extensive costs regarding retrieval of the information.

3. *Data preservation*

Although no formal charges of spoliation were made, the parties raised concerns early in the case about this possibility. After identifying the concerns, the parties agreed to a stipulated data preservation order, which was then entered by the court.

4. *Sharing of costs related to the form of production*

According to a mutual agreement, each party paid the cost of converting available data from the data's existing form to the form in which the party desired them—for example, from one electronic format to another electronic format or to paper copy.

c. *General observations by participants*

According to the magistrate judge who oversaw discovery and to attorneys on both sides, the issues that arose in this case regarding computer-based evidence generally would have arisen even if the same information had been in hard-copy form. In addition, the resolution of disputes regarding computer-based information was mutually agreed upon by the parties without resort to the court.

1. *Magistrate judge who handled discovery disputes*

The magistrate judge who handled the discovery disputes in this case said, "If there is a lesson here, it is that the existing rules can be used successfully if the parties keep good records in the usual course of business and if the amount at stake justifies the expense to search and produce those records. The problems only occur when one of these conditions isn't met." He also indicated that the discovery disputes in this case "related to the contents of the documents rather than the formats of the documents," adding that "the only way that computers might have affected this case that I'm aware of is the amount of data that were available."

2. *Plaintiffs' attorney*

Preservation order. According to the plaintiffs' attorney, "there were allegations of spoliation made early in the case based not on what the defendant had done in this case, but . . . on conduct in other cases. That was relatively quickly resolved by a document preservation agreement."

3. *Defendant's attorney*

Legacy data; costly data retrieval efforts. According to the defendant's attorney, "there was no question" that the computer-based financial and business data sought by the plaintiff class were relevant, so the real issue was how to retrieve the information. As he put it, "The technology changes between the original re-

ording of the information and [the time of discovery] had us working off of different types of databases, [and producing the information] really involved some almost archaeological expeditions in order to figure out how to read and transcribe it” This resulted in increased cost for his client “because of the difficulty of retrieval of the older information and putting it into a usable format.”

Preservation order. The defendant’s attorney indicated that “there were no allegations [of spoliation, but] there were concerns raised early in the case about that possibility, which resulted in a stipulated preservation of evidence order.”

d. Role of Civil Rules

None of the participants (magistrate judge, plaintiffs’ attorney, defendant’s attorney) believed that rule changes would be necessary to handle the types of computer-based discovery issues that arose in this case. The plaintiffs’ attorney did suggest one change, regarding early preservation orders, based on his experiences in another case.

1. Magistrate judge

When asked whether he thought the Civil Rules should be changed to accommodate specifically computer-based discovery, the magistrate judge who handled discovery in this case said, “I’d be really slow to do that . . . I guess that’s a complete answer to your question. I remember thinking for the longest time, starting with law school, that I was impressed with the resilience of the language prepared by the original drafters of the federal rules I’ve been disappointed at the results of the recent efforts to relatively frequently tinker with the rules.”

2. Plaintiffs’ attorney

When asked in the context of this case whether he thought the rules should be changed, the plaintiffs’ attorney said, “I don’t have any particular idea in mind.” He did, however, relate his experience with another case in which there were major spoliation problems. According to the attorney, in that case the opposing party disobeyed court orders, and “we had to have emergency proceedings to have a surprise inspection of the other side’s hard disk.” Based on his experiences in that case, the plaintiffs’ attorney believes it would be useful to have “some type of standing order issued by a court immediately upon the filing [of a case]—a document and data preservation order—that, I think, would make an impression upon parties and their counsel to preserve computer records.” He acknowledged that this type of order could be issued under existing rules.

3. Defendant’s attorney

When asked about the need for rule changes to accommodate computer-based discovery, the defense attorney said, “That’s a good question . . . I think the rules need to be broad enough to allow for just about any kind of development that you can think of I guess the short answer to the question is no, I don’t see an immediate need for changes in the rules to deal specifically with electronic evidence. What I see more is a need for recognition and some education among the judges and lawyers that regularly practice.” He indicated that

this view was based not only on his experiences in this case, but more generally on his overall federal practice experience.

Appendix A: Research Methods

A. Survey of Magistrate Judges

In spring 2000, after consulting with Subcommittee members, FJC staff designed a brief questionnaire asking magistrate judges about their experiences with discovery of computer-based information.¹⁶ In addition to asking about the extent of their experience with such discovery and the types of problems they had encountered, the questionnaire asked for the names of cases with computer-based discovery issues that might warrant further attention as case studies. The questionnaire was computerized, and had buttons, text boxes, and drop-down menus for responses. It was placed on a Web page maintained by the FJC (see Appendix B for a copy of the questionnaire).

In May 2000, Tom Hnatowski, Chief of the Magistrate Judges Division of the Administrative Office, provided us with a list of all magistrate judges who subscribed to the division's listserv (428 total), which sends mass mailings of e-mail messages from the division. Although not all magistrate judges subscribe to the listserv, more than 80% do, and that proportion was deemed sufficient for the purposes of this research, particularly since we were not necessarily seeking information representative of the experience of all magistrate judges.

On June 14, 2000, we sent a message via the listserv, from District Judge David Levi and Magistrate Judge John Carroll, asking recipients to visit the Web page and fill out the questionnaire. We received 120 responses to the survey, for a response rate of 28%. Ten of these responses were not subjected to further analysis, either because the judge did not complete the questions in the questionnaire or because the judge had no experience handling discovery disputes of any kind.

Because the low response rate to the Web-based survey made it difficult to interpret the results, particularly with respect to the frequency of magistrate judge experience with computer-based discovery,¹⁷ we sent a one-page follow-up questionnaire to the nonrespondents, asking them why they did not respond. The follow-up survey specifically asked whether one reason for not responding was that the magistrate judge did not have experience with computer-based discovery.

Of the 314 nonresponding magistrate judges who were mailed the follow-up survey, 236 sent it back, for a response rate of 75%. Thus, from both surveys combined, we obtained information about whether they had experience with computer-based discovery from 83% of the magistrate judges who had been sent the original listserv message. For the rest of the substantive questions on the

16. We restricted the survey to magistrate judges because we (and the Subcommittee) believed they would have more experience with computer-based discovery than district judges would and would be more likely to respond to the questionnaire.

17. In particular, we suspected that magistrate judges who had no experience with computer-based discovery might have chosen not to respond to the first questionnaire, causing the results we did receive to overestimate the extent of magistrate judge experience with computer-based discovery.

Web-based survey, we report results from the 28% who completed that questionnaire.

B. Survey of Computer Consultants

In 2001, FJC research staff undertook a survey of consultants in the fields of computer forensics and electronic discovery. The survey solicited general information about the work the consultants had done on behalf of clients involved in federal civil litigation. It asked about the types of cases in which the consultants had been hired and the nature of the computer-based discovery issues they encountered in those cases.

The survey was undertaken in part to solicit more cases for the in-depth case studies, and in part at the behest of the Subcommittee to see if experiences with computer-based discovery issues reported by consultants were similar to those of magistrate judges as reported in response to our magistrate judge survey. The questions were designed to be similar to the questions asked in the magistrate judge survey.

Consultants who work in the area of electronic discovery are not organized in any professional body or trade association, and do not have any authoritative professional certifications or training programs that would help us identify the population as a whole. However, before this survey was contemplated, FJC research staff came into contact with a number of computer consultants while studying the issue of electronic discovery through articles, conferences, and professional networks. The consultants maintained contact with the FJC and each other through an informal but active Internet discussion group called "CFED," for Computer Forensics and Electronic Discovery.

FJC research staff used the CFED membership list to distribute the survey, which was a simple word-processing questionnaire (see Appendix C). On September 4, 2001, the survey was sent by e-mail to all fifty-seven CFED members on the list at that time, representing thirty-eight consulting firms or agencies. The response to the survey over the next three weeks was poor (only four completed questionnaires were returned), possibly as a result of the intervening events of September 11, 2001. On September 27, the survey was distributed again, resulting in ten additional responses.

Of the total of fourteen responses (representing 25% of the CFED individual membership and 36% of the organizational membership), only ten were usable. Three respondents were CFED members outside of the United States who had no federal case experience, and one respondent did not have access to the information requested. For the ten usable responses, two of the respondents explicitly stated that their answers would be limited, as they operated under confidentiality agreements or court orders preventing them from sharing information. Based on informal discussions with other CFED members, we suspect that others might not have responded for that reason.

C. Case Studies

As mentioned previously, the Subcommittee is interested in a more thorough understanding of how various computer-based discovery issues are manifested in specific cases, rather than their absolute frequency. FJC staff designed a study to look at selected cases illustrating these issues in detail. The study of each case involved reviewing and coding the court files and interviewing the participants (attorneys and judges) who were most involved with the discovery of computer-based evidence in the case.

1. Identification of potential cases for study

We used several methods to identify cases that might be appropriate for more in-depth study:

- The magistrate judge survey asked for nominations of appropriate cases, and fifteen cases were nominated by responding judges.
- We reviewed published case law on the topic, which yielded five possible additional cases.
- At the Brooklyn miniconference sponsored by the Subcommittee in October 2000, we solicited names of cases from the attendees. Although we followed up this solicitation with an e-mail reminder, no suggestions were forthcoming from miniconference participants.
- We asked for nominations from the computer consultants surveyed, and received one additional case.
- We sent letters to several organizations and individuals asking them to help identify possible additional cases. These individuals and organizations included nearly fifty Texas state bar leaders; the Federal Bar Association's Litigation Section; and products liability chairpersons of the following organizations: American Bar Association, Federal Bar Association, American Corporate Counsel Association, Federation of Insurance and Corporate Counsel, Defense Research Institute, and Association of Trial Lawyers of America. None of these organizations nominated a case for study.

Two additional cases were identified from communications with individuals involved in other case-study cases. Altogether, through these various methods, we identified 23 cases for possible in-depth study.

2. Selection criteria

We used the following criteria to ascertain whether an identified case was appropriate for inclusion in the case study:

- The case was closed.
- The judge or judges and most of the attorneys involved were willing to talk with us about the computer-based discovery issues in the case.

- Most or all of the relevant documents from the case file were available to us (i.e., not under protective order or seal).
- Discovery occurred relatively recently, so that participants' memories would be fresh and their files available for reference.

To the extent possible, we also included cases that together represented a range of computer-based discovery issues, case sizes, and geographic locations.

3. Further review of nominated cases

A few of the cases suggested for the case study were clearly inappropriate for further study, as they were not closed or likely to close in the near future, or the attorneys involved were highly unlikely to cooperate in the research. For the remaining cases nominated, we used databases of federal docket records (both Web Pacer and Court Link)¹⁸ to download the dockets for review. In addition, we conducted preliminary interviews with nineteen judges or their representatives about the nominated cases, to glean more information about the appropriateness of the cases for in-depth study. From this further review, we labeled cases as either "Green," "Yellow," or "Red" with respect to their appropriateness for our case study, as defined by the selection criteria set forth above.

Ten cases were identified as "Green," seven as "Yellow," and two as "Red." The "Green" cases generally met our selection criteria, and the judge assigned to the case believed it was worthy of further study and that the attorneys would cooperate. These cases covered a range of case types and computer-based discovery issues of interest to the Subcommittee.

Cases rated "Yellow" or "Red" received that rating either because the discovery in the case was still pending or the judge indicated that the litigation was very contentious and the attorneys probably would not speak with us. If the Committee decides to continue studying the issue of computer-based discovery after the October meeting, we may find that some of the cases originally rated "Yellow" will be available for study (e.g., if a previously pending case closes).

For cases rated "Green," we used information from our preliminary interviews with judges who nominated the cases to determine which attorneys and judges would have knowledge of the computer-based discovery problems that arose in the case. We then sent a letter to each potential interviewee, describing the study to them and asking for their participation in a brief telephone interview. The letter also informed them that "[i]n our report to the Advisory Committee on Civil Rules, the case will be identified only by a number, the parties will be identified only as 'plaintiff' or 'defendant,' and your name will not be mentioned or associated with any answers you give. While it may be possible for a reader who is familiar with the facts to deduce the name of the case and the parties involved, we will make every effort to keep the identities confidential." In most cases, except as noted in the individual case studies, we were able to interview by telephone the judge overseeing discovery and at least one attorney from each side.

18. Web Pacer is the official docket, as posted on the courts' Internet server. Court Link, previously called Marketspan, is a commercial database derived from Pacer data supplied by the courts.

Appendix B: Survey of United States Magistrate Judges

[Authors' note: Because the survey instrument was created in Lotus Notes and administered via the World Wide Web, this transcript does not capture the layout or functionality of the original. Buttons, drop-down menus, and text boxes have been eliminated. All text has been transcribed in full.]

Federal Judicial Center Research Division Survey of United States Magistrate Judges on Experiences with Discovery of Computer-Based Evidence

Thank you for participating in the Federal Judicial Center's survey on magistrate judges' experiences with discovery of computer-based evidence.

For purposes of this survey, "computer-based evidence" means information that was originally created on computers, such as e-mail, word-processed documents, business transaction data, etc.; or evidence that is currently stored on computers or computer-readable media, such as digital images of paper documents, digital voice or video recordings, etc.; or evidence that is best presented or manipulated on computers, such as animations, scientific models, financial databases, etc.

At the end of the questionnaire, you will be given an opportunity to provide open-ended comments about the topic.

1. In the past two years (since June 1998), have you been called upon to resolve disputes affecting discovery of any kind (not limited to computer-based discovery) in civil cases?

Please select one.

No; I do not handle discovery disputes.

Yes; I have had at least one civil case in which I have been asked to handle a discovery dispute.

In approximately how many cases has this occurred in the past two years?

If "No," please skip to Question #7.

2. In the past two years (since June 1998), have you had any civil cases in which an issue connected to the discovery of computer-based evidence was brought to your attention for action on your part?

Please select one.

No; I handle some discovery disputes but have not had any issues involving discovery of computer-based evidence in the past two years.

Yes; I have had at least one civil case in which such an issue was brought to my attention.

In approximately how many cases has this occurred in the past two years?

If "No," please skip to Question #7.

3. Please indicate in how many cases of each of the following case types discovery of computer-based evidence has been brought to your attention in the past two years. For example, if you have handled two antitrust cases in which such issues were raised, select the number "2" next to "Antitrust." Please select a number for each case type, even if that number is zero:

- Products liability
- Employment—Class action
- Employment—Individual plaintiff
- Antitrust
- Construction litigation
- General commercial litigation
- Securities litigation
- Patent/Copyright
- Other. Please specify:

4. Of the cases you indicated in response to Question #2 (i.e., cases in which you have been made aware of discovery of computer-based evidence), in how many have the following occurred? Please enter a number next to each item, even if that number is zero:

- Issuance of preservation order forbidding deletion of e-mail or other computer-based information
- Alleged spoliation (intentional or inadvertent destruction of evidence) of computer-based information by one or more parties
- On-site inspection of a party's computer system by an opposing party
- Hiring of computer experts by one or more parties
- Problems regarding privilege waiver when computerized information was produced
- Sharing of the costs required to retrieve computerized information between the party requesting the information and the respondent
- Sharing of costs resulting from the format for production (e.g., requests to produce in hard copy as well as electronic form)
- Substantially increased efficiency in discovery due to the computer-based nature of the information

5. Have you issued any orders that specify procedures or standards for discovery of computer-based evidence in a particular case that you would be willing to share with us? If so, please briefly describe the nature of the order(s).

6. Have you issued any standing orders that specify procedures or standards for discovery of computer-based evidence that you would be willing to share with us? If so, please briefly describe the nature of the order(s).

7. Does your district have any local rules or standing orders that specify procedures or standards for discovery of computer-based evidence? If so, please briefly describe the nature of the rules (with citations, if possible) or orders.

8. Are you aware of a case or cases in your district involving discovery of computer-based evidence that you think would be a good candidate for an in-depth case study by the Federal Judicial Center?

We are interested in cases in which discovery of computer-based information was handled well by the attorneys, and cases in which problems related to computer-based discovery occurred and may not have been handled as well, or cases in which experiences were mixed. In addition, it would be particularly useful if the case was terminated relatively recently, and if the judge(s) and the attorneys involved would likely be willing to respond to further inquiries about the case. We wish to include cases with magistrate judge activity as well as cases in which the district judge chose not to delegate discovery management to a magistrate judge.

No; I am not aware of such a case.

Yes; I am aware of a case or cases that I think would be appropriate for a case study.

If Yes, please provide the name and docket number of the case(s):

(1) Case Name:

Docket Number:

(2) Case Name:

Docket Number:

(3) Case Name:

Docket Number:

9. Would you be willing to be contacted by an FJC staff member for further inquiry about your experiences with discovery of computer-based evidence?

Please select one.

Yes

No

Not applicable

10. Your Name: (required)

11. Your District:

Please note that your name and district information will be used only to determine the response rate to the survey and follow up with those who indicate a willingness to be contacted. If you do not wish to provide your name, please enter the numerical judge ID code assigned to you by the Administrative Office of the U.S. Courts.

12. If you wish to add any additional experiences or ideas from which you think the Advisory Committee might benefit as it studies issues related to discovery of computer-based evidence, please provide them here:

Thank you for your participation. Your responses will be very helpful to the Federal Judicial Center and the Discovery Subcommittee of the Advisory Committee on Civil Rules. If you have identified a case for study, or orders that you have issued and would be willing to share, we will follow up with you shortly. If you have any questions about the survey, please contact Ken Withers (202-502-4065, kwithers@fjc.gov) or Molly Johnson (315-824-4945, mjohnson@fjc.gov).

Appendix C: Survey of Computer Consultants

Electronic Discovery and Computer Forensics Experts and Consultants Survey

Name:

Organization:

On whose behalf are you responding? Please check one:

myself

my organization

PART ONE

1. In approximately how many **civil** cases per year are you retained by counsel or a court to consult or assist with computer-based discovery? _____

2. Approximately what percentage of these cases are in U.S. federal courts?

If you have not worked on any federal civil cases,
please stop here and return this questionnaire in the enclosed envelope.

3. In the past two years (since September 1999), approximately how many **federal** cases have you worked on in each of the following legal areas? *Please write a number next to each case type, even if that number is "0."*

Products liability

Employment—Class action

Employment—Individual

Antitrust

Construction litigation

General commercial litigation

Securities litigation

Patent/Copyright

Other (please specify):

4. In approximately how many of your **federal civil** cases in the past two years (since September 1999) have any of the following situations arisen? *Please write a number next to each situation, even if that number is "0."*

An effort by one party to limit or prevent deletion of e-mail or other computer-based information by another party, pending discovery

An *ex parte* order from the court forbidding deletion of e-mail or other computer-based information by the other party, pending discovery

___ A request that the court impose sanctions on a party for alleged misconduct in discovery of computerized information

___ Alleged spoliation (intentional or inadvertent destruction of evidence) of computer-based information by one or more parties

___ A demand for on-site inspection of a party's computer system by an opposing party

___ Problems regarding the inadvertent disclosure or production of privileged computerized information

___ An offer or demand to share the costs required to locate and retrieve computerized information (e.g., restoration of backup tapes or development of special search programming)

___ An offer or demand to share the costs of production (e.g., production of information in hard-copy form or a particular data format)

___ An order from the court requiring that the party seeking production of computer data pay all or part of the costs of production

5. Are there any problems related to the discovery of computer-based information that you have frequently encountered, but are not mentioned in the above list? If so, please describe:

PART TWO

We would like your help in identifying federal civil cases involving the discovery of computer-based evidence that might be appropriate for inclusion in our in-depth case study project. We are interested in knowing about any case in which discovery of computer-based information played a significant role. In our study, we obtain and analyze all the court documents regarding discovery available to the public, and conduct interviews with the judge and with counsel for both sides. The goal is to shed light on whether the rules of procedure and the case management tools available were fair and adequate to deal with the electronic discovery issues raised, or whether new procedures should be considered. Members of the Advisory Committee have expressed particular interest in looking at:

- product liability cases involving significant computer-based discovery,
- cases in which the judge considered or imposed sanctions for the withholding, mishandling, or destruction of computer data subject to discovery, and
- sample agreements, procedures, or protocols agreed to by the parties or ordered by the court for the conduct of computer-based discovery (whether or not the particular litigation is appropriate for the case study project).

If you are aware of any case(s) that might be appropriate for our case study, please provide the information requested below. If you wish, we will not identify you as the person who suggested this case for study.

1. Case name:
2. Court (federal district):

3. Approximate filing date:
4. Any comment on why you believe this case should be studied:

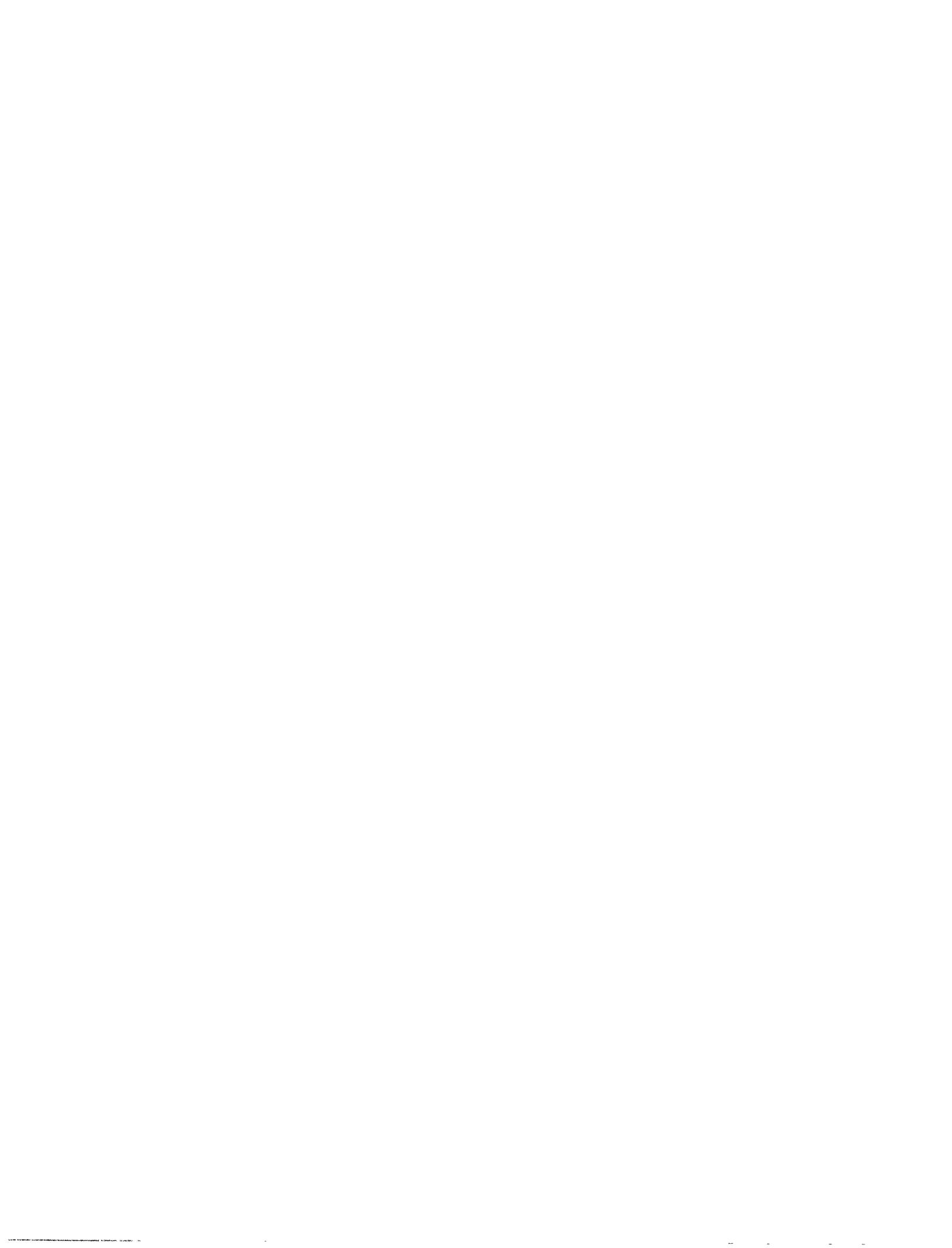
Please check one:

- I do not wish to be identified as having suggested this case
 I do not mind being identified as having suggested this case
(You may nominate multiple cases, if you wish.)

Thank you for your time.

Please return your completed questionnaire in the enclosed envelope to:

Kenneth J. Withers
Research Associate
Federal Judicial Center
One Columbus Circle NE
Washington DC 20002-8003



7A

Rule 6(e): Calculating 3 added days

The Appellate Rules Committee has referred to the Civil Rules Committee a "nice" time-counting problem that arises from the interaction between Rule 6(e) and the time-counting conventions of Rule 6(b). The problem was raised in comments on amendments of the Appellate Rules designed to make the time-counting provisions in the Appellate Rules similar to the Civil Rules. Because the problem arises from the Civil Rules, the Appellate Rules Committee believes that the Civil Rules Committee should take the lead in proposing a solution.

As recently amended, Rule 6(e) says:

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.

The problem described below could be addressed by changing the final clause:

~~3 days shall be added to the prescribed period~~ the prescribed period begins 3 days after service.

This change would capture the meaning that surely must have been intended.

Rule 6(b) says that intervening Saturdays, Sundays, and legal holidays are excluded when computing a prescribed or allowed "period of time" that is "less than 11 days." The Appellate Rules had used 7 days in the parallel rule, but are switching to the less-than-11-days rule to establish uniformity with the Civil Rules. In the course of deliberating the change, the Appellate Rules Committee was asked to address the integration of the additional 3 days. There are at least three possible choices to be made. They are described, with citations to apparently conflicting decisions, in 4B C.A. Wright & A.R. Miller, Federal Practice & Procedure: Civil 3d, § 1171, beginning at p. 595.

The first choice is to add the three days to the underlying period; if it begins as a 10-day period, it becomes a 13-day period when applying Rule 6(b). Because it is a 13-day period, intermediate Saturdays, Sundays, and legal holidays are counted. The result is that the time to respond after mail service is shorter than the time to respond after personal service. Not smart.

The second choice is to treat the 3-day addition independently for purposes of Rule 6(b). If the original period is 10 days, there are two exclusions of intervening "dies non". Saturdays, Sundays, etc. are excluded from the 10-day period and also from the 3-day period. This gives a lot of extension: the three days can easily become five, and with the help of a legal holiday perhaps six.

The third choice is to count the 3-day addition as an addition, not as a period of time prescribed by the rules. This approach corresponds to the apparent intent, and also to the language: "3 days shall be added." Dies non count only if the 3-day addition causes the time to expire on one. (E.g., time, as enlarged by the 3 days, runs out on a Saturday; the time is extended to the next

weekday that is not a legal holiday.) Wright & Miller opt for this choice, adding that the 3 days always should be added at the beginning: we need a clear convention, and this reflects the perception that mail may take as long as 3 days to arrive. (It could be argued that it is improper to count Saturday and Sunday against the 3 days if a letter arrives on Saturday: no one will notice it. But if it is mailed Friday and arrives on Saturday, why not let the 10-day period start on Tuesday: the recipient should have seen it on Monday.)

It is not hard to illustrate circumstances in which it makes a difference whether the Rule 6(e) 3-day addition is inserted at the beginning or at the end of a prescribed 10-day period. The paper is mailed on Wednesday. If we count Thursday, Friday, and Saturday as the 3 days added by Rule 6(e), Monday is day 1 of the 10-day period; the tenth day is Friday, sixteen days after mailing. If we count Thursday and Friday as days 1 and 2 of the 10-day period, day 10 is a Wednesday; the third day added under Rule 6(e) is Saturday, and the response is due on Monday, 19 days after mailing.

If we accept the Wright & Miller recommendation, drafting may not be difficult. The ambiguity arises from saying "3 days shall be added to the prescribed period." We need to find a way to say that "the prescribed period begins 3 days later than it would begin if service had been made under Rule 5(b)(2)(A)." It may suffice to say, as suggested above, that "the prescribed period begins three days after service." This drafting depends on the Rule 5(b) provisions that define the time when service is made. (b)(2)(B) says: "Service by mail is complete on mailing." (C), which permits service by leaving a copy with the clerk of court, does not say that service is complete on leaving the copy, but that seems to speak for itself. (D) says: "Service by electronic means is complete on transmission; service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery."

The alternatives are increasingly uncouth: "3 days shall be [are] added before calculating the prescribed period," or something in that vein.

A more complete restyling — avoided when we amended Rule 6(e) to account for electronic service — might look like this:

(e) Additional Time After Service Under Rule 5(b)(2)(B), (C), or (D). Whenever ~~a party has the right or is required to do some act or take some proceedings within a prescribed period of time after the service of a notice or other paper and the~~ a notice or paper is served ~~upon~~ on a the party under Rule 5(b)(2)(B), (C), or (D), any period prescribed for acting after the notice is served begins 3 days after {service} [the notice or other paper is served] ~~shall be added to the prescribed period.~~

COMMITTEE NOTE

Rule 6(e) is amended to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the party served. The prescribed period begins three days after the notice or other paper is served. All the other time-counting rules apply unchanged.

[One example illustrates the operation of Rule 6(e). A paper is mailed on Wednesday. The period to act begins on Sunday, three days — Thursday, Friday, and Saturday — after the paper was served by mailing. If the period for acting is less than eleven days, Sunday is excluded from the computation under Rule 6(a). Day 1 then becomes Monday.]

Addendum

Rule 6(e) - (a): Less than Ten Days

It is important to keep an eye on the details. Rule 6(a) applies generally to computing any period of time; the "less than 11 days" provision is the same.

Rule 6(e), on the other hand, applies only to actions taken "within a prescribed period after the service of a notice or other paper." It aims at service, after all. So the number of 10-day periods it reaches is far less than the set of 10-day periods. The Rules 50, 52, and 59 10-day periods, for example, do not turn on notice. So:

Non-service 10-day periods: 12(a)(4); 23(f)(after entry of order); Rules 50, 52, 59

Service 10-day periods: 15(a)(time to plead in response to an amended pleading); 31(a)(4)(7 days for redirect and recross questions for deposition on written questions); 38(b)(c)(demand for jury trial; add issues to another party's limited demand); 53(e)(2)(as it now is — the amendment extends to 20 days); 68 (accept offer of judgment); 72(a), (b) (objections to magistrate judge report)

Ambiguous: 14(a) allows impleader by the third-party plaintiff if the complaint is filed "not later than 10 days after serving the original answer." Does this mean that if the third-party plaintiff mails the original answer, it gets an extended period because it has made that choice? An incentive to mail.... Admiralty Rule C(6)(b)(i)(A) sets the time to assert a right of possession in an admiralty proceeding at 10 days after execution of process: does that count as service of a notice or other paper?

Out of it: Rule 56(c) provides that a party opposing summary judgment may serve opposing affidavits prior to the day of the hearing. This is a period less than 11 days, but it makes no sense even to apply Rule 6(a).



APPELLATE RULES COMMITTEE'S MATERIALS
ON
CALCULATING 3 DAYS PROVISIONS

MEMORANDUM

DATE: March 27, 2002
TO: Advisory Committee on Appellate Rules
FROM: Patrick J. Schiltz, Reporter
RE: Item No. 01-03

Attorney Roy H. Wepner has called the Committee's attention to an ambiguity in the way that Rule 26(a)(2) interacts with Rule 26(c). (A copy of Mr. Wepner's letter is attached.)

Rule 26(c) provides that "[w]hen a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service." For example, under Rule 31(a)(1), the appellee must serve and file a brief within 30 days after the appellant's brief is served. If the appellant serves its brief by mail, the appellee's brief must be served and filed within 33 days — the 30 days prescribed in Rule 31(a)(1) plus the 3 days added to that prescribed period by Rule 26(c).

Rule 26(a)(2) currently provides that, in computing any period of time, intermediate Saturdays, Sundays, and legal holidays are excluded when the period of time is less than 7 days, and included when the period of time is 7 days or more. This Committee has proposed amending Rule 26(a)(2) so that the demarcation line is changed from 7 days to 11 days. The purpose of the proposed amendment is to make time calculation under the Appellate Rules consistent with time calculation under the Civil Rules and Criminal Rules.

The ambiguity is this: In deciding whether a deadline is less than 7 days or 11 days, should the court “count” the 3 days that are added to the deadline under Rule 26(c)? Suppose, for example, that a party has 5 days to respond to a paper that has been served upon her by mail. Is she facing a 5-day deadline — that is, a deadline “less than 7 days” for purposes of current Rule 26(a)(2) — and therefore a deadline that should be calculated by excluding intermediate Saturdays, Sundays, and legal holidays? Or is she facing an 8-day deadline — that is, a deadline that is *not* “less than 7 days” for purposes of current Rule 26(a)(2) — and therefore a deadline that should be calculated by including intermediate Saturdays, Sundays, and legal holidays?

This question never arises under the current version of Rule 26(a)(2). The question would arise only with respect to 4-, 5-, or 6-day deadlines, as only then would including the 3 extra days provided by Rule 26(c) change the deadline from one that is less than 7 days to one that is 7 days or more. But there are no 4-, 5-, or 6-day deadlines in the Appellate Rules.

This question will arise under the *amended* version of Rule 26(a)(2). (The amendment will take effect on December 1, 2002, barring Supreme Court or Congressional action.) Under amended Rule 26(a)(2), the question will arise with respect to 8-, 9-, and 10-day deadlines. There are no 8- or 9-day deadlines in the Appellate Rules, but there are several 10-day deadlines.

A lot turns on this question. Suppose that a party has 10 days to respond to a paper that has been served by mail. If the 3 days *are* added to the deadline before asking whether the deadline is “less than 11 days” for purposes of amended Rule 26(a)(2), then the deadline is *not* “less than 11 days,” intermediate Saturdays, Sundays, and legal holidays do count, and the party would have at least 13 calendar days to respond. If the 3 days are *not* added to the deadline before asking whether the deadline is “less than 11 days” for purposes of amended Rule 26(a)(2),

then the deadline *is* “less than 11 days” for purposes of Rule 26(a)(2), intermediate Saturdays, Sundays, and legal holidays do *not* count, and the party would have at least 17 calendar days to respond.

Mr. Wepner is correct that this problem should be fixed. But it is difficult to know exactly how the problem should be fixed or by whom.

The district courts have wrestled with this problem under the Civil Rules for 17 years, yet they have failed to agree on a solution. Professor Arthur Miller devotes 7 pages to this problem in the new edition of Volume 4B of *Federal Practice & Procedure*.¹ Professor Miller’s discussion outlines three possible ways of solving the problem (actually four, as the second option has two “sub-options”), but cites disadvantages to each. The problem is a complicated one.

The problem is also one that should not be addressed only by the Appellate Rules Committee. After December 1, the identical issue will arise under the Appellate Rules, the Civil Rules, and the Criminal Rules. If time is to be calculated the same under all three sets of rules, the issue will have to be resolved at the same time and in the same manner by the three advisory committees. One of those committees will have to take the lead.

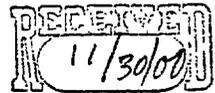
Judge Alito and I believe — and the Reporter to the Civil Rules Committee agrees — that the Civil Rules Committee should take the lead on this matter. The Civil Rules Committee is, if you will, the “biological parent” of this issue; this Committee is only the “adoptive parent.” The Civil Rules Committee has 17 years’ experience with this issue; this Committee has none. And this issue is a bigger problem for the Civil Rules than for the (amended) Appellate Rules. The

¹See 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1171, at 595-601 (2002). A copy of this section is attached.

problem does not arise unless a party is required to act within a prescribed period of 8, 9, or 10 days after a paper is *served* on that party. The Appellate Rules contain no 8- or 9-day deadlines and only a handful of 10-day deadlines that are triggered by *service* (as opposed to by the filing of a paper or the entry of an order). Only one of these 10-day deadlines is of any real consequence — the deadline in Rule 27(a)(3)(A) regarding responding to motions.² By contrast, the Civil Rules appear to contain at least a dozen 10-day deadlines that are triggered by service.

I recommend that the Committee refer Mr. Wepner's letter to the Civil Rules Committee.

²This Committee has proposed amending Rule 27(a)(3)(A) so that it provides 8 days to respond to a motion, rather than 10. But the change will not eliminate the problem cited by Mr. Wepner.



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November 27, 2000

Mr. Peter G. McCabe
Secretary of The Committee on
Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, DC 20544

00-AP-006

00-CV-H

Re: Proposed Amendments to the Federal Rules
Of Appellate Procedure

Dear Mr. McCabe:

In accordance with the request for comments published in the November 1, 2000 advance sheet of West's Supreme Court Reporter, I am writing to comment on the proposed amendments to Rule 26 of the Federal Rules of Appellate Procedure.

I heartily concur with the notion of amending Fed. R. App. P. 26 so that it is congruent with Fed. R. Civ. P. 6. However, it is unfortunate that the Committee has not seen fit to take this opportunity to remove an ambiguity in these rules which has spawned extensive and needless litigation and which has still left the issue without a definitive resolution. *See generally* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1171 at 516-21 (Supp. 2000).

The problem is this: when in the calculation process does one add the three calendar days where service has been made by mail? The answer to that question can and does impact on the ultimate calculation, as a simple example will illustrate.

Suppose an adversary serves a paper by mail, and the recipient is obligated to respond within ten days. If you add the three days for service by mail first, we are now above the 11-day threshold, which would suggest that we do not exclude intermediate Saturdays, Sundays and holidays. The final tally, then, is 13 calendar days.

Alternatively, one can first look at the original 10-day deadline, conclude that it is less than the 11-day threshold, and thereby first determine that intermediate Saturdays, Sundays and holidays do not count. This will provide a tentative time period which would typically be 10 business days or 14 calendar days. If we *now* add the three extra days for mailing, we are up to a

LERNER, DAVID, LITTENBERG, KRUMHOLZ & MENTLIK, LLP

Mr. Peter G. McCabe
Secretary of The Committee on
Rules of Practice and Procedure
November 27, 2000
Page 2

total of 17 calendar days. This four-day discrepancy is significant, and can become even more so if the 17th day is a Saturday, Sunday or holiday, which could then result in a final tally of 19 calendar days or even more.

I take no position on which interpretation leads to the proper result. But I do believe that the rule should be clear so that everyone can readily calculate the correct amount of time. To that end, here are two alternative suggested rewrites of the existing first sentence of Fed. R. App. P. 26(c):

[1] When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period before making of the determination set forth in Rule 26(a)(2) as to whether the period is less than 11 days, unless the paper is delivered on the date of service stated in the proof of service.

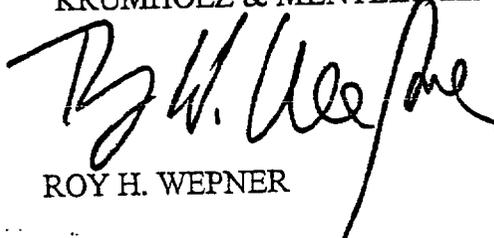
[2] When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period after the deadline has been determined pursuant to Rule 26(a)(2), unless the paper is delivered on the date of service stated in the proof of service.

Should the Committee believe that one of these proposed changes to Fed. R. App. P. 26(c) is desirable, it would obviously make sense to make a similar change in Fed. R. Civ. P. 6, since failing to do so would defeat one object of the present amendment, which was to conform the two rules. If it is too late in the amendment process to make a similar change in Fed. R. Civ. P. 6, perhaps the foregoing proposal could be considered for a separate set of rule changes in the future.

The Committee's consideration of these comments is very much appreciated.

Respectfully submitted,

LERNER, DAVID, LITTENBERG,
KRUMHOLZ & MENTLIK, LLP



ROY H. WEPNER

FEDERAL PRACTICE & PROCEDURE

When the original period is eleven days or more, the three additional days allowed when service has been made by mail should be added to the original period, rather than treated as a separate period, and the total treated as a single period for purposes of computation.⁹ This simplifies computation and accomplishes adequately the purpose of Rule 6(e), which is to protect parties served by mail from suffering a systematic diminution of their time to respond.¹⁰ Thus, suppose that thirty days normally are given to perform a particular act following service of a notice, and the thirtieth day would fall on a Sunday if the party were served personally. It has been argued under state provisions similar to Rule 6(e) that if service is made by mail, the original thirty-day period is then extended to Monday and the three-day addition then makes Thursday the final day for taking action. The better view,

7. Rule 5(b)

See the discussion in § 1147.

8. Advisory Committee

The Advisory Committee Note to the 2001 amendment to Rule 6(e) is reprinted in vol. 12A, App.C.

9. Method of computation

Pagan v. Bowen, D.C.Fla.1987, 113 F.R.D. 667, 668, citing Wright & Miller.

10. Purpose of Rule 6(e)

See the discussion in the text at notes 1-5, above.

however, is that there is simply one thirty-three day period and that the thirty-third day, Wednesday, is the final day of the extended period.¹¹

When the original period is less than eleven days, however, the issue of whether or not to add the three days into the original period becomes more problematic. This particularly is true in the frequent situation of a governing ten-day period.¹² The problem is caused by the 1985 amendment to Rule 6(a), which provides that intermediate Saturdays, Sundays, and legal holidays are excluded from the computation of periods of less than eleven days.¹³ As a result of the amendment, when a notice triggering a ten-day period is served personally, Saturdays, Sundays, and legal holidays are excluded from the period under Rule 6(a). But when the same notice is served by mail, these days arguably should not be excluded since the relevant time frame has become a single time period of thirteen days under Rule 6(e). Unfortunately, the 1985 amendment of the rule does not address the proper integration of Rules 6(a) and 6(e) in this context. A choice therefore has to be made among three possible methods of interpreting these two provisions.

11. Three days added to original period

Wheat State Tel. Co. v. State Corp.
Comm'n, 1965, 403 P.2d 1019, 195
Kan. 268.

In re Iofredo's Estate, 1954, 63 N.W.2d
19, 241 Minn. 335.

See also

EEOC v. TruGreen Ltd. Partnership,
D.C.Wis.1998, 185 F.R.D. 552, quot-
ing Wright & Miller.

Wallace v. Warehouse Employees Union
No. 730, D.C.App.1984, 482 A.2d 801,
809, citing Wright & Miller.

But compare

Kessler Institute for Rehabilitation v.
NLRB, C.A.3d, 1982, 669 F.2d 138,
141 (computing three additional days
granted under 29 C.F.R. § 102.114,
which is virtually identical to Rule
6(e), as separate period in order to
protect number of working days party
being served had to respond when re-
sponse period was only 10 days and
court took judicial notice of delays in
postal system).

No additional time

When no notice of any kind was served
upon indemnitors by mail and the in-
demnitors were not required to await
notification by the district court clerk
that the amended answer had been
approved for filing before they could
make the jury demand, the indemni-
tors' time in which to demand jury
trial was not extended by Rule 6(e).
Engbrock v. Federal Ins. Co., C.A.5th,
1967, 370 F.2d 784, 787-788.

12. Ten-day periods

See, e.g., Rule 12(a)(4)(A), (B) (respon-
sive pleading after grant or denial of
motion for more definite statement);
Rule 38(b) (demand for jury trial);
Rule 56(c) (summary judgment mo-
tion); Rule 59(c) (affidavit opposing
motion for new trial); Rule 68 (offer of
judgment); Rule 72(b) (objection to
magistrate's findings).

13. 1985 amendment

See the discussion in § 1162.

First, the additional three days allowed under Rule 6(e) when service has been made by mail simply can be added to the original period. This method is consistent with the application of Rule 6(e) to periods of more than eleven days, discussed above, and is easy to apply. However, it probably should be rejected as inconsistent with the intent of the 1985 amendment to Rule 6(a), as well as with the underlying purpose of Rule 6(e).¹⁴ The Advisory Committee Note accompanying the 1985 amendment refers specifically to protecting the number of working days parties will have in which to act under rules with ten-day periods.¹⁵ The amendment assures that when service is made personally at least four additional days (from the two intervening weekends) are added to virtually all ten-day periods¹⁶ (along with any legal holidays that fall within the period). If,

14. Purpose of Rule 6(e)

See the discussion in the text at notes 1-5, above.

15. Advisory Committee Note

The Advisory Committee Note accompanying the 1985 amendment to Rule 6(a) is set out in vol. 12A, App. C, and is reprinted at 98 F.R.D. 337, 356-357.

See the discussion in § 1162.

See also

Peabody Coal Co. v. NLRB, C.A.9th, 1983, 709 F.2d 567, 569-570, citing *Wright & Miller* (29 C.F.R. § 102.114, virtually identical to Rule 6(e), interpreted to call for separate 10-day and three-day periods).

Kessler Institute for Rehabilitation v. NLRB, C.A.3d, 1982, 669 F.2d 138, 141 (29 C.F.R. § 102.114, virtually identical to Rule 6(e), interpreted to call for separate periods in order not to eliminate too many working days from 10-day period in which to file exceptions to report of hearings officer).

Coles Express v. New England Teamsters & Trucking Indus. Pension Fund, D.C.Me.1988, 702 F.Supp. 355.

Nalty v. Nalty Tree Farm, D.C.Ala.1987, 654 F.Supp. 1315.

Pre-1985 practice

A previous edition of this Treatise recommended the first method of inte-

gration under the pre-1985 version of Rule 6(a), which excluded "dies non" only from periods of less than seven days. This position probably was correct at that time given the fact that the exclusion under former Rule 6(a) never would add up to more than the three days allowed under Rule 6(e). As a result of the 1985 amendment, however, Rule 6(a) routinely adds four days to ten-day periods when service is made personally. Thus the first method of integration no longer clearly is the proper choice.

The 1985 amendment to Rule 6(a) renders the old practice of adding the three mailing days before deciding whether to except intermediate holidays inapplicable. *National Savs. Bank of Albany v. Jefferson Bank*, D.C.Fla. 1989, 127 F.R.D. 218, citing *Wright & Miller*.

16. Virtually all

In the unusual situation when a notice triggering a ten-day period is served personally on a weekend, the period commences on Monday, and only one complete weekend is excluded under Rule 6(a). In the vast majority of cases, however, personal service is made on working days, and Rule 6(a) assures that two weekends are excluded from the computation of the period.

however, service is made by mail and Rule 6(e) is applied to create a single time span, intervening Saturdays, Sundays and legal holidays are not excluded and the time in which to act is reduced effectively from fourteen calendar days to thirteen. Such a reduction runs counter to the purpose of Rule 6(e), which is to leave a party served by mail in no worse position than a party served personally.¹⁷

The unfairness of the first method of integration is underscored further by the fact that the longer fourteen-day period following personal service does not begin until actual receipt of the notice, but the shorter thirteen-day period following service by mail begins on the date of mailing.¹⁸ Viewed in this light, computation of the three days granted under Rule 6(e) as part of a single time span, rather than as a separate period, results in precisely the situation Rule 6(e) is supposed to prevent—a systematic diminution of the number of working days available to a party to respond when notice is served by mail.¹⁹ Although the diminution is not great, and despite the fact that enlargements of time are available liberally under Rule 6(b)(1),²⁰ the first method of integration should be rejected for the reasons stated.

The second method of integrating Rules 5(a) and 6(e) is to compute two separate time spans of ten and three days, and exclude weekends and holidays from each. This method solves the diminution of time problem caused by the first method discussed above. It also is relatively easy to implement. In addition, it applies

17. Purpose of Rule 6(e)

See the discussion in the text at notes 1-5, above.

See also

“It would be queer if service by mail, which delays actual knowledge of the decision, would reduce the time to object.” *Lerro v. Quaker Oats Co.*, C.A.7th, 1996, 84 F.3d 239, 242 (Eastbrook, J.), citing *Wright & Miller*.

National Savs. Bank of Albany v. Jefferson Bank, D.C.Fla.1989, 127 F.R.D. 213, citing *Wright & Miller* (agreeing with the text at note 21 of the Second Edition of this Treatise and explicitly disapproving of *Pagan v. Bowen*, cited below).

But see

Pagan v. Bowen, D.C.Fla.1987, 113 F.R.D. 667 (construing Rules 6(a) and 6(e) to create single 13-day period).

The court cited a previous edition of this Treatise to support its decision. As a result of the 1985 amendment to Rule 6(a), the position taken in that edition no longer seems to be optimum. See the text at note 13, above.

18. Service complete on mailing

Rule 5(b) provides that service of a notice is complete upon mailing. See the discussion in § 1148.

19. Purpose of Rule 6(e)

See the discussion in the text at notes 1-5, above.

20. Enlargements available

See the discussion in § 1165.

the literal terms of Rule 6(a) to the computation of both time periods in a consistent manner, thereby producing a seemingly desirable result.²¹

On the other hand, the second method can lead to an unjustified lengthening of the permitted time. For example, assume a ten-day period with service by mail occurring on Friday. By eliminating weekends and holidays from both periods, the aggregated period ends on the Wednesday nineteen days later (or Thursday if a holiday intervenes). Even granting that a party served personally would have had fourteen calendar days, and that three additional days should be allowed because service is made by mail, the aggregated period should add up only to seventeen days, not the nineteen (or twenty) permitted by the second method. Of course it should be noted that the unjustified lengthening amounts at most to three days, and this arguably is not grounds for serious concern. It also should be remembered that if the calculation of separate periods results in excessive delay in urgent cases, one of the parties always can request the court to shorten the response time under Rule 6(d).²² Despite these important ameliorating elements, any discrepancy in the computation of time caused by the method of service of court papers, regardless of how slight it may be, should be eliminated, if possible, in order to avoid giving parties improper incentives to choose a particular method of service (in this case personal service) in the hope of shortening another party's response time.²³

The third method of integration attempts to eliminate any unjustified discrepancies based on the type of service employed. Under this method, the ten-day period is computed under Rule 6(a), excluding weekends and holidays, and three calendar days are added to the resulting period pursuant to Rule 6(e). To assure consistent application, and to reflect accurately the presumption that the three days allowed under Rule 6(e) represent transmission time in the mail, the three days always should be counted first,

21. Desirable result

The desirability of applying Rule 6 consistently to the computation of all time periods is discussed in § 1163 at notes 21-24.

22. Shorten time

See the discussion in § 1162 at notes 12-13.

23. Improper incentives

Incentives always will exist for parties to choose particular days of the week to serve notices. The point being made in the text is that no additional incentives should be provided to influence a party to choose one method of service over another in hopes of minimizing the response time available to another party.

followed by a counting of the ten-day period.²⁴ Thus, in the example given of service by mail on a Friday, the three days are Saturday, Sunday, and Monday, and the ten-day period runs from Tuesday through the Monday seventeen days after service. Regardless when the three days end, the ten-day period should begin on the next business day. The ten-day period should not begin on a Saturday, Sunday, or holiday, inasmuch as these days are excluded from the computation period.²⁵

Because the third method of integration most closely achieves the apparent purposes of Rule 6(e) and the 1985 amendment to

24. Three days first

In some cases, computation of the three days after the ten-day period, rather than before, will cause the aggregated period to end on a weekend when it otherwise would not have. To avoid confusion under the third method of integration, it thus is necessary to adopt a convention of always counting the three days either first or last. Counting them first appears more consistent with the purpose of allowing three additional days to account for the transmission time of papers in the mail. The purpose of Rule 6(e) is discussed in the text above, at notes 1-5.

Kruger v. Apfel, D.C.Wis.1998, 25 F.Supp.2d 937, quoting *Wright & Miller*, vacated on other grounds C.A.7th, 2000, 214 F.3d 734.

EEOC v. TruGreen Ltd. Partnership, D.C.Wis.1998, 185 F.R.D. 552.

Littrell v. Shalala, D.C.Ohio 1995, 898 F.Supp. 582.

Epperly v. Lehmann Co., D.C.Ind.1994, 161 F.R.D. 72, citing *Wright & Miller*.

Compare

CNPq-Conselho Nacional de Desenvolvimento Cientifico e Technologico v. Inter-Trade, Inc., C.A.D.C.1995, 50 F.3d 56, 311 U.S.App.D.C. 85.

Vaquillas Ranch v. Texaco Exploration & Production, Inc., D.C.Tex.1994, 844 F.Supp. 1156.

In *Nalty v. Nalty Tree Farm*, D.C.Ala. 1987, 654 F.Supp. 1315, the district judge, without addressing the question of whether the three days should come first or last, applied a modified version of the third method of integration proposed in text, and put the three days after the ten-day period.

But see

The only way to carry out the Rule 6(e) function of adding time to compensate for delays in mail delivery is to employ Rule 6(a) first. *Treanor v. MCI Telecommunications Corp.*, C.A.8th, 1998, 150 F.3d 916.

Consistency with prior cases and ease of computation suggest that the three-day period be computed after the originally prescribed period. *National Savs. Bank of Albany v. Jefferson Bank*, D.C.Fla.1989, 127 F.R.D. 218, 221, quoting *Wright & Miller*.

25. Excluded

Although Rule 6(a) excludes "intermediate" Saturdays, Sundays, and legal holidays, a liberal construction of "intermediate," which seems called for in view of the brevity of the time period involved, excludes from the computation any Saturday, Sunday, and legal holiday falling between the day of the event from which the period begins to run and the final day of the period. See the discussion in § 1162 at notes 12-13.

Rule 6(a), it probably should be preferred. It should be noted, however, that the third method suffers from three drawbacks when compared to the second method. First, it is more complicated; second, it requires the use of a convention (always counting the three-day period first) that is not provided for on the face of either federal rule; and, third, it arguably violates a literal reading of Rule 6(a) by failing to exclude weekends and holidays from the separate three-day transmission period, which, after all, is a period "less than eleven days." These points are well taken, and may lead some courts to adopt the second method of computing time. Nevertheless, the third method still seems preferable, because of its fidelity to the purposes of Rules 6(a) and 6(e), and because it avoids creating undesirable incentives for parties to choose one form of service over another.²⁶

Rule 15(c)(3)

The agenda carries forward a "mailbox" suggestion that Rule 15(c)(3)(B) be amended to overrule several appellate decisions. This proposal has been urged again by the Third Circuit opinion in *Singletary v. Pennsylvania Department of Corrections*, No. 00-3579, Sept. 21, 2001.

The nature of the problem is illustrated by the *Singletary* case. The plaintiff's decedent committed suicide in prison. On the last day of the applicable 2-year limitations period, the plaintiff sued named defendants and "unknown corrections officers." The claim was deliberate indifference to the prisoner's medical needs. Eventually the plaintiff sought to amend to name a prison staff psychologist as a defendant. The court concluded that relation back was not permitted because it was clear that the new defendant had not had notice of the action within the period prescribed by Rule 15(c)(3)(A). It took the occasion, however, to address the question whether there is a "mistake" concerning the proper party when the plaintiff knows that the identity of a proper party is unknown. The court counts seven other courts of appeals as ruling that there is no mistake, and relation back is not permitted even though all other requirements of Rule 15(c)(3) are met, when the plaintiff knows that she cannot name a person she wishes to sue. For this case, the psychologist could not be named as an added defendant. The court also concludes that its own earlier decision had taken a contrary view; if the other requirements of Rule 15(c)(3) are satisfied, the psychologist could be named.

The Third Circuit concludes its opinion by recommending that the Advisory Committee modify Rule 15(c)(3) to permit relation back in these circumstances. The specific recommendation, taken directly from the Advisory Committee agenda materials, would allow relation back when the new defendant "knew or should have known that, but for a mistake or lack of information concerning the identity of the proper party, the action would have been brought against" the new defendant.

The Rule 15(c) memorandum invoked by the Third Circuit is set out below. It identifies a welter of problems posed by Rule 15(c)(3) as it was amended in 1991. The problems almost certainly arise from focusing on the specific desire to overrule an unfortunate Supreme Court interpretation of the former requirement that the new defendant have notice of the action "within the period provided by law for commencing the action." If amendments are justified whenever an active imagination can show genuine difficulties with a rule, extensive amendments may be warranted.

There are good reasons to avoid the thicket of Rule 15(c)(3) amendments. Perhaps the most important is that the questions that can be raised on reading the rule do not appear to have emerged in practice. At least one leading treatise, for example, gives no hint of these problems. A second reason is that amendments should be made only when good answers can be given. Good answers are not immediately apparent, at least as to many of the questions. A third reason arises from the interplay between Erie principles and the Rules Enabling Act. Rule 15(c)(1) allows relation back whenever "relation back is permitted by the law that provides the statute of limitations applicable to the action." Putting aside for the moment the settings in which state limitations periods are borrowed for federal claims, diversity actions present obvious problems. Limitations periods are "substantive" for Erie purposes. Any attempt to adopt limitations periods for state-law claims

through the Rules Enabling Act would surely be challenged as abridging, enlarging, or modifying the state-created substantive claim. As they stand, the relation-back provisions of Rule 15(c)(2) and (3) invite the same challenge whenever they permit litigation and judgment on a claim that would be barred by limitations in the courts of the state that created the claim. Why is this a matter of pleading procedure, necessary to make effective the notice-pleading regime of Rule 8, not a direct adoption of limitations policies?

Three alternative courses of action appear most likely: (1) Invest substantial time and energy in a thorough reconsideration of Rule 15(c)(3). (2) Make the simple change to protect the plaintiff who knows that an intended defendant cannot be identified. (3) Do nothing, concluding that it is better not to attempt to fix one identified incoherence created by judicial interpretation than to expand the reach of a rule that needs more drastic revision.

A revised Rule 15(c) can be put together by choosing from the menu suggested in the memorandum that follows:

(c) RELATION BACK OF AMENDMENTS. An amendment of a pleading relates back to the date of the original pleading when

- (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, ~~or~~
- (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
- (3) the amendment changes¹ the party or the naming of the party against whom a claim is asserted ~~if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint and:~~

(A) Rule 15(c)(2) is satisfied;

¹ Should we make a further amendment to reflect the use of relation back when a defendant is added, not simply substituted? One possible formulation would be: "the amendment asserts a claim against a new party or changes the party or the naming of the party against whom a claim is asserted, and:"

(B) the party asserting the claim has acted diligently to identify the party to be brought in by amendment;

(C) the party to be brought in by amendment has received such notice of the institution of the action that meets the requirements of Rule 15(c)(3)(D) within 120 days after expiration of the limitations period for [commencing the action][filing the claim], or within a shorter period for effecting service in an action filed on the last day of the limitations period set by the law that provides the statute of limitations applicable to the action; and

(D) the notice received within the time set by Rule 15(c)(3)(C) is such that the party to be brought in by amendment ~~(A)~~ (i) will not be prejudiced in maintaining a defense on the merits, and ~~(B)~~ (ii) knew or should have known that, but for a mistake or lack of information concerning the identity of the proper party, the action would have been brought against the party. ~~The~~ Delivering or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of items (i) and (ii) subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.²

Committee Note

Rule 15(c)(2) is amended to make clear the application of Rule 15(c) to an omitted counterclaim set up by amendment under Rule 13(f). The better view is that Rule 15(c) applies because Rule 13(f) provides for adding an omitted counterclaim by amendment, see 6 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d, § 1430. When an answer or like pleading sets forth no claim at all, however, some difficulty might be found in present Rule 15(c)(2)'s reference to a claim set forth or attempted to be set forth in the original pleading. The amendment allows relation back if the claim arises out of the conduct, transaction, or occurrence set forth in the opposing party's pleading. An answer in a counterclaim, for example, will relate back if it arises out of the same conduct, transaction, or occurrence as the complaint.

² Is this right? Suppose the officer is brought into the action in an individual capacity?

Rule 15(c)(3) was amended in 1991 "to change the result in *Schiavone v. Fortune*[, 477 U.S. 21 (1986)]." Several changes are made to better implement that purpose.

The central purpose of relation back under Rule 15(c)(3) has been clear from the beginning. The purposes of a statute of limitations are fulfilled if a defendant has notice of the action within the time allowed for making service in an action filed on the last day of the limitations period. If the defendant is not named in the action, the notice must meet the standards first articulated in 1966: the notice must be such that the defendant will not be prejudiced in defending on the merits, and also such that the defendant knows (or should know) that the plaintiff meant to sue the defendant. The *Schiavone* decision thwarted this purpose by ruling that a defendant not correctly named must have this notice before the limitations period expires, relying on the 1966 requirement that the notice be received "within the period provided by law for commencing the action against" the new defendant. The 1991 amendment changed this phrase, requiring that notice be received "within the period provided by Rule 4(m) for service of the summons and complaint." If an action is filed on the last day of the limitations period, the apparent result is that notice to a defendant not named is timely so long as it occurs within 120 days after filing and expiration of the limitations period. The 1991 Committee Note, further, states that in addition to the 120 days, Rule 15(c)(3) allows "any additional time resulting from any extension ordered by the court pursuant to" Rule 4(m).

Incorporation of Rule 4(m) seemed to provide a convenient means of restoring the purpose of relation back. But it creates several difficulties. If the action is filed more than 120 days before expiration of the limitations period, the time for notice to a defendant not named seems to end before the limitations period. There is little apparent reason, on the other hand, to impose on a defendant not named the open-ended uncertainty that arises from the prospect that the court may have extended the time to serve someone else for reasons that have nothing to do with the situation of the defendant not named. And there is no apparent provision at all for cases that fall outside Rule 4(m) entirely — by its terms, Rule 4(m) does not apply "to service in a foreign country pursuant to [Rule 4] (f) or (j)(1)." Further perplexities may arise if a claim for relief is stated in a cross-claim or counterclaim, followed by a later attempt to amend to add an additional defending party.

The amended rule deletes the reliance on Rule 4(m). Instead, it requires that notice to the defendant not named be received within the shorter of two periods. The first period is 120 days after expiration of the limitations period for [commencing the action]{filing the claim}. This period corresponds with the most direct application of the present rule in an action that in fact is filed on the final day of the limitations period. To this extent, it does not change the period in which a defendant is vulnerable to amendment and relation back. But it alleviates any uncertainty that might arise from the prospect that the period may extend beyond 120 days because an extension was granted under Rule 4(m), and applies to cases of foreign service that fall outside Rule 4(m). [It also gives a clear answer for counterclaims, cross-claims, and the like: the new defending party must have had notice of the required quality no later than 120 days after expiration of the limitations period for commencing the action.]{As to a claim stated by counterclaim, cross-claim, or the like, the amended rule is open-ended. By referring to the time for filing the claim, it allows 120 days from whatever limitations rule governs the counterclaim, cross-claim, or other claim.} The alternative period is less

than 120 days. This period applies when the limitations law governing the claim requires service in less than 120 days after filing. A federal court may be bound by a state limitations statute that requires service within a defined period after the action is filed. See *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). There is no reason to subject a defendant not named in the original complaint to a longer period for receiving notice of the action than applies to a defendant who is named in the original complaint.

A new requirement is introduced in addition to deleting the reliance on Rule 4(m). Relation back is permitted under Rule 15(c)(3) only if the party asserting the claim has acted diligently to identify the party to be brought in by amendment. The rule should not encourage a plaintiff to prepare poorly during the limitations period, relying on relation back to save the day.

An unrelated change is made in describing the quality of the notice that must be received by a defendant not named in the complaint. A common problem arises when a plaintiff is not able to identify a proper defendant. Several courts have ruled that a plaintiff who knows that an intended defendant has not been identified has not made a "mistake concerning the identity of the proper party." The result is that a diligent plaintiff whose thorough investigation has proved inadequate is less protected than a less diligent plaintiff who mistakenly thought to have identified defendant. This result cannot be justified by looking to differences in the position of a defendant not named — if anything, a defendant not named may be put on better notice by a complaint naming an "unknown named police officer" than by a complaint that incorrectly names a real police officer.³ The reasons for allowing relation back against a defendant who knew that the lack of identification arose from a diligent plaintiff's lack of information are clearly stated in *Singletary v. Pennsylvania Department of Corrections*, F.3d (3d Cir.2001).

Rule 15(c)(3) Puzzles

The excuse for addressing Rule 15(c)(3) is 98-CV-E, a law student's suggestion that something should be done to overturn the unfortunate result in *Worthington v. Wilson*, 7th Cir.1993,

³ This is the point to consider whether to say anything about suing "unknown named" defendants. The question may arise if there is at least one defendant who can be identified with enough confidence to satisfy Rule 11. That is the easier case: there is sufficient ground to sue that person, and — unless things go awry at the outset — to launch discovery. Adding "unknown named" defendants may provide additional notice to the anonymous potential defendants, particularly if a further category is added — "unknown-named police officers." The question also may arise if there is no reasonably identifiable defendant: it is a large police force, and there is no reasonable way to identify even one plausible defendant. Filing an action then becomes primarily a tool for launching discovery, and — if filed toward expiration of the limitations period — winning an extension of the limitations period. There is likely to be substantial resistance to an amendment that clearly contemplates this practice.

8 F.3d 1253, and like cases. That suggestion will be addressed in due course. As often happens, however, consideration of one possible defect in a rule suggests consideration of others. Rule 15(c)(3) was amended in 1991 to supersede the decision in *Schiavone v. Fortune, Inc.*, 1986, 477 U.S. 21. It seemed like a good solution at the time. But literal reading leads to a number of puzzles. The puzzles may have satisfactory answers, but they present genuine difficulties.

A first warning may be useful. These problems all involve statutes of limitations, commonly state statutes of limitations. There are real questions about the propriety of using the Enabling Act to achieve what seems to be sound limitations practice that supersedes practices bound up with the underlying statute.

Limitations Background

28 U.S.C. § 1658 provides a general four-year limitations period for federal statutes enacted after December 1, 1990, apart from statutes that contain their own limitations provisions. Some statutes enacted before December 1, 1990 have their own limitations provisions. Most do not. Federal courts have long chosen to adopt analogous state limitations periods for these statutes. (In some settings, the analogy instead is drawn to the limitations period in a different federal statute.) The alternatives of having no limitations period, or creating limitations periods in the common-law process, are very unattractive. One frequently encountered illustration — the one involved in the *Worthington* case — is 42 U.S.C. § 1983.

State limitations periods also are applied by federal courts when enforcing state-created claims. One of the well-known wrinkles occurs when the state limitations scheme provides time limits not only for commencing the action but also for effecting service. *Walker v. Armco Steel Co.*, 1980, 446 U.S. 740, confirmed the rule that Civil Rule 3 does not supersede the state service requirements in these settings. The Rule 3 provision that an action is commenced by filing a complaint was not intended to address this issue.

Civil Rule 15(c) generally addresses the question whether an amendment to a pleading "relates back" to the time of the initial pleading. Rule 15(c)(1) provides the most general rule: if "relation back is permitted by the law that provides the statute of limitations applicable to the action," relation back is permitted. If federal law provides the statute of limitations, relation back can be addressed as a matter of federal law, supplemented if need be by Rule 15(c) paragraphs (2) and (3). If state law provides the statute of limitations, state-law relation-back doctrine is the first fall-back.

Rule 15(c)(2) allows a claim or defense asserted in an amended pleading to relate back if it "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." This is a nice functional provision that of itself creates few problems. It may raise a question when an attempt is made to add a new plaintiff, a separate issue described below.

Rule 15(c)(3) deals with relation back when an amendment "changes the party or the naming of the party against whom a claim is asserted." The first requirement for relation back is that the claim satisfy Rule 15(c)(2) by arising from the conduct, transaction, or occurrence set forth or

attempted to be set forth in the original pleading. So far, so good. Beyond that point, the rule has been framed in response to the Schiavone ruling.

In the Schiavone case the plaintiff claimed that he had been defamed in an article in Fortune Magazine. Ten days before the last day that could be argued to be the end of the limitations period, he filed an action captioned against "Fortune." "Fortune" exists only as a tradename and as an unincorporated division of Time, Inc. The complaint was mailed to Time, Inc.'s registered agent, who refused to accept service because Time was not named as defendant. The plaintiff promptly amended the complaint to name "Fortune, also known as Time, Incorporated." The amendment was not allowed to relate back, and the action was dismissed as time-barred.

The critical phrase in the 1966 version of Rule 15(c)(3) allowed relation back if the new or renamed defendant had notice of the action satisfying specified criteria "within the period provided by law for commencing the action against" the new defendant. The Court concluded that the "plain language" of the rules defeated relation back. The time permitted to commence the action — to file the complaint — is the limitations period. The complaint must be filed by the end of the limitations period. That is the period in which the "new" defendant must have notice of the action.

The difficulty with the Schiavone conclusion is that it requires notice to the "new" defendant at a time earlier than would be required if the new defendant had been properly identified in the initial complaint. As the practice then stood, if a complaint was filed on the last day of the limitations period, it sufficed to accomplish service on the defendant within a reasonable time. Time, Inc. had actual notice of the lawsuit — and surely knew exactly what was intended — at a time that satisfied all limitations requirements. There was an obvious reason to conclude that Rule 15(c)(3) should be amended to allow the action to proceed in such circumstances.

The amended version of Rule 15(c)(3) allows the amendment changing or renaming the defendant to relate back if the defendant had notice "within the period provided by Rule 4(m) for service of the summons and complaint." The base-line Rule 4(m) period is 120 days from filing. If the action is filed on the last day of the limitations period, it is good enough to effect notice within 120 days (or more, as discussed below). So far, so good. But it seems likely that the many questions that arise from this incorporation of Rule 4(m) were engendered by focusing on the "last-day" filing; if the complaint is filed well within the limitations period, awkward results seem to follow. These results are discussed below after beginning with the "mistake" question that prompts the discussion.

Mistake

Notice to the new defendant must satisfy two Rule 15(c)(3) criteria that are crafted to reflect the major purposes of limitations statutes. Within the Rule 4(m) period, the new party must have:

(A) * * * received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a *mistake* concerning the identity of the proper party, the action would have been brought against the party.

The notice that obviates prejudice in defending responds to the purpose to protect the opportunity to gather evidence and to stimulate the gathering. Knowing that the new party would have been sued if only the plaintiff had known enough both helps to stimulate the evidence gathering and also defeats the sense of repose that arises with the end of a limitations period.

The Worthington case involved a not uncommon problem. The plaintiff was arrested. The plaintiff believed that the arresting officers had used unlawful force, causing significant injuries. The plaintiff did not know the names of the arresting officers. At the end of the two-year limitations period provided by Illinois law, the plaintiff sued the village and three unknown-named police officers. There was in fact no tenable § 1983 claim against the village, given the limits on respondeat superior liability in § 1983 actions and the inability to claim a village policy or the like. But the plaintiff was able to discover the names of two arresting officers and sought to amend to name them as defendants. It was conceded that the officers had notice of the action within 120 days, and that the notice satisfied the Rule 15(c)(3) requirements. Relation back was denied, however, because there was no "mistake." It was not as if the plaintiff thought that Sergeant Preston had arrested him, and discovered only later that in fact it was Officers Wilson and Wall. The plaintiff knew from the beginning that he did not know the identity of the proper defendants. This was ignorance, not mistake.

On its face, the result in the Worthington case seems strange. The plaintiff very well may have faced insuperable difficulties in learning the identities of the arresting officers. Neither the arresting officers nor their police-department compatriots may have been willing to come forward. Many departments may lack sufficiently rigorous internal investigation procedures to ensure a reasonable opportunity to penetrate the wall of silence. Filing an action and discovery may be the only way to force production of the critical information. Why should the plaintiff be left out in the cold when state law does not provide a tolling principle that would invoke Rule 15(c)(1)?

If the result is in fact untoward, it would be easy to amend Rule 15(c)(3) to correct the result in a rough way. Subparagraph (2) could require that the new defendant "knew or should have known that, but for a mistake or lack of information concerning the identity of the proper party, the action would have been brought against" it. This approach is rough because it does not look to the diligence of the plaintiff who lacked information. It might be enough to add one more word: "but for a mistake or reasonable lack of information." But this too is rough, because the setting requires that the new defendant know that it is a reasonable lack of information, and how is the new defendant to know that? More complicated redrafting will be required to specify that the plaintiff's lack of information remained after diligent effort to identify the proper defendants, and that the new defendant knew it would have been named but for a mistake or lack of information.

That leaves, first, the question whether there is some principled ground to be more demanding when the plaintiff knows that he does not know the identity of one or more proper defendants. It can be argued that indeed there is. The plaintiff in these circumstances knows that if he waits to file until the end of the limitations period, it will not be possible to get notice to the proper defendants within the limitations period or even very soon after it has expired. Perhaps this

plaintiff should be forced to file well before the limitations period has expired, to facilitate notice to the defendant within the limitations period or within a brief time after the limitations period. This argument could be bolstered by observing that it minimizes the intrusion on state law when it is state law that supplies the limitations period. If state law does not allow relation back, why should a federal court, even if the federal court is enforcing federal law?

That argument may not seem forceful, but it is the most plausible one that comes to mind. It may gain some force from a different consideration. The problem facing the plaintiff in the Worthington case is not easily met by filing an action well within the limitations period. Who is to be the defendant? The plaintiff escaped Rule 11 sanctions for suing the village only because the complaint was filed in state court, and under the version of Rule 11 then in effect the court concluded that it could not apply sanctions. The strategy of simply suing a pseudonymous defendant as a basis for invoking discovery to find a real defendant is not permitted in most federal courts. See, e.g., *Petition of Ford*, M.D.Ala.1997, 170 F.R.D. 504. Perhaps it would not do much good to allow correction when the defendant lacks information as to the identity of the defendant. But there will be cases where the defendant has a claim against an identifiable adversary strong enough to meet the Rule 11 test, and can proceed to attempt to use discovery to identify the more important defendants.

An amendment supplementing the "mistake" language in Rule 15(c)(3)(B), in short, is attractive, but it may not reach very many cases. Drafting also may not be as easy as might be wished.

Any draft should confront — at least in Committee Note — the distinction between two problems. In one, the plaintiff can — within the limits of Rule 11 — identify one real defendant, but hopes to enhance the quality of notice to unidentified defendants by pleading that there are others who will be sued when they can be identified. Adding a "Doe" or "unknown-named" defendant, as an "unknown-named police officer," does carry a message to the unidentified defendant that the plaintiff wants to sue. That practice might well be blessed in the Note, to avoid Rule 10 questions. In the other, the plaintiff is unable to name any real defendant without violating Rule 11. What advice do we give for that situation? That it is, after all, proper to sue only unknown-named defendants, so long as Rule 11 is satisfied as to the existence of a claim against someone unidentifiable? Does an action against parties who are real but who cannot be identified satisfy Article III — is there a real case or controversy? If the only purpose of protecting the opportunity to sue is to provide a vehicle for discovery, would it be better after all to create a procedure for discovery in aid of framing a complaint?

Rule 4(m) Incorporation

The specification that the new defendant must know of the mistake within the period provided by Rule 4(m) for effecting service of the summons and complaint is easily understood when the complaint is filed at the end of the limitations period. Suppose a 2-year, 730-day limitations period applies. The complaint is filed on Day 730. If the proper defendant is properly named, the effect of Rule 4(m) — putting aside Erie complications for the moment — is that service up to Day 850 is proper. Since a properly identified defendant is exposed to actually learning of the suit as late

as Day 850, it seems to make sense to say that it also is enough that the properly intended defendant, although not named, should be exposed to substitution if knowledge of the mistake was brought home at any time up to Day 850. That is the problem of the Schiavone case, and it is cured by the incorporation of Rule 4(m).

The snag is that Rule 4(m) begins to run with the filing of the complaint, not the expiration of the limitations period. If The complaint is filed on Day 180, the plaintiff has until Day 300 to effect service. If the new defendant learns of the mistake on Day 190, everything is fine, even if the plaintiff does not become aware of the problem until Day 735. But if the defendant learns of the mistake on Day 350, the Rule 4(m) period has expired and the condition of Rule 15(c)(3) seems not to be satisfied. Of course there is no problem if the plaintiff also learns of the problem before Day 730 and amends to bring in the new defendant — the limitations period is met without any need for relation back. But if the plaintiff learns of the problem on Day 735, it is too late. It is too late even though the plaintiff would have been protected if the plaintiff had waited to file until Day 730 and the new defendant had learned of the action on day 734, not day 350.

The problem of the new defendant who learned on day 350 of an action filed on day 180 is made more curious by comparison to the pre-1991 version of Rule 15(c)(3). Until 1991, it was enough that the new defendant have notice within the period provided by law for commencing the action against him. With a two-year limitation period, notice on day 350 is adequate with more than a year to spare. Curiously, an amendment designed to make sufficient notice received on day 740 — so long as filing occurred on or after day 620 — bars relation back.

This consequence of incorporating Rule 4(m), gearing the time for notice to the new defendant to filing the complaint rather than expiration of the limitations period, may seem anomalous. Why should the new defendant have the benefit of the plaintiff's diligence in filing earlier than need be?

Again, there may be an answer. It can be argued that once a plaintiff has filed — as on Day 180 — the plaintiff becomes obliged diligently to pursue the litigation and to find out whether the defendants have been properly identified. Filing opens the opportunity for discovery, and so on. This is not a particularly satisfying argument. The time actually used to effect service may use up much of the 120 days. The defendant may manage to postpone filing an actual answer for some time. The Rule 26(d) discovery moratorium, geared to the Rule 26(f) conference, may delay matters still further. To expect diligent uncovering of the mistake within 120 days is to set a high standard of diligence.

This seeming anomaly may be subject to a cure through another aspect of the incorporation of Rule 4(m) into Rule 15(c)(3). Rule 4(m) allows an extension of the time to serve beyond 120 days. When the new defendant learns of the mistake on Day 350, 170 days after the filing on Day 180, the court might address the problem by allowing a retroactive extension of the time for service. But this solution generates great difficulties of its own.

There are yet other difficulties with incorporating Rule 4(m). One is that Rule 4(m) does not apply to service in a foreign country under Rule 4(f) or (j)(1). There is no period provided by Rule 4(m) for making service in those cases: so what are we to make of Rule 15(c)(3) relation back? Another is that Rule 15(c)(3) is deliberately drafted to refer not to a complaint, but to any pleading that states a claim for relief. If the complaint is filed on the last day of the limitations period, a counterclaim that grows out of the same transaction or occurrence may not be barred by limitations. So the counterclaim is made. Then after a time the counterclaimant seeks to change the party against whom the counterclaim is made: can Rule 4(m) apply in an intelligible way?

Extending Rule 4(m) Period

Rule 4(m) provides that if service is not made within 120 days after filing the complaint, the court shall either dismiss without prejudice or require that service be made by a specified time. Rule 4(m) further provides that the court "shall" allow additional time to serve if the plaintiff shows good cause for failing to make service within 120 days.

The 1991 Committee Note to Rule 15(c)(3) says explicitly that:

In allowing a name-correcting amendment within the time allowed by Rule 4(m),⁴ this rule allows not only the 120 days specified in that rule, but also any additional time resulting from any extension ordered by the court pursuant to that rule, as may be granted, for example, if the defendant is a fugitive from service of the summons.

It is difficult to know what to make of this note. The only reason for incorporating Rule 4(m), rather than providing 120 days from filing the complaint, must be to take account of the flexibility that allows an extension of the time for service. But the context of Rule 15(c)(3) is quite different. Does it mean that the time by which the new defendant must learn of the action is extended only if the court has ordered an extension of time to effect service? If so, service on whom — service on someone else, as the Committee Note seems to suggest? But why should we care whether it was difficult to serve someone else, not the new defendant? Because the plaintiff is more easily excused when there was no defendant to tell it of the mistake, even though the new defendant has little concern with that? Or is it an extension of time for service on the new defendant? But if it is an extension of time for service on the new defendant, the scheme takes hold only when the plaintiff has learned of the new defendant and asks for an extension. By then, the determination of the extension period also will involve a discretionary determination of the extent to which the limitations period should be extended.

It may be possible to read the incorporation of Rule 4(m) in a still more expansive way. Although the Committee Note illustrates only an extension actually granted, it does not specify the

⁴ This is an awkward locution. Rule 15(c)(3) does not say that the amendment must be made within the Rule 4(m) time. It says that the person to be brought in by amendment must have learned of the action, etc., within the Rule 4(m) time.

time when the extension was granted. Perhaps invocation of the Rule 4(m) power to extend the time for service would support an ad hoc determination that the time when the new defendant learned of the action and the mistake was "soon enough," so the court will "extend" the time for "service" to include that time even though there is in fact no problem of service at all. This interpretation would create an open-ended power to suspend the statute of limitations in favor of a plaintiff who mistakes the proper defendant, even though there is no such power to favor a plaintiff who simply waits too long to sue (often in a layman's forgivable ignorance of the limitations period). That would be exceedingly strange, and directly contrary to the general belief that limitations periods should be held as firmly as possible.

Putting these problems together, the drafting decision to incorporate Rule 4(m) into Rule 15(c)(3) seems very strange. Only with brute force can the text of the two rules be made to generate sensible answers, supposing we know what the sensible answers are.

Adding Plaintiffs

The 1966 Committee Note observes that "[t]he relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. * * * [T]he attitude taken * * * toward change of defendants extends by analogy to amendments changing plaintiffs."

There is an ambiguity in the reference to "changing" plaintiffs. If one plaintiff is substituted for another plaintiff, each pursuing a single claim that remains unchanged as to the basis of liability and the measure of damages, the problem is indeed easier. A common illustration, invoked by the 1966 amendments of Rule 17(a), occurs when suit is brought by a plaintiff who is not the real party in interest. Substituting the real party in interest, even after the statute of limitations has run, is not likely to threaten repose or the opportunity to gather evidence.

If the original plaintiff remains and a new plaintiff is added, things are not so simple. Suppose the passenger in one car brings suit against the driver of the other car. After the limitations period expires, a motion is made to amend to add the driver of the passenger-plaintiff's car as a second plaintiff. The defendant is now exposed to greater liability, eroding the repose engendered when the driver did not sue within the limitations period. There will be evidentiary problems at least as to the cause, nature, and extent of the new plaintiff's injuries. And there may also be evidentiary problems as to liability — particularly if there is joint-and-several liability, the negligence of the new plaintiff-driver may play quite a different role in the litigation than it would have played had only the passenger been a plaintiff. Because Rule 15(c)(3) does not address these issues, it is possible to read Rule 15(c)(2) to allow relation back because the claim asserted by the new plaintiff-driver arises from the same "conduct, transaction, or occurrence" as the claim of the original plaintiff-passenger. The Rule may not be silent. And the apparent answer may not be the right answer.

The problems that arise from adding a new plaintiff may arise as well when one plaintiff is substituted for another. If the grievously injured driver of the automobile is substituted as plaintiff

for the slightly injured passenger, there may be little difference from the addition of a new plaintiff while the original plaintiff remains in the action.

"Erie"

The problem addressed in *Walker v. Armco Steel*, cited on p. 1, arose from a state statute that holds it sufficient to file a complaint within the defined limitations period only if service is actually made within 60 days. The Court held that the 60-day service requirement binds the federal court in a diversity action. Rule 3, it concluded, is not intended to answer this question for diversity cases.

Rule 15(c)(3) is relevant only when state law does not permit relation back; if state law does permit relation back, Rule 15(c)(1) allows reliance on state law. If any attempt is made to amend Rule 15(c)(3), it will be important to decide how far to go in superseding state law. The question may yield one answer when state law would apply of its own force under *Erie*, unless preempted by a valid Civil Rule, and a different answer when state law is simply borrowed to fill the gap resulting from the lack of a federal limitations statute.

The *Erie* problem may be illustrated by a single example. The complaint in a diversity action is filed on day 730, the last day of the limitations period. State limitations law requires service within 60 days, by day 790. The new defendant learns of the action on day 850, 120 days from filing: should relation back be permitted, even though service on a properly named defendant would be defeated by state limitations law?

Redrafting Rule 15(c)(3)

If an attempt were made to redraft Rule 15(c)(3), the first question to be resolved is the focus of the relation-back doctrine. One plausible focus is to permit relation back whenever a new defendant learned of the action at a time when timely service could have been made in an action naming the new defendant as an original party. This focus draws from a belief that limitations periods are designed to foster and protect the repose interests of defendants, and to protect both defendants and courts by facilitating the task of gathering, preserving, and presenting evidence. The draft might look like this:

- 1 **(3)** the amendment changes the party or the naming of the party against whom a claim is asserted
2 and:
3 **(A)** Rule 15(c)(2) is satisfied;
4 **(B)** within the time specified in Rule 15(c)(3)(C) the party to be brought in by amendment
5 (i) has received such notice of the institution of the action that the party will not be
6 prejudiced in maintaining a defense on the merits, and (ii) knew or should have

1 known that, but for a mistake or lack of information concerning the identity of the
2 proper party, the action would have been brought against the party; and

3 (C) the notice described in Rule 15(c)(3)(B)(i) is received at a time when the party to be
4 brought in by amendment could have been timely served with the summons and
complaint in an action naming the party as an original party.

The same approach could be taken in simpler form, combining (B) with (C) and perhaps adding a requirement that the plaintiff have exercised due diligence:

(B) within the time for effecting service on a correctly named defendant, [the party asserting the claim has acted diligently to identify the party to be brought in by amendment, and] the party to be brought in by amendment (i) has received such notice * * *

These time provisions still leave a question akin to the Rule 4(m) question: should the time be measured by hypothetical extensions of the time to serve process? A comment in the Committee Note might suffice to address this issue. One answer could be that an extension of time to serve counts only if in fact an extension was granted to effect service on a party named in the original complaint. That answer would prevent fiddling with the limitations period based on the court's sense of fairness for the specific case. Other answers also could be given.

The "120-day" question could be approached more directly, giving up as a bad idea the incorporation of Rule 4(m):

(B) the party to be brought in by amendment has received notice that meets the requirements of Rule 15(c)(3)(C) within 120 days after expiration of the limitations period for commencing the action, or within a shorter period for effecting service in an action filed on the last day of the limitations period set by the law that provides the statute of limitations applicable to the action; and

(C) the notice received within the time set by Rule 15(c)(3)(B) is such that the party to be brought in by amendment (i) will not be prejudiced in maintaining a defense on the merits, and (ii) knew or should have known that, but for a mistake or lack of information concerning the identity of the proper party, the action would have been brought against the party.

If a different focus is chosen, drafting would proceed in a different direction. There is something to be said for the view that a plaintiff should be required to proceed with dispatch once

suit is actually filed, even though filing occurs long before expiration of the limitations period. This approach would require a structure quite different from present Rule 15(c)(3). Even illustrative drafting can await the event.

Quality of Timely Notice

Rule 15(c)(3) requires not only that the new defendant have notice of the action within the defined time, but also that the notice serve the purposes of limitations periods. The new defendant should recognize that the plaintiff wants to sue, and — recognizing that — be put into a position to gather and preserve evidence.

In some cases it may be clear that the new defendant had notice of this quality. A named defendant may tell the new defendant about the litigation and the apparent mistake, and be prepared to say so. If the named defendant has some relationship to the intended defendant, it may be a natural reaction to notify the intended defendant. It also may be natural to notify the plaintiff, unless the named defendant hopes to protect the new defendant by working toward a limitations defense. But there will be many cases in which there is some ground to surmise that the new defendant learned of the action, but no clear showing. Both versions of Rule 15(c)(3), pre- and post-1991, present this factfinding problem. One reason to restrain any enthusiasm about revising Rule 15(c)(3) is that even the clearest theory cannot alleviate the task of application. The Singletary case that prompted the Third Circuit to invite further work on Rule 15(c)(3) was in fact dispatched on the ground that the new defendant clearly had not had any notice of the action within the required time, no matter how the time might be measured. Cases that offer some circumstantial evidence of notice will be more difficult to dispatch.

70

Notice of Constitutional Challenge to Statute

This material is set out in two parts. The first is the draft that parallels Appellate Rule 44 and that prompted reactions by the Department of Justice. The second is a description of those reactions and a new draft that takes account of many of them. The new draft departs further from Appellate Rule 44.

I

Civil Rule 24(c) and Appellate Rule 44 implement 28 U.S.C. § 2403:

(a) In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. * * *

(b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible, and for argument on the question of constitutionality. * * *

Appellate Rule 44, including a new subdivision (b) transmitted by the Supreme Court to Congress in April 2002, provides:

- (a) **Constitutional Challenge to Federal Statute.** If a party questions the constitutionality of an Act of Congress in a proceeding to which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.
- (b) **Constitutional Challenge to State Statute.** If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

This rule reflects § 2403, but makes some departures from its terms.

Judge Barbara B. Crabb, commenting on the amendment, added the suggestion that a similar rule should be added to the Civil Rules "to assist district courts in remembering to make the requir[ed] notification." The comment apparently reflects the view that present Rule 24(c) does not provide an appropriate reminder, perhaps because of its relatively obscure location in the rule on intervention.

Civil Rule 24(c), describing the procedure for intervention, includes these three sentences, the final two of which were added in 1991:

(c) Procedure. * * * When the constitutionality of an Act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, office, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

It seems likely that these provisions were attached to Rule 24 because the purpose of notice is to support the right to intervene. This location, however, is not calculated to catch the attention of any but the most devoted students of procedure. There is a plausible argument that these provisions should be relocated. They might be added to Civil Rule 5, which includes service requirements, or they might be established as a new Rule 5.1.

The differences between Appellate Rule 44 and Civil Rule 24(c) highlight the issues that might be addressed if revision is undertaken. Rule 44 imposes a more explicit duty on the party who raises the constitutional question. It transfers the notice requirement from "court" to "clerk." It adds an element found neither in § 2403 nor in Rule 24(c) — the duty of notice applies if the parties include an officer or employee who is not sued in an official capacity. It refers broadly to a "proceeding" rather than the "action" referred to in statute and Rule 24(c). It does not reflect the words that limit the statute to a challenge to an Act of Congress or state statute "affecting the public interest." Finally, Rule 44 seems to apply only if a party raises the constitutional question; both § 2403 and Rule 24(c) apply when constitutionality "is drawn in question," thus reaching a case in which the court raises the question.

The departures of Appellate Rule 44 from § 2403 raise the interesting question whether Rule 44 is intended to supersede the statute to the extent of the departures. Does it require the clerk to give notice without inquiring whether the challenged statute affects the public interest? Does it — as seems apparent — supersede the seeming statutory rule that notice is not required when an officer or employee is sued in an individual capacity? Would a Civil Rule modeled on Appellate Rule 44 have the same effects?

Because Rule 24(c) does most of the work, there is no urgent need to add this project to the agenda. It may be time enough to face the question as part of the Style project, although culmination of the Style project may be far off and some of the issues go beyond style.

If an attempt is to be made now, account should be taken of the differences between district-court and appellate-court proceedings. The most specific difference is that Civil Rule 4(i)(2)(B) requires service on the United States when an officer or employee is sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States. The United States will have notice of the action, although it may not have notice of the constitutional challenge if it does not assume the burden of defense. Remember that the statute requires notice only if "the United States or any agency, officer or employee thereof is not a party." A rule goes beyond the statute if it requires notice to the court — and notice by the court to the Attorney General — when an officer of the United States is sued in an individual capacity, whether or not the claim is related to official duties. There is room to dispense with the notice requirement if we wish.

One version might look like this, rearranging the provisions of Appellate Rule 44 to bring the party's notice obligation closer to the beginning of the first sentence in each subdivision:

Rule 5.1 Notice of Constitutional Question

- (a) Constitutional Challenge to Federal Statute.** A party who questions the constitutionality of an Act of Congress must give written notice to the clerk when the question is first raised if no party is the United States, an agency of the United States, an officer or employee of the United States suing or being sued in an official capacity, or an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States. The clerk must then certify that fact to the Attorney General.
- (b) Constitutional Challenge to State Statute.** A party who questions the constitutionality of a statute of a State must give written notice to the clerk when the question is first raised if no party is that State, an agency of that State, or an officer or employee of that State suing or being sued in an official capacity. The clerk must then certify that fact to the attorney general of that State.
- (c) No forfeiture.** Failure of a party or the clerk to give the notice or certification required by Rule 5.1(a) or (b) does not forfeit any constitutional right otherwise timely asserted.

Committee Note

Rule 5.1 replaces the final three sentences of Rule 24(c). Although the purpose of notice is to support the statutory right of intervention established by 28 U.S.C. § 2403, location of this requirement in the vicinity of the rules that require notice by service and pleading seems more likely to attract the attention of the party charged with giving notice.

The provisions that formerly were placed in Rule 24(c) are amended to establish a close parallel with the provisions of Appellate Rule 44. The party who raises a constitutional challenge to a state or federal statute is directed to give written notice to the clerk when the question is first raised. Prompt notice is important to provide an opportunity for timely intervention and participation. The former requirement that limited the duty to give notice to cases involving statutes "affecting the public interest" reflected the terms of § 2403. Rule 5.1 goes beyond that limit because it is better to allow the Attorney General to determine whether the statute affects a public interest. The notice obligation also is expanded to include cases in which the only "official" party is a state officer or employee suing or being sued in an individual capacity, or a federal officer or employee suing in an individual capacity or being sued in an individual capacity for acts or omissions that did not occur in connection with the performance of duties on behalf of the United States. Such cases are not literally covered by § 2403, but there is a risk that an individual-capacity party will not think to give notice to the Attorney General or to appropriate state officials.

The no-forfeiture provision of subdivision (c) is carried forward from former Rule 24(c).

II Department of Justice Suggestions

Assistant Attorney General Robert D. McCallum, Jr., addressed this Rule 5.1 draft in an April 30, 2002 letter to Judge David F. Levi. The letter states that § 2403 and Civil Rule 24(c) have not proved as effective as should be — the Attorney General does not consistently receive notice when notice should be given. Relocation in a new Rule 5.1 is supported. The Department agrees that the new rule should apply to any Act of Congress, without adopting the § 2403 limit to an act "affecting the public interest." But the Department suggests several changes in the draft. These changes are listed below before setting out a redrafted Rule 5.1 that incorporates some of the changes.

(1) The Department believes that it should have notice when an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States. It notes that United States officials "are sometimes represented by private counsel," and urges that it is not wise to rely on private counsel to give notice. This suggestion does not address the new Rule 4(i)(2)(B) requirement that the United States be served in an action against an officer or employee of the United States for acts or omissions occurring in connection with the performance of duties on behalf of the United States. But, as suggested above, it may not be wise to assume that plaintiffs always comply with this requirement. Service, moreover, does not always entail notice of the constitutional challenge. The Rule is much easier to read if this wrinkle is removed. It is removed with a good will.

(2) The Department would expand the notice requirement imposed on a party challenging an Act of Congress. The Notice must be filed concurrently with the pleading or other paper raising

the challenge. The party also must serve the Notice on the Attorney General. These requirements reflect a variety of parallel provisions established by a number of local district rules. The Department draft discards any obligation of clerk or court to give notice to the Attorney General. There is something to be said for avoiding duplicating notices. But we need to face the question whether to supersede the § 2403 requirement — it is one thing to displace the duty from "court" to the clerk as the court's agent, but something else to eliminate the court's duty. It does not seem appropriate simply to ignore the matter: if we mean to relieve the court of any duty, we should at least say so in the Committee Note. Alternative versions are set out to reflect this question.

(3) A third Department recommendation would reverse the final part of present Rule 24(c), which provides that failure to call the court's attention to the court's duty to notify the Attorney General "is not a waiver of any constitutional right otherwise timely asserted." This recommendation would make the notice requirement effective by prohibiting entry of a final order or judgment on a constitutional challenge until notice has been given to the Attorney General and time has passed. The specific suggestion is that the court must wait at least 60 days after notice is given. If the Attorney General intervenes or gives notice of intent to intervene within 60 days, the court may set a deadline for intervening but must not enter final judgment until the deadline has expired. This provision would permit interim relief. As presented, it forbids the court from sustaining the constitutionality of an Act of Congress equally as it forbids invalidation. This suggestion deserves careful thought. The idea of using a court rule to deny the right to enter final judgment is bold. A clear decision would have to be made as to the consequences of disregarding the rule: is the judgment not final for purposes of appeal? Is it "void," "voidable," or simply "irregular"? Should the answer to these questions turn on whether it sustains the Act of Congress? And apart from these questions, prohibiting entry of judgment "on the constitutional challenge" may emphasize as-applied challenges more than should be. The draft responds to these doubts by substituting a narrow provision setting a deadline for intervention.

(4) A fourth suggestion is that if a party does not comply with the requirements of filing and serving notice the court shall order compliance within a specified time, and if the party fails to comply must dismiss without prejudice the claim or defense raising the constitutional challenge. It is not clear why this provision is not framed in a simpler way — the court can give the § 2403 notice to the Attorney General, as § 2403 itself prescribes. That simpler alternative is incorporated as one alternative in the revised draft.

(5) Finally, the Department adds a last paragraph stating that Rule 5.1 does not restrict the Attorney General's "ability * * * to intervene in an action more than 60 days after service of the notice, or, in the event that there is noncompliance with this Rule, after a final order or judgment issues." The purpose of intervention is not specified. The most obvious purposes are to appeal or to move to vacate the judgment. This draft provision may imply an answer to one of the questions asked above: a final judgment entered in defiance of the stay provision is both final and not invalid. But that is not clear. The alternative Rule 5.1 draft does not include any analogue to this provision, adhering to the view that it is better not to attempt to anticipate every complicated question that may arise.

The alternative draft Rule 5.1 is an attempt to adapt the Department suggestions in ways that reduce the departures from § 2403 and also reduce the attempt to control entry of judgment. It departs further from the style of Appellate Rule 44, but the departures are intended to be improvements. In departing also from the substance of Appellate Rule 44, it raises the question whether the Department will wish to suggest parallel revisions of Appellate Rule 44.

Rule 5.1 Alternative

- (a) Notice of Constitutional Challenge to Federal Statute.** A party who questions the constitutionality of an Act of Congress must, if no party in the action is the United States, or an agency, officer, or employee of the United States sued in an official capacity:
- (1) file a Notice of Constitutional Challenge, stating the question [and identifying the pleading or other paper that raises the question], and
 - (2) *{version 1}* serve the Notice on the Attorney General of the United States under Rule 4(i)(1)(B).
{version 2} notify the clerk of the court's duty to certify the Notice to the Attorney General.
- (b) Notice of Constitutional Challenge to State Statute.** A party who questions the constitutionality of a statute of a State must, if no party in the action is that State, or an agency, officer, or employee of that State sued in an official capacity:
- (1) file a Notice of Constitutional Challenge, stating the question [and identifying the pleading or other paper that raises the question], and
 - (2) *{version 1}* serve the Notice on the State Attorney General under Rule 5(b).
{version 2} notify the clerk of the court's duty to certify the Notice to the State Attorney General.
- (c) Time To Intervene.** The court may set a time for intervention by the Attorney General no less than 60 days after the Notice of Constitutional Challenge is served on the Attorney General.

(d){Version 1} No Forfeiture. Failure of a party {or the court} to file or serve {certify} the Notice required by Rule 5.1(a) or (b) does not forfeit any constitutional right otherwise timely asserted.

{Version 2} Failure To Comply. The court, in its discretion, may refuse to consider a constitutional question raised by a party who has failed to file or serve the Notice required by Rule 5.1(a) or (b), or may itself notify the Attorney General.

[If we wish to reach the case in which the court raises the constitutional question — now covered both by § 2403 and by Rule 24(c) — we could add another subdivision between (b) and (c):

(c) Court Raises Question. A court that calls into question the constitutionality of an Act of Congress or a state statute must notify the Attorney General of the United States or the state attorney general {unless notice is provided under Rule 5.1(a) or (b).]

7D

"Indicative Rulings"

On March 14, 2000, Solicitor General Seth P. Waxman proposed to Judge Garwood, as chair of the Appellate Rules Advisory Committee, an amendment to the Appellate Rules. The amendment would address a common procedure that at times is characterized as an "indicative ruling." The problem arises when a notice of appeal has transferred jurisdiction of a case to the court of appeals. A party may seek to raise a question that is properly addressed to the district court — a common example is a motion to vacate the judgment under Civil Rule 60(b). As a rough statement, the most workable present approach is that the district court has jurisdiction to deny the motion but lacks jurisdiction to grant the motion. If persuaded that relief is appropriate, the district court can indicate that it is inclined to grant relief if the court of appeals should remand the action for that purpose. The court of appeals can then decide whether to return the case to the district court. This procedure, however, is not securely entrenched; different approaches are taken. See 11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d, § 2873. Additional detail is provided in Solicitor General Waxman's letter.

The proposal to adopt a court rule was made for several reasons. First, differences remain among the circuits. A uniform national procedure seems desirable. Second, experience shows "that the existence of the indicative ruling procedure is generally known only by court personnel and attorneys with special expertise in the courts of appeals." Third, the Supreme Court's ruling that a court of appeals need not vacate a district court judgment when an appeal is mooted by settlement creates a new need for advice from the district court. The parties to an appeal may be able to settle only if they can persuade the district court to vacate the judgment; providing a procedure for an indication by the district court will lead to settlement of more "cases on the docket of the appellate courts."

The proposal was limited to civil actions because "post-judgment motion practice in criminal cases does not pose a problem and is not used nearly as often as in civil matters."

The Appellate Rules Committee considered this proposal in April 2000 and April 2001. Judge Garwood reported that although committee members "seemed to have a variety of views on the merits of the proposal and on the drafting of the proposed rule," "the committee concluded unanimously" that any rule should be included in the Civil Rules, not the Appellate Rules. Reliance on the Civil Rules makes sense because the court of appeals plays only a minor role in the process. The first line of action is in the district court. The court of appeals becomes involved only if the district court indicates a desire to grant relief, and then "a routine motion to remand is made in the appellate court."

If a civil rule is to be adopted, it should be tailored to the transfer of jurisdiction effected by an appeal. There is no apparent reason to limit existing district-court freedoms to act pending appeal. An interlocutory injunction appeal, for example, does not oust district-court jurisdiction to carry on many proceedings, including entry of judgment on the merits. Section 1292(b) and Civil Rule 23(f) expressly address stays of district-court proceedings. Collateral-order appeals present special questions: immunity appeals, for example, are designed to protect against the burdens of trial

and even pretrial proceedings, while a security appeal may have quite different consequences. It does not seem desirable, however, to limit any new rule to appeals from "final" judgments.

The following draft is simply a sketch to illustrate the form a rule might take. It is described as Rule 62.1, bringing it within Civil Rules Part VII (Judgments). An alternative might be to resurrect the appeals numbers beginning with Rule 74.

RULE 62.1 INDICATIVE RULINGS

- (a) A district court may entertain an otherwise timely motion to alter, amend, or vacate a judgment that is pending on appeal [and that cannot be altered, amended, or vacated without permission of the appellate court] and
 - (1) deny the motion, or
 - (2) indicate that it would grant the motion if the appellate court should remand for that purpose.
- (b) A party who makes a motion under Rule 62.1(a) must notify the clerk of the appellate court when the motion is filed and when the district court rules on the motion.
- (c) If the district court indicates that it would grant a motion under Rule 62.1(a)(2), a party may move the appellate court to remand the action to the district court. The appellate court has discretion whether to remand.
- (d) This Rule 62.1 does not apply to relief sought under Federal Rule of Appellate Procedure 8, nor to proceedings under Title 28, U.S.C., §§ 2241, 2254, and 2255.

Committee Note

[The Committee Note should make clear that subdivision (a) does not address a judgment that the district court can change or supersede without appellate permission.

[Subdivision (c) calls for remand of the action. It might be better to retain jurisdiction of the appeal, with a limited remand for the purpose of ruling on the motion in the district court. Much would depend on the nature of the relief indicated by the district court. If there is to be a new trial, outright remand makes sense. If the judgment is to be amended and re-entered, retained jurisdiction may make better sense.]



U.S. Department of Justice
Office of the Solicitor General

00-04

The Solicitor General

Washington, D.C. 20530

March 14, 2000

The Honorable William L. Garwood
United States Court of Appeals
for the Fifth Circuit
903 San Jacinto Boulevard
Austin, Texas 78701

Re: Proposed Amendment to FRAP to Establish a New Rule
Governing "Indicative Rulings" by District Courts

Dear Judge Garwood:

The Department of Justice proposes creation of a new provision in the Federal Rules of Appellate Procedure (FRAP) to cover the use of a procedure commonly referred to in civil cases by the courts of appeals as seeking an "indicative ruling." An indicative ruling procedure allows a district court that has lost jurisdiction over a matter due to the filing of a notice of appeal to notify the court of appeals how it would rule on a motion if it still had jurisdiction. If the district court would grant the motion, the court of appeals can then remand the matter for entry of a new order. The indicative ruling is commonly used in the context of a motion that would be filed under Federal Rule of Civil Procedure 60(b), but it can also be used in an interlocutory appeal when the district court's ruling is needed on the specific issue appealed.

We are suggesting a new provision in the FRAP to cover this indicative ruling procedure for civil cases because it is widely employed by the Circuits on the basis of case law, but is nowhere mentioned in the federal civil or appellate rules. There is no relevant rule in the FRAP. FRCP 60(a) provides that a district court may grant relief from a "clerical mistake" while an appeal is pending "with leave of the appellate court." But the civil rules mention no other situations and do not explain the procedure to be used.

A federal rule is warranted because our experience in dealing with many counsel in appellate civil cases over the years has revealed that the existence of the indicative ruling procedure is generally known only by court personnel and attorneys with special expertise in the courts of appeals. In addition, the Circuits use somewhat differing procedures, although there appears to be no good reason for local variation.

The indicative ruling procedure is discussed in Smith v. Pollin, 194 F.2d 349 (D.C. Cir. 1952), and is currently used by nearly every Circuit.¹ Under this procedure, "when an appellant in a civil case wishes to make a motion for a new trial on the ground of newly discovered evidence while his appeal is still pending, the proper procedure is for him to file his motion in the District Court. If that court indicates that it will grant the motion, the appellant should then make a motion in [the proper court of appeals] for a remand of the case in order that the District Court may grant the motion for new trial." The Circuits that follow this procedure appear to accept that a district court has some form of jurisdiction to allow it to deny a post-judgment motion, even though an appeal is pending, but not to grant such a motion. The Ninth Circuit, however, maintains that the district court has no jurisdiction to entertain a Rule 60(b) motion, and therefore requires a remand from the court of appeals before a district court can even deny such a motion.

By contrast, the Second Circuit has on some occasions used a different procedure. For example, in Haitian Centers Council, Inc. v. Sale, Acting Commissioner, INS, No. 93-6216 (Oct. 26, 1993), the court declined to use the indicative ruling procedure and instead dismissed the appeal without prejudice for 60 days. The Second Circuit then reinstated the case in the court of appeals after the district court had ruled on the relevant motion. We have found this procedure to be commonly used in the Second Circuit.

¹ See Commonwealth of Puerto Rico v. SS Zoe Colocotroni, 601 F. 2d 39 (1st Cir. 1979); Toliver v. Sullivan, 957 F. 2d 47 (2nd Cir. 1992); United States v. Accounts Nos. 3034504504 & 144-07143, 971 F.2d 974 (3d Cir. 1992); Fobian v. Storage Tech. Corp., 164 F.3d 887 (4th Cir. 1999); Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404, (5th Cir. 1994); Detson v. Schweiker, 788 F. 2d 372 (6th Cir. 1986); Brown v. United States, 976 F. 2d 1104 (7th Cir. 1992); Pioneer Insurance v. Gelt, 558 F.2d 1303 (8th Cir. 1977); Aldrich Enterprises, Inc. v. United States, 938 F. 2d 1134 (10th Cir. 1991).

Originally, the Circuits used the indicative ruling procedure solely or principally for parties who wished to move for a new trial based on newly-discovered evidence. In other circumstances, however, this procedure has been deemed applicable -- for example, when new methodologies or procedures change the impact of evidence used below; when the law has changed subsequent to judgment; when settlement negotiations are contingent on the district court's judgment being vacated; or when there is an interlocutory appeal and the district court's ruling is needed on a matter relating to the issues on appeal.

Indicative rulings are procedurally superior to other possible methods of handling these situations. The district court, being familiar with the case, is often in the best position to evaluate a motion's merits quickly. If a motion should clearly not be granted, the district court will usually recognize that fact faster than the appellate court. If the motion has possible merit, there is no need for the appellate court to have discovered that first. Most importantly, an early indication of the district court's view can avoid a pointless remand in those cases where the trial court would deny the motion.

In addition, indicative rulings have become critical in modern settlement negotiations, following the Supreme Court's ruling in U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994), for cases that are on appeal. In that opinion, the Supreme Court ruled that, in most circumstances, a court of appeals need not vacate the decision of a district court if an appeal becomes moot through a settlement. The Court made clear, however, that the district court remains free to vacate its own judgment pursuant to Fed. R. Civ. P. 60(b). See 513 U.S. at 29. Vacatur of a district court ruling is often a key element in a negotiated settlement. The indicative ruling procedure can be used effectively to determine if a district court would be willing to vacate its judgment as part of an overall settlement of a case. If the district court indicates a willingness to issue such an order, more cases on the docket of the appellate courts can be settled and dismissed without taking up scarce appellate judicial resources.

A formal amendment to the FRAP is warranted for several reasons. While the indicative ruling procedure is commonly used, its inclusion in the federal rules would ensure that all practitioners are aware of it. In addition, while nearly every Circuit currently employs this procedure, courts have used other mechanisms to achieve the same end. By making our recommended change to the FRAP, the courts would have

one standardized procedure to rely on under these circumstances, which would promote efficiency, consistency, and predictability in judicial proceedings.

Therefore, we propose a new rule, and suggest that it be located after current FRAP 4. At this point, it appears appropriate to provide for this procedure only in civil cases; our understanding is that post-judgment motion practice in criminal cases does not pose a problem and is not used nearly as often as in civil matters. In addition, Federal Rule of Criminal Procedure 33 already states that, if an appeal is pending, a district court may grant a new trial in a criminal case "based on the ground of newly discovered evidence," "only on remand of the case." Because our proposal does not apply to criminal cases, we also make clear that it does not apply to cases under 28 U.S.C. §§ 2241, 2254, and 2255, which are technically civil in nature but are linked to criminal matters. In addition, FRAP 4 does not apply to appeals from the Tax Court (see FRAP 14), but we make clear in the explanatory note that the courts of appeals are free to use this same procedure in Tax Court cases.

We suggest a new FRAP 4.1, to read as follows:

"Rule 4.1. Indicative Rulings. When a party to an appeal in a civil case seeks post-judgment relief in district court that is precluded by the pendency of an appeal, the party may seek an indicative ruling from the district court that heard the case. A party may seek an indicative ruling by filing a motion in district court setting forth the basis for the relief requested, and stating that an indicative ruling appears to be necessary because an appeal is pending and the district court lacks jurisdiction to grant the relief absent a remand. The movant must notify the clerk of the court of appeals that a motion requesting an indicative ruling has been filed in the district court, and must notify the clerk of any disposition of that motion. If the district court indicates in an order that it would grant the relief requested in the event of a remand, the movant may seek a remand to the district court for that purpose. Nothing in this rule governs relief sought under FRAP 8, and it does not apply to matters under 28 U.S.C. §§ 2241, 2254, and 2255."

We also propose the following as an Advisory Committee Note:

"This rule is designed to make known, and to make uniform, a procedure commonly used by the courts of appeals in civil cases for obtaining 'indicative

rulings' by the district courts when an appeal is pending. (The problem arises because a district court loses jurisdiction over a judgment when an appeal is filed.) The D.C. Circuit described this procedure in Smith v. Pollin, 194 F.2d 349 (D.C. Cir. 1952), as follows:

When an appellant in a civil case wishes to make a motion for a new trial on the ground of newly discovered evidence while his appeal is still pending, the proper procedure is for him to file his motion in the District Court. If that court indicates that it will grant the motion, the appellant should then make a motion in [the proper court of appeals] for a remand of the case in order that the District Court may grant the motion for new trial."

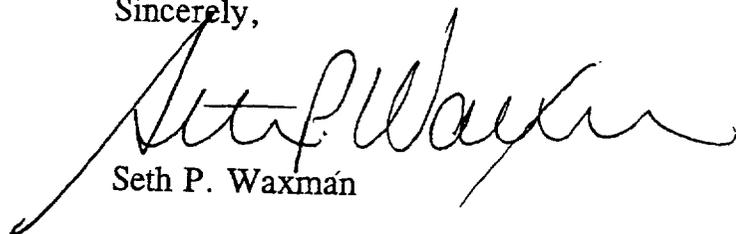
Nearly all of the Circuits have adopted this procedure in their case law; they appear to accept that a district court has some form of jurisdiction that allows it to deny a post-judgment motion, even though an appeal is pending, but not to grant such a motion. Accordingly, a uniform procedure is needed so that a district court may notify the parties and the court of appeals that it would grant or seriously entertain a post-judgment motion, and that a remand from the appellate court is thus warranted for that purpose. This procedure is currently used by the courts of appeals in a variety of situations other than simply seeking a new trial based on recently discovered evidence: new methodologies or other procedures change the impact of evidence used below; there has been a post-judgment change in the law; settlement negotiations are contingent on a decision that the district court's judgment be vacated, see U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 29 (1994); or there is an interlocutory appeal and the district court's ruling is needed on a matter relating to the issue on appeal. Thus, the indicative ruling procedure should be used in appropriate circumstances for filing post-judgment motions in civil cases, such as under FRCP 60(b), and may also be used when an interlocutory appeal is pending. The procedure provided by this Rule 4.1 will not be necessary or appropriate, of course, where the movant seeks relief pending appeal under Rule 8 FRAP (*i.e.*, a stay or injunction pending appeal) or seeks other relief in aid of the appeal, since such relief is available in the district court without a remand even after the notice of appeal is filed. Moreover, nothing in this rule would foreclose a district court from exercising any authority it retains during the pendency of an interlocutory appeal. There does not appear to be a need for this procedure in

The Honorable William L. Garwood
March 14, 2000
Page 6

criminal cases, and FRCrP 33 already provides that a district court may grant a new trial in a criminal case 'based on the ground of newly discovered evidence,' 'only on remand of the case.' Because this new rule does not apply to criminal cases, it also does not apply to cases under 28 U.S.C. §§ 2241, 2254, and 2255, which are technically civil in nature but are linked to criminal matters. In addition, although Rule 4 does not apply to appeals from the Tax Court, the courts of appeals are free to use this same procedure in Tax Court cases."

Thus, I am submitting this matter to you for consideration by the full FRAP Advisory Committee.

Sincerely,



Seth P. Waxman

cc: Professor Patrick J. Schiltz
University of Notre Dame
325 Law School
Notre Dame, Indiana 46556

7E

Rule 27(a)(2) Cross-Reference To Rule 4

Rule 27(a)(2) provides that notice of the hearing on a petition to perpetuate testimony must be served "in the manner provided in Rule 4(d) for service of summons." The reference is to the Rule 4(d) that disappeared in 1993. Present Rule 4(d) addresses not service but waiver of service.

Former Rule 4(d) provided for service: (1) upon an individual; (2) upon an infant or an incompetent person; (3) upon a domestic or foreign corporation, partnership, or other unincorporated association; (4) upon the United States; (5) upon an officer or agency of the United States; and (6) upon a state or municipal corporation or other governmental organization thereof subject to suit.

Present Rule 4 provides for service on an individual in subdivision (e); on an infant or incompetent in (g); on a corporation or association in (h); on the United States or officers or agencies of the United States in (i); and on a state, municipal corporation, et., in (j)(2). It also picks up service on a foreign state or political subdivision subject to suit under the Foreign Sovereign Immunity Act in (j)(1).

The cross-reference to Rule 4 needs to be corrected. It is clear that the former cross-reference to 4(d) included present (e), (g), (h), (i), and (j)(2). Service on a foreign state or political subdivision is less certain, but if such an entity is a prospective party to the action that cannot yet be brought, it makes sense to provide for service on it as well.

A gap remains. Former Rule 4(i) provided "Alternative provisions for service in a foreign country." Service on individuals in a foreign country is now governed by Rule 4(f). Since Rule 27 incorporates only former Rule 4(d), it is uncertain whether Rule 4(f) should be incorporated now. Again, however, it is curious to suppose that notice need not be given to an individual potential party who is in a foreign country. Perhaps the answer is that notice should be given, but it need not be in the potentially cumbersome and time-consuming methods needed to effect service. Some foreign countries may object to official notices being sent to individuals absent those procedures, however, so this question requires more thought.

Two drafting alternatives seem attractive. One is to be specific: "notice shall be served either within or without the district or state in the manner provided in Rule 4(e), (g), (h), (i), or (j) for service of summons * * *." The other is to incorporate Rule 4. That would include notice given in the manner of service on an individual in a foreign country under Rule 4(f); if we decide to reach that far, simple incorporation of all of the Rule 4 service provisions seems effective.

This question may be useful to illustrate one range of issues to be confronted in the style project. Careful reading through the rules is likely to reveal several gaffes of this sort. It is difficult now to be confident about the intended meaning of the cross-reference. Providing a clear answer may effect a change. The more attractive answer seems to be to incorporate all of Rule 4. It is better to have an explicit direction for the means of notice to expected parties who are in foreign countries. Reliance on the means used to make that person a party provides a reliable means of notice and

ensures compatibility with procedures carefully developed to account for foreign sensibilities. Is it appropriate to make this sort of change through the style process? Or should this and countless other small changes be separated out for adoption through the regular means used for other rules?

Admiralty Rules B(1), C(6)(b)(i)

The MLA has recommended two minor changes to Supplemental Rules B(1)(a) and C(6)(b)(i). Each is ready for a decision whether to recommend publication for comment.

B(1)(A)

During discussion of the Admiralty Rules changes that took effect on December 1, 2000, a member of the Standing Committee suggested that Rule B(1) should be amended to incorporate the ruling in *Heidmar, Inc. v. Anomina Ravennate di Armamento Sp.A.*, 5th Cir. 1998, 132 F.3d 264.

Rule B(1) provides for attachment in a maritime in personam action. It applies when "a defendant is not found within the district." The "found" concept is old-fashioned; a defendant who is not physically present in the district and who has no agent there for the service of process is not "found" there, even though subject to personal jurisdiction on some other basis. Rule B(1) thus serves two purposes: it establishes a form of quasi-in-rem jurisdiction to substitute for personal jurisdiction, but it also provides a pre-judgment security device in some cases in which the court has personal jurisdiction. The ploy attempted in the *Heidmar* case reflects the use of Rule B(1) as a security device. The complaint was filed at 3:45 p.m. with a motion to arrest a vessel; at 4:00 the owner faxed notification that it had appointed an agent for service of process. After straightening out various confusions, the case came to be treated as presenting the question whether the application of Rule B(1) is determined at the time the complaint is filed or instead at the time the attachment issues. The court ruled that the time of filing controls. It relied in part on inference from the requirement that the complaint be accompanied by an affidavit that the defendant cannot be found, and that the court review these materials before ordering attachment — "not found" relates to the time of filing, not the time of attachment. More importantly, it relied on the theory that Rule B(1) serves the purpose of "assuring satisfaction in case the plaintiff's suit is successful," pointing out that an attachment, once issued, is not vacated when the defendant appears. The court also thought it unfair and inefficient to allow a defendant to defeat attachment by waiting to appoint an agent for service until a complaint had been filed.

Incorporation of the *Heidmar* decision into Rule B(1) is readily accomplished:

Rule B. * * *

(1) * * * In an in personam action:

- (a)** If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property — up to the amount sued for — in the hands of garnishees named in the process.

Committee Note

Rule B(1) is amended to incorporate the decisions in *Heidmar, Inc. v. Anomina Ravennate di Armamento Sp.A.*, 132 F.3d 264, 267-268 (5th Cir. 1998), and *Navieros Inter-Americanos, S.A. v. M/V Vasilias Express*, 120 F.3d 304, 314-315 (1st Cir. 1997). The time for determining whether a defendant is "found" in the district is set at the time of filing the verified complaint that prays for attachment and the affidavit required by Rule B(1)(b). As provided by Rule B(1)(b), the affidavit must be filed with the complaint. A defendant cannot defeat the security purpose of attachment by appointing an agent for service of process after the complaint and affidavit are filed. The complaint praying for attachment need not be the initial complaint. So long as the defendant is not found in the district, the prayer for attachment may be made in an amended complaint; the affidavit that the defendant cannot be found must be filed with the amended complaint.

REPORTER'S NOTE

This amendment embodies the MLA recommendation that Rule B should identify the rule adopted in the *Heidmar* case. An express statement in the rule will give direct notice to lawyers and courts without the need to identify the question and search for an answer in circumstances that often require prompt action.

The amendment simply accepts without further reflection the peculiar dual role of Rule B attachment and garnishment. These devices are used in in personam actions for two quite distinct purposes, as noted above. Maritime actions frequently involve foreign defendants and special needs for quasi-in-rem jurisdiction when personal jurisdiction cannot be obtained. But attachment becomes a security device when personal jurisdiction can be obtained. Here too, there may be a special need for security that distinguishes maritime practice from land-based practice: enforcement of a personal judgment may be more difficult, more often.

The proposed amendment does not directly address the question whether attachment should be available if the defendant could have been found in the district when the action was filed, but cannot be found in the district at the time an amended complaint is filed. It would be possible to provide that attachment is available only if the defendant could not be found in the district when the action was filed and could not have been found at any time up to the moment when attachment is first demanded by an amended complaint supported by the required affidavit: "If a defendant is not found within the district at the time when the action is commenced or at any time before the plaintiff files a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) * * *." The proposed amendment puts this question aside as one better addressed by courts as the cases arise.

C(6)(B)(I)(A), (B)

The problem with Rule C(6)(b)(i)(A) arises from the December 2002 amendments that divided Rule C(6) into separate provisions for forfeiture proceedings — subdivision (a) — and for maritime proceedings — subdivision (b). For forfeiture proceedings, C(6)(a)(1)(A) allows a statement of interest to be filed "within 20 days after the earlier of receiving actual notice of execution of process, or (2) completed publication of notice under Rule C(4)." That provision works. For maritime proceedings, the earlier rule had required that a claim be filed within 10 days

after process has been executed, or within such additional time as may be allowed by the court. The admiralty bar was concerned that the 10-day period be retained, and also that it begin to run with execution of process — it was well established that the time runs from execution of process whether or not the claimant has actual notice. So the "actual notice" provision, newly added for forfeiture proceedings, was not added for maritime proceedings. At the same time, unthinking parallelism with the forfeiture proceeding retained the structure setting the date "within 10 days after the earlier of (1) the execution of process, or (2) completed publication of notice under Rule C(4) * * *." The problem is that Rule C(4) requires publication of notice only if the property that is the subject of the action is not released within 10 days after execution of process. It makes no sense to refer to completed publication of notice as if it could occur before process is executed — publication begins, at the earliest, 10 days after process is executed.

The MLA proposes an amendment that restores the practice as it was before December 1, 2000:

(6) RESPONSIVE PLEADING; INTERROGATORIES. * * *

(b) *Maritime Arrests and Other Proceedings.* In an in rem action not governed by Rule C(6)(a):

(i) A person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest:

(A) within 10 days after ~~the earlier of (1) the execution of process, or (2) completed publication of notice under Rule C(4);~~ or

(B) within the time that the court allows.

Committee Note

Rule C(6)(b)(i)(A) is amended to delete the reference to a time 10 days after completed publication of notice under Rule C(4). This change corrects an oversight in the amendments made in 2000. Rule C(4) requires publication of notice only if the property that is the subject of the action is not released within 10 days after execution of process. Execution of process will always be earlier than publication.



CONSENT CALENDAR

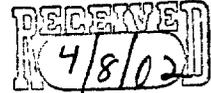
02-CV-C: Checks for Filing Fees

Mr. James A. Andrews sought to pay the filing fee in a pro se action filed in the United States District Court for the District of Columbia by a cashier's check made payable to him and endorsed by him "to order of the clerk of the court." The check was refused by the clerk. A letter from Mr. Andrews to Lisa Novak in the Administrative Office of the United States Courts indicates that the clerk's refusal may have been based on Volume 2, chapter 7 of the Guide to Judiciary Policies and Procedures. Mr. Andrews understands that the Guide requires that checks for filing fees be made payable to the clerk of the court; "third-party" checks will not do.

Mr. Andrews appears to make two suggestions. The first is that the requirement should be changed. He believes it better that the check be made payable to the filing party, so that the party's name appears to identify the source of payment; endorsement to the clerk of the court ensures payment.

The second suggestion is that any requirement such as this should appear either in the Federal Rules of Civil Procedure or at least in a local court rule. It is wrong to bury it in a Guide that is designed for internal use by the courts and is not readily available to the public.

There is no apparent reason to expand the Federal Rules of Civil Procedure to reach this level of detail. The Administrative Office can determine whether the policy should be changed, and whether some other Judicial Conference committee might be asked to consider the matter.



21 Bikaki St., Box 44
21056 Tolo
Greece

02-CV-C

Tel: 30-752-059-774
Fax: 30-752-099-581
e-mail: james44a@hotmail.com

April 1, 2002

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20544

Subject: Civil Rules
Court Filing Fee Checks

Dear Mr. McCabe:

After visiting your website, I understand that I may submit comments as to the Federal Rules of Civil Procedure and/or the Local Rules of a Court, and that such comments may become a part of the public record.

Recently, as a pro se civil action filer before the United States District Court for the District of Columbia, a cashier's check that I mailed for the filing fee of \$150.00 was refused, and it is still not clear to me why. I am submitting as Exhibit A a letter of March 28, 2002 on this subject that I mailed to Ms. Lisa Novak of your staff. I am also submitting a copy of the refused cashier's check as Exhibit B. Both are incorporated by reference. Since I sent the letter of March 28, 2002 by ordinary mail, it may be that as of today, it has not yet arrived. As to this matter, I believe that the attached letter of March 28, 2002 largely explains my position.

Even so, I would like to reiterate five paragraphs from this letter of March 28, 2002 as follows, and these following paragraphs also constitute my comments and recommendations:

As best as I can determine, Volume 2, Chapter 7 of the Guide to Judiciary Policies and Procedures states, on the topic of Receipts, two things, namely, that checks for court filing fees should be made payable to the Clerk of the Court, and that third party checks may not be submitted.

Thus, an endorsement on the back of the check payable to the order of the Clerk of the Court, according to the Uniform Commercial Code, especially with regard to a cashier's check, ultimately has the same effect as the payee line. Moreover, a third party would normally be someone not related to the case, which may very well be the intention of this rule.

Meanwhile, filers of such cases are normally held responsible for the Federal Rules of Civil Procedure and the Local Rules, and not the Guide to Judiciary Policies and Procedures, which is OOU, Official Use Only, and not available for reference by the public. Indeed, it is an unusual

cashier's check was issued on their behalf, and that they are not nameless on the check, as I am now forced to be.

Moreover, when the Administrative Office committee issues an internal rule like this, shouldn't it be made clear that it cannot take effect until it appears in either the Federal Rules of Civil Procedure, and/or the Local Rules of the Court?

Sincerely,

James A. Andrews

21 Bikaki St., Box 44
21056 Tolo
Greece

Tel: 30-752-059-774
Fax: 30-752-099-581

March 28, 2002

Office of Public Affairs
Attn: Ms. Lisa Novak
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Court Filing Fee Checks

Dear Ms. Novak:

This letter is a follow-up to my previous letter of February 8, 2002 to your office, and the brief discussion I had with you by telephone earlier today.

As best as I can determine, Volume 2, Chapter 7 of the Guide to Judiciary Policies and Procedures states, on the topic of Receipts, two things, namely, that checks for court filing fees should be made payable to the Clerk of the Court, and that third party checks may not be submitted.

Thus, an endorsement on the back of the check payable to the order of the Clerk of the Court, especially with regard to a cashier's check, ultimately has the same effect as the payee line. Moreover, a third party would normally be someone not related to the case, which may very well be the intention of this rule.

Meanwhile, filers of such cases are normally held responsible for the Rules of Civil Procedure and the Local Rules, and not the Guide to Judiciary Policies and Procedures, which is O.U.O., Official Use Only, and not available for reference by the public.

So, I appreciate the fact that you will be contacting Ms. Yvonne Malatino, Financial Administrator for the United States District Court for the District of Columbia, and advising her that this rule should be added (by court committee) to the Local Rules of the Court, and also to their website.

However, where does this leave the remaining courts throughout the United States, including the Appellate Courts, and all of the other U.S. District Courts?

I would like to ask and recommend if the committee that issued this rule might be able to review this internal rule once more, and perhaps an allowance should be made for cashier's checks obtained by filers who are first parties, and not third parties, for their protection, so that it is clear that the cashier's check was issued on their behalf, and that they are not nameless on the check.

EXHIBIT A.

- 2 -

Moreover, when the Administrative Office committee issues an internal rule like this, shouldn't it be made clear that it cannot take effect until it appears in either the Federal Rules of Procedure, and/or the Local Rules of the Court?

Sincerely,

James A. Andrews

EXHIBIT A. (CONT.)



NATIONAL BANK
OF GREECE

CHEQUE No 2490471

1-758/260

NAUPLIA 12DEC 2001 NAFPLION BR. 427 *****150,00*
 place, date Branch U.S.D. CUR. AMOUNT
 JAMES A. ANDREWS
 sum of U.S. dollars ONE HUNDRED FIFTY ONLY**
 ATLANTIC BANK OF NEW YORK
 960 Avenue of the Americas
 New York, NY 10001 U.S.A.
 NATIONAL BANK OF GREECE S.A.
 NATIONAL BANK OF GREECE S.A.
 G. KAFADARIS Signature FERDIKOMATIS

12/15/01 (8/97)

⑈02490471⑈ ⑈026007582⑈ ⑈1700105⑈

EXHIBIT B.

ENDORSE HERE
 PAY TO THE ORDER OF
 CLERK OF THE COURT
 James A. Andrews

DO NOT WRITE, STAMP OR SIGN BELOW THIS LINE
RESERVED FOR FINANCIAL INSTITUTION USE

Original Document

The security features listed below, as well as those not listed, exceed industry guidelines.

Security Features:

- Microprint Signature Line
- Chemical Protection
- Security Screen

Results of document alteration:

- Small type in signature line appears as dotted line when photocopied
- Stains or spots appear with chemical alteration
- Absence of "Original Document" vestige on back of check

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02-CV-D: Revive Rule 68 Inquiry

Nearly ten years ago, the Committee studied an elaborate proposal to amend the offer-of-judgment provisions of Civil Rule 68. The Federal Judicial Center was enlisted to investigate the common perception that Rule 68 offers are seldom made because the sanction — defeat of a successful plaintiff's ordinary right to recover costs — is too inconsequential to provide an incentive to accept a Rule 68 offer. The common perception recognized an exception: offers are made, and often are effective, in cases in which a plaintiff has a right to recover attorney fees under a statute that characterizes the fee award as a "cost." The effect of Rule 68 in such cases is to cut off the right to recover post-offer attorney fees, creating a substantial incentive to accept the offer. The study seemed to confirm the force of Rule 68 offers in civil rights cases with fee-shifting statutes: defendants in these cases wanted still greater Rule 68 sanctions, while plaintiffs would prefer to abolish Rule 68 entirely.

The Rule 68 draft developed in response to the proposal focused on adding strength to Rule 68 through shifting attorney fees. The draft enabled both plaintiffs and defendants to make Rule 68 offers. Successive offers could be made as the case progresses. An offeree who fails to win a judgment more favorable than the offer would become liable for the offeror's post-offer attorney fees, subject to two limits: the award would be reduced by the "benefit of the judgment" [offer \$50,000, judgment \$40,000 — the fee award is reduced by \$10,000 to reflect that the offeror pays less on the judgment than the offer], and the award could not exceed the amount of the judgment [the plaintiff cannot be put to an out-of-pocket loss; balance accords equal treatment to the defendant].

The Committee Note sought to address a number of complications, both those addressed in the rule text and others. The effects of successive offers, counteroffers, and counterclaims were considered. Contingent fees were accounted for. Nonmonetary relief was addressed at length. Multiparty offers were addressed in part.

The last lengthy discussion of the Rule 68 proposal appears in the Minutes for the April 20-22, 1995, meeting, at pp. 22-26. Eventually the proposal was put aside. Dissatisfaction with the draft arose from several sources. One was the inevitable comparison to the "American Rule" that attorney fees are not shifted. A second was dismay at the complexities that arise in attempting to anticipate even the most obvious combinations of offers, parties, and results. A third — and perhaps most pervasive — was concern whether it is desirable to augment pressures to settle by creating a complex device that can be manipulated to strategic purpose. There also may have been concern with the need to confront two Supreme Court rulings. One was that although a plaintiff who wins a token judgment remains subject to Rule 68 sanctions, a plaintiff who loses completely is not because such a plaintiff does not "obtain" a judgment. The other was the ruling that Rule 68 can defeat a successful plaintiff's statutory fee award if — but only if — the fee statute happens to characterize the fee award as a "cost." These perplexities, and others, are explored in Cooper, *Rule 68, Fee Shifting, and the Rulemaking Process*, in *REFORMING THE CIVIL JUSTICE SYSTEM* 108-149 (L. Kramer ed., N.Y.U. Press 1996).

In 02-CV-D, the Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association reports that it has "narrowly approved" a proposal to add "teeth" to Rule 68. The cover letter also states that there was a "strong dissent in the Section." The proposal reflects study of earlier failed attempts by the Advisory Committee to amend Rule 68 through proposals published for comment in 1983 and 1984. It does not reflect any study of the later Advisory Committee review, which never progressed to the point of recommending publication. This proposal is simpler. It proceeds from the premise that "[t]he long-recognized purpose of Rule 68 has been 'to relieve overburdened federal courts from litigation by encouraging early settlement.'" It identifies "a need and consensus for changing Rule 68 to make it more vigorous in achieving its purpose." To this end several changes are urged: (1) Enable plaintiffs as well as defendants to make Rule 68 offers. This feature was built into the 1993 draft. (2) Make Rule 68 sanctions available to a defending party when a claimant-offeree loses on the merits at trial or on a dispositive motion. This feature too was built into the 1993 draft. (3) Establish discretion to award post-offer expenses, not including attorney fees, as Rule 68 sanctions. Expenses might include discovery expenses and "office services such as electronic imaging and storage." Awards of expenses would "up the ante" without moving toward an "English Rule" award of attorney fees. In exercising discretion, the court could consider the reasonableness of the offer and the reasonableness of a rejection, reducing the risk of "gaming" behavior; consider the burden payment would impose on the offeree and the resources of the offeror, reducing the risk that wealthy litigants will intimidate less wealthy adversaries; account for the relation of the expenses to the claim; and look to the relation of the claim to any other claim in the action and the importance of the claim. (4) Make it clear that in a multiparty or multi-claim case the clerk can enter final judgment when an offer is accepted as to only part of the case.

The "strong dissent" is summarized in the cover letter as expressing concern "that the proposal contained a significant and inappropriate disincentive to litigate imposed upon plaintiffs, especially less wealthy plaintiffs; contained a strong incentive for deep-pocket defendants to run up costs beyond what they would otherwise spend; and left it to the uncertain and undoubtedly non-uniform discretion of individual judges to ameliorate any unfairness in imposing expenses upon parties who reject settlement offers less favorable than the outcome after trial."

There is no apparent advantage in deferring consideration of this proposal. The subject is important and troubling. Several years have passed since the Committee's most recent surrender. This proposal is more modest, and therefore less troubling. It is more modest, and therefore less likely to have a substantial impact. It seeks to avoid the issues that arise whenever attorney fees are used as a sanction. It does not address the complications of successive offers by the same party, counteroffers, multiparty offers, and the like. The desirability of increasing pressure to settle is assumed, and it is assumed for the purpose of relieving overburdened federal courts from litigation.

One choice is to take on the proposal, setting it for drafting and revision in the ordinary way.

The other choice is to conclude once again that the desire to promote settlement does not of itself justify the risks that inhere in adding new sanctions for a party who loses on the merits, or for a party who wins on the merits but does not win more than a former court-rule offer of settlement.

It is recommended that this topic be removed from the agenda. The questions are important, intrinsically difficult, and contentious. They will require extensive study when they are taken on. The time required for the style project seems likely to preclude the level of attention a Rule 68 project would require.

RECEIVED
5/7/02

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April 19, 2002

02-CV-D

Mr. Peter G. McCabe
Secretary of the Committee on
Rules of Practice and Procedure
Administrative Office of the United
States Courts
1 Columbus Circle, N.E.
Room 4-170
Washington, D.C. 20544

Re: Federal Rule of Civil Procedure 68

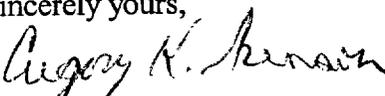
Dear Mr. McCabe:

I am the Chair of the Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association. On April 17, 2002, the Section narrowly approved the enclosed report on Providing Offers of Judgment with "Teeth"; A Proposal for the Amendment of Federal Rule of Civil Procedure 68. On behalf of the Commercial and Federal Litigation Section, I would like to submit this report for consideration by the Advisory Committee on Civil Rules.

This report identifies an intriguing and possibly controversial change in an underutilized rule with the objective of encouraging settlements. The strong dissent in the Section was concerned that the proposal contained a significant and inappropriate disincentive to litigate imposed upon plaintiffs, especially less wealthy plaintiffs; contained a strong incentive for deep-pocket defendants to run up costs beyond what they would otherwise spend; and left it to the uncertain and undoubtedly non-uniform discretion of individual judges to ameliorate any unfairness in imposing expenses upon parties who reject settlement offers less favorable than the outcome after trial.

If you would like further information or wish to pass along any comments, I would be pleased to hear from you.

Sincerely yours,


Gregory K. Arenson

Enclosure

cc: Jay G. Safer, Esq. (w/o encl.)
Chair, Commercial and Federal Litigation Section

PROVIDING OFFERS OF JUDGMENT WITH "TEETH"; A PROPOSAL FOR THE AMENDMENT OF *FEDERAL RULE OF CIVIL PROCEDURE 68*

Summary

The concept of an "offer of judgment" under Rule 68 has been practically a dead letter since its adoption as one of the original *Federal Rules of Civil Procedure* in 1938. The intent of the Rule has been to encourage settlements by shifting taxable costs to a claimant (usually the plaintiff) who rejects a written settlement offer on the claim and later fails to obtain a judgment more favorable than the rejected offer. The Section believes that the Rule's lack of utility as a settlement-promoting device stems from the fact that it does not apply to a broad enough range of situations, and because its limited financial consequences do not provide a sufficient economic incentive for offerees to settle by accepting offers of judgment.

Accordingly, the Section recommends that Rule 68 be modified **(i)** to make it applicable to both claimants and defendants on a claim; **(ii)** to make it applicable when a claimant-offeror obtains a result that is more favorable than the offer; **(iii)** to make it applicable when the claimant-offeree loses at trial or on a dispositive motion; and **(iv)** to strengthen the potential economic consequences to the party rejecting the offer by shifting, in addition to taxable costs, the offeror's reasonable post-offer expenses (but not attorneys' fees) to the offeree, in the discretion of the court, if the offeree fails to obtain a result more favorable than the rejected offer.

1. The Current State of the Federal Rule on Offers of Judgment

As a matter of course, Fed. R. Civ. P. 54(d)¹ provides that a party who loses at trial or on a dispositive motion, *i.e.*, the non-prevailing party, will be taxed the costs of suit defined in 28 U.S.C. § 1920,² unless the court otherwise directs. See *Kohus v. Cosco, Inc.*, Case No. 01-1358 (Fed. Cir. 2002) ("Section 1920 'embodies Congress' considered choice as to the kinds of expenses that a

¹ **Rule 54. Judgments; Costs**

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(d) Costs; Attorneys' Fees.

(1) Costs Other than Attorneys' Fees. Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

² **§ 1920. Taxation of costs.**

A judge or clerk of any court of the United States may tax as costs the following:

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

federal court may tax against the losing party,' " citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987)).

Rule 68 of the *Federal Rules of Civil Procedure*³ shifts the risk of being saddled with taxable costs to a prevailing claimant under the circumstances spelled out in the Rule, which reads as follows:

Rule 68. Offer of Judgment

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment,

³ For comprehensive discussions of Rule 68, see 12 *Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d* §§ 3001-3007 (1997); and 13 *Moore's Federal Practice 3d* §§ 68.01-68.10 and 68 App. 01-68 App. 101 (3d 2001). An extensive and scholarly analysis of Rule 68, its history, shortcomings, and proposals for amending it, can be found in Roy D. Simon, "The Riddle Of Rule 68," 54 *Geo. Wash. L. Rev.* 1 (1985).

which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Rule 68 introduced a new concept in federal jurisprudence⁴ by allowing a party defending against a claim to serve upon the claimant more than 10 days prior to trial an offer "to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued." If the claimant-offeree refuses the offer but does not obtain a better result at trial, then "costs [under 28 U.S.C. § 1920] incurred after the making of the offer" are taxed to the offeree in accordance with Rule 54(d). Rule 68 operates only when the offeree refuses the offer and subsequently wins on the merits of the claim but obtains the same or less than the amount offered.⁵ A plaintiff may make an offer of judgment under Rule 68 only as to a counterclaim or cross-claim against it. In short, "Rule 68 bites only when the plaintiff wins but wins less than the defendant's offer of judgment." *Amati v. City of Woodstock*, 176 F.3d 952, 957 (7th Cir. 1999).

⁴ State court antecedents can be found in Minnesota, Montana and New York. See 2 *Minn.Stat.* (Mason, 1927) § 9323; 4 *Mont.Rev.Codes Ann.* (1935) § 9770; and *N.Y.C.P.A.* (1937) § 177.

⁵ Rule 68 does not apply if the claimant-offeree refuses the offer of judgment and subsequently loses on the merits, because the claimant-offeree did not "obtain" a judgment within the meaning of the Rule. In almost all such cases, Rule 68 would be superfluous because "costs" under 28 U.S.C. § 1920 are taxed against the losing claimant-offeree under Rule 54(d). *Delta Air Lines, Inc. v. August*, 101 S.Ct. 1146, 450 U.S. 346 (1981).

The long-recognized purpose of Rule 68 has been "to relieve overburdened courts from litigation by encouraging early settlement." Martha A. Mills et al., *Report on Proposed Rule 68: Offer of Settlement*, "The New and Proposed Rules of Civil Procedure" 501, 506 (PLI 1984). In theory at least, parties are more likely to settle early in the case when prolonging the litigation carries with it the prospect that the prevailing party (i.e., the claimant-offeree) will have to pay the losing party's costs taxable under 28 U.S.C. § 1920 which were incurred after the offer of judgment was served. The Supreme Court in *Delta Air Lines, supra*, explained the rationale of Rule 68 -- which has no purpose other than to promote settlement -- as follows:

The purpose of Rule 68 is to encourage the settlement of litigation. In all litigation, the adverse consequences of potential defeat provide both parties with an incentive to settle in advance of trial. Rule 68 provides an additional inducement to settle in those cases in which there is a strong probability that the plaintiff will obtain a judgement but the amount of recovery is uncertain. Because prevailing plaintiffs presumptively will obtain costs under Rule 54(d), Rule 68 imposes a special burden on the plaintiff to whom a formal settlement offer is made. If a plaintiff rejects a Rule 68 settlement offer, he will lose some of the benefits of victory if his recovery is less than the offer.

101 S.Ct. at 1150, 450 U.S. at 352.

In his concurring opinion, Justice Powell commented further on the Rule's purpose as follows:

The Rule particularly facilitates the early resolution of marginal suits in which the defendant perceives the

claim to be without merit, and the plaintiff recognizes its speculative nature.

Id. at 1156, 450 U.S. at 363.

2. Why Has Rule 68 Not Fulfilled Its Purpose?

In reality, Rule 68 is used infrequently by litigants,⁶ and has come to be generally regarded as ineffective as a means of inducing settlements, especially in protracted cases where the purpose of the rule would, in principle, be best served.⁷ See, Association of the Bar of the City of New York, *Report of the Committee on the Federal Courts*, March 1, 1984 at 11.

There are several reasons why parties forego making offers of judgment under Rule 68. For instance, the Rule refers to "costs," which presumptively entail only *taxable costs* specified in 28 U.S.C. § 1920, incurred after the offer of judgment was made. Such costs (*see, fn. 2, supra*) are usually relatively small -- especially if the offer is made close to the 10-day pre-trial deadline -- compared to the offeree's actual expenses (even without taking into account its attorneys' fees), such as document imaging, travel and lodging, and

⁶ See, Simon, *supra* at 8.

⁷ "[T]he rule 'has rarely been invoked and has been considered largely ineffective in achieving its goals.'" 12 *Wright, Miller & Marcus, supra*, at § 3001 at 67-68 (*quoting* Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. 339, 363 (1983)). In a Court of Appeals decision, the Rule was described as being "among the most enigmatic of the Federal Rules of Civil Procedure because it offers imprecise guidelines regarding which post-offer costs become the responsibility of the plaintiff," *Crossman v. Marcoccio*, 806 F.2d 329, 331 (1st Cir. 1986).

interpreters and testifying experts. Therefore, the risk of having to pay the costs prescribed in 28 U.S.C. § 1920 provides little financial incentive for defending parties to make, and claimant-offerees to accept, Rule 68 offers of judgment even at an early stage of a case. Also, only a party defending against a claim may invoke the rule. While a plaintiff defending against a counterclaim or a cross-claim may make an offer of judgment, it may not make an offer of judgment in order to settle its affirmative claim, 12 *Wright, Miller & Marcus, supra*, § 3000 at fn. 7.

Recognizing the shortcomings of Rule 68, proposals to amend it were made in 1983⁸ and 1984,⁹ but were never enacted.

3. Opposing Views Regarding Possible Changes to Rule 68

Notwithstanding -- or perhaps because of -- its desuetude, there has been considerable debate over how Rule 68 can be made more effective as a

⁸ Committee on Rules of Practice & Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, Rules Governing Section 2254 Cases in the United States District Courts, and Rules Governing Section 2255 Proceedings in the United States District Courts*, reprinted in 98 F.R.D. 337, 361-67 (1983).

⁹ Committee on Rules of Practice & Procedure of the Judicial Conferences of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure, Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, and Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts*, reprinted in 102 F.R.D. 407, 432-37 (1984).

settlement tool in litigation.

It has been suggested that Rule 68 be amended to include an award of the offeror's attorney's fees.¹⁰ The Association of the Bar of the City of New York has criticized such a change, reasoning that amending the rule to allow an award requiring "losing" claimants to pay defendants' litigation expenses beyond the usual taxable costs -- especially attorneys' fees -- would be a "radical departure from traditional American litigation philosophy." See Association of the Bar of the City of New York, *Report of the Committee on the Federal Courts*, *supra* at 10. Amending Rule 68 to include attorneys' fees, the Association later stated, would be tantamount to foregoing the traditional "American Rule" (requiring each party to bear its own legal expenses, regardless of the outcome) in favor of the "English Rule" (requiring the loser to pay the winner's attorneys' fees).¹¹ See, Association of the Bar of the City of New York, *Report of the*

¹⁰ See 28 U.S.C. § 1927 (counsel's liability for excessive costs) The rule (R.4:58) governing offers of judgment in New Jersey state courts provides for the shifting of attorneys' fees. See, *New Jersey Law Journal*, January 14, 2002, p. 1.

¹¹ The "English Rule" on attorneys' fees in litigation under the Civil Procedure Rules of England is that the unsuccessful party will be ordered to pay the "costs" (see below) of the successful party (Rule 44.3(2)(a)), although the court may order otherwise if it considers it appropriate (Rule 44.3(2)(b)). In assessing costs, the court will only allow those costs that were reasonably incurred, are reasonable in amount (Rule 44.4(1)) and are proportionate to the matters at issue in the case, which generally is about 65% -75% of a party's actual legal bills.

"Costs" are defined in the Civil Procedure Rules to include fees, charges, disbursements and expenses. There is no definition of either "disbursements" or "expenses" but, in addition to the time charges of its solicitors, a winning party may be entitled to claim:

Committee on Federal Legislation, "Attorney Fee-Shifting and the Settlement Process," The Record, Vol. 51, No. 4, 391 at 393-94 (1996).

The United States Supreme Court has repeatedly reaffirmed its commitment to the American Rule. *See, e.g., Fleischman Distilling Corp. v. Maier Brewing Co.*, 87 S. Ct. 1404, 386 U.S. 714 (1967) (citing several rationales for continued support of the American Rule); *Alyeska Pipeline Service v. Wilderness Society*, 95 S. Ct. 1612, 421 U.S. 240 (1975) (rejecting a general theory in support of attorney fee-shifting). But compare 35 U.S.C. § 285, a statutory partial abrogation of the American Rule, whereby courts in patent infringement cases of an "exceptional" nature "may award reasonable attorney fees to the prevailing party."

In short, plaintiffs generally contend that amending Rule 68 to allow

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1. The costs of being represented by a barrister;
 2. Court fees;
 3. The fees and expenses of expert witnesses;
 4. The expenses of witnesses of fact; and
 5. Disbursements such as travel expenses and translation fees.

Solicitors' internal expenses (photocopying, postage, couriers, outgoing telephone calls and faxes etc.) are assumed to be covered by the solicitors' time charges and are not normally recoverable separately (exceptions can be made where the expenses are heavy, for example photocopying voluminous discovery documents for trial bundles).

It is not possible to recover internal costs of a corporate client (e.g., time spent by in-house counsel in supervising the case) save in the rare situation where it can be shown that in-house counsel has performed a role normally carried out by the outside legal team.

for an award of attorneys' fees¹² would dramatically shift the risks of litigation in favor of well-financed defendants, thereby forcing many small or individual claimants to forego pursuing litigation claims. They argue that this would be especially true in "test cases," such as those involving civil rights or toxic torts, where there is a strong societal interest in allowing them to come to a final resolution on the merits rather than by settlement. See *Mills et al.*, *supra*, at 509. On the other hand, defendants generally would obviously favor an award of attorneys' fees against plaintiffs who refuse to settle. Clearly, there is a need and consensus for changing Rule 68 to make it more vigorous in achieving its purpose,¹³ but which would accommodate the concerns regarding attorneys' fees.

The Recommendation of The Section

(1) The Section recommends that Rule 68 be amended to state that the offeror can be either the claimant or a party defending against a claim. This was suggested by the Advisory Committee on the Federal Rules of Civil

¹² Some statutes provide for the award of attorneys' fees to the prevailing party as part of "taxable costs" under 28 U.S.C. § 1920. See, for example, 42 U.S.C. § 1988 (Civil Rights Act), 42 U.S.C. § 7413(b) (Clean Air Act), and 17 U.S.C. § 505 (Copyright Act). Fed.R.Civ.P. 54(d)(2) applies to applications for attorneys' fees in such cases, and the shifting of taxable costs under Rule 68 carries with it the denial of an attorney's fee to the prevailing plaintiff-offeree who fails to win a judgment for more than the offer. See *Marek v. Chesny*, 105 S.Ct. 3012, 3017, 473 U.S. 1, 11 (1985). Parties litigating under such statutes would not be treated any differently by the Section's recommendation.

¹³ See, *Simon*, *supra* at 53. ("Nearly everyone agrees that the existing procedures under Rule 68 should be changed.")

Procedure and favored by the Committee on Second Circuit Courts of the Federal Bar Council in 1984. See "Bar Panel Opposes Change in Civil-Procedure Rule," *New York Law Journal* Mar. 1, 1984. The Federal Bar Council Committee stated that a revised Rule 68 applicable equally to claimants and parties defending against claims would best serve the interests of all parties and eliminate concerns regarding parties on opposite sides of a litigation with unequal resources and levels of sophistication. *Id.* The Section submits that there is ample reason to allow claimants to make offers of judgment in view of the Section's proposal to allow the offeror to recover certain post-offer expenses from the offeree, subject to court approval. Counterpart rules in several states permit plaintiffs to make offers of judgment.¹⁴

¹⁴ See *12 Wright, Miller & Marcus, supra*, at § 3001.2, fn. 2. For a detailed discussion of the applicability in federal cases of offers of judgment by plaintiffs under state rules, see *12 Wright, Miller & Marcus, supra*, at § 3001.2.

For example, in Connecticut there are separate statutes for plaintiffs and defendants governing offers of judgment. The plaintiff's statute, *Conn. Gen. Statute* § 52-192a, provides that a plaintiff in an action on a contract or for the recovery of money (whether or not other relief is sought) can make a written pre-trial offer of judgment to the defendant offering to settle the claim underlying the action and to stipulate to a judgment as upon a default, for a sum certain. The offer is filed with the clerk of the court and notice thereof is served on the defendant. If the defendant rejects the offer by failing to file a written acceptance thereof with the clerk of the court within the earlier of 30 days or the rendering of the verdict or court award, and judgment is ultimately entered in the case, the court then determines whether the plaintiff has recovered an amount equal to or greater than the amount the plaintiff offered to settle for in the offer of judgment. If the amount recovered is equal to or greater than the sum certain stated in the offer of judgment, then the court adds 12% annual interest to the amount recovered, running either from the date on which the complaint was filed (if the offer of judgment was filed in the first 18 months of the case), or the date on which the offer of judgment was filed (if the offer was filed after the first 18

(2) In view of the Section's proposal to allow the offeror to recover certain post-offer expenses (see below), the Section recommends that the Rule be amended to make it applicable also to cases where a claimant-offeree loses on the merits at trial or on a dispositive motion.

(3) The Section further recommends that Rule 68 be amended so that the trial court has discretion as to whether and to what extent an award of post-offer expenses, exclusive of attorneys' fees, should be made beyond the costs that may be taxed under 28 U.S.C. § 1920. Such post-offer expenses could include discovery expenses such as photocopying, deposition transcripts, travel and lodging for attorneys, witnesses, and other personnel, fees of testifying

months of the case). The court may also award up to \$350 in reasonable attorney's fees to the plaintiff.

The defendant's statutes, *Conn. Gen. Statute* § 52-193 through § 52-195 provide, in essence, that the defendant in the same types of actions may offer judgment and file the offer with the clerk of the court. If the plaintiff fails to accept the offer of judgment within 10 days prior to the commencement of the trial and obtains a judgment for an amount not greater than the amount of the defendant's offer, with interest included, then plaintiff shall recover no costs that accrued after he received notice of the filing of the offer of judgment and must pay defendant's costs accruing after plaintiff's receipt of such notice. Defendant's costs may include defendant's reasonable attorneys' fees up to \$350.

Because the Connecticut plaintiff's statute, *supra*, created a substantive right under state law (see, *Erie*), it is not preempted in federal diversity actions by Fed. R. Civ. P. 68 which in its current form only allows offers of judgment by claim defendants. See, *Murphy v. Marmon Group, Inc.*, 562 F. Supp. 856 (D. Conn. 1983).

experts and other expert expenses recoverable under Fed.R.Civ.P. 26(b)(4)(c),¹⁵ and office services such as electronic imaging and storage. Since the offeror could be the claimant or the party defending against the claim, giving courts such discretion would “up the ante” without embracing the “English Rule” as to attorneys' fees (and thereby avoid the possibility of running afoul of the Rules Enabling Act).¹⁶

There is also a procedural correction to Rule 68 which the Section

¹⁵ **Rule 26(b) Discovery Scope and Limits**

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(4) Trial Preparation: Experts.

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(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

¹⁶ **28 U.S.C. § 2072. Rules of procedure and evidence; power to prescribe**

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

recommends. Since its enactment in 1938, Rule 54(a) has defined "judgment" to include "a decree and any order from which an appeal lies." In the interim, Rules 54(b)¹⁷ and 62(h)¹⁸ were amended to make clear that a judgment on less than all the claims or involving less than all the parties is not appealable as of right as a final judgment. Yet the provision in Rule 68 allowing the clerk of the court to enter judgment upon acceptance of an offer of settlement, which could be for less than all claims or involve less than all parties, was not so amended. This creates the potential for an anomalous situation of there being an offer and acceptance of

¹⁷ **Rule 54. Judgment; Costs**

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(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

¹⁸ **Rule 62. Stay of Proceedings to Enforce a Judgment**

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(h) Stay of Judgment as to Multiple Claims or Multiple Parties. When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

judgment on less than all the claims or involving fewer than all the parties which cannot be entered by the clerk. The Section recommends that this be corrected by providing that, if a judgment is entered under Rule 68 on fewer than all claims or involving fewer than all parties, then, to establish its finality, the judgment be considered an appealable final judgment.

Thus, the Section recommends that Rule 68 be amended as follows, where changes are indicated in boldface (additions underlined and deletions bracketed):

(a) At any time more than 10 days before the trial begins, a party **[defending against a claim]** may serve upon **[the] an** adverse party an offer to **[allow judgment to be taken against the defending party] resolve a claim** for the money or property or to the effect specified in the offer**[, with costs then accrued]**. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment **which, if with respect to fewer than all claims or all parties, shall nonetheless be considered an appealable final judgment.** An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the **[judgment finally obtained by the] offeree [is] does** not **obtain a more favorable judgment on the merits of the claim** than the offer, the offeree must pay **to the offeror** the costs incurred after the making of the offer **and, upon motion by the offeror, in the court's discretion, reasonable expenses, excluding attorneys' fees, incurred by the offeror after the making of the offer.** The fact that an offer is made but not accepted does not preclude a subsequent offer.

(b) When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, **[the party adjudged liable may make an offer of judgment,] either party may make an offer to resolve the amount or extent of the liability,** which shall have the same effect as an offer made before trial if it is served **[within a reasonable time]** not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

(c) **In exercising its discretion whether and to what extent to award reasonable expenses, exclusive of attorneys' fees, a court may consider, among other things, (1) the relation of the claim to any other claim in the action, (2) the relation of the expenses to the claim, (3) the reasonableness of the offer, (4) the burden on the offeree in paying the expenses, (5) the resources of the offeror, (6) the importance of the claim, and (7) the reasonableness of the rejection of the offer.**

How Rule 68 would read, as amended, is shown in Appendix A.

The Section believes that this amendment effects a workable compromise in several respects.

First, it does not adopt the English Rule of awarding attorneys' fees to the winning party, because such fees are not normally awarded under the proposal. See, *Marek v. Chesny*, 105 S. Ct. 3012, 3016, 3018, 473 U.S. 1, 9, 12 (1985) (where a statute provides for attorneys' fees to be awarded to the prevailing party as part of costs, a claimant who rejects a Rule 68 offer and recovers less than the offer may not recover attorneys' fees incurred after the

offer); *Crossman v. Marcoccio*, 806 F.2d 329, 333-4 (1st Cir. 1986). Any award of the offeror's expenses is likely to be far less than the amount of its attorneys' fees incurred after a rejected offer.

Second, any expenses and costs that are shifted are only those incurred after an offer is rejected. It does not include what may be substantial expenses and costs incurred prior to the offer. It might be anticipated that offers would be made after substantial discovery occurs, thereby reducing the amounts that would be subject to shifting.

Third, under the proposal, judges may exercise their discretion to reduce the amount of costs and expenses to be shifted. Judges may explicitly consider the relative resources of the parties (items (4) and (5)), which is meant to alleviate concerns that shifting costs and expenses after rejection of an offer might have a chilling effect on civil actions which society has an interest in fostering, such as class actions in which class representatives reject an offer, environmental claims, etc. Further, judges should consider the importance of the claim or claims offered to be settled and their relationship to the other claims in the action and to the post-offer expenses (items (1), (2) and (6)) in apportioning additional costs and expenses incurred after the offer. Moreover, judges may examine any gamesmanship in making or rejecting the offer (items (3) and (7)).

The proposal retains the applicability of Rule 68 to non-monetary claims. 13 *Moore's Federal Practice 3d, supra*, at § 68.04[5]. Under the

Section's proposed amendment of Rule 68, offers of judgment would remain in the form of "money or property or to the effect specified in the offer." The Section agrees that the term "to the extent specified in the offer" includes equitable claims, which appears to be consistent with Fed.R.Civ.P. 1 making the rules applicable to "all suits of a civil nature" unless exempted by Fed.R.Civ.P. 81, and that allowing a party to make an offer to settle equitable claims, such as injunctive relief, would "create much greater incentives to use the Rule." *Mills et al., supra* at 506.

Finally, there may be some concern that proposed Rule 68 would lead to further litigation. To be sure, there would be an increase in collateral proceedings after some judgments on the merits. However, the Section believes that shortening of litigation times and reduction in case loads due to increased pretrial settlements would result in greater cost savings than any increase in collateral post-trial litigation costs in consequence of an amended Rule 68.

Conclusion

The Section believes that its present recommendation will add more "teeth" to Rule 68 by modifying it (i) to make it applicable to both a claimant and a party defending against a claim, (ii) to make it applicable when a claimant-offeror obtains a result that is more favorable than the offer, (iii) to make it applicable when a claimant-offeree loses on the merits at trial or on a dispositive motion,

and (iv) to strengthen its financial "bite" upon the party rejecting the offer by creating the risk that the offeror's reasonable post-offer expenses -- exclusive of attorneys' fees -- will be shifted to the offeree, in addition to taxable court costs. Most importantly, the Section believes that in the long run, the proposed amendment would make Rule 68 effective in achieving its intended purpose of encouraging settlement of litigation.

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APPENDIX A

Rule 68. Offer of Judgment

(a) At any time more than 10 days before the trial begins, a party may serve upon an adverse party an offer to resolve a claim for the money or property or to the effect specified in the offer. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment which, if with respect to fewer than all claims or all parties, shall nonetheless be considered an appealable final judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the offeree does not obtain a more favorable judgment on the merits of the claim than the offer, the offeree must pay to the offeror the costs incurred after the making of the offer and, upon motion by the offeror, in the court's discretion, reasonable expenses, excluding attorneys fees, incurred by the offeror after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.

(b) When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, either party may make an offer to resolve the amount or extent of the liability, which shall have the same effect as an offer made before trial if it is served not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

(c) In exercising its discretion whether and to what extent to award reasonable expenses, exclusive of attorneys' fees, a court may consider, among other things, (1) the relation of the claim to any other claim in the action, (2) the relation of the expenses to the claim, (3) the reasonableness of the offer, (4) the burden on the offeree in paying the expense, (5) the resources of

the offeror, (6) the importance of the claim, and (7) the reasonableness of the rejection of the offer.

02-CV-E: Restore Fact Pleading

Nancy J. Smith, Senior Assistant Attorney General of New Hampshire, suggests that Rule 8(a)(2) should be amended to correct the decision in *Swierkiewicz v. Sorema*, 2002, 122 S.Ct. 992, as put to work in *Gorski v. New Hampshire Dept. of Corrections*, 1st Cir., May 24, 2002, No. 01-1995. There are many ways to read the suggestion. It may mean to ask only that particularized pleading standards be adopted for employment discrimination claims, requiring the plaintiff to plead the elements of a prima facie case. It may mean to suggest more generally that Rule 8 be amended to require that "the essential factual basis of the claim be stated." Various intermediate interpretations also are possible.

The *Swierkiewicz* decision reversed a ruling that a plaintiff claiming employment discrimination by reason of age and nationality must plead the elements of a prima facie case. In part the Court relied on the proposition that the "prima facie" case has evolved in employment discrimination law as one mode of evidence, not as a matter of pleading; discrimination can be proved by means that do not establish all elements of a prima facie case. More generally, the Court reiterated its earlier ruling that Rule 8(a)(2) applies general notice pleading to all civil claims, allowing particular pleading requirements only for those matters specified in Rule 9. It is enough to give fair notice of what the claims are and the grounds upon which they rest. Dismissal is not proper simply because it appears on the face of the pleadings that a recovery is very remote and unlikely. The simplified notice pleading standard relies on discovery and summary judgment to define disputed facts and dispose of unmeritorious claims. And so on.

The *Gorski* decision reversed dismissal of a constructive discharge claim based on a hostile work environment created by slighting remarks about the plaintiff's pregnancy. Several remarks were stated in the complaint. The district court concluded that taken together, these remarks did not show a hostile work environment. The court of appeals reversed. The complaint did not allege that the specific instances of harassment set forth were the only evidence available to support the claim. Nor was the plaintiff required to plead all the evidence that would later be offered. The district court erred in believing that the complaint established a fixed set of facts to measure application of the hostile workplace claim. "When the allegations of the complaint are read favorably to Gorski, with the understanding that notice pleading does not require recitation of detailed evidence in support of the claim, it is clear that Gorski satisfactorily alleged the elements of a cause of action for discrimination * * *."

The general notice pleading standard was considered by the Advisory Committee in the wake of the ruling that particularized pleading cannot be required in a civil rights action asserting that a municipal entity is liable for the constitutional tort of its employees, *Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 1993, 507 U.S. 163. The Minutes for April 20, 1995, show that the Committee concluded that it was then premature to consider the impact of the *Leatherman* decision on developing practice, and that the combined operation of pleading and discovery would continue to be studied.

Among the proposals deferred in 1995, the most general would amend Rule 8(a)(2):

A pleading * * * shall contain * * * (2) a short and plain statement of the claim in sufficient detail to showing that the pleader is entitled to relief * * *."

A related approach would amend Rule 8(e)(1):

Each averment of a pleading ~~shall~~ must be simple, concise, and direct. No technical forms of pleading or motions are required. The pleading as a whole must suffice to support informed decision of a motion under Rule 12(b), (c), (d), or (f).

More particular proposals could be framed as part of Rule 9, perhaps amending Rule 9(b). Restyling, a revision to catch up the *Leatherman* and *Swierkiewicz* decisions might look like this:

A pleading of fraud, mistake, civil rights violation by a public official or entity, or employment discrimination must be stated with particularity.

(The prospect of referring to a "prima facie case" in a court rule cannot be contemplated. That phrase is used and misused in far too many ways to be used.)

Yet another approach would be to undo some part of the long-ago decision to delete from Rule 12(e) the original provision for a bill of particulars:

(e) MORE DEFINITE STATEMENT.

- (1) On motion or on its own, the court may order a more definite statement of a pleading if:
 - (A) the pleading is one that requires a responsive pleading and is so vague or ambiguous that a responsive pleading cannot reasonably be required; or
 - (B) a more particular pleading will support informed decision of a motion under Rule 12(b), (c), (d), or (f), or will better define the claim and defense of a party for Rule 26(b)(1).
- (2) A motion for a more definite statement must point out the deficiencies in the pleading and the details desired.
- (3) A more definite statement must be made by the time fixed by the order or, if no time is fixed, within 10 days after notice of the order. The court may strike the pleading if a more definite statement is not timely made.

The approaches that qualify the commitment to notice pleading would require careful study and powerful justification. The approaches that would begin to specify particularized pleading requirements for specific substantive claims present other problems. There is reason to be wary of Rules Enabling Act limits: heightened pleading standards might seem to abridge or modify the substantive rights singled out for special treatment. Assuming that the Enabling Act permits some such pleading requirements — and Rule 9 provides several examples — the question remains

whether it is wise to go down this road without compelling evidence that notice pleading is failing to achieve goals that properly may be demanded of pleading. In 1995 the Committee concluded that the time had not come to open up these questions. Since then the discovery rules have been amended extensively, but so recently that it remains difficult to assess what the consequences will be.

It is recommended that these questions again be deferred and that this specific proposal be removed from the agenda. The topic goes to the very heart of the pleading and discovery package created in 1938. It was addressed in part in the nascent simplified rules project. To take it on would require more time than can be spared from the style project. Serious reconsideration of pleading requirements might indeed require postponement of the style project because of potential effects on the substance of the discovery rules, and perhaps such other topics as summary judgment.

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PHILIP T. MCLAUGHLIN
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STEPHEN J. JUDGE
DEPUTY ATTORNEY GENERAL

02-CV-E

June 17, 2002

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Administrative Office of the Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20544

RE: Proposed Change to Fed.R.Civ.P. 8(a)(2)

Dear Mr. McCabe:

This letter is submitted in accordance with the process for requesting changes in the Federal Rules of Civil Procedure outlined in the Courts' website. The change that we propose is amendment of Rule 8(a)(2) to require that the "short and plain statement of the claim" allege facts sufficient to establish a *prima facie* case.

This change is necessitated by the recent U.S. Supreme Court decision in *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (copy attached as Exhibit 1). The Supreme Court noted the practical merits of the argument that allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated claims, but stated that "a requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'"

The *Swierkiewicz* decision was very recently followed by the First Circuit in a case in which we were involved, *Gorski v. New Hampshire Department of Corrections*, Docket No. 01-1995 (May 25, 2002) (copy attached as Exhibit 2). The district court had determined that the allegations in the complaint, assuming them to be true were insufficient to rise to the level required by law to create an actionable claim of hostile work environment. See Order on Motion to Dismiss, J. DiClerico, July 19, 2000, Civil No. 99-562-JD, 2000DNH156 (copy attached as Exhibit 3). The

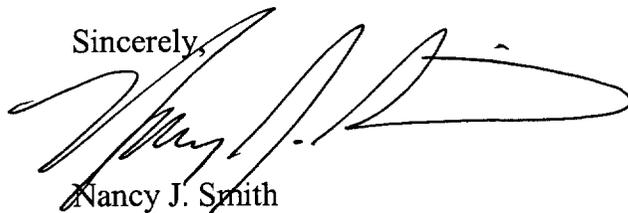
result of *Swierkiewicz*, as applied by the First Circuit in *Gorski*, is to render Fed. R. Civ. P. 12 (b)(6) meaningless. This result is undesirable from a practical standpoint and inconsistent with common statutory interpretation that presumes every part of a statute to have effect. Where statutes and case law establish standards for a *prima facie* case, failure to allege facts meeting that standard should mean that a claim for which relief can be granted has not been stated under Rule 12(b)(6).

The cost to employers of the *Swierkiewicz* and *Gorski* decisions are heavy. The practical result is that not only disgruntled employees, but any employee faced with less than satisfactory performance reviews will be able to force the employer through the long and costly defense of conclusory allegations of a "hostile environment," even when they are unable to articulate any plausible discriminatory actions. For a governmental entity such as the State, retaining unproductive or even incompetent employees because of the threat of hostile environment claims is not in the best interests of the citizens.

Conversely, the burden on plaintiffs is minimal and will promote the general purpose of notice pleadings by identifying the conduct at issue. The requirements of a *prima facie* case are "not onerous." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Requiring that the essential factual basis of the claim be stated is consistent with the stated goal of notice pleadings, to provide the defendant with notice of the reason for the claim. Additionally, a heightened pleading requirement will promote compliance with the early mandatory disclosure requirements of Fed. R. Civ. P. Rule 26.

We respectfully request that amendment to Fed.R.Civ.P. Rule 8(a)(2) be considered incorporating the *prima facie* requirement.

Sincerely,



Nancy J. Smith
Senior Assistant Attorney General
Civil Bureau

NJS:jmw/188702

Enclosures

cc: United States Senate, Committee on the Judiciary (w/enclosures)

cc: U.S. House of Representatives, Committee on the Judiciary (w/enclosures)

cc: Senator Bob Smith (w/enclosures)

02-CV-F: Better Drafting

The main submission is a copy of an article by Professor Bradley Scott Shannon, *Action Is an Action Is an Action Is an Action*, 2002, 77 Wash. L. Rev. 65. A supplement summarizes specific proposals to amend the rules.

There are seven numbered proposals. They may be described in short compass: (1) That "action" be used throughout the rules, displacing such terms as "case," "lawsuit," "litigation," "proceeding," and other similar expressions. (2) That "averment" be used where appropriate, displacing such terms as "allegation." (3) Rule 41(a)(1) should be amended to make clear the right to voluntary dismissal of a single "claim." (4) A similar change should be made in Rule 41(a)(2), to provide that an action "or claim" shall not be dismissed, and that "the plaintiff's claims," not the action, shall not be dismissed. (5) Forms 31 and 32 should be amended to delete "that the action be dismissed on the merits" — it is confusing to describe judgment for the defendant as a "dismissal." (6) Rule 19(a) should be amended to substitute "the action shall be dismissed as to the joined party" for the present phrase "that party shall be dismissed from the action." The Rules elsewhere refer to dismissal of an action or claim; it is incongruous to refer to dismissal of a party. (7) Rule 58 should be rewritten so that the clerk is not responsible for determining whether entry of a separate judgment is required because an order that does not terminate the entire action is appealable. The new rule would require that the court promptly prepare "a final order,denominated as such, upon the disposition of all claims."

The first six proposals have been referred to the style consultants for consideration as the style project develops. It is recommended that this approach provides the most useful method of consideration and eventual action.

The Rule 58 proposal raises issues that were considered and put aside in the process of generating the Rule 58 amendments scheduled to take effect on December 1, 2002. It seems too early to venture again onto these quaking grounds. It is recommended that this proposal be removed from the agenda.

02-CV-F

6/10/02
University of Idaho
College of Law
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May 30, 2002

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

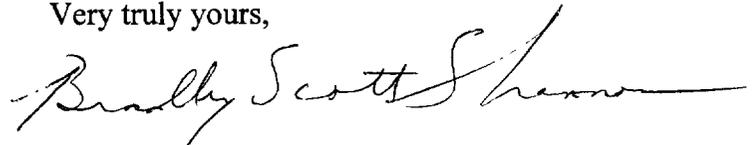
Re: Suggestions for Amendments to the Federal Rules of Civil Procedure

Dear Mr. McCabe:

Submitted for the Committee's consideration is a copy of my article, *Action Is an Action Is an Action Is an Action*, 77 Wash. L. Rev. 65 (2002). This article (in Part III) contains a number of suggestions for amendments to the Federal Rules of Civil Procedure. I would appreciate it if this article could be forwarded to the Advisory Committee on Civil Rules for consideration.

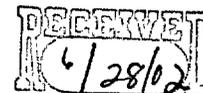
Thank you for your assistance. If you should have any questions, my direct telephone number is (208) 885-7842, and my e-mail address is <bshannon@uidaho.edu>.

Very truly yours,



Bradley Scott Shannon
Visiting Associate Professor

02-CV-F
Supplement



University of Idaho

College of Law
Legal Aid Clinic
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June 28, 2002

BY FAX AND MAIL

Judy Krivit
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Re: Suggestions for Amendments to the Federal Rules of Civil Procedure

Dear Ms. Krivit:

This letter supplements my letter to the Committee dated May 30, 2002, and hopefully will help clarify the precise nature of the amendments I am proposing and the rationales therefor. Again, the rationales for these proposed amendments is set forth in greater detail in my article, *Action Is an Action Is an Action Is an Action*, 77 Wash. L. Rev. 65 (2002) (hereinafter "*Action*").

I respectfully propose the following amendments:

1. Where appropriate, the term "action" (and variations thereof) should be substituted for the words "case," "lawsuit," "litigation," "proceeding," and other, similar words (and variations thereof).

Rationale: "Action" is the term specified by the Rules to represent the concept of the sum of all claims in a federal civil judicial proceeding. Accordingly, the Rules should use the word "action," and no other, when attempting to communicate this concept. See *Action* at 89-102.

2. Where appropriate, the term "averment" (and variations thereof) should be substituted for the word "allegation" and any other, similar words (and variations thereof).

Rationale: "Averment" is the term specified by the Rules to represent the concept of a fact pleaded in an affirmative pleading in an action. Accordingly, the Rules should use the word "averment" exclusively when attempting to communicate this concept. See *Action* at 107-09.

Judy Krivit
June 28, 2002
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3. Rule 41(a)(1) should be amended to read: "Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action or claim may be dismissed . . ." (added language underlined)

Rationale: Though Rule 41(a)(1) appears, by its language, to permit only the voluntary dismissal of entire actions, Rules 41(b) (governing involuntary dismissals) and 41(c) (governing the dismissal of counterclaims, cross-claims, and third-party claims) speak of dismissals of individual claims. There does not seem to be any reason why the voluntary dismissal of individual claims should not be permitted, and in fact this result frequently is accomplished, albeit through some bastardization of the language of this Rule, the utilization of some other, less applicable Rule, or the invocation of court's inherent power. *See Action* at 92-93.

4. Rule 41(a)(2) should be amended to read: "Except as provided in paragraph (1) of this subdivision of this rule, an action or claim shall not be dismissed If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the ~~action~~ plaintiff's claims shall not be dismissed . . ." (deleted language stricken and added language underlined)

Rationale: Same as with respect to proposed amendment three above, with the added substitution of "plaintiff's claims" for "action," which more accurately reflects the fact that the action is to continue with respect to the defendant's counterclaim(s).

5. The phrase, "that the action be dismissed on the merits" should be removed from Official Forms 31 and 32.

Rationale: Forms 31 and 32 appear to relate to dispositions of actions by trial. Dispositions by trial do not result in the dismissal of the action. The inclusion of the above language therefore is erroneous and potentially confusing. *See Action* at 116-41.

6. The phrase, "that party shall be dismissed from the action" should be removed from Rule 19(a), and the following phrase substituted therefor: "the action shall be dismissed as to the joined party."

Rationale: With one exception, the Rules speak only of the dismissal of actions or of claims. The one exception is Rule 19(a). The language proposed is similar to that currently employed in Rule 25(a)(1). *See Action* at 141-42.

Judy Krivit
June 28, 2002
Page 3

7. Rule 58 should be replaced by the following:

Rule 58. Final Order

The court shall promptly prepare a final order, denominated as such, upon the disposition of all claims, setting forth the nature of each claim, the manner by which it was disposed, and the type and extent of the relief, if any, awarded to the claiming party. A final order shall be prepared at the conclusion of every action, regardless of the manner of disposition. The preparation of the final order shall not be delayed to tax costs, award fees, or determine post-disposition motions, though the final order shall be amended as necessary to reflect the manner by which each claim was finally disposed and the extent of the relief finally awarded to each party.

Rationale: As reflected in the commentary that led to the 1963 amendment to Rule 58, the idea of requiring that judgments be set forth on a separate document makes some sense in the abstract. Practically speaking, though, current Rule 58 suffers from several problems. Perhaps most significantly, it requires the district court (or worse, the district court clerk) to determine whether any particular order is appealable, and therefore constitutes a judgment. This can be a difficult exercise, and one for which the district courts are ill-suited. For this and other reasons, district courts frequently fail to prepare judgments in accordance with Rule 58 (and sometimes prepare papers purporting to be judgments that are not). The most recent amendments to Rule 58 do little more than erode whatever benefits might be derived from a separate judgment requirement.

The proposed amendment to Rule 58 solves many of these problems by taking the district court out of the appealability determination business. The proposed amendment also would provide two important administrative benefits: it would result in the preparation of an order that would clearly mark the conclusion of the action, and it would provide a succinct summary, in one document, of each underlying claim and the disposition thereof. And unlike the current separate judgment rule, there would be no doubt as to whether such an order should be prepared, as the proposed amendment requires that a final order be prepared at the conclusion of every action, regardless of the nature of the disposition (i.e., even where there is no judgment, such as typically occurs where the action is disposed of by settlement). The proposed rule also makes it clear that it would be the court (and not the clerk) that would prepare such an order. *See Action* at 146-64.

A few general comments: First, for purposes of proposed amendments one and two, "where appropriate" refers to both the Rules themselves and to the Official Forms that follow. Second, with respect to these same proposed amendments, the converse also should apply – that is, not only should terms such as "action" be used wherever appropriate, but they also should *not* be used where *not* appropriate (or potentially confusing). *See Action* at 101-02. Third, should the Committee be interested in adopting proposed amendments one and two, I would be happy to help the Committee locate those specific instances in the Rules and Forms where an inappropriate word currently is being used. Fourth, should the Committee be interested in

Judy Krivit
June 28, 2002
Page 4

adopting amendments like proposed amendments one and two, the Committee might consider conducting a more plenary investigation into its Rules terminology. And finally, with respect to proposed amendment seven, the Committee should be aware that the adoption of this amendment would require amendments to other rules (including rules contained within the Federal Rules of Appellate Procedure). If desired, I would be happy to assist the Committee in locating those other rules that might be in need of amendment were my proposed amendment seven be adopted.

I hope this is helpful. I would appreciate it if the foregoing also could be forwarded to the Advisory Committee on Civil Rules for consideration.

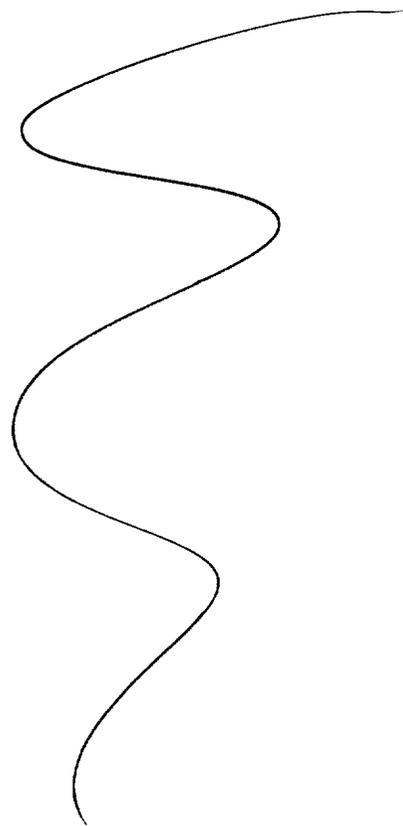
Thank you for your assistance. Of course, if you should have any further questions, I still can be reached by telephone ((208) 885-7842) or by e-mail address (bshannon@uidaho.edu).

Very truly yours,



Bradley Scott Shannon
Visiting Associate Professor

Supplemental
Agenda
Book
Materials





memorandum

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To: Advisory Committee on Civil Rules - 10/10/02
From: Tom Willging^{Tom}, Bob Niemic^{Bob} & Shannon Wheatman^{Sh}
Date: September 19, 2002
Subject: Design for survey of attorneys in closed class actions

Background

The Class Action Subcommittee asked the Center to survey attorneys who have filed class action cases. The subcommittee's purpose is to determine whether counsel have filed fewer class actions in federal court because of the U.S. Supreme Court decisions in *Amchem*¹ and *Ortiz*.²

In the subcommittee's view, *Amchem* and *Ortiz* may have created a context in which attorneys are reluctant to file class actions in the federal courts because of the uncertainty as to whether federal judges have the authority under Rule 23 to certify nationwide class actions and to approve nationwide settlements, particularly in cases that arise under state laws claims affecting diverse citizens. Modifying Rule 23 to establish clear rules permitting settlement class actions is one course of action the subcommittee may consider if a link is found between Rule 23 and attorney decisions to file nationwide class actions in state courts.

The Committee's October 2002 Agenda Book contains our September 9, 2002 report on phase one of our study: the empirical analyses of class action filings and removals post-*Amchem* / *Ortiz*. In that report, we found overall that attorneys have filed (and removed) more class actions in (to) federal court after *Amchem-Ortiz* than before. This finding, however, does not fully address the question of whether the two decisions have had an adverse impact on federal class action filings. For example, the number of federal filings might have increased at a slower rate than filings in state courts. We do not have state court data to test that proposition directly.

Instead, we will approach the impact of *Amchem* / *Ortiz* on federal filings by asking class action attorneys who appeared in recently closed class action cases why they chose to file a class action in federal or state courts or why they chose to remove a class action from state to federal court. This survey will be phase two of our study.

¹ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

² *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

Objective of the survey

The objective of the survey is to help the subcommittee better understand lawyers' decisions about whether to file class actions in state or federal court. We designed the questionnaire, which is attached, to gather data on what factors influence those attorney decisions.

Typically, plaintiffs' attorneys have a choice of filing class actions in state or federal court. For example, they may be able to choose whether to include federal claims in their actions or whether to include at least one defendant with the same state citizenship as at least one named plaintiff.

Defendants and their attorneys often have an opportunity to choose between exercising their removal rights or remaining in state court. The grounds for removal may be either that:

- a federal question is at issue;
- there is complete diversity of citizenship among the litigants; or
- plaintiffs' effort to destroy diversity jurisdiction by adding a local defendant amounts to a fraudulent joinder.

A host of factors are likely to influence such decisions. One review of the literature found that attorneys give "quite diverse" reasons for forum selection, citing "as many as fifteen or twenty different factors" when responding to surveys on forum selection choices.³ Attorneys cited factors relating to "geographic convenience, fear of local bias, superior rules of procedure, case delay, judicial competence, litigation costs, favorable or unfavorable precedent, higher damages awards, jury pool differences, better rules of evidence, greater judicial pretrial involvement, and selection choice made by client or referring attorney."⁴ In addition, in diversity cases attorneys indicated that "attorney habit, convenience, and case delay" were the primary factors affecting their choice of forum.⁵ Our survey will gather similar information for class actions.

Case-based survey

The survey we propose to conduct is mostly a case-based approach, with some direct, general questions asking whether the Supreme Court's rationales in the two decisions have affected the respondent-attorneys' decisions about where to file class actions. We propose to conduct a survey of lead plaintiff and defendant counsel in closed class actions selected from the database of cases we created for phase one. See Methods subsection below for a description of how we will select these cases and counsel.

We intend to examine the full panoply of considerations that might have affected attorneys' deciding on a forum in each of the selected cases. This approach will enable us to get a contextual picture of the role that class-certification and settlement-approval considerations played in attorneys' decision-making processes. We expect that questionnaire responses will allow us to uncover and measure, in the context of typical class actions, the relative

³ Neal Miller, *An Empirical Study of Forum Choices in Removal Cases under Diversity and Federal Question Jurisdiction*, 41 Am. U. L. Rev. 369, 382 (1992).

⁴ *Id.*

⁵ *Id.* at 383.

importance of a variety of factors that might have influenced the attorney's decision to file in federal or state court.

A major benefit of this approach is that it links an attorney's views to concrete decisions that the attorney made in an actual closed case, avoiding the distortions that hypothetical or general questions might elicit. The approach also allows us to see to what extent class action rules or settlement rules represent determinative factors in filing or removing a case.

For example, appointment of counsel and class representatives; certification of classes and subclasses; and the timing, content and extent of notice to the class all represent critical factors that might influence a class attorney's choice of forum. In addition, plaintiff counsel may anticipate advantageous rulings in one forum on the substantive and procedural issues in a case, including the core issues related to invoking the class action procedure. Avoidance of perceived local or federal court biases might also motivate an attorney to file in one court or the other. Matters of convenience and familiarity may also drive the choice. An attorney or client's perception of a judge's approach to the underlying state law claims might also carry great weight.

In the questionnaire, we also will ask each attorney directly whether the Supreme Court's rationales in *Amchem* or *Ortiz* have affected the attorney's own decisions about where to file class actions within the past 24 months. We will also ask how much weight the attorney gave to the two opinions in the context of the attorney's own decisions on where to file. A benefit of this approach is that it poses the relevant question directly. A risk is that isolating and focusing attention on the *Amchem/Ortiz* factors might lead an attorney to overstate their importance.

For these reasons, we decided to use a case-based questionnaire. After the attorneys have responded to case-based questions dealing with all factors, the questionnaire then asks direct opinion questions that focus on *Amchem* and *Ortiz* factors.

We attached to this memorandum a draft form of the questionnaire, for your review and comment. The attached questionnaire at this point is designed to be sent only to lead plaintiff counsel in cases filed in state court and later removed to federal court. We intend to prepare slightly different versions so that we have a questionnaire for each of the following categories of respondents:

- lead plaintiff counsel in cases originally filed in federal court;
- lead plaintiff counsel in cases removed to federal court;
- lead defendant counsel in cases originally filed in federal court; and
- lead defendant counsel in cases removed to federal court.

The title for the survey, as proposed, is National Survey of Class Action Counsel in Federal Class Actions Regarding Federal and State Class Action Practices. We expect to send the questionnaire with a cover letter signed by a judge, either the Chair of the Committee or Subcommittee or the Center's Director. The cover letter will explain some background on the survey, without explicitly stating the Committee's specific interests.

Questionnaire topics

We attempted to frame questions that will give an opportunity for questionnaire respondents to respond to a host of factors that may have influenced their decisions to pursue litigation in state or federal court. Our survey will enable us to compare the perceived impact of settlement rules and other rules-related aspects of class action filing practice and to improve our understanding of the role played by class action rules in attorney decisionmaking on where to file or remove. The questionnaire addresses the questions at the heart of the subcommittee's request, that is whether the *Amchem* and *Ortiz* rules regarding certification and settlement of class are relatively important determinants of an attorney's decision to file cases in state or federal courts, or to remove such cases.

We also included questions on relatively objective factors such as case characteristics, features of the local legal culture, and each attorney's background and experience. We hope to collect sufficient information to allow us to identify the characteristics of lawyers and cases that correlate to the effects, strong or weak, of *Amchem/Ortiz* or other factors.

The questionnaire consists of four sections. Part I seeks general information on case characteristics. This includes nature of the claims; the make-up of the class (i.e., number, residence); the outcome of class allegations; monetary and non-monetary recovery; costs of litigation; costs of providing notice; and details on additional court actions filed with a similar subject matter.

Part II asks about reasons for selecting a state or federal forum. Attorneys will be asked to provide reasons that were important in their decision to file in state or federal court; rate possible sources of favoritism that may have affected their decisions on where to file; and give their impressions of any predisposition a state or federal judge may have towards the interests of their clients.

Part III covers respondents' class action experience: how many class actions they filed in the past two years; the percentage filed in state court; and the impact of *Amchem/Ortiz* on their decision to file in state or federal court.

Part IV seeks information on the nature of the respondents' law practice. We ask for the size of their practice; the length of time they have practiced; the percentage of work time spent on *state* civil litigation in the past five years; and the percentage of work time spent on class action litigation (federal or state) in the past five years.

Again, please note that the attached draft questionnaire is directed to plaintiffs' attorneys who filed in state court and whose cases were removed to federal court. We will draft separate parallel questionnaires directed to plaintiffs' attorneys who filed in federal court and to defendants' attorneys.

Methods

Population of Closed Class Actions

We propose to conduct a survey of lead plaintiff and defendant counsel in closed class action cases using the database of class action cases we created for our "Report on the Effects of *Amchem/Ortiz* on the Filing of Federal Class Actions."⁶

⁶ Memorandum to the Advisory Committee on Civil Rules from Robert J. Niemic and Tom Willging, dated

This database consists of 15,037 class action cases (excluding all pro se litigant and prisoner cases) from 82 districts.⁷ These cases are lead class actions among intradistrict consolidations, lead class actions among interdistrict (MDL) consolidations, and singly-filed or "unique" class actions. We determined that 5,587 of these cases included class actions that terminated between July 1, 1999 and June 30, 2002. The table below shows these class action cases for each nature of suit category and by origin and jurisdiction category.

Table

Number of Class Action Cases Terminated Between July 1, 1999 and June 30, 2002 by Nature of Suit, Original or Removed Proceeding, and Federal Question or Diversity Jurisdiction

		Federal Question	Diversity of Citizenship
Civil Rights	Original Proceeding	767	3
	Removal from State Court	75	8
Contracts	Original Proceeding	224	172
	Removal from State Court	63	209
Labor	Original Proceeding	903	0
	Removal from State Court	147	0
Other Statutes	Original Proceeding	1264	68
	Removal from State Court	212	61
Securities	Original Proceeding	1130	0
	Removal from State Court	46	0
Personal Injury/Property Damage	Original Proceeding	39	81
	Removal from State Court	21	94

Note. The class action cases in the shaded cells will not be included in our survey.

We excluded from consideration certain types of cases that were categorically unlikely to be affected by *Amchem/Ortiz*. These were (1) all labor cases; (2) all securities cases⁸; (3) civil rights cases originally filed in federal court based on federal question jurisdiction; and (4) cases described as "other (federal) statutes" that had been originally filed in federal court based on federal question jurisdiction. In most or all of the above cases, the predominance of federal statutory claims seems likely to render their filing in federal court as more of a routine decision that would not reveal any of the state-federal dynamics that are the core of our inquiry.

After this exclusion, we will select cases and identify lead plaintiff and defendant counsel in those cases based on Integrated Database (IDB) origin codes for Original Proceedings and Removed from State Court⁹ and based on

September 9, 2002. See Appendix I of that memorandum for the Methods we used in phase one.

⁷ For practical reasons, we excluded 12 districts in which we could not electronically access docket data. These districts are Alabama Middle, Alaska, Arkansas Western, Guam, Indiana Southern, Mariana Islands, North Carolina Eastern, Nevada, New Mexico, Oklahoma Eastern, Virgin Islands, and Wisconsin Western.

⁸ In our September 9, 2002 memorandum to the Committee, we found that class action filing rates for securities cases did not decrease after *Amchem/Ortiz*. See *supra* note 6.

⁹ Focusing on original proceedings and removed cases as origin codes excludes cases that originated on remand from an appellate court, that were reopened or reinstated, that were transferred from another district, or that were transferred by the MDL panel.

IDB jurisdiction codes for Federal Question and Diversity of Citizenship.¹⁰ The table above identifies the types, origin, and jurisdiction of cases and the case counts in those categories. The counts that are in bold are the ones that we will include in our survey. We will not include the cases shown in the shaded areas.

After excluding cases as described above, our final set of cases includes 1,330 class actions.

Identifying Attorneys

We downloaded the docket sheets for the 1,330 class action cases in our study. From these docket sheets, we have developed a database of the names and addresses of the first-stated lead attorneys for both the plaintiff and defendant parties in the case. Our plan is to mail out a survey to one plaintiff attorney and one defense attorney for each case.

Collecting Data

We will mail the attached questionnaire, or variations of it, to each of the attorneys in our study, as described in the previous subsection. The cover letter for each questionnaire will refer to a specific class action case along with the case's docket number. We will include a postage-paid return envelope and a FAX response option.

Approximately two weeks after the initial mailing, we will send a follow-up postcard to each attorney in the study. The postcard will thank those attorneys who completed the questionnaire and prompt those who have not to return their questionnaire. Approximately one week after we send the postcards, we will mail out a second survey to any attorney who has not yet responded.

Comparisons

We will be able to compare plaintiff counsel's perceptions and motivations for filing originally in state court (before removal) with plaintiff counsel's perceptions and motivations for filing original actions in federal courts. We will also be able to compare the responses of defendant counsel who removed cases to federal courts with those of defendant counsel in cases filed originally in federal court. We do not have the option of including defendants who have chosen to remain in state court. To do so would require a reliable, national database of state court class action filings, which currently does not exist.

In an effort to gain the view of defendants in state court actions, we will ask defendants in federal actions whether they ever choose to remain in state court and, if so, what factors are most important in making that decision. Because defendants are often repeat players in class action litigation, we expect this approach to uncover defendant counsel views about remaining in state court to avoid any perceived impact of *Amchem/Ortiz*.

Closing

We welcome your comments about our pursuing the approaches we described above and any suggestions about our pursuing other approaches. We plan to pretest the questionnaire on or about October 15, 2002.

¹⁰ Focusing on federal question and diversity of citizenship jurisdiction excludes cases involving the United States as a plaintiff or defendant.

**National Survey of Class Action Counsel in Federal Class Actions Regarding
Federal and State Class Action Practices**

Designed and administered by the Federal Judicial Center

**For the Advisory Committee on Civil Rules of the
Judicial Conference of the United States**



CIV 10102

Note to the Committee: This questionnaire will be sent only to plaintiff counsel in cases originally filed in state court and later removed to federal court.

Who Should Complete the Questionnaire?

Court records show that you, _____ (name of attorney), represented a party in a recently closed case captioned as _____ (L. D. __ 199__) ("the named case"). Plaintiff filed that case in state court as a class action or raised the issue of class certification at a later stage of the litigation. A defendant removed the action to federal court where it was either litigated or remanded to state court. The purpose of this survey is to examine the factors affecting attorney and client decisions to litigate class actions in state or federal courts. **If the named case was not filed in state court and removed to federal court, please check this box and return the questionnaire and cover letter.**

We ask that the primary attorney (or attorneys) who represented your client or clients in this case complete the questionnaire. If that is someone other than you, please pass this questionnaire along to the appropriate attorney. **If the attorney primarily responsible for this case is no longer available, please check this box and return the cover letter in the enclosed envelope.** We are sending a similar questionnaire to attorneys for other parties in the litigation.

Origin and Purpose

This questionnaire was designed by the Federal Judicial Center (Center) at the request of the federal judiciary's Advisory Committee on Civil Rules. The Center is a judicial branch agency whose duties include conducting research on the operation of the courts. The Advisory Committee on Civil Rules conducts an ongoing examination of the Federal Rules of Civil Procedure pursuant to the Rules Enabling Act, 28 U.S.C. §§ 2071-2074, on behalf of its parent body, the Judicial Conference of the United States, a 27-judge body chaired by the Chief Justice of the United States. 28 U.S.C. § 331. The Center is conducting this research to assist the Advisory Committee in its ongoing examination of class action rules.

Confidentiality

All information that you provide that would permit identification of the named case, the lawyers, or the parties is strictly confidential and only the three-person research team within the Center's Research Division will have access to this information. Findings will be reported only in aggregate form. **No individual litigant, attorney, or case will be identifiable.** The Center's research team will use the code number on the back of the questionnaire only to link information from this questionnaire to information about the case obtained from court records and to, if necessary for the limited purposes of the study, communicate further with you.

Please return questionnaire in the enclosed envelope.

Part I. Case Characteristics in the Named Case

Please answer the questions in this Part with reference to the named case only.

1. Which of the following best describes the proportion of claims based on federal and state law?

Please check one:

- All claims were based on state law.
- The majority of claims were based on state law.
- Claims were based on state and federal law about equally.
- The majority of claims were based on federal law.
- All claims were based on federal law.
- I don't know/Not applicable

2. Members of the proposed class (including any subclasses) resided in how many state(s)? approximately _____

3. What percentage of claimants resided in the state in which the class action was filed? approximately _____%

4. What percentage of claims-related transactions or events occurred in the state in which the class action was filed? approximately _____%

5. When you filed the named case, what was your estimate of the amount of loss that each class member had incurred? approximately \$_____ per class member

6a. Was the named case certified or settled as a class action?

Please check one:

- Yes-----→ *Proceed to question 6b*
- No-----→ *Proceed to question 7*
- I don't know/Not applicable-----→ *Proceed to question 7*

6b. What was the approximate number of members in the class (including any subclasses)?
_____ members

7a. Did the federal court remand the named case to state court?

Please check one:

- Yes-----→ *Answer 7b with respect to actions taken in the state court after remand.*
- No -----→ *Answer 7b with respect to actions taken in federal court.*
- I don't know/Not applicable-----→ *Answer 7b with respect to actions taken in federal court.*

7b. The outcome of the class allegations in the named case was:

Please check all that apply:

- The court dismissed the case for lack of jurisdiction.
- The court dismissed the case on the merits.
- The court took no action on class certification.
- The court denied all motions to certify a class.
- The court certified a class.
- Parties proposed a classwide settlement and the court approved the settlement as proposed.
- Parties proposed a classwide settlement and the court approved a revised settlement.
- Parties proposed a classwide settlement and the court did not approve any settlement.
- Trial on class claims resulted in a judgment for the class.
- Trial on class claims resulted in a judgment for the defendant(s).
- Other (specify) _____
- I don't know/Not applicable

8. When the litigation was concluded, what was the total monetary recovery, if any, for the class (not including coupons, stocks, or other non-monetary relief)?

Please check one:

- \$ _____ total monetary recovery (present value at the time of settlement or award)
- There was no monetary recovery
- I don't know/Not applicable

9. In addition to the monetary recovery, the class received relief in the form of

Please check and complete all that apply:

- Transferable coupons, securities, or other instruments with an estimated value of \$ _____
- Nontransferable coupons or other instruments with an estimated value of \$ _____
- Injunctive relief with an estimated value of \$ _____
- Injunctive relief of a value that is impossible to estimate.
- Medical monitoring with an estimated value of \$ _____
- Other (specify) _____, with an estimated value of \$ _____
- There was only a monetary recovery
- I don't know/Not applicable

10. Did any party or an intervening party appeal the final judgment of the district court?

Please check one:

- Yes-----→ Proceed to question 11
- No-----→ Proceed to question 12
- I don't know/Not applicable-----→ Proceed to question 12

11. What was the outcome of the appeal?

Please check one:

- Affirmed
- Dismissed on procedural grounds or by the appellant before a decision
- Reversed in the following way _____
- I don't know/Not applicable

12. The class's costs of conducting this litigation, not including attorneys' fees, were approximately

\$ _____.

13. Of the total cost of conducting the litigation, approximately \$ _____ was attributable to the costs of providing notice to class members:

\$ _____ for notice after class certification (if any) and/or

\$ _____ for notice of the settlement or judgment.

14. In addition to the named case, had any additional court actions been filed in state or federal court dealing with the same subject matter within six months before or after the filing of that case?

Please check one:

- Yes-----→ *Proceed to question 15*
- No-----→ *Proceed to question 17*
- I don't know/Not applicable-----→ *Proceed to question 17*

15. Were any of those cases consolidated with the identified named case?

Please check all that apply:

- Yes, by the federal district court
- Yes, by the state trial court
- Yes, by the federal Judicial Panel on Multidistrict Litigation
- I don't know/Not applicable

16. What were the outcomes of those additional cases?

Please check one:

- Same as the outcome in the named case identified for this survey
- The outcome in the additional case(s) differed from the case identified for the survey in the following ways (specify): _____
- I don't know/Not applicable

Part II. Reasons for selecting a state or federal forum

Please answer the questions in this Part with reference to the named case only.

17. My clients and I decided to file this action in state court instead of federal court for the following reasons:

In each category please check responses that led to your decision to file in state court:

Applicable Law

- All claims were based on state law.
- All claims were based on the law of the state in which we filed the case.

Convenience

- A majority of claims-related transactions or events took place within state of filing.
- A majority of claims-related witnesses lived or worked in state of filing.
- A majority of proposed class members lived or engaged in relevant activity in state of filing.
- My co-counsel and I are more familiar with the procedures in state court.
- The location of the state court is more convenient for me and/or my clients and witnesses in the named case.

Rules

- State discovery rules were more favorable.
- State evidentiary rules were more favorable.
- State class action rules in general imposed less stringent requirements for certifying a class action.
- State class action rules imposed less stringent requirements for notifying class members.
- State class action rules were less likely to require creating subclasses.
- State class action rules have less stringent requirements for creating subclasses.
- State rules do not permit interlocutory appeal of a certification order.

Judicial Receptiveness

- The state judiciary is generally more receptive to motions to certify a class.
- The state judiciary would be more receptive to motions to certify a class or approve a class settlement.
- The state court would be able to schedule this class action litigation for trial more expeditiously.
- The state court would have more resources available to handle this class action.

Costs and Fees

- The state court would be more likely to appoint my clients and our law firm to represent the class.
- The state court would be more likely to approve our request for attorneys' fees.
- The cost of litigation would be lower.

Strategy

- We wanted to avoid being included in a federal multidistrict litigation transfer.
- We wanted the opportunity to present claims in a number of state courts.

Other

- The jury award in state court would likely be higher.
 - Please specify any other reasons why you filed this action in state court.
-
-

18. Local state court favoritism (including bias) relating to special characteristics of litigants or their claims is a major underlying historical justification for statutes authorizing removal from state to federal court. For each of the possible sources of favoritism listed below, please circle the number below the degree of favoritism you anticipated might be a factor to file the named case in state court and whether that favoritism would favor or disfavor your client. If you did not anticipate any favoritism for that source then circle N/A for not applicable.

Source of favoritism	Strongly disfavor my client	Disfavor my client	Did not favor or disfavor my client	Favor my client	Strongly favor my client	Not Applicable
Defendant's out-of-state residence	1	2	3	4	5	N/A
Defendant's residence in another part of the state.	1	2	3	4	5	N/A
Gender, ethnicity, race, socioeconomic status of a party or attorney on the plaintiff's side	1	2	3	4	5	N/A
Gender, ethnicity, race, socioeconomic status of a party or attorney on the defendant's side.	1	2	3	4	5	N/A
Foreign national status of a class representative or class	1	2	3	4	5	N/A
Foreign national status of a defendant	1	2	3	4	5	N/A
Incorporated status of a class representative or class	1	2	3	4	5	N/A
Incorporated status of a defendant	1	2	3	4	5	N/A
Type of business conducted by a class representative or class (specify) _____	1	2	3	4	5	N/A
Type of business conducted by a defendant (specify) _____	1	2	3	4	5	N/A
Class representative's or class' reputation in the community	1	2	3	4	5	N/A
Defendant's reputation in the community	1	2	3	4	5	N/A
Other client characteristic (specify) _____	1	2	3	4	5	N/A

Note to the Committee: We will ask similar questions in a separate survey for cases that were original proceedings in federal court.

19. At the time you filed the named case which of the following statements best describes your impression about any predisposition of state or federal judges toward interests like your clients'? Please answer the question with respect to the state court judges and federal court judges most likely to hear the named case at the trial level.

Please check one:

- Federal judges were more likely than state judges to rule in favor of interests like those of my clients'.
- State judges were more likely than federal judges to rule in favor of interests like those of my clients'.
- We perceived no differences between state and federal judges in this regard.
- We had no way of knowing which of many different judges would be likely to hear this case.
- I don't know/Not applicable

Part III. Class Action Experience

The questions in this section apply to all class action you have filed in the past 24 months.

20. In the past 24 months, how many class actions have you filed (including those filed as part of a team of plaintiffs' attorneys)? _____ class actions
21. Of these class action lawsuits, what percentage did you file in state courts? _____ % in state courts
22. Which of the following statements best describe the effect of the Supreme Court's interpretation of Rule 23 in one or both of the following U.S. Supreme Court interpretations of Rule 23 in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp*, 527 U.S. 815 (1999) on your decisions about where to file class actions during the last 24 months?

Please check all that apply:

- One or both decisions were the main reason I filed one or more class actions in **state court**.
- One or both decisions were one of a number of factors that led me to file one or more class actions in **state court**.
- One or both decisions had no effect on my decisions about where to file class actions.
- One or both decisions were one of a number of factors that led me to file one or more class actions in **federal court**.
- The decisions were the main reason I filed one or more class actions in **federal court**.
- I don't know/Not applicable

Part IV. Nature of Law Practice.

23. Which of the following best describes your law practice at the time you filed the named case?

Please check one:

- Sole practitioner
- Private firm of 2-10 lawyers
- Private firm of 11-49 lawyers
- Private firm of 50 or more lawyers
- Legal staff of a for-profit corporation or entity
- Legal staff of a non-profit corporation or entity
- Government
- Other (specify) _____

24. For how many years have you practiced law? _____ years

25. What types of clients do you generally represent?

Please check one:

- Primarily plaintiffs
- Primarily defendants
- Plaintiffs and defendants about equally
- Other (specify): _____

26. What percentage of your work time has been devoted to *civil litigation* in state courts during the past five years (or during the time you have been in practice, if less than five years)?
_____ % of my work time
27. What percentage of your work time has been devoted to *class action litigation* (federal or state courts) during the past five years (or during the time you have been in practice, if less than five years)?
_____ % of my work time
28. Comments. Please add any comments you may have about your experiences with filing or removing class actions generally.

THANK YOU

Please return the questionnaire in the enclosed envelope addressed to the Federal Judicial Center (Class Action Counsel Survey), One Columbus Circle, N.E., Washington, D.C. 20002. If you have questions, please call Tom Willging at 202-502-4049 or Bob Niemic at 202-502-4074.