

**COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE**

**San Francisco, CA
June 11-12, 2007
Volume III**

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 11-12, 2007

VOLUME I-A

1. Opening Remarks of the Chair
 - A. Report on the March 2007 Judicial Conference session
 - B. Transmission of Supreme Court-approved proposed rules amendments to Congress
2. **ACTION** – Approving Minutes of January 2007 Committee Meeting
3. Report of the Administrative Office
 - A. Legislative Report
 - B. Administrative Report
4. Report of the Federal Judicial Center
5. Report of the Time-Computation Subcommittee
6. Report of the Evidence Rules Committee
 - A. **ACTION** – Approving and transmitting to the Judicial Conference proposed new Evidence Rule 502 on waiver of attorney-client privilege and work-product protection and draft letters to Congress accompanying the proposed new rule
 - B. **ACTION** – Approving draft report to Congress on harm-to-child exception to marital privileges required under Adam Walsh Child Protection Act
 - C. Minutes and other informational items

VOLUME I-B

7. Report of the Criminal Rules Committee
 - A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Criminal Rules 1, 12.1, 17, 18, 32, 60, and new Rule 61 implementing the Crime Victims' Rights Act
 - B. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendment to Criminal Rule 41(b) authorizing issuance of search warrants
 - C. **ACTION** – Approving publishing for public comment proposed amendments to Criminal Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 45, 47, 58, 59, and Rule 8 of the Rules Governing §§ 2254 and 2255 Cases on time computation.
 - D. **ACTION** – Approving publishing for public comment proposed amendments to Criminal Rules 7, 16, 32, 32.2, 41 and Rule 11 of the Rules Governing §§ 2254

- and 2255 Cases.
- E. Minutes and other informational items

VOLUME II-A

- 8. Report of the Bankruptcy Rules Committee
 - A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Bankruptcy Rules 1005, 1006, 1007, 1009, 1010, 1011, 1015, 1017, 1019, 1020, 2002, 2003, 2007.1, 2015, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5001, 5003, 6004, 8001, 8003, 9006, and 9009, and new Bankruptcy Rules 1021, 2007.2, 2015.1, 2015.2, 2015.3, 5008, and 6011.
 - B. **ACTION** – Approving and transmitting to the Judicial Conference proposed technical amendments to Bankruptcy Rules 7012, 7022, 7023.1, and 9024.
 - C. **ACTION** – Approving publishing for public comment proposed amendments to Bankruptcy Rules 4008, 7052, 9006, and 9021, and proposed new Bankruptcy Rules 1017.1 and 7058.
 - D. **ACTION** – Approving publishing for public comment proposed amendments to Bankruptcy Rules 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1, 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9027, and 9033 on time computation.

VOLUME II-B

- E. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Official Forms 1, 3A, 3B, 4, 5, 6, 7, 9, 10, 16A, 18, 19, 21, 22A, 22B, 22C, 23, 24, and Exhibit D to Official Form 1, and new Official Forms 25A, 25B, 25C, and 26.
- F. **ACTION** – Approving publishing for public comment proposed revisions to Official Forms 8 and 27.
- G. Minutes and other informational items

VOLUME III

- 9. Report of the Civil Rules Committee
 - A. **ACTION** – Approving publishing for public comment proposed amendments to Civil Rules 6, 12, 14, 15, 23, 27, 32, 38, 50, 52, 53, 54, 55, 59, 62, 65, 68, 71.1, 72, 81, and Supplemental Rules B, C, and G on time computation.

Agenda for Standing Committee Meeting
June 11-12 2007

- B. **ACTION** – Approving publishing for public comment proposed amendments to Civil Rules 56 and 81, and proposed new Rule 62.1
 - C. Minutes and other informational items
10. Report of the Appellate Rules Committee
- A. **ACTION** – Approving publishing for public comment proposed amendments to Appellate Rules 4, 5, 6, 10, 12, 15, 19, 25, 26, 27, 28.1, 30, 31, 39, and 41 on time computation.
 - B. **ACTION** – Approving publishing for public comment proposed amendments to Appellate Rules 4, 22, 26, 29, and 40, and new Rule 12.1
 - C. Minutes and other informational items
11. Report on Standing Orders
12. Report on Sealing Cases
13. Long-Range Planning Report
14. Next Meeting: January 2008

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

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To: Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure

From: Honorable Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure

Date: May 25, 2007

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met at the Brooklyn Law School on April 19-20, 2007. Draft Minutes of the meeting are attached. Subcommittees held three "miniconferences." The Discovery Subcommittee met with a group of lawyers after the January Standing Committee meeting to discuss reports from and discovery of testifying expert witnesses. In April, the day before the Advisory Committee meeting, the Discovery Subcommittee met in New York with a group of New Jersey lawyers to explore experience with a New Jersey rule addressing some of the expert-witness disclosure and discovery issues. The Rule 56 Subcommittee met in New York in late January with a large group of lawyers and judges to review possible approaches to revising Rule 56.

No rules were published for comment in August 2006, and no amendments are recommended for adoption.

Part I of this report presents three sets of proposed amendments recommended for approval for publication in August 2007. The first set is amendments that result from or relate to the Time-Computation Project. Proposed Rule 6(a) implements for the Civil Rules the time-computation methods template developed by the Time-Computation Subcommittee for parallel provisions in the Civil, Appellate, Bankruptcy, and Criminal Rules. Revisions of other Civil Rules are also proposed, most adjusting for elimination of the former rule that excluded intermediate Saturdays, Sundays, and legal holidays in computing periods shorter than 11 days. A final amendment related to the Time-Computation Project adds commonwealths, territories, and possessions to the Rule 81 definition of "state."

The second set proposes publication of amendments to regularize Rule 56 summary-judgment procedures without revising summary-judgment standards. This set of proposals also has a tie to time computation. Proposed Rule 56(a) makes needed changes in the timing rules and is independently recommended for publication as part of the Time-Computation Project.

The final item proposed for publication, a new Rule 62.1 on indicative rulings, was discussed extensively at the January Standing Committee meeting. The current proposal includes revisions that reflect that discussion and — more importantly — integrate the Civil Rule with the parallel Appellate Rule 12.1 being recommended for publication by the Appellate Rules Committee.

This report does not set out again proposals approved for publication at the January 2006 and January 2007 Standing Committee meetings. Publication of an amendment of Rule 8(c) to delete “discharge in bankruptcy” from the list of affirmative defenses was approved in 2006. The 2007 meeting approved publication of three amendments. Rule 13(f) would be deleted, making Rule 15 the sole standard for amendments that add a counterclaim. Rule 15(a) would be amended to allow one amendment of a pleading as a matter of course within 21 days after a responsive pleading is served; the memorandum transmitting this amendment will invite comment on the desirability of eliminating the present distinction that terminates the right to amend once as a matter of course upon service of a responsive pleading. A new subdivision (c) would be added to Rule 48 to provide for jury polling in terms drawn from Criminal Rule 31(d).

Part II is a brief description of ongoing Advisory Committee projects.

I. Action Items: Recommendations for Publication

A. TIME-COMPUTATION PROPOSALS

These recommendations to approve publication of the Civil Rules components of the Time-Computation Project contemplate publication coordinating with publication of parallel proposals for the Appellate, Bankruptcy, and Criminal Rules. They begin with Civil Rule 6(a), the template rule defining computation methods, and then turn to corresponding proposals to amend specific time periods in particular rules.

(1) Computation Method

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 6. Computing and Extending Time; Time for Motion Papers

- 1 ~~(a) **Computing Time.** The following rules apply in~~
2 ~~computing any time period specified in these rules or in~~
3 ~~any local rule, court order, or statute:~~
- 4 ~~(1) **Day of the Event Excluded.** Exclude the day of the~~
5 ~~act, event, or default that begins the period.~~
- 6 ~~(2) **Exclusions from Brief Periods.** Exclude~~
7 ~~intermediate Saturdays, Sundays, and legal~~
8 ~~holidays when the period is less than 11 days.~~
- 9 ~~(3) **Last Day.** Include the last day of the period unless~~
10 ~~it is a Saturday, Sunday, legal holiday, or — if the~~
11 ~~act to be done is filing a paper in court — a day on~~
12 ~~which weather or other conditions make the clerk's~~
13 ~~office inaccessible. When the last day is excluded,~~

*New material is underlined; matter to be omitted is lined through. Includes amendments to rules that will take effect on December 1, 2007.

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14 the period runs until the end of the next day that is
15 not a Saturday, Sunday, legal holiday, or day when
16 the clerk's office is inaccessible.

17 ~~(4) "Legal Holiday" Defined.~~ As used in these rules,
18 "legal holiday" means:

19 ~~(A) the day set aside by statute for observing New~~
20 ~~Year's Day, Martin Luther King Jr.'s~~
21 ~~Birthday, Washington's Birthday, Memorial~~
22 ~~Day, Independence Day, Labor Day,~~
23 ~~Columbus Day, Veterans' Day, Thanksgiving~~
24 ~~Day, or Christmas Day; and~~

25 ~~(B) any other day declared a holiday by the~~
26 ~~President, Congress, or the state where the~~
27 ~~district court is located.~~

28 **(a) Computing Time.** The following rules apply in
29 computing any time period specified in these rules, or in
30 any local rule, or court order, or in any statute that does
31 not specify a method of computing time.

32 **(1) Period Stated in Days or a Longer Unit.** When
33 the period is stated in days or a longer unit of time:

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53 to run until the same time on the next day that
54 is not a Saturday, Sunday, or legal holiday.

55 **(3) Inaccessibility of Clerk's Office.** Unless the court
56 orders otherwise, if the clerk's office is
57 inaccessible:

58 **(A)** on the last day for filing under Rule 6(a)(1),
59 then the time for filing is extended to the first
60 accessible day that is not a Saturday, Sunday,
61 or legal holiday; or

62 **(B)** during the last hour for filing under Rule
63 6(a)(2), then the time for filing is extended to
64 the same time on the first accessible day that
65 is not a Saturday, Sunday, or legal holiday.

66 **(4) "Last Day" Defined.** Unless a different time is set
67 by a statute, local rule, or court order, the last day
68 ends:

69 **(A)** for electronic filing, at midnight in the court's
70 time zone; and

71 **(B)** for filing by other means, when the clerk's
72 office is scheduled to close.

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Discussion

The Advisory Committee concurs in the discussion of the template provisions provided by the Time-Computation Subcommittee. The Advisory Committee had continuous opportunities to participate in framing the template and was pleased both with the process and with the product.

(2) Specific Rule Time Provisions

13 (C) when a court order — which a party may, for
14 good cause, apply for ex parte — sets a
15 different time.

16 (2) *Supporting Affidavit.* Any affidavit supporting a
17 motion must be served with the motion. Except as
18 Rule 59(c) provides otherwise, any opposing
19 affidavit must be served at least † 7 days before the
20 hearing, unless the court permits service at another
21 time.

22 * * * * *

Committee Note

Subdivision (b). None of the rules listed in former Rule 6(b) allow the court to extend the times to act set in those rules. The purported exception for extensions allowed by those rules is deleted as meaningless. The times allowed for motions under Rules 50, 52, and 59, however, are extended to 30 days.

Subdivision (c). The time provided by former Rule 6(c) to serve a motion and notice of hearing has been expanded from 5 days to 14 days before the time specified for the hearing, without changing the exceptions. The 14-day period sets a more realistic time for other parties to respond and for the court to consider the motion. The time

to serve an opposing affidavit is expanded from 1 day before the hearing to 7 days before the hearing. Even if actual delivery is accomplished 1 day before the hearing, a single day is not sufficient time to consider and prepare a response.

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

1 **(a) Time to Serve a Responsive Pleading.**

2 **(1) *In General.*** Unless another time is specified by
3 this rule or a federal statute, the time for serving a
4 responsive pleading is as follows:

5 **(A)** A defendant must serve an answer:

6 **(i)** within ~~20~~ 21 days after being served with
7 the summons and complaint; or

8 **(ii)** if it has timely waived service under
9 Rule 4(d), within 60 days after the
10 request for a waiver was sent, or within
11 90 days after it was sent to the defendant

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12 outside any judicial district of the United
13 States.

14 (B) A party must serve an answer to a
15 counterclaim or crossclaim within ~~20~~ 21 days
16 after being served with the pleading that states
17 the counterclaim or crossclaim.

18 (C) A party must serve a reply to an answer within
19 ~~20~~ 21 days after being served with an order to
20 reply, unless the order specifies a different
21 time.

22 * * * * *

23 (4) *Effect of a Motion.* Unless the court sets a
24 different time, serving a motion under this rule
25 alters these periods as follows:

26 (A) if the court denies the motion or postpones its
27 disposition until trial, the responsive pleading

28 must be served within ~~10~~ 14 days after notice
29 of the court's action; or

30 **(B)** if the court grants a motion for a more definite
31 statement, the responsive pleading must be
32 served within ~~10~~ 14 days after the more
33 definite statement is served.

34 * * * * *

35 **(e) Motion for a More Definite Statement.** A party may
36 move for a more definite statement of a pleading to
37 which a responsive pleading is allowed but which is so
38 vague or ambiguous that the party cannot reasonably
39 prepare a response. The motion must be made before
40 filing a responsive pleading and must point out the
41 defects complained of and the details desired. If the
42 court orders a more definite statement and the order is
43 not obeyed within ~~10~~ 14 days after notice of the order or

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44 within the time the court sets, the court may strike the
45 pleading or issue any other appropriate order.

46 **(f) Motion to Strike.** The court may strike from a pleading
47 an insufficient defense or any redundant, immaterial,
48 impertinent, or scandalous matter. The court may act:

49 **(1)** on its own; or

50 **(2)** on motion made by a party either before responding
51 to the pleading or, if a response is not allowed,
52 within ~~20~~ 21 days after being served with the
53 pleading.

54 * * * * *

Committee Note

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Note to Rule 6.

Rule 14. Third-Party Practice

1 **(a) When a Defending Party May Bring in a Third Party.**

2 (1) *Timing of the Summons and Complaint.* A
3 defending party may, as third-party plaintiff, serve
4 a summons and complaint on a nonparty who is or
5 may be liable to it for all or part of the claim against
6 it. But the third-party plaintiff must, by motion,
7 obtain the court's leave if it files the third-party
8 complaint more than ~~10~~ 14 days after serving its
9 original answer.

10 * * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

Rule 15. Amended and Supplemental Pleadings

1 (a) **Amendments Before Trial.**

2 (1) *Amending as a Matter of Course.* A party may
3 amend its pleading once as a matter of course:

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4 (A) before being served with a responsive
5 pleading; or

6 (B) within ~~20~~ 21 days after serving the pleading
7 if a responsive pleading is not allowed and
8 the action is not yet on the trial calendar.

9 (2) *Other Amendments.* In all other cases, a party
10 may amend its pleading only with the opposing
11 party's written consent or the court's leave. The
12 court should freely give leave when justice so
13 requires.

14 (3) *Time to Respond.* Unless the court orders
15 otherwise, any required response to an amended
16 pleading must be made within the time remaining
17 to respond to the original pleading or within ~~10~~ 14
18 days after service of the amended pleading,
19 whichever is later.

20 * * * * *

Committee Note

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Note to Rule 6.

Rule 23. Class Actions

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* * * * *

2

(f) Appeals. A court of appeals may permit an appeal from

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an order granting or denying class-action certification

4

under this rule if a petition for permission to appeal is

5

filed with the circuit clerk within ~~10~~ 14 days after the

6

order is entered. An appeal does not stay proceedings in

7

the district court unless the district judge or the court of

8

appeals so orders.

9

* * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

16 represented. If any expected adverse party is a
17 minor or is incompetent, Rule 17(c) applies.

18 * * * * *

Committee Note

The time set in the former rule at 20 days has been revised to 21 days. See the Note to Rule 6.

Rule 32. Using Depositions in Court Proceedings

1 **(a) Using Depositions.**

2 * * * * *

3 **(5) *Limitations on Use.***

4 **(A) *Deposition Taken on Short Notice.*** A
5 deposition must not be used against a party
6 who, having received less than ~~14~~ 14 days'
7 notice of the deposition, promptly moved for
8 a protective order under Rule 26(c)(1)(B)

9 requesting that it not be taken or be taken at
10 a different time or place — and this motion
11 was still pending when the deposition was
12 taken.

13 * * * * *

14 **(d) Waiver of Objections.**

15 * * * * *

16 **(3) *To the Taking of the Deposition.***

17 * * * * *

18 **(C) *Objection to a Written Question.*** An
19 objection to the form of a written question
20 under Rule 31 is waived if not served in
21 writing on the party submitting the question
22 within the time for serving responsive
23 questions or, if the question is a
24 recross-question, within 5 7 days after being
25 served with it.

26

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Committee Note

The times set in the former rule at less than 11 days and within 5 days have been revised to 14 days and 7 days. See the Note to Rule 6.

Rule 38. Right to a Jury Trial; Demand

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2

(b) Demand. On any issue triable of right by a jury, a party

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may demand a jury trial by:

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(1) serving the other parties with a written demand —

5

which may be included in a pleading — no later

6

than ~~10~~ 14 days after the last pleading directed to

7

the issue is served; and

8

(2) filing the demand in accordance with Rule 5(d).

9

(c) Specifying Issues. In its demand, a party may specify

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the issues that it wishes to have tried by a jury;

11

otherwise, it is considered to have demanded a jury trial

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12 on all the issues so triable. If the party has demanded a
13 jury trial on only some issues, any other party may —
14 within ~~10~~ 14 days after being served with the demand or
15 within a shorter time ordered by the court — serve a
16 demand for a jury trial on any other or all factual issues
17 triable by jury.

18 * * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 6.

**Rule 50. Judgment as a Matter of Law in a Jury Trial;
Related Motion for a New Trial; Conditional
Ruling**

1 * * * * *

2 **(b) Renewing the Motion After Trial; Alternative**
3 **Motion for a New Trial.** If the court does not grant a
4 motion for judgment as a matter of law made under Rule

5 50(a), the court is considered to have submitted the
6 action to the jury subject to the court's later deciding the
7 legal questions raised by the motion. No later than ~~10~~
8 30 days after the entry of judgment — or if the motion
9 addresses a jury issue not decided by a verdict, no later
10 than ~~10~~ 30 days after the jury was discharged — the
11 movant may file a renewed motion for judgment as a
12 matter of law and may include an alternative or joint
13 request for a new trial under Rule 59. In ruling on the
14 renewed motion, the court may:

15 * * * * *

16 **(d) Time for a Losing Party's New-Trial Motion.** Any
17 motion for a new trial under Rule 59 by a party against
18 whom judgment as a matter of law is rendered must be
19 filed no later than ~~10~~ 30 days after the entry of the
20 judgment.

21 * * * * *

Committee Note

Former Rules 50, 52, and 59 adopted 10-day periods for their respective postjudgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory postjudgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 30 days. Rule 6(b) continues to prohibit expansion of the 30-day period.

**Rule 52. Findings and Conclusions by the Court;
Judgment on Partial Findings**

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* * * * *

2

(b) Amended or Additional Findings. On a party's

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motion filed no later than ~~10~~ 30 days after the entry of

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judgment, the court may amend its findings — or make

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additional findings — and may amend the judgment

6

accordingly. The motion may accompany a motion for

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a new trial under Rule 59.

8

* * * * *

Committee Note

Former Rules 50, 52, and 59 adopted 10-day periods for their respective postjudgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory postjudgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 30 days. Rule 6(b) continues to prohibit expansion of the 30-day period.

Rule 53. Masters

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2

(f) Action on the Master's Order, Report, or

3

Recommendations.

4

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5

(2) *Time to Object or Move to Adopt or Modify.* A

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party may file objections to — or a motion to adopt

7

or modify — the master's order, report, or

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recommendations no later than ~~20~~ 21 days after a

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9 copy is served, unless the court sets a different
10 time.

11 * * * * *

Committee Note

The time set in the former rule at 20 days has been revised to 21 days. See the Note to Rule 6.

Rule 54. Judgment; Costs

1 * * * * *

2 **(d) Costs; Attorney's Fees.**

3 **(1) *Costs Other Than Attorney's Fees.*** Unless a
4 federal statute, these rules, or a court order
5 provides otherwise, costs — other than attorney's
6 fees — should be allowed to the prevailing party.
7 But costs against the United States, its officers, and
8 its agencies may be imposed only to the extent
9 allowed by law. The clerk may tax costs on †

10 day's 14 days' notice. On motion served within
11 the next 5 7 days, the court may review the clerk's
12 action.

13 * * * * *

Committee Note

Former Rule 54(d)(1) provided that the clerk may tax costs on 1 day's notice. That period was unrealistically short. The new 14-day period provides a better opportunity to prepare and present a response. The former 5-day period to serve a motion to review the clerk's action is extended to 7 days to reflect the change in the Rule 6(a) method for computing periods of less than 11 days.

Rule 55. Default; Default Judgment

1 * * * * *

2 **(b) Entering a Default Judgment.**

3 * * * * *

4 **(2) *By the Court.*** In all other cases, the party must
5 apply to the court for a default judgment. A
6 default judgment may be entered against a minor
7 or incompetent person only if represented by a

8 general guardian, conservator, or other like
9 fiduciary who has appeared. If the party against
10 whom a default judgment is sought has appeared
11 personally or by a representative, that party or its
12 representative must be served with written notice
13 of the application at least 3 7 days before the
14 hearing. The court may conduct hearings or make
15 referrals — preserving any federal statutory right to
16 a jury trial — when, to enter or effectuate
17 judgment, it needs to:

18 * * * * *

Committee Note

The time set in the former rule at 3 days has been revised to 7 days. See the Note to Rule 6.

17 an opportunity to be heard, the court may grant a timely
18 motion for a new trial for a reason not stated in the
19 motion. In either event, the court must specify the
20 reasons in its order.

21 **(e) Motion to Alter or Amend a Judgment.** A motion to
22 alter or amend a judgment must be filed no later than ~~10~~
23 30 days after the entry of the judgment.

24 * * * * *

Committee Note

Former Rules 50, 52, and 59 adopted 10-day periods for their respective postjudgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory postjudgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 30 days. Rule 6(b) continues to prohibit expansion of the 30-day period.

Former Rule 59(c) set a 10-day period after being served with a motion for new trial to file opposing affidavits. It also provided that the period could be extended for up to 20 days for good cause or by

stipulation. The apparent 20-day limit on extending the time to file opposing affidavits seemed to conflict with the Rule 6(b) authority to extend time without any specific limit. This tension between the two rules may have been inadvertent. It is resolved by deleting the former Rule 59(c) limit. Rule 6(b) governs. The underlying 10-day period was extended to 14 days to reflect the change in the Rule 6(a) method for computing periods of less than 11 days.

Rule 62. Stay of Proceedings to Enforce a Judgment

1 **(a) Automatic Stay; Exceptions for Injunctions,**
2 **Receiverships, and Patent Accountings.** Except as
3 stated in this rule, no execution may issue on a
4 judgment, nor may proceedings be taken to enforce it,
5 until ~~10~~ 14 days have passed after its entry. But unless
6 the court orders otherwise, the following are not stayed
7 after being entered, even if an appeal is taken:

8 * * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

Rule 65. Injunctions and Restraining Orders

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(b) Temporary Restraining Order.

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(2) Contents; Expiration. Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry — not to exceed ~~10~~ 14 days — that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

* * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

Rule 68. Offer of Judgment**1 (a) Making an Offer; Judgment on an Accepted Offer.**

2 ~~More than 10~~ At least 14 days before the date set for
3 trial begins, a party defending against a claim may serve
4 on an opposing party an offer to allow judgment on
5 specified terms, with the costs then accrued. If, within
6 ~~10~~ 14 days after being served, the opposing party serves
7 written notice accepting the offer, either party may then
8 file the offer and notice of acceptance, plus proof of
9 service. The clerk must then enter judgment.

10

* * * * *

Committee Note

Former Rule 68 allowed service of an offer of judgment more than 10 days before the trial begins. It may be difficult to know in advance when trial will begin. The time is now measured from the

date set for trial. The former 10-day period was extended to 14 days to reflect the general preference for setting short periods in multiples of 7 days. See the Note to Rule 6.

Rule 71.1. Condemning Real or Personal Property

1

* * * * *

2

(d) Process.

3

* * * * *

4

(2) Contents of the Notice.

5

(A) Main Contents. Each notice must name the

6

court, the title of the action, and the

7

defendant to whom it is directed. It must

8

describe the property sufficiently to identify

9

it, but need not describe any property other

10

than that to be taken from the named

11

defendant. The notice must also state:

12

(i) that the action is to condemn property;

13

(ii) the interest to be taken;

- 14 (iii) the authority for the taking;
- 15 (iv) the uses for which the property is to be
- 16 taken;
- 17 (v) that the defendant may serve an answer
- 18 on the plaintiff's attorney within ~~20~~ 21
- 19 days after being served with the notice;
- 20 (vi) that the failure to so serve an answer
- 21 constitutes consent to the taking and to
- 22 the court's authority to proceed with the
- 23 action and fix the compensation; and
- 24 (vii) that a defendant who does not serve an
- 25 answer may file a notice of appearance.

26 * * * * *

27 (e) **Appearance or Answer.**

28 * * * * *

- 29 (2) *Answer.* A defendant that has an objection or
- 30 defense to the taking must serve an answer within

10 consider timely objections and modify or set aside any
11 part of the order that is clearly erroneous or is contrary
12 to law.

13 **(b) Dispositive Motions and Prisoner Petitions.**

14 * * * * *

15 (2) *Objections.* Within ~~10~~ 14 days after being served
16 with a copy of the recommended disposition, a
17 party may serve and file specific written objections
18 to the proposed findings and recommendations. A
19 party may respond to another party's objections
20 within ~~10~~ 14 days after being served with a copy.
21 Unless the district judge orders otherwise, the
22 objecting party must promptly arrange for
23 transcribing the record, or whatever portions of it
24 the parties agree to or the magistrate judge
25 considers sufficient.

26 * * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 6.

Rule 81. Applicability of the Rules in General; Removed Actions

1

* * * * *

2

(c) Removed Actions.

3

* * * * *

4

(2) Further Pleading. After removal, repleading is

5

unnecessary unless the court orders it. A defendant

6

who did not answer before removal must answer or

7

present other defenses or objections under these

8

rules within the longest of these periods:

9

(A) ~~20~~ 21 days after receiving — through service

10

or otherwise — a copy of the initial pleading

11

stating the claim for relief;

12 (B) ~~20~~ 21 days after being served with the
13 summons for an initial pleading on file at the
14 time of service; or

15 (C) 5 ~~7~~ days after the notice of removal is filed.

16 **(3) Demand for a Jury Trial.**

17 * * * * *

18 (B) *Under Rule 38.* If all necessary pleadings
19 have been served at the time of removal, a
20 party entitled to a jury trial under Rule 38
21 must be given one if the party serves a
22 demand within ~~10~~ 14 days after:

23 (i) it files a notice of removal; or

24 (ii) it is served with a notice of removal
25 filed by another party.

26 * * * * *

Committee Note

The times set in the former rule at 5, 10, and 20 days have been revised to 7, 14, and 21 days, respectively. See the Note to Rule 6.

**SUPPLEMENTAL RULES FOR
ADMIRALTY OR MARITIME CLAIMS
AND ASSET FORFEITURE ACTIONS**

**Rule B. In Personam Actions: Attachment and
Garnishment**

1
2
3
4
5
6
7
8
9
10
11
12
13

* * * * *

(3) Answer.

(a) By Garnishee. The garnishee shall serve an answer, together with answers to any interrogatories served with the complaint, within 20 21 days after service of process upon the garnishee. Interrogatories to the garnishee may be served with the complaint without leave of court. If the garnishee refuses or neglects to answer on oath as to the debts, credits, or effects of the defendant in the garnishee's hands, or any interrogatories concerning such debts, credits, and effects that may be propounded by the plaintiff, the

14 court may award compulsory process against the
15 garnishee. If the garnishee admits any debts,
16 credits, or effects, they shall be held in the
17 garnishee's hands or paid into the registry of the
18 court, and shall be held in either case subject to the
19 further order of the court.

20 * * * * *

Committee Note

The time set in the former rule at 20 days has been revised to 21 days. See the Note to Rule 6.

Rule C. In Rem Actions: Special Provisions

1 * * * * *

2 **(4) Notice.** No notice other than execution of process is
3 required when the property that is the subject of the
4 action has been released under Rule E(5). If the property
5 is not released within ~~10~~ 14 days after execution, the

6 plaintiff must promptly — or within the time that the
7 court allows — give public notice of the action and arrest
8 in a newspaper designated by court order and having
9 general circulation in the district, but publication may be
10 terminated if the property is released before publication
11 is completed. The notice must specify the time under
12 Rule C(6) to file a statement of interest in or right against
13 the seized property and to answer. This rule does not
14 affect the notice requirements in an action to foreclose a
15 preferred ship mortgage under 46 U.S.C. §§ 31301 et
16 seq., as amended.

17 * * * * *

18 **(6) Responsive Pleading; Interrogatories.**

19 **(a) Maritime Arrests and Other Proceedings.****

**A technical revision of Supplemental Rule C(6)(a) has been proposed for adoption without publication. That revision has no effect on the proposal to amend subparagraph (i)(A) to extend the time to file from 10 days to 14 days.

36 within ~~20~~ 21 days after filing the statement of
37 interest or right.

38 * * * * *

Committee Note

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Note to Rule 6.

Rule G. Forfeiture Actions In Rem

1 * * * * *

2 **(4) Notice.**

3 * * * * *

4 **(b) Notice to Known Potential Claimants.**

5 **(i) Direct Notice Required.** The government
6 must send notice of the action and a copy of
7 the complaint to any person who reasonably
8 appears to be a potential claimant on the facts
9 known to the government before the end of

10 the time for filing a claim under Rule
11 G(5)(a)(ii)(B).

12 **(ii) Content of the Notice.** The notice must state:

13 **(A)** the date when the notice is sent;

14 **(B)** a deadline for filing a claim, at least 35
15 days after the notice is sent;

16 **(C)** that an answer or a motion under Rule
17 12 must be filed no later than ~~20~~ 21
18 days after filing the claim; and

19 **(D)** the name of the government attorney to
20 be served with the claim and answer.

21 * * * * *

22 **(5) Responsive Pleadings.**

23 * * * * *

24 **(b) Answer.** A claimant must serve and file an answer
25 to the complaint or a motion under Rule 12 within
26 ~~20~~ 21 days after filing the claim. A claimant

27 waives an objection to in rem jurisdiction or to
28 venue if the objection is not made by motion or
29 stated in the answer.

30 **(6) Special Interrogatories.**

31 **(a) Time and Scope.** The government may serve
32 special interrogatories limited to the claimant's
33 identity and relationship to the defendant property
34 without the court's leave at any time after the claim
35 is filed and before discovery is closed. But if the
36 claimant serves a motion to dismiss the action, the
37 government must serve the interrogatories within
38 20 21 days after the motion is served.

39 **(b) Answers or Objections.** Answers or objections to
40 these interrogatories must be served within 20 21
41 days after the interrogatories are served.

42 **(c) Government's Response Deferred.** The
43 government need not respond to a claimant's

40 FEDERAL RULES OF CIVIL PROCEDURE

44 motion to dismiss the action under Rule G(8)(b)
45 until ~~20~~ 21 days after the claimant has answered
46 these interrogatories.

47 * * * * *

Committee Note

The times set in the former rule at 20 days have been revised to 21 days. See the Note to Rule 6.

Discussion

Revisions of the time periods in specific rules are proposed for publication in the Style Rule form. The Style Rules have been transmitted to Congress. It seems better to anticipate the presumed December 1 effective date than to invite confusion by publishing in the form of present rules that are slated to be superseded before the close of the comment period. The same choice has been made for the other proposals for publication this August, including those that have been approved at earlier Standing Committee meetings.

The Committee Notes describe the changes proposed for each rule. Most of the changes respond to elimination of the rule that excluded intermediate Saturdays, Sundays, and legal holidays in computing periods shorter than 11 days. Some of the changes reflect determinations that the period allowed by a present rule is simply too short.

A few of the changes were somewhat more complex. The 10-day limit for posttrial motions under Rules 50, 52, and 59 was extended to 30 days in each Rule. The 10-day period has proved too short in many cases. Because Rule 6(b) prohibits any extension of these particular time limits, courts have responded by such strategies as deferring entry of judgment or setting briefing dates long after the motion deadline. Rather than amend Rule 6(b) to permit extensions, the Committee concluded that it would be better to set a more realistic initial period while carrying forward the bar against any extension. Allowing an additional 20 days does not seem extravagant. If there is no appeal, 20 days are not much in comparison to the time required to get through to the end of trial. If there is to be an appeal, 30 days corresponds to the period for most civil appeals, and should work well in conjunction with the rule that a timely motion under these Rules suspends appeal time.

Another revision of Rule 59 is also proposed. Style Rule 59(c) provides that the period to file affidavits opposing a new-trial motion may be extended “for up to 20 days.” This provision has been in Rule 59(c) since 1938. Up to 1948, Rule 6(b) prohibited extension of any Rule 59 time period, “except as stated in subdivision (c) thereof.” In 1948 this reference to Rule 59(c) was deliberately omitted from Rule 6(b); the Committee Note observed that Rule 6(b) no longer referred to Rule 59(c) “because, once the motion for new trial is made, the judgment no longer has finality, and the extension of time for affidavits thus does not of itself disturb finality.” This Note explanation suggests that the open-ended Rule 6(b) extension provision was intended to supersede the 20-day limit in Rule 59(c). However that may be, it seems appropriate to reconcile the tension between the two rules by eliminating the 20-day limit from Rule 59(c). There is no reason to fear that over-long extensions will be granted.

A minor revision is proposed for Rule 68. The present provision directs that an offer of judgment be made more than 10 days before “trial begins.” It may be difficult to know when trial will begin. The amendment would change this to 14 days before “the date set for trial.”

Finally, it should be noted that proposed Rule 56(a) includes time provisions for summary-judgment practice quite different from the current provisions. Proposed Rule 56(a) has been approved independently as part of the Time-Computation project and is recommended for publication both in the Time-Computation Rules and in Rule 56.

(3) Statutory Time Provisions

The Advisory Committee has not concluded its study of statutory time periods that may seem uncomfortably short in light of the proposal to compute periods less than 11 days without excluding intermediate Saturdays, Sundays, and legal holidays. It is likely that any final list will be quite brief.

One statutory period, however, is an important candidate for revision. 28 U.S.C. § 636(b)(1) allows 10 days to serve and file written objections to a magistrate judge’s proposed findings and

recommendations “as provided by rules of court.” Current Rule 72 provisions adopt the same 10-day period. Under the present rule excluding intermediate Saturdays, Sundays, and legal holidays, the period is always a minimum of 14 calendar days and runs longer if there is an intermediate legal holiday. Both the statutory and Rule 72 time periods are calculated according to Rule 6(a). The specific Rules package includes a recommendation that the period in Rule 72 be extended to 14 days to accommodate the new calendar-day computation rule. This proposal will supersede the statutory period less dramatically than the double-supersession effect of present Rules 6(a) and 72, and is further bolstered by the § 636(b)(1) recognition that court rules may provide for serving and filing objections. This does not eliminate the usefulness of seeking statutory amendment because of the potential for confusion from the difference between the statute and the amended Rule.

commonwealth, territory[, or possession] of the United States. As before, these entities are included only “where appropriate.” They are included for the reasons that counsel incorporation of state practice. For example, state holidays are recognized in computing time under Rule 6(a). Other, quite different, examples are Rules 64(a), invoking state law for prejudgment remedies, and 69(a)(1), relying on state law for the procedure on execution. Including commonwealths, territories[, and possessions] in these and other rules avoids the gaps that otherwise would result when the federal rule relies on local practice rather than provide a uniform federal approach. Including them also establishes uniformity between federal courts and local courts in areas that may involve strong local interests, little need for uniformity among federal courts, or difficulty in defining a uniform federal practice that integrates effectively with local practice.

Adherence to a local practice may be refused as not “appropriate” when the local practice would impair a significant federal interest.

Discussion

Consideration of Rule 81(d)(2) began with the Time-Computation Project. Civil Rule 6(a) and its counterparts extend a time period that ends on a state holiday. The reasons that make it useful to integrate federal time-counting practices with state practices seem to apply as well in a commonwealth or territorial court. If the more general proposal to publish Rule 81 for comment is deferred, it is recommended that Civil Rule 6(a)(6)(B) be amended by adding a new final sentence: “The word ‘state,’ as used in this Rule, includes [the District of Columbia] and any commonwealth, territory[, or possession] of the United States.” (“District of Columbia” is shown in brackets. It is not necessary in Rule 6(a) because the District already is defined as a state by Rule 81(d)(2). More than a few casual readers might be misdirected, however, if forced to remember Rule 81 when reading Rule 6(a).)

The reasons for including commonwealths, territories, and perhaps possessions in the rules that incorporate state practice are sketched in the Committee Note. The closest analogue in the Rules is Criminal Rule 1(b)(9): “The following definitions apply to these rules * * * (9) ‘State’ includes the District of Columbia, and any commonwealth, territory, or possession of the United States.” The Criminal Rule does not include the qualifying “where appropriate” found in Style Rule 81(d)(2) and carried forward by this proposal. Retaining “where appropriate” seems desirable in light of the

inability to know or foresee all of the ways in which a territorial procedure, for example, might prove unsuitable for adoption into federal-court practice.

Comment should be particularly invited from those familiar with procedures in the commonwealths and territories. If there are a significant number of local practices unsuitable for adoption into federal practice, it may not suffice to rely on “where appropriate” as an escape clause.

Comment should be separately invited on the question whether to include “possessions.” There is at least some reason to believe that the United States does not now have any possessions. Even if that is so, symmetry with the Criminal Rules might support retaining the reference on the chance that a possession might be acquired in the future.

Finally, an apparent miscue in the Style Rule is corrected. Present Rule 81(e) provides that “the term ‘statute of the United States’ * * * includes * * * any Act of Congress locally applicable to and in force in the District of Columbia.” Style Rule 81(d)(2) limits this provision by the introductory language: “When these rules provide for state law to apply, in the District Court for the District of Columbia * * * (B) the term ‘federal statute’ includes any Act of Congress that applies locally to the District.” That is at best narrower than present Rule 81(e), and at worst confusing.

Authority to adopt the proposed definition of “state” seems secure. The Rules Enabling Act, 28 U.S.C. § 2072(a), establishes Supreme Court authority to adopt procedure rules for “the United States district courts.” 28 U.S.C. § 451 defines “district court of the United States” for all of Title 28 — it “mean[s] the courts constituted by chapter 5 of this title.” Chapter 5 in turn includes §§ 132(a) and 133. Section 132(a) provides for a district court in each judicial district, “known as the United States District Court” for the district. Section 133 enumerates the districts; the list includes Puerto Rico but not Guam, the Northern Mariana Islands, or the Virgin Islands. Up to this point, authority to make rules for federal courts in those places seems uncertain. But the Enabling Act rules are incorporated by the territorial organic acts for each place — as an Enabling Act Rule is “promulgated and made effective,” it is incorporated in territorial court practice. 48 U.S.C. §§ 1424-4 (Guam); 1416(b) (Virgin Islands); 1821(c) (Northern Mariana Islands).

C. RULE 56: SUMMARY JUDGMENT

The Advisory Committee on Civil Rules recommends publication for comment of a revised Civil Rule 56 to clarify and make more consistent the procedures for litigating summary-judgment motions, without changing the substantive standards that apply. The proposed changes respond to the wide gap between present Rule 56 and the ways in which summary-judgment motions are actually brought and litigated; to the increasing number and variety of detailed local rules, standing orders, and individual judge rules that address summary-judgment procedures; and to the problems in the present Rule made apparent through the close study required by the Style Project. The proposed changes to Rule 56 are intended to facilitate the determination of whether summary judgment is appropriate, in a way that neither favors nor disfavors the grant or denial of the motion, while allowing the case law on the standards for obtaining or defeating summary judgment to continue to develop.

I. Introduction

In 1992, after the 1986 “trilogy” of Supreme Court decisions on summary judgment, the Standing Committee recommended adoption of a thoroughly revised Rule 56. The Judicial Conference rejected the recommendation. That effort differed from the present proposal in many ways. The most important difference is that the present proposal does not attempt to incorporate into the rule the substantive teaching of the Supreme Court cases establishing the summary-judgment standard. At the same time, the work done in developing the 1992 proposal provided valuable insight into ways the procedures for presenting a summary-judgment motion to the other parties and to the court might be improved.

Present Rule 56 has not been amended in any significant way since 1963 despite significant changes in both summary-judgment practice and the importance of summary-judgment motions since

then. For years, the Committee has been told that Rule 56 is far removed from current practice. For example, present Rule 56 does not mention partial summary judgment. Rule 56(d) focuses on court orders specifying facts that are not in controversy, which are “deemed established” in subsequent proceedings, while actual practice focuses much more on obtaining summary judgment as to claims, defenses, or issues, often dispositive of the entire case. Rule 56(c) provides that the motion shall be served at least ten days prior to “the hearing” – which few judges hold and most do not hold regularly – and that affidavits can be served the day before a hearing – an obvious timing problem addressed in parallel both in the Rule 56 proposal and independently in the timing project. The many gaps between Rule 56 and summary-judgment practice have made the Rule text increasingly irrelevant. A clear indication of the extent to which the national Rule is viewed as deficient is the number of local rules addressing summary-judgment procedures. All but thirty districts have local rules addressing summary-judgment procedures, and those local rules vary significantly from district to district. The practice rules of individual judges provide additional variation within a single district, even in those without a local rule on summary judgment.

The Civil Rules Committee formed a subcommittee to undertake a thorough study of Rule 56 practice and possible amendments. Judge Michael Baylson served as chair. The Subcommittee studied many local rules, as well as some standing orders and individual judges’ practice orders establishing specific procedures for summary-judgment motions, identified the common features and variations in the rules and orders, and synthesized and harmonized what appeared to be the best “best practices” identified from that study. The Subcommittee reviewed the 1992 proposal to revise Rule 56, adapting some ideas from it but, as noted, taking a very different approach shaped by the experience of the last 15 years. The Subcommittee developed several successive drafts and led a lengthy discussion of Rule 56 at the September 2006 Advisory Committee meeting. A draft based

on the Advisory Committee's deliberations was presented on January 29, 2007, at a "miniconference" of a small group of litigators, judges, and professors, all of whom had extensive summary-judgment expertise. The draft considered at the conference was revised in light of the lessons learned. This draft in turn has been revised extensively in response to decisions made by the Advisory Committee at its April 2007 meeting. The revisions have been reviewed and approved by the Advisory Committee for presentation to the Standing Committee with a recommendation for publication for comment.

The proposed amendments are limited to clarifying and improving summary-judgment procedures and making them more consistent, without changing the standard for granting or denying summary judgment. There is no purpose to make it easier or more difficult to grant summary judgment, no purpose to favor plaintiffs or defendants. The changes address only the procedure for presenting and considering summary-judgment motions.

II. Summary of Revisions

The proposed amended version of Rule 56 consists of the following subdivisions: (a) timing; (b) affidavits; (c) a procedure for the movant to state what facts are asserted to be undisputed and entitle the movant to judgment as a matter of law, for the nonmovant to respond addressing those facts, for the movant to reply to address additional facts stated in the response, and for the parties to present citations to record support and to present their legal arguments; (d) the court's action when there is no response or no proper response; (e) court's action on grounds not raised by a motion; (f) the procedure for seeking additional time to respond to a summary-judgment motion; (g) the court's action in granting summary judgment; (h) partial summary judgment; and (i) affidavits that are presented in bad faith. The primary changes from the present Rule are in subdivisions (a), (c), (d), and (h).

Subdivisions (a) and (c) are “default” provisions, designed to be overridden by a court order entered in a particular case and tailored to that case. These portions of the rule are consistent with the practice most judges follow of entering case-specific orders that set deadlines and other limits on summary-judgment motions and responses. Subdivision (c) implements as a default provision a procedure for stating undisputed facts that are asserted as the basis for a summary judgment motion, and for challenging that statement in the response to that motion. Subdivision (c) is based on the procedures used in the local rules of approximately fifty districts. Subdivision (d) describes the court’s authority to act when a party fails to respond or to file a response that complies with the rule. Subdivision (g) states but does not change the standard for granting summary judgment and makes clear that a court should state its reasons for doing so. Subdivision (h) addresses partial summary judgment by name for the first time in the Rule. These changes are summarized in detail in the “discussion” section following the proposed amended Rule 56 text, both “clean” and “blacklined” to show changes from the Style Rule 56, and the proposed Committee Note.

III. Conclusion

Rule 56 presents difficult drafting challenges. There is a reason it has not been revised in over forty years. But during that period, the law has developed in ways that have made summary-judgment motions and summary judgments – whole or partial – much more frequent. A study by the Federal Judicial Center shows that summary-judgment motions are now filed in a high proportion of civil cases that survive default, disposition on the pleadings, and early settlement. The ways in which those motions are brought and litigated no longer resemble the procedures described in Rule 56. The proliferation of local rules and other orders evidences the deficiencies in the national rule, yet those local rules and orders are often inconsistent with each other and with the national rule. Both bench and bar deserve better and more consistent procedures in this critical area of litigation.

The drafting difficulties and challenges that Rule 56 presents should not defeat or further delay efforts to improve it. The Advisory Committee has worked diligently. That work has made it clear that public comment is essential to understand whether the procedures that have worked well in the “laboratories” provided by districts with local rules can work fairly and effectively as the national rule. Standing Committee consideration, followed by publication for comment, is the next step in ensuring that Rule 56, amended to be relevant to current summary-judgment motion practice, is as good as possible.

Attached are the following:

1. Clean copy of proposed Rule 56.
2. Blacklined copy showing the changes the proposal would make from Style Rule 56
3. Proposed Committee Note.
4. Discussion of proposed Rule changes.
5. Summary of our miniconference on January 29, 2007.
6. Memoranda from Jeffrey Barr and James Ishida of the Administrative Office Rules Support Office summarizing a survey of district court local summary-judgment rules and standing orders and summarizing local rules provisions for statements of uncontested facts.
7. Research by the Federal Judicial Center on motions related to affidavits taken in bad faith and on the frequency of motions and whole or partial grants.
8. Memorandum on “Rule 56 Revision: The Effort That Failed in 1992.”

1. Proposed Rule 56

A. *The “Clean” Proposed Rule 56 Amendment*

**PROPOSED AMENDMENT TO THE FEDERAL
RULES OF CIVIL PROCEDURE***

Rule 56. Summary Judgment

- 1 **(a) Time for a Motion, Response, and Reply.** These
2 times apply unless a different time is set by local rule or
3 the court orders otherwise:
- 4 **(1)** a party may move for summary judgment on all or
5 part of a claim or defense — or on an issue — at
6 any time until 30 days after the close of all
7 discovery;
- 8 **(2)** a party opposing the motion must file a response
9 within 21 days after the motion is served or a
10 responsive pleading is due, whichever is later; and

*New material is underlined; matter to be omitted is lined through.
Includes style amendments to rule that will take effect on December 1,
2007.

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

13 **(b) Affidavits.** A party may support or oppose the motion
14 with an affidavit that is made on personal knowledge,
15 sets out facts that would be admissible in evidence, and
16 shows that the affiant is competent to testify on the
17 matters stated.

18 **(c) Procedures.**

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

21 **(2) Motion.** The motion must:

22 **(A)** describe each claim, defense, or issue as to
23 which summary judgment is sought; and

24 **(B)** state in separately numbered paragraphs only
25 those material facts that the movant asserts
26 are not genuinely in dispute and entitle the
27 movant to judgment as a matter of law.

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- 28 **(3) Response.** A response:
- 29 **(A)** must, by correspondingly numbered
- 30 paragraphs, accept, qualify, or deny — either
- 31 generally or for purposes of the motion only
- 32 — each fact in the Rule 56(c)(2)(B)
- 33 statement;
- 34 **(B)** may state that those facts do not support
- 35 judgment as a matter of law; and
- 36 **(C)** may state additional facts that preclude
- 37 summary judgment.
- 38 **(4) Reply.** The movant may reply to any additional
- 39 fact stated in the response in the form required for
- 40 a response.
- 41 **(5) Citing Support for Positions.** A statement,
- 42 qualification, or denial of fact in a motion,
- 43 response, or reply must be supported by:

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44 (A) citations to particular parts of depositions,
45 documents, electronically stored information,
46 affidavits, stipulations (including those made
47 for purposes of the motion only), admissions,
48 interrogatory answers, or other materials; or

49 (B) a showing that:

50 (i) the materials cited to support the fact do
51 not establish the absence of a genuine
52 dispute; or

53 (ii) no material can be cited to support the
54 fact.

55 (6) **Filing Cited Materials.** A party must attach to a
56 motion, response, or reply the cited parts of any
57 factual materials that have not already been filed.

58 (7) **Brief.** A party must make its arguments of law and
59 fact in a separate brief filed with the motion,
60 response, or reply or at a time the court orders.

FEDERAL RULES OF CIVIL PROCEDURE

61 **(d) Failure to Respond or Properly Respond.** If a party
62 does not respond to the motion or if a response fails to
63 comply with Rule 56(c), the court may:

64 **(1)** afford an opportunity to respond as required by
65 Rule 56(c);

66 **(2)** grant summary judgment if the motion and
67 supporting materials show that the movant is
68 entitled to it; or

69 **(3)** issue any other appropriate order.

70 **(e) Court Action.** The court may:

71 **(1)** grant or deny summary judgment in whole or in
72 part; or

73 **(2)** after giving notice and a reasonable time to
74 respond:

75 **(A)** grant summary judgment for a nonmovant;

FEDERAL RULES OF CIVIL PROCEDURE

76 **(B)** grant or deny a motion for summary
77 judgment in whole or in part on grounds not
78 raised by the motion or response; or

79 **(C)** consider summary judgment on its own after
80 identifying for the parties material facts that
81 may not be genuinely in dispute.

82 **(f) When Facts are Unavailable.** If a nonmovant shows
83 by affidavit that, for specified reasons, it cannot present
84 facts essential to justify its opposition, the court may:

- 85 **(1)** defer consideration of the motion or deny it;
86 **(2)** allow time to obtain affidavits or to take discovery;
87 or
88 **(3)** issue any other appropriate order.

89 **(g) Granting Summary Judgment.** Summary judgment
90 should be granted if evidence that would be admissible
91 at trial shows that there is no genuine dispute as to any
92 material fact and that a party is entitled to judgment as

FEDERAL RULES OF CIVIL PROCEDURE

93 a matter of law. An order or memorandum granting
94 summary judgment should state the reasons.

95 **(h) Granting Partial Summary Judgment.** If summary
96 judgment is not granted on the whole action, the court
97 may:

- 98 **(1)** grant partial summary judgment on a claim,
99 defense, or issue;
- 100 **(2)** enter an order or memorandum stating any material
101 fact — including an item of damages or other relief
102 — that is not genuinely in dispute and treating the
103 fact as established in the action; or
- 104 **(3)** identify material facts that are genuinely in dispute.

105 **(i) Affidavit Submitted in Bad Faith.** If satisfied that an
106 affidavit under this rule is submitted in bad faith or
107 solely for delay, the court may order the submitting party
108 to pay the other party the reasonable expenses, including

109 attorney's fees, it incurred as a result. An offending
110 party or attorney may also be held in contempt.

***B. The "Blacklined" Proposed Rule 56 Amendment
Showing Changes from the Style Rule***

Rule 56. Summary Judgment

1 **(a) ~~By a Claiming Party~~ Time for a Motion, Response,**
2 **and Reply.** A party claiming relief may move, with or
3 without supporting affidavits, for summary judgment on
4 all or part of the claim. ~~The motion may be filed at any~~
5 ~~time after:~~
6 ~~(1) 20 days have passed from commencement of the~~
7 ~~action; or~~
8 ~~(2) the opposing party serves a motion for summary~~
9 ~~judgment.~~
10 These times apply unless a different time is set by local
11 rule or the court orders otherwise:

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12 **(1)** a party may move for summary judgment on all or
13 part of a claim or defense — or on an issue — at
14 any time until 30 days after the close of all
15 discovery;

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

19 **(3)** the movant may file a reply within 14 days after
20 the response is served.

21 ~~**(b) By a Defending Party.** A party against whom relief is~~
22 ~~sought may move at any time, with or without~~
23 ~~supporting affidavits, for summary judgment on all or~~
24 ~~part of the claim.~~

25 **(b) Affidavits.** A party may support or oppose the motion
26 with an affidavit that is made on personal knowledge,
27 sets out facts that would be admissible in evidence, and

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28 shows that the affiant is competent to testify on the
29 matters stated.

30 ~~(c) **Serving the Motion; Proceedings.** The motion must be~~
31 ~~served at least 10 days before the day set for the hearing.~~
32 ~~An opposing party may serve opposing affidavits before~~
33 ~~the hearing day. The judgment sought should be~~
34 ~~rendered if the pleadings, the discovery and disclosure~~
35 ~~materials on file, and any affidavits show that there is no~~
36 ~~genuine issue as to any material fact and that the movant~~
37 ~~is entitled to judgment as a matter of law.~~

38 **(c) Procedures.**

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

41 **(2) Motion.** The motion must:

42 **(A) describe each claim, defense, or issue as to**
43 which summary judgment is sought; and

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44 **(B)** state in separately numbered paragraphs only
45 those material facts that the movant asserts
46 are not genuinely in dispute and entitle the
47 movant to judgment as a matter of law.

48 **(3) *Response.*** A response:

49 **(A)** must, by correspondingly numbered
50 paragraphs, accept, qualify, or deny — either
51 generally or for purposes of the motion only
52 — each fact in the Rule 56(c)(2)(B)
53 statement;

54 **(B)** may state that those facts do not support
55 judgment as a matter of law; and

56 **(C)** may state additional facts that preclude
57 summary judgment.

58 **(4) *Reply.*** The movant may reply to any additional
59 fact stated in the response in the form required for
60 a response.

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61 **(5) Citing Support for Positions.** A statement,
62 qualification, or denial of fact in a motion,
63 response, or reply must be supported by:

64 **(A) citations to particular parts of depositions,**
65 documents, electronically stored information,
66 affidavits, stipulations (including those made
67 for purposes of the motion only), admissions,
68 interrogatory answers, or other materials; or

69 **(B) a showing that:**

70 **(i) the materials cited to support the fact do**
71 not establish the absence of a genuine
72 dispute; or

73 **(ii) no material can be cited to support the**
74 fact.

75 **(6) Filing Cited Materials.** A party must attach to a
76 motion, response, or reply the cited parts of any
77 factual materials that have not already been filed.

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78 **(7) Brief.** A party must make its arguments of law and
79 fact in a separate brief filed with the motion,
80 response, or reply or at a time the court orders.

81 **(d) Failure to Respond or Properly Respond.** If a party
82 does not respond to the motion or if a response fails to
83 comply with Rule 56(c), the court may:

84 **(1) afford an opportunity to respond as required by**
85 Rule 56(c);

86 **(2) grant summary judgment if the motion and**
87 supporting materials show that the movant is
88 entitled to it; or

89 **(3) issue any other appropriate order.**

90 **(e) Court Action.** The court may:

91 **(1) grant or deny summary judgment in whole or in**
92 part; or

93 **(2) after giving notice and a reasonable time to**
94 respond:

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- 95 (A) grant summary judgment for a nonmovant;
- 96 (B) grant or deny a motion for summary
- 97 judgment in whole or in part on grounds not
- 98 raised by the motion or response; or
- 99 (C) consider summary judgment on its own after
- 100 identifying for the parties material facts that
- 101 may not be genuinely in dispute.
- 102 (f) **When Opposing Affidavits Facts are Unavailable.** If
- 103 a ~~party opposing the motion~~ nonmovant shows by
- 104 affidavit that, for specified reasons, it cannot present
- 105 facts essential to justify its opposition, the court may:
- 106 (1) defer consideration of the motion or deny it the
- 107 motion;
- 108 (2) ~~order a continuance~~ allow time to obtain enable
- 109 ~~affidavits to be obtained, depositions to be taken,~~
- 110 or ~~other~~ to take discovery ~~to be undertaken;~~ or
- 111 (3) issue any other just appropriate order.

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112 **(g) Granting Summary Judgment.** Summary judgment
113 should be granted if evidence that would be admissible
114 at trial shows that there is no genuine dispute as to any
115 material fact and that a party is entitled to judgment as
116 a matter of law. An order or memorandum granting
117 summary judgment should state the reasons.

118 **~~(hd) Granting Partial Summary Judgment Case Not Fully~~**
119 **~~Adjudicated on the Motion.~~**

120 ~~(i) *Establishing Facts.* If summary judgment is not~~
121 ~~rendered on the whole action, the court should, to~~
122 ~~the extent practicable, determine what material~~
123 ~~facts are not genuinely at issue. The court should~~
124 ~~so determine by examining the pleadings and~~
125 ~~evidence before it and by interrogating the~~
126 ~~attorneys. It should then issue an order specifying~~
127 ~~what facts — including items of damages or other~~
128 ~~relief — are not genuinely at issue. The facts so~~

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129 specified must be treated as established in the
130 action.

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

135 If summary judgment is not granted on the whole action,
136 the court may:

137 (1) grant partial summary judgment on a claim,
138 defense, or issue;

139 (2) enter an order or memorandum stating any material
140 fact — including an item of damages or other relief

141 — that is not genuinely in dispute and treating the
142 fact as established in the action; or

143 (3) identify material facts that are genuinely in dispute.

144 ~~(e) *Affidavits; Further Testimony.*~~

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

155 ~~—(2) *Opposing Party's Obligation to Respond.* When~~
156 ~~a motion for summary judgment is properly made~~
157 ~~and supported, an opposing party may not rely~~
158 ~~merely on allegations or denials in its own~~
159 ~~pleading, rather, its response must — by affidavits~~
160 ~~or otherwise as provided in this rule — set out~~
161 ~~specific facts showing a genuine issue for trial. If~~

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162 ~~the opposing party does not so respond, summary~~
163 ~~judgment should, if appropriate, be entered against~~
164 ~~that party.~~

165 **(ig) Affidavit Submitted in Bad Faith.** If satisfied that an
166 affidavit under this rule is submitted in bad faith or
167 solely for delay, the court ~~must~~ may order the submitting
168 party to pay the other party the reasonable expenses,
169 including attorney's fees, it incurred as a result. An
170 offending party or attorney may also be held in
171 contempt.

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3. *Proposed Committee Note*

COMMITTEE NOTE

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

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

Subdivision (a). The timing provisions in former subdivisions (a) and (c) are consolidated and substantially revised in new subdivision (a). The new rule allows a party to move for summary judgment at any time, even as early as the commencement of the action. If the motion seems premature both subdivision (a) and Rule 6(b) allow the court to extend the time to respond. The rule

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does set a presumptive deadline at 30 days after the close of all discovery.

The presumptive timing rules are default provisions that may be altered by an order in the case or by local rule. In most cases the court will enter a scheduling order tailored to the specific case, superseding the presumptive rule provisions and setting different deadlines or specific dates for summary-judgment motions. The parties may agree on a tailored scheduling order, including deadlines for filing and responding to summary-judgment motions. A scheduling order may be tailored to a particular case by, for example, calling for discovery to occur in stages, such as resolving threshold issues on jurisdiction or aspects of liability first. Or the order may call for expert-witness discovery to occur after all other discovery has been completed. Deadlines for summary-judgment motions may be set to correspond with completion of the discovery stages.

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

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

Subdivision (b). Subdivision (b) carries forward some of the provisions of former subdivision (e)(1). Other provisions are relocated or omitted. The requirement that a sworn or certified copy of a paper referred to in an affidavit be attached to the affidavit is omitted as unnecessary given the requirement that an affidavit set out facts that would be admissible in evidence and the subdivision (c)(6) direction to file factual materials.

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

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

The subdivision (c) procedure is designed to fit the practical needs of most cases. The court retains authority to direct a different procedure by order in a case that will benefit from different procedures. The parties may be able to agree on a procedure for presenting and responding to a summary-judgment motion tailored to the needs of the case. The court may play a role in shaping the order under Rule 16.

The motion must describe the claims, defenses, or issues as to which summary judgment is sought. This requirement is expressed in terms that anticipate the “partial summary judgment” provisions in subdivision (h). A motion may address discrete parts of an action without seeking disposition of the entire action.

The movant must state only material facts that are not genuinely in dispute and are the basis of the claim that the movant is entitled to judgment as a matter of law. Many local rules require, in varying terms, that a motion include a statement of undisputed facts. In some cases the statements and responses have expanded to identification of hundreds of facts supported by unwieldy volumes of materials. This practice is self-defeating. To be effective, the statement of undisputed facts in the motion should be limited to the small number of facts identified as dispositive because they are both undisputed and entitle the movant to judgment as a matter of law.

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The response must indicate what material facts are genuinely in dispute. A response that a material fact is accepted—is not in dispute—may be made for purposes of the motion only. The response should fairly meet the substance of the asserted fact. A response that qualifies an asserted fact should specify any part of the fact that is not genuinely in dispute, in a way similar to the response to a Rule 36(b)(2)(4) request for an admission or a Rule 8(b)(4) answer to a claim.

Subdivision (c)(4) recognizes that the movant may reply to the response. The time to reply is governed by subdivision (a)(3). The procedures that apply to a response also apply to a reply. A reply may address only additional facts stated in the response; it is not the occasion for asserting facts not addressed by the motion or response.

Subdivision (c)(5)(A) requires that a statement, qualification, or denial of fact be supported by citations to particular parts of discovery responses, documents, electronically stored information, affidavits, or other materials. Specific citations are important to enable the parties and the court to address the facts efficiently and effectively. Specific citations often will be provided even by a party who does not have the trial burdens on an issue, including citations to discovery responses, stipulations, or other concessions by the party who does have the trial burdens. But subdivision (c)(5)(B) recognizes that a party need not always point to specific record materials. One party may respond or reply to another party's statement, qualification, or denial by showing that the materials cited to support the fact do not establish the absence of a genuine dispute without citing any other materials. And a party who does not have the trial burdens may rely on a showing that a party who does have the trial burdens does not have sufficient evidence to carry them.

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A response must respond to the facts asserted in the motion by correspondingly numbered paragraphs and may recite any additional facts defeating summary judgment. The citation of supporting materials must follow the same procedures that apply to the motion. But as subdivision (c)(5)(B)(i) recognizes, a nonmovant who does not have the trial burden on an issue is not required to point to evidence that supports its position. It suffices instead to respond that the materials cited by the movant do not show that the fact is established beyond genuine dispute. No matter who has the trial burden, the nonmovant also may state that even if the movant has established the asserted facts they do not support judgment as a matter of law.

Subdivision (c)(6) requires filing with a motion, response, or reply any cited factual materials that have not already been filed when the motion, response, or reply is filed. The filing requirement includes materials referred to in an affidavit. Legal sources cited to support a party's position need not be filed. A local rule or order in the case may direct that materials *already on file* be gathered in an appendix, or a party may voluntarily submit an appendix. Direction to a specific location in an appendix satisfies the citation requirement.

Subdivision (c)(7) directs that arguments as to the law or the facts must be made in a separate brief.

Subdivision (d). Subdivision (d) resolves a question that has been answered differently by different local rules. The court may not grant a motion for summary judgment simply because a nonmovant has failed to respond at all or has responded in a manner that does not comply with subdivision (c). Instead the court must examine the motion and supporting materials to ensure that the movant has carried the summary-judgment burden. Before undertaking this task, however, the court may afford an opportunity to respond as the Rule requires or make another appropriate order. One approach would be

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an order in the case stating that the court will treat as admitted for purposes of the motion any fact that is not addressed by a proper response.

Subdivision (e). Subdivision (e) brings into Rule 56 text a number of related procedures that have grown up in practice. After giving notice and a reasonable time for responses the court may grant summary judgment for a nonmovant, grant or deny a motion on grounds not raised by the motion or response, or consider summary judgment on its own.

Subdivision (f). Subdivision (f) carries forward without substantial change the provisions of former subdivision (f).

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

The Rule 56(f)(1) provision to defer ruling is new. It may be better to deny a motion that is clearly premature, without prejudice to filing a new motion after further discovery. Further discovery may so change the record that both the statement of material facts required by subdivision (c)(2) and the record citations required by subdivision (c)(5) will have to be substantially changed. But it may be feasible to defer consideration of the motion if there is a prospect that it can be addressed without substantial change after further discovery.

Subdivision (g). Subdivision (g) carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word — genuine “issue” becomes genuine “dispute.” Words are added to express the requirement that although the summary-judgment materials need not themselves be in a form admissible at trial, summary judgment should be granted only on the basis of evidence that would be admissible at trial. There is no

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change in the rule that a court has discretion to deny summary judgment if information not admissible at trial shows a prospect that a nonmovant may be able to find sufficient admissible evidence in time for trial.

The reference to a genuine “issue” is changed to “dispute” to avoid any risk that other uses of “issue” to refer to a component of the case might cause confusion. This substitution does not affect the summary-judgment standard. The reference to “any material fact” is carried forward unchanged, recognizing that the materiality of a fact may be conditional upon other facts. If the defendant was not driving the automobile involved in the accident and there is no basis for vicarious liability, the character of the driver’s conduct is not material as to this defendant, even though it would be material to a claim against the driver.

Subdivision (g) also adds a new direction that an order granting a final summary judgment should state the reasons for the judgment. This statement is not a matter of finding facts in the sense of Rule 52. Appellate review will continue to be as a matter of law. But the statement should address the dispositive facts and underlying law in a way that may inform the decision whether to appeal and the argument and decision of the appeal.

Subdivision (g) is satisfied by identifying the general reasons that support the judgment. At the same time the court may, if it wishes, address other issues as well. It might be useful for purposes of appellate review, for example, to state that not only is there no genuine dispute whether the defendant was driving the automobile but in addition the defendant has established beyond genuine dispute that the driver was not negligent — or to state that there is a genuine dispute as to the driver’s negligence.

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

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

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

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

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

Subdivision (i). Subdivision (i) carries forward former subdivision (g) with one change. Sanctions are made discretionary, not mandatory, reflecting the experience that courts seldom invoke the independent Rule 56 authority to impose sanctions. *See Cecil & Cort, Federal Judicial Center Memorandum on Federal Rule of Civil Procedure 56(g) Motions for Sanctions (April 2, 2007).*

4. Discussion of Proposed Rule Changes

Subdivision (a).

Subdivision (a) allows a summary-judgment motion at any time up to 30 days after the close of all discovery and sets the times for the nonmovant's response and any reply. These time periods can be changed by a local rule or by judge's order in a particular case. It is expected that most cases will be governed by case-specific scheduling orders and that the default deadline set in Rule 56 will govern only a small number of cases.

The timing provision is the only provision that, under the proposed amended Rule 56, can be changed by local rule. This approach recognizes that local scheduling practices may respond to local docket conditions of case load and case mix in ways that are incompatible with the proposed national rule. The other aspects of summary-judgment practices and procedures do not vary with conditions in particular districts in ways that require or justify the across-the-board rejection that a local rule or standing order represents. Under the proposed amended rule, provisions other than timing are not variable by local rule or standing order, but can and frequently should be changed or adapted by court order to the specific needs of particular cases.

The Subcommittee and full Advisory Committee extensively debated whether to have a default timing rule at all and, if so, what it should be. The conclusion was that having a clear default rule was useful, particularly to avoid summary-judgment motions filed so late in the case or so close to trial as to be disruptive. The Subcommittee and full Advisory Committee also extensively debated whether the default timing rule should be keyed to a certain amount of time before trial as well as after discovery. The conclusion was that a single deadline set after discovery would be more effective and less likely to generate timing problems. The Committee held extensive discussions over an alternative that would have set the deadline at the earlier of 30 days after the end of all discovery or 60 days before the date set for trial. We heard concerns from both judges and lawyers that the alternative that looked to the date set for trial would not work in many cases. Given the 21 days to respond and 14 days to reply, a timely motion could – and often would – be submitted 25 days before the date set for trial. That would often require that the trial be rescheduled or that the case go to trial without any decision on the motion. In addition, some courts apparently do not set trial dates in a fashion that would make sense of this alternative. That could cause difficulty if the time-before-trial deadline were extended backward to a greater number of days – such as 120 days.

Like all default or presumptive timing provisions – or, for that matter, case-specific timing provisions – the proposal cannot cover all timing contingencies. If, for example, important evidence is obtained after the deadline, either because discovery has revived or through other investigation, the court should consider granting leave to file the motion.

This timing subdivision has been independently approved as part of the Time-Computation Project, and is recommended for publication in conjunction with the Civil Rules portion of the Time-Computation Project, perhaps most conveniently by cross-reference to the full text of Rule 56 if it is published at the same time.

Subdivision (c)

Subdivision (c) was approved after vigorous discussion. The central feature is the (c)(2)(B) requirement that as part of the summary-judgment motion, the movant must file a statement of “only those material facts that the movant asserts are not genuinely in dispute,” complemented by a nonmovant’s (c)(3)(A) duty to respond by correspondingly numbered paragraphs. The statement, response, and any reply must cite to specific record sources supporting the movant’s and nonmovant’s assertions. In the response, a nonmovant may state whether the facts the movant asserted to be undisputed are accepted, denied, or qualified (either generally or limited to the purposes of the motion); may state that even if accepted as true, those facts do not support summary judgment; or may state that other facts, not identified by the movant, preclude summary judgment.

Subdivision (c)(4) addresses replies by limiting them to “any additional fact stated in the response.” Subdivision (c)(5) addresses the need to provide citations to the record to support statements, qualifications, or denials of fact in a motion, response, or reply. The amendment recognizes that a nonmovant may show that the materials cited by the movant to support a fact do not establish the absence of a genuine dispute, or may show that there is no record evidence to

support a particular fact asserted as undisputed by the movant. Subdivision (c)(6) addresses whether parties need to attach factual materials to their motions, responses, or replies. The proposed rule provides that parties must attach materials that have not already been filed, but does not state whether materials that have already been filed must be refiled in connection with the summary-judgment filings. The national rule need neither mandate nor forbid refiling materials that are already in the court's record if those materials are cited in the summary-judgment motion or supporting brief. As the Committee Note states, some judges want an appendix collecting in one place the materials relied on to support or oppose summary judgment, even if those materials are already on file. Other judges do not want duplicate filings of the same material. Proposed amended Rule 56 would allow both practices to continue.

The proposed Rule 56(c) procedure provides a clear framework to focus the parties and the court on the specific facts and record support asserted as the basis for granting or denying summary judgment. It is drawn from procedures established by the local rules in over fifty districts. Judges and lawyers with experience under such local rules and similar standing orders informed the Committee that such a procedure brings a very useful discipline, organization, and focus to summary-judgment motions and responses. But the judges and lawyers acknowledged that the procedure was not appropriate for all cases. In particular, huge cases that generate lengthy, even mammoth, records may also generate lengthy, even mammoth, motions. Although the proposed Rule text emphasizes that the statements of undisputed fact are to be limited to those facts critical to the summary-judgment motion, a rule can go only so far in reminding the parties that no one is well served by a motion listing hundreds of facts and perhaps thousands of supporting references. Based on the experience of lawyers and judges with such procedures, the proposed Rule also allows a judge to tailor the form of the summary-judgment motion, response, and reply based on what works

best for a specific case. The proposed Rule recognizes that certain cases may – whether because of complexity or unduly adversarial approaches – require different case-management techniques implemented through case-specific orders altering the Rule’s default provisions.

One aspect of subdivision (c) generated substantial discussion. Subdivision (c)(3)(A) allows a response to “qualify” a fact that the movant asserts is undisputed, rather than merely accept or deny that fact. This provision is drawn from Style Rule 36(a)(4), which allows a party to qualify a response to a request for admission, and Style Rule 8(b)(4), which directs that a responsive pleading must admit the part of an allegation that is true and deny the rest. The Committee considered at length a concern that this word might seem to invite lawyers to “qualify” rather than accept facts asserted as undisputed. This concern was overcome by the recognition that in many cases, facts cannot simply be accepted or denied. Including the word “qualify” allows a nonmovant to make it clear to the judge whether a fact the movant asserts is undisputed is accepted or denied entirely, or is qualified, rather than inviting endless wrangles over whether a stated fact was not simply accepted or denied and therefore not in compliance with the Rule. Allowing a nonmovant’s response to include “qualifying” as well as “accepting” or “denying” facts the movant asserts are undisputed allows a nonmovant fully to respond to a motion. The Committee concluded that explicit recognition of the opportunity to “qualify” was more realistic, would in many cases likely lead to partial acceptance rather than blanket denial, and would in general lead to better-focused responses rather than convoluted denials that would be qualifications in all but name.

Subdivision (d).

Subdivision (d) addresses an issue at the heart of summary judgment. A party may fail to respond to the motion, or may respond in a way that does not satisfy subdivision (c). Three main approaches could be taken. One would treat the failure to respond or an improper response as a

default, leading the judge to grant summary judgment without examining the motion or supporting materials to determine whether the movant is entitled to judgment as a matter of law. A second – reflected in more than a dozen local rules – would “deem admitted” facts asserted by the movant and not properly responded to. This approach is not the same as default. If there is no response to a summary-judgment motion, or the response does not address the facts asserted to be undisputed as subdivision (c) requires, the court could not grant summary judgment unless the facts “deemed admitted” and facts otherwise established beyond genuine dispute supported judgment as a matter of law. A third approach would require the judge to examine the motion and the supporting materials, allowing summary judgment only if the movant has carried the summary-judgment burden; on this approach the only penalty for failure to respond properly is loss of the opportunity to direct the court to information that would defeat the otherwise sufficient showing made by the movant. Subdivision (d) combines the second and third approaches, recognizing the common practice that the court first gives the nonmovant an opportunity to respond, in proper form, before “deeming admitted” facts not properly responded to. If there is no response or a deficient response, the court may defer its examination of the motion and record, order the nonmovant to file a response that meets the Rule’s requirements, and then conduct its analysis. Or the court may grant summary judgment if, after reviewing the motion and supporting materials, the court determines that the movant has shown entitlement to judgment as a matter of law. But the court also may issue another appropriate order. As recognized in the Committee Note, it may be appropriate to order that facts not properly responded to will be “deemed admitted” unless a proper response is filed.

Other Subdivisions.

The remaining subdivisions present fewer issues. Subdivision (b) carries forward with little change Style Rule 56(e)(1)’s provision on affidavits; it omits as incomplete and unnecessary the

further Rule 56(e)(1) direction to attach a cited paper. The word “declaration” was added to earlier drafts of the proposal as a reminder of 28 U.S.C. § 1746 but later deleted to reflect the Style Project’s choice to refer uniformly to “affidavits.” The Committee Note explains that under section 1746, a “declaration” is an acceptable alternative to an affidavit.

Subdivision (e) recognizes practices well established in current procedure, making clear the court’s obligation to give notice to the parties before granting summary judgment on grounds not raised in the motion, or for a nonmovant, or without a motion. Subdivision (f) carries forward substantially unchanged Style Rule 56(f); the Committee considered and rejected adding a requirement that a party asking more time for discovery or other investigation describe the facts it hopes to prove.

Subdivision (g) carries forward the Style Rule 56(c) language setting the summary-judgment standard, with only one change. “Genuine *issue* of material fact” is changed to “genuine *dispute*” of material fact. “Dispute” is a more natural word in this setting. It also avoids any risk of confusion with repeated references in Rule 56 and elsewhere to an “issue” as a component of a claim or defense. Subdivision (g) also adds a provision that an order granting summary judgment “should state the reasons.” This provision reflects regular requests by appellate courts for district-court explanations of orders granting summary judgment. Such explanations are not only useful to the appellate courts, but also help the parties decide whether to appeal and what focus the appeal should have. The proposed amendment does not require a Rule 52-like finding of facts and leaves to the district judge’s discretion how to provide the explanation of the summary judgment grant; the proposed rule does not say “must.”

Subdivision (h) recognizes the common tendency to describe summary adjudication of part of a case as “partial summary judgment” and simplifies expression to emphasize the court’s

discretion in determining whether it is useful to grant partial summary judgment. It also recognizes that a court may find it useful to identify material facts that are genuinely in dispute.

Subdivision (i), finally, carries forward with only one change the Style Rule 56(g) provision for affidavits submitted in bad faith. Sanctions are made discretionary, recognizing that – as demonstrated by Federal Judicial Center research – Rule 56(g) is almost never invoked.

Conclusion

The Rule 56 proposal draws from the laboratory provided by the many districts with local rules on summary-judgment procedures. The proposed amendment attempts to synthesize the procedures that have been most effective, providing both guidance and consistency lacking in the present Rule, as well as necessary flexibility to tailor the procedures to the needs of particular cases. Public comment will further reveal experiences with the local rules and will ensure that the amended Rule achieves its stated purpose of improving the procedures and making them more consistent without changing the standard for summary-judgment rulings or making summary judgments easier or more difficult to obtain.

NOTES: RULE 56 MINICONFERENCE

The Rule 56 Subcommittee held a miniconference at the new United States Courthouse in Manhattan on January 29, 2007. Committee members present included Hon. Lee H. Rosenthal, Committee Chair; Hon. Michael M. Baylson, Subcommittee Chair; Hon. C. Christopher Hagy; Robert C. Heim, Esq.; Ted Hirt, Esq. (for the Department of Justice); Hon. Randall T. Shepard; and Hon. Vaughn R. Walker. Anton R. Valukas, Esq., participated by telephone. Former Committee members Sheila L. Birnbaum, Esq., and Hon. Shira Ann Scheindlin were among the invited participants. Edward H. Cooper, Reporter, and Richard L. Marcus, Special Reporter, were present. Joe Cecil represented the Federal Judicial Center. Administrative Office Representatives included Peter G. McCabe, John K. Rabiej, James N. Ishida, and Jeffrey N. Barr.

The invited participants who attended, in addition to the former Committee members, included Alice W. Ballard, Allen D. Black, Edward J. Brunet, Edward D. Buckley, Richard B. Drubel, Muriel Goode-Trufant, Jeffrey J. Greenbaum, Gregory P. Joseph, Peter F. Langrock, Frank C. Morris, George F. Pappas, David Rudovsky, and Alan N. Salpeter. Alfred W. Cortese, Jr., and Sol Schreiber were observers.

Chief Judge Kimba Wood welcomed the participants to Manhattan and to the courthouse.

Judge Rosenthal expressed the Subcommittee's appreciation for being invited to use the court facilities. And she expressed thanks to all the participants for taking the time to come to appraise the current Rule 56 draft in light of their experiences with summary judgment. She noted that the "miniconference" format has been very helpful in the past in helping to move the Committee beyond the limits of its own members' experience. Richly experienced and thoughtful lawyers are able to appraise the implications a draft proposal may have and to advance the drafting process. This sort of help is an important part of the process in moving toward a proposal that is worthy of the intense scrutiny that follows on publication. This group of participants includes lawyers from a variety of practice backgrounds, including areas that involve frequent use of summary-judgment motions. They include both those who frequently represent plaintiffs and those who frequently represent defendants. This blend of perspectives will be important.

The practice backgrounds of the participants were briefly identified. Many of them observed that they had seen an increase in the frequency of summary-judgment motions; several said that at least one summary-judgment motion had been made in every case they had been involved with in the last ten years. This was often coupled with the remark that the motions usually fail — with at least one observation that this experience generally seems to have involved complex litigation. Judge Baylson built on these remarks to open the initial discussion. The group's experience shows that Rule 56 motions are more common now than at the time the participants entered practice. And they are more likely to be granted; thirty years ago orders granting the motions were seldom encountered.

Pappas observed that Rule 56 "has to be made better and has to work better." He often engages in patent litigation involving high technology products that have a market life cycle of 18 or 20 months. There should be procedures for prompt disposition, including trial while the dispute still has meaning.

Salpeter noted that in the large-scale commercial litigation he encounters, a few Rule 56 motions are won and many are lost.

Ballard said that she has been faced by a summary-judgment motion in every case she has litigated in the last ten years. The cases involve plaintiff job rights — dismissal, pension rights, False Claims Act.

Black suggested that this is another case of the rules process focusing on a practice that "ain't broke."

Scheidlin said that Rule 56 is a big part of a judge's job. "The papers come in boxes." Lawyers should screen the motions more carefully; a Rule 56 motion should not become a matter of reflex.

Joseph agreed that Rule 56 motions are made in every case that is not dismissed, without adequate thought or careful presentation.

Rudovsky emphasized the frequency and importance of Rule 56 motions in civil rights cases.

Morris said that in defending employment cases careful use of Rule 56 is met with some success.

Brunet found that Rule 56 practice is very helpful in inducing settlements.

Goode-Trufant noted that her department has an average of 1,200 cases pending. Summary judgment is important, particularly in defending police conduct cases.

Buckley said that his job in pursuing employment claims is "to get past Rule 56." There are too many motions, and the motions are too voluminous.

Birnbaum observed that she had just won a summary-judgment motion in a multi-class class action. Rule 56 can be used successfully even in complex litigation.

Valukas sounded a common theme by observing that one side or the other had moved for summary judgment in every case he has litigated in the last ten years.

Judge Rosenthal explained that the current study was given added urgency when "the Style Project hit Rule 56." Close scrutiny of the Rule 56 text showed a great distance between "Rule 56 in practice and what Rule 56 says." Enough time has passed since rejection of the 1992 revisions to see whether improvements can be made.

Discussion then turned to the specific details of the current draft, generally proceeding subdivision-by-subdivision.

Draft 56(a): Timing

Judge Baylson noted that the draft of Rule 56(a) has been approved by the Advisory Committee as part of the time-computation project. But it has not yet been recommended to the Standing Committee, and it remains open for full discussion.

Subdivision (a) allows a summary-judgment motion at any time "until the earlier of 30 days after the close of discovery or 60 days before the date set for trial." This would depart from present Rule 56 in two directions. First, there is no waiting period — a plaintiff, for example, could serve a Rule 56 motion with the complaint. Second, there is a cut-off. Both departures, however, are designed as "default" provisions. Subdivision (a) begins: "Unless a different time is set by local rule or by an order in the case." It is anticipated that scheduling orders will set times in most cases, geared to the anticipated needs of each particular case. And room is left for adoption of local rules that might, for example, respond to special needs arising from more comprehensive local rules for particular types of litigation.

The first question was whether "the close of discovery" means the close of all discovery. The intent is to refer to the close of all discovery, recognizing that the needs of specific cases can be met by orders that, for example, stage discovery on specific issues and direct that summary-judgment motions be integrated with the completion of a defined discovery stage. It was suggested that "all" be added to the rule text: "after the close of all discovery."

Turning to paragraph (a)(2), it was suggested that the 21 days allowed to respond is too brief; it should be made 30 days. A second participant agreed that 21 days to respond to a long statement

of uncontested facts “is very tight.” And a third noted that he always has needed more time than 21 days; 30 days seems a minimum.

The cut-off at 60 days before trial was then questioned. It was noted that under Rule 26(a)(2) the presumptive time to disclose expert trial-witness reports is 90 days before the trial date, with an additional 30 days to disclose rebuttal expert witness reports. The result would be that the summary-judgment motion must be made on the same day as the rebuttal reports are filed. Even if the rule adheres to a 21-day response period, adding those 21 days and the 14 days allowed by (a)(3) to reply means that the motion will be submitted 25 days before trial. That is very short. Of course, this concern arises only in the “mythical district” that does not govern these questions by a scheduling order.

A judge asked whether these problems can be addressed by agreement among counsel, working through the provision that allows the timing requirements to be altered by order in the case. The response was that it doesn't work, particularly for the cut-off for the motion itself. It would be better to have a deadline that requires the matter — motion, response, and reply — to be submitted for decision at least 90 days before trial.

In the same vein, another judge observed that for the “mythical” case without a scheduling order, a procedure that contemplates submission for decision 25 days before trial will require that the trial date be pushed back. This judge usually sets the time by order at the close of fact discovery, before expert disclosure and discovery even begin. Another participant suggested the Committee Note should make it clear that the deadline is geared to the close of fact discovery because the motion and ruling may avoid or change the need for expensive expert discovery. But another participant observed that he needs to have expert discovery before summary judgment; in his civil rights practice, expert testimony commonly goes to the merits, not just to damages. Still another participant noted that the period should extend after the close of all discovery, noting that it is a deadline — a motion can always be made earlier.

A practitioner noted that when a motion is served close to trial, the lawyers still have to prepare for trial. A different practitioner noted that it is often difficult to know when discovery has concluded, and that often enough it is clear that discovery is continuing beyond the time set at 60 days before trial.

Turning to an omission from the draft, it was urged that there should be a provision for cross-motions. The calculation can be much like the dilemma involved with the decision whether to appeal. A party may believe that there is a plausible basis for a summary-judgment motion, but also believe that on balance it is better to proceed as promptly as possible toward trial. Proceeding toward trial saves the expense of a summary-judgment motion, which can be high, and advances the powerful effect an impending trial has in encouraging settlement. If another party is going to defeat these objectives by moving for summary judgment, on the other hand, the responding party should be free to respond with a cross-motion even though the time set for an initial motion has run. The provision could look for inspiration to the provisions for crossappeals, which involve similar concerns. The opportunity to invite the court to grant summary judgment for the nonmovant is not an adequate substitute. But another participant objected that a rule provision would encourage crossmotions that otherwise would not — and should not — be made.

A different omission was noted. It would be useful to include a statement that there is no right for a nonmovant to file a “sur-reply” to address the movant's reply to the nonmovant's response.

These complications led to the question whether it is useful to have a default time provision. Why not rely on scheduling orders for all cases? The draft does not reflect a judgment that the default time periods are desirable for all cases, setting a presumptive model for case-specific orders. Instead, it reflects concern that there may not be a scheduling order in every case — Rule 16(b)

makes an exception for categories of cases exempted by local rule. And there are local rules. But the question persists: has anyone identified problems that arise from the lack of any deadlines in present Rule 56?

Discussion returned to the event that should measure the deadline. Support was urged for setting it to run from the close of discovery. An experienced lawyer usually knows pretty early in the case whether there are grounds for a serious summary-judgment motion. The rule should protect against motions delayed until a time that will require that the trial date be deferred. "It's pure hell preparing for trial." The motion should be made well before trial, and can be if there is serious support.

The contrary suggestion was made: instead of alternative deadlines, (a)(1) should set the deadline at a specified time before trial. One possibility would be "no later than 90 days before trial," remembering that the court can order otherwise. But a judge responded that even 90 days is a close thing: "I have a 60-day list to decide motions, and often it's a close thing." That pushes the decision back to 30 days before trial. A different protest was that a national rule cannot be written on the assumption that every case has a "date set for trial." Some cases do not.

This discussion led to a quite different suggestion. Building from the observation that Rule 56 motions often involved "boxes of papers" the judge must wade through, it was suggested that Rule 56 should look for inspiration to practice in SDNY. A motion could be made only after a prescreening conference with the judge. The conference could be initiated by a 2-page letter brief identifying a small number of "big issues" and stating why it is proper to consider them on summary judgment. The result of the conference would be an order identifying the issues that can be addressed by the motion.

Draft 56(b): Affidavits or Declarations

The first questions asked whether it is necessary to supplement the traditional reference to "affidavits" by adding "or declaration." 28 U.S.C. § 1746 is clear — a rule that requires an affidavit is satisfied by submitting a statement made under penalty of perjury. And it is not clear that "declaration" refers to § 1746 — although that is the intent, there is no single word that really does the job. New York practice uses "affirmation" to describe the substitute for a sworn statement, but that may be even more obscure in a federal rule. But if "declaration" is used in subdivision (b), care should be taken to ensure consistent usage throughout the rule.

Discussion turned to the second sentence, which revises Style Rule 56: "~~If a paper or part of a paper is~~ Other evidence referred to in an affidavit or declaration ~~a sworn or certified copy must be attached to or served with the affidavit~~ must be served with it in a form admissible at trial unless the evidence is already on file [with the court]." The changes began with concern that an affidavit may rely on electronically stored information, better referred to as "evidence" than as a paper. Then "form admissible at trial" was substituted for a sworn or certified copy, with the thought that admissible form should suffice without the present need to supply a sworn or certified copy. Disputes as to authenticity could be resolved if they actually arise. But the rule can be read to say that the evidence attached to the affidavit or declaration must be presented in a way that would overcome all trial objections to admissibility. It would be better to refer to "a form that can be made admissible at trial." (This view was seconded later in the discussion. A variation also was suggested: "a form that would be admissible at trial.") It was also observed that the draft seems to assume that anything on file with the court is in a form admissible at trial, which may not be the case. These observations were supplemented by noting that many traditional summary-judgment materials are not in a form admissible at trial. Affidavits are prominent examples. Deposition transcripts may or may not be admissible at trial. An instrument attached to a pleading may not be sworn or certified. For that matter, documents produced in discovery may present problems arising from custody of the documents. So the Celotex decision on remand to the court of appeals led to a ruling

that summary judgment can be opposed by material that simply shows information that can be put in admissible form, or likely can be put in admissible form.

A related twist was the suggestion that this second sentence seems to invoke the Rules of Evidence for all Rule 56 materials. But that issue really is presented by draft subdivision (f). Subdivision (b) addresses only the form of materials referred to in an affidavit and not already on file. It has that in common with present Rule 56(e)(1). Something should be done somewhere to make clear the proposition that summary judgment can be granted only on the basis of information admissible at trial — that is different from denying summary judgment on the basis of information that is not yet in admissible form. Perhaps the tag line for subdivision (b) should be changed to “summary-judgment evidence.”

This observation was complicated by referring to a practice common in some federal courts. A summary judgment motion often is supported by an “affidavit” of counsel that warrants the authenticity of the supporting materials — “this is an accurate excerpt from the deposition of Witness 1,” “this document was produced by the plaintiff in response to a Rule 34 request,” and so on. So drafting subdivision (b) to cover only “evidence” referred to in an “affidavit” does not narrow it. Another practitioner retorted that this practice is peculiar to SDNY; it is not followed in most districts. A judge said that the SDNY practice is useful because it organizes the presentation and ensures that the summary-judgment “exhibits” are in a form admissible at trial. But it was responded that the organizing function is better performed by the statement of uncontested facts required by subdivision (c).

A different question asked whether supporting materials always need be attached to an affidavit. Suppose the affidavit describes the contents of “five pounds of telephone records,” or extensive accounts.

Quite a different question was raised by asking whether a reference to admissibility invites Evidence Rule 403 rulings at the summary-judgment stage. It was suggested that “this happens now, particularly with expert witness affidavits.”

Draft 56(c): Detailed Procedure

Statement of Undisputed Facts. Draft Rule 56(c) provides a far more detailed statement of summary-judgment procedure than present Rule 56 provides, built around a detailed statement of “specific facts that are not genuinely at issue.” The statement must be supported by specific references to materials supporting the facts. This procedure is adapted from a large number of local district rules that, in various terms, impose similar requirements.

The first observation was that the draft makes all of this detail “part of the motion. It is extraordinarily expensive.” And once the detailed “150-page” motion is made, the nonmovant “denies everything.” The denials are as lengthy as the motion. Often the denials do not address the understood merits of the stated facts but instead address quibbles about the precise forms of stating the facts. This captious response behavior is driven in part by fears on consequences outside the immediate litigation. The rule should allow the parties to opt out of the detailed statement by agreement. Most parties think they get nothing out of it.

But, it was protested, this procedure has become very common because it makes things easier for the judge. That in turn makes possible prompter and better-informed rulings. The parties do get something out of it.

A rejoinder suggested that this requirement for a detailed and supported statement of specific facts “is a bad idea. The Committee should lead in the opposite direction,” away from an accumulation of undesirable local rules. Professor Burbank, who was required by his teaching schedule to miss this meeting, has put it well. The proposals have at least five undesirable effects. (1) Practice will be more burdensome and expensive. (2) 90% of what is required is busy work.

Without these requirements, the parties will do a pretty good job of identifying what is at issue. (3) Adding cumbersome requirements makes Rule 56 ever more a tool of delay and oppression of the weak. (4) There will be a further erosion of jury trial. (5) All of this will facilitate the continuing movement away from trial and toward trial by affidavit without cross-examination or any of the other benefits of a "real trial."

The perspective of plaintiff employment-law practice was offered by arguing that the proposal "retreats from Celotex." Under present practice a party can move by stating that there is a piece missing from the nonmovant's case, a piece that cannot be proved. The nonmovant can respond that this piece indeed can be proved. Employment cases commonly turn on intent. Findings of intent depend on how the facts are put together. If a movant has the first right to order the facts, and subdivision (c)(2) requires the nonmovant to respond by accepting the movant's fact framework, the nonmovant is put at a disadvantage. It is a big disadvantage.

A somewhat different criticism was that Rule 56 motions should be brought to a quick focus. "Long statements are a waste. They go in no particular order." It is wrong to introduce motion requirements by directing that the motion be "without argument"; it always is an argument. A separate memorandum of law should not be required. The facts should be organized in the way the case is organized, not as draft (c)(1)(C) suggests. The motion in a fraud action, for example, should be organized in the way the case is organized. The focus should be on the elements of the claim or defense, pointing to supporting materials. The response would enable the judge to see whether anything is missing. Ordinarily "the paragraphs will line up" by the elements of the claim. If clarification is needed, the court can hold a hearing.

The suggestion for organization by the elements of claim or defense was met by a counter-suggestion that focus should be on the "controlling facts" that support judgment as a matter of law. The Committee Note could say that ordinarily there will be only a few facts of this caliber. This procedure could be integrated with Rule 16, providing an opportunity for a hearing when a party wants to assert more than a limited number of facts — the limit might, for example, be set at 20 controlling facts. Some form of organization is needed to avoid the burden of stating every fact and responding by quibbles.

An alternative suggestion was that often a motion is best organized by a "chronology." Whatever the order, "there has to be a story." The movant tells the story. The response, organized around the numbered paragraphs of the motion, is orderly. It should be "like a complaint and answer."

A theme familiar to many procedure discussions emerged with the thought that something like the draft (c)(1) procedures can be useful in simple cases with no more than a few disputed facts. But in complicated cases it is "busy work." The story is told in the brief, not in the motion. The motion does not help the judge.

This view was supported, speaking from practice in civil rights cases, by urging that the motion should be focused on "material" facts. Local rules similar to draft (c)(1) help to focus the parties and court.

A judge reported similar experiences. The statement should be limited to "material" facts. Then it can be very helpful in small cases. But in big cases the statement generates collateral disputes. "The movant's stated fact 135 is really two propositions; I cannot respond until you make them state them separately." The statement can be an exercise in futility in such cases.

Another lawyer suggested that the detailed statement by the defendant helps him, representing a plaintiff, to get organized for trial. "I want to tell my story in my own statement of facts." But a pro se litigant cannot make that happen. Indeed there are unsophisticated lawyers who cannot. There should be an escape clause.

Still another practitioner said that "Rule 56 is an organization of facts. We need to allow the responding party to marshal the facts to tell its story. 'Without argument' means nothing. It's all argument."

The burden argument was embroidered by noting that the debates about summary judgment will be stimulated by the pending publication of two articles. One argues that summary judgment is unconstitutional. The second, agreeing with that argument, adds that it also is inefficient and unfair. Academic criticism of any draft that is seen as facilitating summary judgment will be intense. And the academic protests will spur protests by broader segments of the bar.

Further criticism was that more than 90% of summary-judgment motions are denied because they should not have been made. The motions are too long, and so are the responses. The court cannot wade through the morass. But there is a helpful practice in pretrial hearings to construe patent claims that may be useful more generally. After discovery every word in the claim that requires interpretation is listed separately in a chart. Each party addresses separately its position and supporting evidence as to each word. Judges find this very useful. The same thing could be done for each disputed fact under Rule 56. But it was asked whether "spreadsheet presentation" will work generally in all cases.

Drawing back, participants were reminded that draft (c)(1) is based on a great number of local rules. Many courts have found something like this useful. The practice avoids the risk that motion and response will be ships passing in the night. But it may not be needed for small cases, and it may present difficulties in the large cases. The difficulties may be augmented when practice wings out of control on excesses of adversary zeal. And it does seem important to allow the nonmovant to find a way to tell its own story without being bound to the movant's chosen frame.

Returning to the fray, a practitioner observed that there are a lot of false denials, based on the asserted ambiguity of the words used in stating an "uncontested" fact. It might help to call for a statement of what facts a movant thinks are established beyond dispute, and a response that identifies facts that are in dispute.

After an interval devoted to other questions, the problems of statement and counter-statement were resumed. The response provision in (c)(2)(A)(ii) might be modified to call, not for "additional facts" precluding summary judgment, but for "any additional facts or inferences from facts." Both in (c)(1)(C) and in (c)(2)(A)(ii), it might be better to omit the lengthy — and probably incomplete — itemization of various types of supporting materials such as depositions, documents, and the like. Instead the required reference could be to "particular evidence supporting" the facts or response. Or the bracketed itemization could be deleted, referring only to the supporting "materials."

Others were worried about "materials," and suggested "evidence." But it should not be "evidence admissible at trial." A judge observed that it has become common to make evidence motions on summary judgment, arguing the admissibility at trial of evidence relied upon to support or oppose summary judgment. This theme was carried further by observing that the problem of admissibility appears throughout the draft. One complication is that a lawyer may deliberately refrain from objecting at trial — evidence ruled out of consideration on a Rule 56 motion might well come in at trial even though it would have been excluded on objection. But at least Rule 403 rulings are not being sought on summary judgment.

The "evidence" question was attacked from a different angle. "Evidence" is not "fact." There is a risk that references to "evidence" and to "fact" in Rule 56 will cause confusion. What will decide the motion is the determination whether facts are genuinely disputed, not what evidence is.

A different perspective was taken in observing that it is difficult to frame a statement of undisputed facts that observes the line between "fact" and "inference." A response denying a statement that "intent" is not disputed, for example, may be treated as an "argumentative" response.

These questions may be addressed in the argument called for in draft subdivision (c)(6), but they are hard to address in the statement and response form.

The inference problem was illustrated by another example. A common civil rights claim is that prison officials have shown deliberate indifference to a prisoner's medical needs. The facts susceptible of direct testimony may be clear, but the inference is not. The prisoner should be able to respond to an official's statement that the lack of deliberate indifference is undisputed by saying that the official is simply missing the issue.

One suggestion was that the nonmovant can respond by identifying the facts that should be considered in determining the range of reasonable inferences and by describing the permissible inferences favoring the nonmovant. This suggestion was followed up by suggesting that the inference arguments can be addressed in the argument memorandum described by draft (c)(6), and need not be addressed also in the motion. But it was responded that "the mind doesn't work that way. You want the judge to see the inference issue when she reads" the statement of facts. This perspective suggests that Rule 56 should recognize the nonmovant's right to provide an independent statement of facts, not simply a response that initially tracks the movant's statement item-by-item.

Another practitioner thought that this is what generally happens. The first step is the motion identifying facts and record support for them. Then briefs are filed — often the briefs gloss over the evidentiary support. "This works when properly done." It helps to approach the question by asking what are the elements of the claim.

Discussion of inferences led to the observation that the draft uses "issue" in two different senses. It carries forward the current rule's reference — adopted in Style Rule 56 — to any "genuine issue" of material fact. But it also refers to summary judgment on any "issue." "Issue" in this second use seems better than "fact" — we may not want to provide for a motion describing the "claims, defenses, or issues facts" on which summary judgment is sought. "Matters" might be substituted for either "issues" or "facts," but it may be too open-ended. Although the present rule language has been treated as nearly sacred in the Style Project, perhaps the time has come to adopt a more natural contemporary expression. The standard could be expressed as a genuine dispute as to any material fact.

Federal Judicial Center Study. Various assertions having been made about the frequency of orders granting summary judgment, Joe Cecil was asked to report on progress in the Federal Judicial Center study. The study examines cases terminated in 2006. Summary-judgment motions were made in 16 of every 100 cases terminated in the federal courts. That frequency is not as low as might appear, remembering that significant numbers of cases are resolved by default, dismissal on the pleadings, or settlement before it seems plausible to seek summary judgment. There is significant variation in the frequency of motions across different case types. Motions are more frequent in civil rights cases, less frequent in tort cases. Some of the increase in frequency across the entire body of filings is attributable to changes in the composition of the case load toward types of cases that experience more frequent motions.

Across all case types, 60% of the Rule 56 motions are granted in whole or in part. Again, the rate varies across case types.

Ongoing work in the study will examine how long it takes the judge to decide Rule 56 motions. It may be possible to compare disposition time to the time to dispose of Rule 12 motions. It would be nice to be able to compare disposition times in districts that have local rules requiring undisputed-fact statements of the sort required by draft subdivision (c) with times in districts that do not have such local rules, but the comparison might be made unreliable by individual judge practices in districts that do not have local rules.

Three-stage presentation. Discussion cycled around a different question. The draft, drawing from the 1992 proposals, directs that the motion and response be made "without argument." The "argument" is to be made in a separate memorandum. The first suggestion was that there should be three steps: A motion that states in simple terms the undisputable facts that control judgment, matched by a response in equally simple terms; a separate statement that marshals the record materials that support or refute the asserted facts; and an argument.

This discussion was directed next to draft (c)(6), which directs that "a party must submit its contentions as to the controlling law or the facts in a separate memorandum * * *." Why direct that there "must" be a separate memorandum? The result may be wasteful duplication of matters already presented in the motion. The Rule 56 procedure should be streamlined, not made more cumbersome. The memorandum is likely to resemble the statement of uncontested facts before turning to arguments. Some judges prefer to get it all in one document. It would be better to reduce this to a direction to "submit its contentions as to the controlling law or the facts in a separate memorandum."

The next statement was that the brief is the most important document. It provides the opportunity for a party to tell its story. The brief can cite to the statement of facts without lengthy repetition. It can, for example, say "the defendant stabbed the plaintiff three times, see Statement at x - y."

A judge noted that there is strong support for a right to file a brief that recites the facts and argues how the law applies. If the brief is to be a full explanation of the law and facts, is there a need for the discipline provided by a separate statement of facts?

A practitioner urged that the statement of undisputed facts "is organized." It lays out the record. It anchors the advocacy in the brief. A judge added that it reduces the risk that "the ships will pass in the night."

Another judge recognized that draft (c)(1) may need revision, but observed that in most cases the facts are fairly straightforward. The sequence of statement and brief helps the judge process the case. Many local rules require a statement of undisputed facts, but the terms vary, imposing a burden on the bar. It would be better to have a uniform national practice.

Another judge responded that "you're not going to corral all 94 districts. This rule will metastasize through the local rules." Is it possible to draft a rule that prohibits elaboration or departure by local rules?

A practitioner asked whether the concern about lengthy statements of uncontested facts that are not material to the case could be met by requiring that the facts be organized according to the elements of claim or defense? That would leave the free-form memorandum-brief for the task of addressing fact, inference, and law as an advocacy piece. Another practitioner suggested that greater supervision is needed. It is "controlling facts" that support judgment as a matter of law. The Committee Note could say that ordinarily there will be only a few facts of this caliber. This procedure could be integrated with Rule 16, providing an opportunity for a hearing when a party wants to assert more than a limited number of facts — the limit might, for example, be set at 20 controlling facts. Some form of organization is needed to avoid the burden of stating every fact and responding by quibbles. (The desire for judicial supervision was addressed directly by urging that a Rule 56 motion should be available only with the court's leave, a proposal noted separately below.) Organization is needed to avoid the burden of stating "every fact, and responding by quibbles."

A judge stated that "you lose the judge real quick if you list a lot of not material facts." The sanction is to deny the motion or, if the failure is in the response, to deem the facts admitted.

A practitioner asked what sanction will be imposed on a party who does not comply with the appropriate procedure? Draft (c)(7) addresses this only in part, stating that the court may grant summary judgment against a party who does not respond or whose response does not comply with

(c)(2) requirements only if the motion and supporting materials show there is no genuine issue — that the movant has carried the summary-judgment burden. The draft does not address a motion that fails to comply, assuming that the court may simply refuse to consider the motion. Later discussion renewed the suggestion that the court can deny a motion that is not supported by a proper statement of undisputed facts.

Pre-motion hearing. Earlier discussion tied the undisputable fact statement to an argument for a pre-motion hearing. If we allow a motion only on leave of court granted after a hearing, with an order that identifies the facts to be addressed by the motion, a requirement that the facts be stated separately and supported by specific references to the record is fine. And it will work to require the nonmovant to respond in that order. But simply limiting the required statement to “material” facts will not resolve the problem. This argument was renewed by a suggestion that the “urge” to require statement and counterstatement of undisputed and disputed facts might be channeled through a pre-motion conference with the court. The problem is that present practice generates too many fact statements that run far too long, supported by boxes of materials. Few motions should be so cumbersome. Most cases will turn on a small number of essential facts. A conference with the judge can focus the motion and response on the truly important facts.

Rule 56 burdens. Quite a different question was raised about the need to frame a rule that addresses the nature of the movant's burden when the nonmovant has the trial burden of production. The draft, in (c)(2)(B)(i), allows a nonmovant to respond with the simple statement that the movant has not carried the Rule 56 burden of showing that there is no genuine issue as to the assertedly undisputed facts. It should be balanced by stating in (c)(1), or somewhere, that a movant who does not have the trial burden does not have to cite to materials that fail to show what the nonmovant has to show. A defendant in an antitrust action, for example, may believe that the plaintiff has no evidence of the claimed conspiracy. The rule should be clear that the defendant need only state that the plaintiff has no evidence.

This question directed the discussion toward the draft provision (c)(2)(B)(i). The 1992 draft attempted to restate the 1986 Supreme Court decisions in rule text, identifying moving burdens that correspond to allocation of the trial burden of proof and a standard that varies with the standard of proof required at trial. There is at least some ground to suspect that the Judicial Conference rejected the 1992 proposal because of dissatisfaction with this effort. This concern has engendered a wariness about further attempts to address the Rule 56 moving burden in rule text. The (c)(2)(B)(i) item was added to offset the seeming command of (c)(2)(A)(ii) that the nonmovant must respond by an item-by-item listing of record sources that refute the movant's statement of undisputed facts. It is clear that when the movant has the trial burden a nonmovant can respond with a simple assertion that the movant's showings have not carried the summary-judgment burden of showing support in record materials that would require judgment as a matter of law if introduced at trial. An alternative provision that speaks directly to the moving burden is included at the end of the draft rule materials. This alternative would distinguish between a movant who has the trial burden and one who does not.

The practitioner who raised the question responded that it is not desirable to refer to only part of the Celotex allocation of the moving burden. As soon as the rule addresses the need to support the motion — as by separately reciting facts and pointing to materials that support or refute them — it becomes necessary to address the complete allocation. “The paradigmatic Rule 56 setting is when the party who has the trial burden has no evidence. You need it both places.” (c)(1)(C) should balance (c)(2)(B)(i) — it should state that a movant who does not have the trial burden can carry the summary-judgment burden by “pointing out” that the nonmovant lacks evidence. The Celotex opinion immediately describes the statement that the movant must “show” the absence of evidence as “pointing out” the absence of evidence. A party can “point out” the lack of evidence by stating simply that the nonmovant has none, without having to point to anything specific that negates the nonmovant's position.

This question was expressed in terms of the Celotex setting: How does Celotex “show” that the plaintiff’s late husband never was exposed to any Celotex product, at any time or any place? Celotex makes it clear that the movant does not have to make an affirmative showing that negates an element that must be proved by the nonmovant at trial. The movant does not have to “prove” that the light was green; it suffices to show that the nonmovant has no evidence that the light was red. It is difficult to reconcile this proposition with a rule that directs the movant to cite to particular parts of record materials.

This discussion led to a further exchange about the question whether there is any reason to distinguish between trial burdens and the summary-judgment burden. Summary-judgment practice could be made an image of trial practice by allowing a movant who does not have the trial burden to demand summary judgment without any showing at all. At trial a party who does not have the burden wins judgment as a matter of law unless the party who does have the burden produces sufficient evidence to carry the burden. So it could be done before trial. But the Celotex requirement that the movant “show” the lack of evidence has not meant that. In effect the Court qualified its statement that summary judgment is not “disfavored” by imposing a burden that distinguishes summary judgment from trial. Any attempt to further relax the movant’s responsibility raises fundamental questions about the wisdom of relying on predictions of what a trial record will be without having a trial.

The first piece of advice was that the rule should not be complicated by express references to burdens and shifting burdens.

The next observation was that what movants and courts fear is the late-filed affidavit. So in the Celotex case, Celotex twice asked the plaintiff by interrogatory to identify the circumstances of her husband’s exposure to any Celotex product. Twice she failed to respond. It was only after Celotex moved for summary judgment that she provided affidavits and other materials that may have shown a prospect that — if reduced to admissible form — she could carry the trial burden of production. But that “fear” may address only a desire to put orderly procedure ahead of a well-informed decision whether there is a prospect of success at trial.

Another practitioner suggested that it may not be necessary to refer to the trial burden. It suffices to allow a response that the movant has failed to show there is no genuine issue. That approach could be built into (c)(2)(A)(ii), leaving it to the nonmovant to decide whether it will suffice to rely on this general assertion or whether it is better to point to record materials that are not described by the movant and that show there is a genuine issue. But it was asked whether it is possible to direct a movant to show a basis in the record for asserting that the nonmovant lacks evidence — doesn’t this resolve to “make them prove their case”? There is a “nasty drafting problem” here. “Pointing out” sounds good, but what does the movant point to?

A practitioner responded that this is not a problem. The movant relies on deposition testimony, admissions, or the like, to show there is no evidence to support a necessary element of a claim or defense. Another practitioner elaborated. The movant will depose the witnesses identified in the initial disclosures — those, for example, identified as having information about the plaintiff’s exposure to the defendant’s asbestos products. Then the defendant moves for summary judgment, showing that none of the deponents has testified to exposure. Another practitioner agreed that this is not a problem. Draft (c)(2)(B)(i) can be discarded.

A judge asked whether explicit Rule 56 text is important as a guide to lawyers who do not have the sophisticated grasp of practice common to participants in this conference? A first response was that it is “a whole lot more efficient” to allow the simple response that the movant has not carried the burden of showing there is no genuine issue. This response should be specifically identified in rule text. Another response was that “this is the distinction between motion and brief” — the brief can point out that the movant has not carried the moving burden.

Yet another response was that the alternative draft provision addressing burdens is accurate and clear, but might be improved in the part that addresses a movant who does not have the trial burden, who can “show point out that the nonmovant does not have sufficient evidence to carry its burden at trial.” Another practitioner objected that the reference to “sufficient evidence” seems to invite weighing. It would be better to say “does not have evidence to avoid judgment as a matter of law at trial.” This view was supported by yet another practitioner.

Doubts whether Rule 56 should refer to trial burdens were renewed. Will any expression of this complication in the Rule 56 moving burden generate confusion? Will it generate complaints that Rule 56 is being amended to skew the burdens to the disadvantage of some litigants? A practitioner expressed the view that any rule addressing these problems will generate confusion. But another practitioner expressed approval of the (d)(2)(B) alternative draft, thinking it better than the less comprehensive effort in draft (c)(2)(B)(i). Yet a different practitioner returned to the suggestion that the (c)(2)(B)(i) provision should be balanced by adding a parallel statement in (c)(1)(C) that a movant who does not have the trial burden can point out that the nonmovant lacks evidence to carry the trial burden. Still another suggested that these wrinkles would be better addressed in the Committee Note than in rule text.

(c)(3) was discussed briefly. The draft provides that a movant can reply to a response by using the response procedure. It was observed that if the response is an affirmative defense, the movant should be allowed to respond to the affirmative defense in all the ways that a nonmovant is allowed to respond to the initial motion. This discussion was tied to discussion of draft subdivision (c)(5). This provision gives the court discretion to permit a party to supplement the materials supporting a motion, response, or reply. The response to a motion, for example, may point to the need to adduce materials that were omitted from the initial identification of support, or to find and supply new materials. Or the movant may want to add materials to support a reply to the response, particularly if the response raises new issues not included in the motion. A practitioner approved the implicit requirement that a party must obtain the court's leave to supplement the summary-judgment record. This requirement may assuage another concern — that this provision may seem to invite motions to reconsider after summary judgment is granted or denied.

Admissible evidence. There was an early observation that draft (c)(7) anticipates the summary-judgment standard articulated in draft (f) but does not incorporate the bracketed reference in (f) to “[evidence available for use at trial * * *].” The suggestion was that (c)(7) should not refer to admissible evidence.

(c)(7) Draft subdivision (c)(7) provides that even when a nonmovant fails to respond, or responds in a form that does not comply with subdivision (c)(2), the court can grant summary judgment only if the motion and supporting materials show there is no genuine issue of material fact. It also says that the court may — but need not — consider materials outside those called to its attention by motion, response, and reply. An academic participant observed that there are cases that say these things. A practitioner added that the cases are right. But another practitioner thought that if there is no response the court should be authorized to find that a fact asserted by the movant is not contested. A judge pointed out that some local district rules state that failure to respond puts a nonmovant at risk of a “deemed admission.” There was no further development of these positions.

Draft 56(d): Court Action

Draft subdivision (d) sets out three propositions established by decisions under present Rule 56. The court may (1) grant summary judgment for a nonmoving party; (2) grant or deny a motion on grounds not raised by motion or response; or (3) raise the possibility of summary judgment on its own.

Discussion began by agreeing that notice should be given before the court grants or denies a motion on grounds not raised by the parties; the brackets around this provision in the draft should be removed.

That notice provision provoked the suggestion that notice also should be required before the court grants summary judgment for a nonmoving party. It might be better, for that matter, to adopt an explicit cross-motion provision. The nonmovant needs notice it is at risk so it can respond. Another practitioner agreed that notice should be required, comparing the provision that allows the court to deny an unopposed motion.

The question whether Rule 56 should duplicate the Rule 12(b) and 12(c) provisions that require a reasonable opportunity to respond when a pleading motion is converted to a summary-judgment motion was raised and put aside as not necessary.

Further discussion suggested that all of the obvious alternatives should be listed in subdivision (d), particularly if it continues to be tag-lined as "Court action": (1) grant summary judgment in whole or in part; (2) deny summary judgment in whole or in part; (3) grant summary judgment for a nonmovant; * * *.

Draft 56(e): Cannot Present Opposing Facts

Draft 56(e), which parallels present Rule 56(f), includes a provision directing that a party who seeks more time to oppose summary judgment describe the facts it intends to support. This provision is drawn from an "offer of proof" provision in the 1992 proposal. The first practitioner reaction was that something like this is a good idea — the nonmovant should be forced to do more than simply ask for time. Another practitioner, however, asked how specific must be the showing of the facts you do not yet know? A third asked whether it would suffice to say that you want to depose an affiant to find out more about what the full testimony would be?

Another practitioner suggested there may be some disagreement in the cases about the court's authority to grant summary judgment after denying a Rule 56(f) motion for more time.

A different question was asked: should we assume that a motion for more time is sensible only after discovery has closed? A judge responded that the court can reopen discovery, and that in any event the case-management order may anticipate such issues. Another judge further observed that the draft provision that allows a Rule 56 motion at any time will increase the frequency of motions to defer consideration pending further discovery. It is difficult to be more specific in the rule.

A different question asked whether a party requesting more time should be required only to offer "specified reasons," as in the draft, or whether good cause should be required. An academic noted that the case law is not clear. Some courts say that argument in a brief is the substantial equivalent of an affidavit, but it would be better to adhere to the draft, which requires an affidavit or declaration of reasons. A judge responded that "a lawyer's affidavit is an argument."

Finally, a question was raised as to the relationship between the effect of a motion to defer consideration of a Rule 56 motion and the time to respond to the motion. It was said that the First Circuit has ruled that the time to respond can continue to run, and expire, while the court is considering the motion to defer. All participants agreed this was a bad idea. There was no discussion of the question whether a motion to defer consideration should toll the time to respond. Tolling might create an artificial incentive to move for deferral. Perhaps this problem should be left to the initiative of the party seeking to defer consideration — if there is a problem with the time to respond to the motion, the party should address the problem in its motion to defer.

Draft 56(f): Final Grant

Draft subdivision (f) raises several issues. One is whether, and in what detail, a court should be required to explain an order granting summary judgment. Another is whether the rule should add words similar to the draft, authorizing summary judgment if “evidence available for use at trial shows” the absence of a genuine issue.

Trial Evidence: A practitioner observed that “available” for trial presents awkward practical problems. No one can be sure whether a witness will be available at the time of trial, whether by subpoena or otherwise. What we want to describe is evidence that would be admissible at trial. Another practitioner agreed that “available” is too demanding. Perhaps the rule should simply cross-refer to the subdivision (c) requirements for motion, statement of uncontested facts with supporting references, and so on.

Another practitioner protested that requiring evidence admissible at trial is too limiting. A nonmovant should be able to oppose the motion by other forms of showing.

A judge asked whether it would be better to refer to evidence that “may be admissible at trial”? A different judge thought this formulation presents distinctions that may be too subtle for easy administration.

Another practitioner asked whether the reference to available evidence responds to a problem found in practice. The history of this provision traces back to 1992. The Committee then was concerned that present Rule 52(e) requires that supporting and opposing affidavits set forth such facts as would be admissible in evidence, but does not impose a similar admissibility requirement on discovery materials used to support or oppose a motion. Inclusion of this provision in the current draft does not reflect any judgment whether it is needed.

Other practitioners supported “may be admissible.” The declarant in an affidavit, for example, may be available at trial.

It was observed that some of the difficulty may lie in the word “evidence.” But it may be difficult to substitute some more neutral word, such as “information.” An affidavit plainly can be used to support or oppose summary judgment, but ordinarily is not admissible as evidence at trial. The affidavit may suffice even though it points to information that is not itself in admissible form — the affiant, for example, may swear to hearing another person say something. The prospect that this hearsay information might be available in a form admissible at trial may justify denial of summary judgment, at least until there is no reasonable prospect that it can be produced in admissible form. But at some point, why deny summary judgment when the nonmovant cannot show any reasonable prospect that a trial will yield sufficient evidence to avoid judgment as a matter of law?

A different practitioner asked about evidence that may be impeached at trial? The witness who recants at trial? The draft forces the nonmoving party to engage in cross-examination before trial. A judge asked what happens if a party has a “dynamite impeaching document” it wants to use to blow a witness out of the water: must it be revealed on summary judgment? Another judge said it must be, if that is the only way to defeat summary judgment. A practitioner observed that this is a problem only if the document is protected by work-product doctrine; if it is not protected, it is discoverable in any event (even though protected against disclosure, if solely for impeachment, by 26(a)(1) and (3)). Still another judge agreed that if the movant has carried the Rule 56 burden, the nonmovant has to show the impeaching materials to defeat summary judgment. A practitioner agreed; it is not enough simply to say “I will destroy this witness at trial.”

Another practitioner observed that he tries some cases without taking depositions. He wants to cross-examine a witness known to be weak at trial.

An academic observed that the discussion of impeachment raises the question of credibility in an unusual setting. Ordinarily credibility is resolved at trial, and at trial is resolved by the trier of fact. But the Supreme Court has provided deliberately considered dictum stating that there is a category of witnesses that must be believed. A jury or judge may be required to believe a witness who is disinterested, uncontradicted (whether by direct or circumstantial contradiction), and unimpeached. In theory, it is only this kind of witness that raises the concern about impeachment at the summary-judgment stage. When such a witness appears, summary judgment is not defeated by a mere hope that other witnesses or cross-examination at trial will lead to contradiction. Nor will an unsupported hope to impeach defeat summary judgment.

This discussion led a practitioner to recall the fear that practice is evolving away from live trial and toward trial by affidavits. We risk diluting the role of cross-examination if we provide that summary judgment can be defeated only by showing the cross-examination questions, or even conducting the cross-examination, before trial.

Explanation: The second question posed by draft subdivision (f) is how much explanation should be required when the court grants a “final” summary judgment. The draft includes a bracketed provision that the judgment “[should state material facts that are genuinely at issue and that require judgment as a matter of law {and should separately state conclusions of law <on those facts>}].”

The first comment was that this draft looks like a findings requirement. It would be a lot of work, and would provide ammunition for appeal. Present Rule 52(a) expressly says that findings of fact are not required.

The next comment anticipated draft subdivision (g), noting that in some settings appellate courts are calling for findings to support a denial of summary judgment.

A third comment asked whether it would suffice to read the explanation into the record; a judge responded that a separate writing would not be required.

Another practitioner urged that Rule 56 should require “something like this.” The court should give “reasons” for granting summary judgment. And why limit the direction to “final” summary judgment? It was observed that the Committee Note defines a “final” summary judgment as one that concludes the action or one that is entered as a partial final judgment under Civil Rule 54(b). As compared to findings on an interlocutory partial summary judgment, or on denying summary judgment, there is a higher obligation to explain an appealable order that is not vulnerable to revision as the case proceeds.

Yet another practitioner observed that an articulated opinion that provides a basis for appeal is necessary to make the system work. It facilitates the appeal. In like vein, support was expressed for the Third Circuit requirement of “an explanation sufficient to permit the parties and this court to understand the legal premise for the court’s order.”

Two other practitioners suggested some form of the 1992 draft: “recite the law and facts on which the decision is based.”

Further discussion suggested that any provision for an explanation should be expressed as “may,” not “should.” This suggestion was not developed further.

Draft 56(g): Partial Summary Judgment

Subdivision (g) expressly recognizes “partial summary judgment” practice. It ties to the proposition recognized in earlier subdivisions — summary judgment may be appropriate on all or part of a claim or defense. The earlier subdivisions would benefit from further revision to make this still clearer.

It was noted that present Rule 56(d) says that the court "shall if practicable" determine what material facts exist without substantial controversy. This direction is softened in Style Rule 56 to "should." The current draft softens it still further to "may."

A practitioner thought it an improvement to revise the present rule to remind the court of this "useful option." A second practitioner agreed, recommending that the rule choose "may" rather than "should" to express the discretion to resolve facts. Discretion, sensitive to case needs, is important. He recommended another edit: "an order stating identifying any material fact * * *"; "stating" seems to set the matter too firmly in concrete, when there may be occasions to reconsider as the case develops.

In response to a question, it was agreed that the draft provision that the partial summary judgment fact is "established in the action" means that it is not to be a subject for dispute at trial.

A judge said that the common practice is to grant "partial" summary judgment as to causes of action, not individual issues within a cause of action. It was noted that present Rule 56(a) refers to summary judgment on all or any part of a claim. One practitioner thought the rule text should refer to claims or defenses.

Draft 56(h): Sanctions

The draft sanctions provision in subdivision (h) carries forward present Rule 56(g), but makes sanctions discretionary rather than mandatory. Brief discussion focused on the adequacy of Rule 11 and other sanctions. The Rule 56 sanctions can be more severe; there is no "safe-harbor" provision akin to Rule 11; and misuse of affidavits may present special problems that require special sanctions. Opinion divided evenly on the question whether Rule 56 should continue to include separate sanctions.

Draft Rule 12(e)

The draft materials include several versions of an amended Rule 12(e). The focus on Rule 12(e) has grown out of the overall consideration of notice pleading, discovery, and summary judgment. The Advisory Committee has concluded that it is not yet appropriate to propose general modifications of notice pleading. But the question remains whether pleading can be used more effectively to advance disposition of actions that now are pursued too far into discovery and other pretrial work. Present Rule 12(e) provides for a more definite statement only when a pleading is so unintelligible that a response is not possible. The drafts present the question whether pretrial management can be enhanced by providing a case-specific tool that requires more specific pleading.

A judge opened the discussion by asking whether anyone present had seen a Rule 12(e) motion granted. Another judge responded that the Swierkiewicz decision invites the motions; "we get them." Another judge stated that in some cases, after some discovery, he requires the plaintiff to file a statement of fact contentions — this device is not limited to the initial pleading stage.

A practitioner noted that she had won a few orders granting more definite statements, and that the orders were not limited to immunity cases. A judge commented that it is surprising that there are not more Rule 12(e) motions in immunity cases.

It was noted that preliminary work by the Federal Judicial Center indicates that Rule 12(e) motions "are seldom decided." It is too early to tell, but it seems likely that the pleader responds to the motion by an amended pleading.

A practitioner seconded the observation of an academic who was unable to attend the conference: Rule 12(e) revisions will be politically charged. They are likely to be seen as yet another effort to rein in plaintiffs and to advantage defendants. The Advisory Committee should not take up this question. Another practitioner thought that some version of the draft models would be a useful advance.

Summary Discussion

Judge Baylson invited concluding remarks, stating that the discussion had been extremely helpful. Many useful points were made. The conference will advance the Subcommittee's progress toward proposals for the Advisory Committee meeting in April.

Greenbaum offered five suggestions. (1) If a plaintiff can move for summary judgment with the complaint, the defendant should be allowed at least 21 days after the responsive pleading is due to respond to the motion for summary judgment. (2) It may be desirable to allow counsel to agree on the times for motion, response, and reply, but the rule should require court approval. (3) The rule should address cross-motions, and provide 30 days to respond to a cross-motion. (4) Most importantly, the (c)(1) statement of undisputed facts could be limited to "core or material facts essential to the claim." The Committee Note could observe that in many cases only a few facts will be core or material. (5) The national rule should provide that a supporting brief is filed with all the other materials, and be designed to preempt local rules. Later he added a sixth suggestion: there should be more oral arguments on summary-judgment motions. Judges widely discredit the value of oral argument, inappropriately.

Salpeter said that (1) a separate statement of facts is a good discipline. It is used for a separate brief. "This is not chaos at all. It works. It is a lot of paper. (2) Partial summary judgment is a reality. It should be expressed clearly in the rule. (3) The problem of fact inferences should be addressed in rule text. (4) The court should articulate reasons for granting or denying a motion, "certainly the grant." (5) Cross-motions should be "handled in the rule." It could be a mirror of the rule for first filing.

Drubel argued that together, *Celotex* and *Anderson v. Liberty Lobby* show that Rule 56 practice mirrors trial practice on a motion for judgment as a matter of law. A party who does not have the trial burdens on an issue can, at trial, insist that it is entitled to judgment as a matter of law unless the party who does have the trial burden carries the burden. The same should be true on summary judgment: a party who does not have the trial burden should have no more burden on summary judgment than to make a request that it be awarded judgment unless its adversary shows enough evidence to carry the trial burden. This statement prompted an exchange of views. It was suggested that because Rule 56 motions occur before trial, the Rule 56 burden should require the movant to show that the nonmovant does not have a right to jury trial. It was responded that the question can be seen by asking what is it that triggers the obligation to come forward with evidence: trial? Or, usefully, a pretrial motion by the party who does not have the trial burden? A different protest was that *Celotex* incorporates the *Anderson* decision for the purpose of invoking the standard of proof required at trial — if the trial burden requires clear and convincing evidence, that standard must be recognized in measuring the sufficiency of the evidence. *Celotex* still puts the burden on the moving party to show that the nonmovant cannot carry the trial burden. This protest was met head-on: why should we not do before trial as we would do at trial, after adequate opportunity for discovery — it is easier for the party who has the trial burden to show how it will carry the burden than it is for the opposing party to "show" or "point out" that the burden cannot be carried. Another participant agreed that a movant who does not have the trial burden should not be required to "list evidence"; the rule should say so, or else the rule should not say that a party who does not have the trial burden can respond to the motion by stating simply that the movant has not shown that it can carry the trial burden to the point of winning judgment as a matter of law. The rule can say that the movant can point to the absence of facts to support the nonmovant's trial burden. Another participant suggested that the draft helps by identifying the alternatives available for response by the nonmovant.

Further discussion in this vein observed that after discovery, the defendant may know that the plaintiff does not have sufficient evidence. The rule should say that it is enough to point that out. Another practitioner added that the rule should include the alternative draft that spells out the *Celotex* definition of the Rule 56 moving burdens.

Ballard said that “we should not forget that inferences are evidence.” Impeachment — credibility — is evidence. Attacks on testimony are evidence. These things should not be relegated to the briefs. Inference is fact, not argument. “Intent” in an employment case is a fact. We should not rely on a defendant’s statements about intent at a deposition; there may be serious credibility problems that are not reflected in the deposition transcript. Apart from that, the judge should not have to write an opinion in denying summary judgment. But it would be OK to recognize discretion to tell the parties what issues the judge considers open for trial.

Black urged that Rule 56 should preserve the values of trial by jury. The Committee should consider the prospect that requiring a premotion conference will reduce the burdens arising from the identification of “uncontested” facts and designation of record sources. Or the rule might limit the number of facts a party can claim are undisputed. A judge suggested that Rule 16 gives the general authority to direct a pretrial conference before a Rule 56 motion can be made — is it necessary to duplicate this in Rule 56, or to cross-refer to Rule 16? Black responded that it might be better to go further, to eliminate the statement of undisputed facts. The rule could provide that the motion identifies the undisputed facts that entitle the movant to judgment as a matter of law. The first step is notice to the court, with a brief statement of reasons. The next step is the conference with the court to determine how the motion will be presented.

Scheidlin offered these suggestions: (1) the alternative deadline for a Rule 56 motion set by draft subdivision (a) at 60 days before the date set for trial should be deleted. If it is retained, it should be set at a period longer than 60 days. (2) The rule should address the nature of the Rule 56 burden for a party who does not have the trial burden. It remains a puzzle to understand how a movant can point out what isn’t there. This party should be allowed to make a one-page motion, without identifying evidence. The nonmovant’s response will point to the materials that support its case. The movant’s reply will do the heavy work of showing — if it can be done — the inadequacy of the support asserted in the response. (3) The idea that the parties be required to meet before a Rule 56 motion can be made is attractive. A premotion conference is a possible alternative. “I do this in cases that are not pro se.” The conference limits the motion, and can be used to set the time for motions — often the time is set after the close of fact discovery. (4) Credibility is a hard issue to deal with when the nonmovant says “I can show the witness is not credible.”

Joseph suggested that there is no value in requiring the parties to meet and confer before a Rule 56 motion. A premotion conference can be helpful, but there is no need to provide for it in the Rule. This device should be left for use by judges who can make it work.

Morris (1) agreed that a premotion conference adds expense, and expressed concern that some judges “will never allow the motion to be filed. (2) Rule 56 should address partial summary judgment. (3) A time cut-off 60 days before trial makes no sense. (4) A party who resists a summary-judgment motion by attacking credibility should be required to show a basis for the attack — allowing a motion to be defeated by a bare statement that credibility is an issue would disfavor Rule 56, contrary to the Celotex admonition that summary judgment is not disfavored.

Brunet observed that Charles Clark preferred “simple, brief, succinct rules.” Draft subdivision (c) on motion, response, reply, and court responsibilities and powers, is not succinct. The final paragraph of the Celotex opinion celebrates summary judgment. Summary judgment is a tool that weeds out sham cases. We need it. Pleadings do not do the job. The discussion today has not seemed a celebration of summary judgment. On a different front, the draft does not address “sham” affidavits. The second generation of cases addressing self-serving, self-contradicting affidavits allows explanation of the change in position, recognizing authority to rely on the affidavit to defeat summary judgment. The Supreme Court seems to have blessed this approach in the Cleveland dictum. It may be appropriate to leave these problems out of the rule text, but perhaps they could be addressed in the Committee Note.

Goode-Trufant said (1) that practice under SDNY Local Rule 56.1 leads her to strongly approve the statement of uncontested facts. (2) The Local Rule 56.2 requirement that an attorney moving for summary judgment notify a pro se adversary of Rule 56 requirements and consequences is useful. (3) Pre-motion conferences often are very helpful — often a plaintiff withdraws some claims when confronted with the law. (4) One SDNY judge requires a joint statement of facts; this practice may avoid the problem arising when the movant frames the facts.

Buckley (1) recognized that intent and motive are particularly unsuited to resolution on summary judgment. Intent, inference, and credibility “often cannot be put down on paper. Only a jury can pin this Jello® to the wall.” (2) Rule 56 is a device that may soak up as much time as it saves. Summary judgment is over-used in employment cases; there is an assembly line in some courts. The FJC statistics show that “District A” in the Eleventh Circuit grants summary judgment in 95% of the employment cases — many of these cases are not suitable for summary disposition. “Human rights should not be sacrificed to judicial efficiency.” At the same time, partial summary judgments can be useful. (3) Evidence determinations that should be left for trial are being made on Rule 56 motions. (4) The draft (c)(2) provisions for the nonmovant’s response are reasonable, but it would be better to have the response provide its own statement of facts that are in dispute and that defeat judgment as a matter of law. That will allow the nonmovant to tell its story.

Langrock (1) noted that summary judgment is used in a variety of circumstances. It is used in small cases, not only the complex cases described by many of the participants. In big cases, it can help formulate positions. (2) “Courts are not for lawyers or judges but for litigants. Ease and efficiency should not stand in the way.” (3) Cross-examination is the best way to get at the truth. Summary judgment should be closely guarded lest it defeat the values of cross-examination at trial. (4) Local rules in Vermont require a lawyer to provide a pro se adversary a notice set out in the rule; this might be a useful addition to the national rule.

Judge Rosenthal noted in summation that neither the Subcommittee nor the Advisory Committee have decided what might be recommended for publication as proposed Rule 56 amendments. This meeting was arranged to enable the Committee to draw from the kinds of resources the participants in fact brought to the discussion. “The horse has not left the barn. We know there is a barn, but not what the horse looks like.” The Committee will welcome any further suggestions.

Judge Baylson thanked all the participants for taking the time and making the effort to attend, and urged all to continue to offer advice.

MEMORANDUM TO: Judge Michael Baylson

CC: Judge Lee H. Rosenthal, Professor Edward H. Cooper, Peter G. McCabe, John K. Rabiej

FROM: Jeffrey Barr and James Ishida

DATE: March 21, 2007

RE: Survey of District Court Local Summary Judgment Rules

You had asked us to undertake additional research on summary judgment local rules and practices in the courts. Specifically, you had asked us to identify:

- the district courts that have local rules requiring the: (a) moving party to include a statement of undisputed facts with its motion for summary judgment, and (b) non-moving party to respond to the movant's statement, fact by fact;
- the districts with the above local rules that also have provisions stating that facts not properly disputed are deemed admitted or accepted; and
- the number of judges in districts without such local rules who have similar requirements in their individual standing orders.

We reviewed the local rules of 92¹ district courts posted on the *Federal Rulemaking* web site at <http://www.uscourts.gov/rules/distr-localrules.html>. We found 56 districts that have local rules requiring the moving party to attach a statement of undisputed facts with its motion for summary judgment.² Of the 56 districts, 20 districts require the non-moving party to respond to

¹We were unable to access the web sites of the District of the Northern Mariana Islands and Western District of Wisconsin.

²Six districts do not require the movant to file a list of undisputed facts in support of its motion for summary judgment — Northern District of California, District of Colorado, Southern District of Illinois, Western District of Tennessee, Eastern District of Washington, and Northern District of West Virginia:

1. Northern District of California LR 56-2(a)(unless required by the assigned judge, no separate statement of undisputed facts or joint statement of undisputed facts shall be submitted);

each of the movant's alleged undisputed facts.³ The remaining 36 districts⁴ do not require the

2. District of Colorado LCivR 56.1(A) (a motion under Fed. R. Civ. P. 56 shall be accompanied by an opening brief. A response brief shall be filed within 20 days after the date of filing of the motion and opening brief, or such other time as the court may order);
3. Southern District of Illinois Local Rule 7.1 (any brief in support of or in opposition to a motion for summary judgment shall contain citation to relevant legal authority and to the record, together with any affidavits or documentary material designated pursuant to Federal Rule of Civil Procedure 56 supporting the party's position. All briefs must contain a short, concise statement of the party's position, together with citations to relevant legal authority and to the record);
4. Western District of Tennessee LR 7.2(d)(2) (on every motion for summary judgment the proponent shall designate in the submit in a separate document affixed to the memorandum each material fact upon which the proponent relies in support of the motion by serial numbering, and shall affix to the memorandum copies of the precise portions of the record relied upon as evidence of each material fact. The opponent of a motion for summary judgment who disputes any of the material facts upon which the proponent has relied shall respond to the proponent's numbered designations);
5. Eastern District of Washington LR 56.1 (any party filing a motion for summary judgment shall set forth separately from the memorandum of law the specific facts relied upon in support of the motion. The specific facts shall be set forth in serial fashion and not in narrative form. As to each fact, the statement shall refer to the specific portion of the record where the fact is found (i.e., affidavit, deposition, etc.). Any party opposing a motion for summary judgment must file with its responsive memorandum a statement in the form prescribed above, setting forth the specific facts which the opposing party asserts establishes a genuine issue of material fact precluding summary judgment. Each fact must explicitly identify any fact(s) asserted by the moving party which the opposing party disputes or clarifies); and
6. Northern District of West Virginia LR Civ P 7.02(a) (motions for summary judgment shall include or be accompanied by a short and plain statement of facts).

³District of Arizona, District of Connecticut, Eastern District of California, Middle District of Georgia, Northern District of Georgia, Central District of Illinois, Northern District of Illinois, Northern District of Iowa, Southern District of Iowa, District of Maine, District of Nebraska, Eastern District of New York, Northern District of New York, Southern District of New York, District of Oregon, Middle District of Pennsylvania, Western District of Pennsylvania, District of Puerto Rico, District of South Dakota, and Middle District of Tennessee.

⁴Southern District of Alabama, Eastern District of Arkansas, Western District of Arkansas, Central District of California, District of the District of Columbia, Northern District of Florida, Southern District of Florida, Southern District of Georgia, District of Hawaii, District of Idaho, Northern District of Indiana, Southern District of Indiana, District of Kansas, Eastern District of Louisiana, Middle District of Louisiana, Western District of Louisiana, District of Massachusetts, Eastern District of Missouri,

non-moving party to address each of the moving party's list of undisputed facts, fact by fact, but do require the non-moving party to provide its own list of disputed facts or respond to the movant's undisputed facts in opposing the motion for summary judgment.⁵

Thirty districts do not have local rules specifically addressing summary judgment practice.⁶

In addition, every one of the 20 districts requiring the movant to submit a list of undisputed facts and non-moving party to respond to each of the movant's undisputed facts has a "deemed admitted" provision in their local rules, except for the Eastern District of California.

We also checked the web sites of the four largest districts⁷ without such local rules — the Central District of California, Southern District of Florida, Northern District of Ohio, and Northern District of Texas. (Your staff had polled judges in your district, Pennsylvania Eastern.) We found eight judges⁸ in the Central District of California who have issued standing orders posted on the court web site prescribing paragraph-by-paragraph requirements. Your staff found that of 35 judges in the Eastern District of Pennsylvania, 12 have practice rules requiring the movant to include a statement of undisputed facts in support of its motion for summary judgment and non-moving party to respond, fact by fact, to the moving party's statement. Seven judges also have a "deemed admitted" provision in their practice rules if the respondent party fails to adequately dispute a proposed undisputed fact by the movant.

Western District of Missouri, District of Montana, District of Nevada, District of New Hampshire, District of New Jersey, District of New Mexico, Western District of New York, Middle District of North Carolina, Eastern District of Oklahoma, Northern District of Oklahoma, Western District of Oklahoma, Eastern District of Pennsylvania, Eastern District of Texas, District of Utah, District of Vermont, District of the Virgin Islands, Eastern District of Virginia, and District of Wyoming.

⁵See Appendix.

⁶Middle District of Alabama, Northern District of Alabama, District of Alaska, Southern District of California, District of Delaware, Middle District of Florida, District of Guam, Eastern District of Kentucky, Western District of Kentucky, District of Maryland, Eastern District of Michigan, Western District of Michigan, District of Minnesota, Northern District of Mississippi, Southern District of Mississippi, Eastern District of North Carolina, Western District of North Carolina, District of North Dakota, Northern District of Ohio, Southern District of Ohio, District of Rhode Island, District of South Carolina, Eastern District of Tennessee, Northern District of Texas, Southern District of Texas, Western District of Texas, Western District of Virginia, Western District of Washington, Southern District of West Virginia, and Eastern District of Wisconsin.

⁷The districts having the greatest number of civil filings in 2000.

⁸Eight judges out of 60 district and magistrate judges serving in the Central District of California.

A. Districts Requiring Undisputed Facts by Movant and Responses to Each Fact by Non-movant

1. District of Arizona (a party filing a motion for summary judgment must file a statement setting forth each material fact on which the party relies in support of the motion. Each material fact must be set forth in a separately numbered paragraph. Any party opposing a motion for summary judgment must file a statement setting forth for each paragraph of the moving party's separate statement of facts, a correspondingly numbered paragraph indicating whether the party disputes the statement of fact set forth in that paragraph. Each statement of facts set forth in the moving party's statement of facts shall be deemed admitted for purposes of the motion if not specifically controverted by a correspondingly numbered paragraph in the opposing party's separate statement of facts).
2. District of Connecticut (a "Local Rule 56(a)1 Statement" must be attached to each summary judgment motion, which sets forth in separately numbered paragraphs a concise statement of each material fact as to which the moving party contends there is no genuine issue to be tried. All material facts set forth in movant's statement and supported by the evidence will be deemed admitted unless controverted by the statement required to be filed and served by the opposing party in accordance with Local Rule 56(a)2. The papers opposing a motion for summary judgment must include a "Local Rule 56(a)2 Statement," which states in separately numbered paragraphs and corresponding to the paragraphs contained in the moving party's Local Rule 56(a)1 Statement whether each of the facts asserted by the moving party is admitted or denied).
3. Eastern District of California (each motion for summary judgment must be accompanied by a "Statement of Undisputed Facts" that must enumerate discretely each of the specific material facts relied upon in support of the motion. Any party opposing a motion for summary judgment must reproduce the itemized facts in the Statement of Undisputed Facts and admit those facts that are undisputed and deny those that are disputed).
4. Middle District of Georgia (the movant must attach to the motion a separate and concise statement of the material facts to which the movant contends there is no genuine issue to be tried. Each material fact must be numbered separately. The respondent must attach to the response a separate and concise statement of material facts, numbered separately, to which the respondent contends there exists a genuine issue to be tried. A response must be made to each of the movant's numbered material facts. All material facts contained in the moving party's statement which are not specifically controverted by the respondent in respondent's statement must be deemed to have been admitted, unless otherwise inappropriate).

5. Northern District of Georgia (a movant for summary judgment must include with the motion and brief a separate, concise, numbered statement of the material facts to which the movant contends there is no genuine issue to be tried. The respondent must file a response containing individually numbered, concise, nonargumentative responses corresponding to each of the movant's numbered undisputed material facts. The movant's facts are deemed admitted unless the respondent: (i) directly refutes the movant's fact with concise responses supported by specific citations to evidence; (ii) states a valid objection to the admissibility of the movant's fact; or (iii) points out that the movant's citation does not support the movant's fact or that the movant's fact is not material or otherwise has failed to comply with the rules).

6. Central District of Illinois (a party filing a motion for summary judgment must include in that motion a list of each undisputed material fact that is the basis for the motion. The respondent must file a response to the movant's list of undisputed facts indicating which facts are: (i) undisputed material facts, (ii) disputed material facts, and (iii) immaterial. The respondent may also file any additional facts relevant to its opposition. In addition, Local Rule 7.1(D)(2) requires the non-moving party to file a response to the motion for summary judgment within 21 days after service of the motion. The rule also provides that "[a] failure to respond must be deemed an admission of the motion." In *Foley v. Plumbers & Steamfitters Local No. 149*, 109 F. Supp.2d 963, 966 (C.D.Ill., 2000), the court held that "[f]ailing to submit an appropriate response to a statement of undisputed facts allows the court to assume that the facts stipulated by the moving party exist without controversy." Because the Plaintiff's statement of undisputed facts did not admit or deny any specific allegations and did not support many of the statements, the court found that it did not comply with Local Rule 7.1(D)(2)).

7. Northern District of Illinois (the movant must file with its summary judgment motion a statement of material facts which the moving party contends there is no genuine issue and entitles it to judgment as a matter of law. The non-moving party must file a concise response to the movant's statement of facts that contain: (i) numbered paragraphs, each corresponding to and stating a concise summary of the paragraph to which it is directed, and (ii) a response to each numbered paragraph in the moving party's statement, including, in the case of any disagreement, specific references to the affidavits, parts of the record, and other supporting materials relied upon, and (iii) a statement, consisting of short numbered paragraphs, of any additional facts that require the denial of summary judgment. All material facts set forth in the statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party).

- 8/9. Northern District of Iowa and Southern District of Iowa (the joint rules of the Northern and Southern Districts of Iowa require the movant to append to its motion a statement of material facts setting forth each material fact that the moving party contends there is no genuine issue to be tried. The non-moving party must file with its opposition papers a response to the statement of material facts in which the resisting party expressly admits, denies, or qualifies each of the moving party's numbered statements of fact. Failure to respond, with appropriate citations to the appendix, to an individual statement of material fact constitutes an admission of that fact).
10. District of Maine (a motion for summary judgment must be supported by a separate, short, and concise statement of material facts, each set forth in a separately numbered paragraph(s), as to which the moving party contends there is no genuine issue of material fact. A party opposing a motion for summary judgment must submit with its opposition a separate, short, and concise statement of material facts. The opposing statement must admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement. Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by the rule, must be deemed admitted unless properly controverted).
11. District of Nebraska (the moving party must set forth in the brief a separate statement of material facts which the moving party contends there is no genuine issue to be tried and that entitle the moving party to judgment as a matter of law. The party opposing a motion must include in its brief a concise response to the moving party's statement of material facts. The response must address each numbered paragraph in the movant's statement. Properly referenced material facts in the movant's statement will be deemed admitted unless controverted by the opposing party's response).
- 12/13. Eastern and Southern Districts of New York (the joint rules of the Eastern and Southern Districts of New York provide that the movant must attach to the notice of summary judgment motion a separate, short, and concise statement, in numbered paragraphs, of the material facts to which the moving party contends there is no genuine issue to be tried. The papers opposing a motion for summary judgment must include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party which is contended there exists a genuine issue to be tried. Each numbered paragraph in the moving party's statement of material facts will be deemed admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the opposing party's statement).

14. Northern District of New York (a motion for summary judgment must contain a Statement of Material Facts. The Statement of Material Facts must set forth, in numbered paragraphs, each material fact that the moving party contends there exists no genuine issue. The opposing party must file a response to the Statement of Material Facts. The non-movant's response must mirror the movant's Statement of Material Facts by admitting or denying each of the movant's assertions in matching numbered paragraphs. Any facts set forth in the Statement of Material Facts must be deemed admitted unless specifically controverted by the opposing party).
15. District of Oregon (a motion for summary judgment must be accompanied a separately filed concise statement of facts, which articulates the undisputed relevant material facts that are essential for the court to decide the motion for summary judgment. The non-moving party must include a separately filed response to the movant's statement that responds to each numbered paragraph by: (i) accepting or denying each fact contained in the moving party's concise statement; or (ii) articulating opposition to the moving party's contention or interpretation of the undisputed material fact. For purposes of the motion for summary judgment, material facts set forth in the moving party's concise statement, or in the response to the moving party's concise statement, will be deemed admitted unless specifically denied or otherwise controverted by a separate concise statement of the opposing party).
16. Middle District of Pennsylvania (a motion for summary judgment must be accompanied by a separate, short, and concise statement of the material facts, in numbered paragraphs, which the moving party contends there is no genuine issue to be tried. The papers opposing a motion for summary judgment must include a separate, short, and concise statement of the material facts, responding to the numbered paragraphs set forth in the movant's statement, to which it is contended that there exists a genuine issue to be tried. All material facts set forth in the moving party's statement will be deemed to be admitted unless controverted by the non-moving party's statement).
17. Western District of Pennsylvania (a motion for summary judgment must be accompanied by a concise statement of material facts setting forth the facts essential for the court to decide the motion for summary judgment, which the moving party contends are undisputed and material. The facts set forth in any party's Concise Statement must be stated in separately numbered paragraphs. The opposing party must file in opposition a concise statement responding to each numbered paragraph in the moving party's Concise Statement of Material Facts by: (a) admitting or denying whether each fact is undisputed and/or material; (b) setting forth the basis for the denial if any fact contained in the moving party's Concise Statement of Material Facts is not admitted in its entirety (as to whether it

is undisputed or material), with appropriate reference to the record; and (c) setting forth in separately numbered paragraphs any other material facts that are allegedly at issue, and/or that the opposing party asserts are necessary for the court to determine the motion for summary judgment. Alleged material facts set forth in the moving party's Concise Statement of Material Facts or in the opposing party's Responsive Concise Statement, which are claimed to be undisputed, will for the purpose of deciding the motion for summary judgment be deemed admitted unless specifically denied or otherwise controverted by a separate concise statement of the opposing party).

18. District of Puerto Rico (a motion for summary judgment must be supported by a separate, short, and concise statement of material facts, set forth in numbered paragraphs, which the moving party contends there is no genuine issue of material fact to be tried. A party opposing a motion for summary judgment must submit with its opposition a separate, short, and concise statement of material facts. The opposing statement must admit, deny, or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts and unless a fact is admitted, must support each denial or qualification by a record citation as required by this rule. Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, must be deemed admitted unless properly controverted).
19. District of South Dakota (the moving party must include with the motion a separate, short, and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. Each material fact must be presented in a separate, numbered statement and with an appropriate citation to the record in the case. The papers opposing a motion for summary judgment must include a separate, short, and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried. The opposition must respond to each numbered paragraph in the moving party's statement with a separately numbered response and appropriate citations to the record. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party).
20. Middle District of Tennessee (a motion for summary judgment must be accompanied by a separate, concise statement of the material facts as to which the moving party contends there is no genuine issue for trial. Each fact must be set forth in a separate, numbered paragraph. Any party opposing the motion for summary judgment must respond to each fact set forth by the movant by either: (i) agreeing that the fact is undisputed; (ii) agreeing that the fact is undisputed for the purpose of ruling on the motion for summary judgment only; or (iii) demonstrating that the fact is disputed. Failure to respond to a moving party's

statement of material facts, or a non-moving party's statement of additional facts, within the time periods provided by these local rules shall indicate that the asserted facts are not disputed for purposes of summary judgment).

B. Judges Requiring Undisputed Facts by Movant and Responses to Each Fact by Non-movant

You had also requested — after we identified those district courts which have a local rule mandating a paragraph-by-paragraph statement of undisputed facts by the moving party and a paragraph-by-paragraph response by the opposing party — we examine standing orders or “procedures” issued by individual district judges in the four largest districts that do not have such local rules. You asked that we ascertain how many judges in those four districts have prescribed similar requirements by means of standing order.

In those four districts, we found eight judges — all in the Central District of California — who have issued standing orders prescribing paragraph-by-paragraph requirements.

1. The four-district sample. The four districts we chose in addition to the Eastern District of Pennsylvania — after a quick examination of civil caseload statistics published in *The Judicial Business of the U.S. Courts* — are as follows:

- a) Central District of California,⁹
- b) Southern District of Florida,¹⁰

⁹The Central District of California does require, in Local Rule 56-1, that each moving party file a “Statement of Uncontroverted Facts and Conclusions of Law,” and in Local Rule 56-2, that each opposing party file a “Statement of Genuine Issues” setting forth all material facts as to which the opposing party contends there exists a genuine issue necessary to be litigated. But this local rule does not require any paragraph-by-paragraph enumerations or lists. Therefore we thought it appropriate to include the Central District of California among the four courts we examined.

¹⁰The Southern District of Florida requires in Local Rule 7.5(A) that “[m]otions for summary judgment shall be accompanied by a memorandum of law, necessary affidavits, and a concise statement of the material facts as to which the movant contends there is no genuine issue to be tried.” Local Rule 7.5(B) requires the non-moving party to include in its papers in opposition “a memorandum of law, necessary affidavits, and a single concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.” For the reason given for the Central District of California, *supra* n. 9, we decided to include the district in our sampling.

- c) Northern District of Texas, and
- d) Northern District of Ohio.

2. No relevant standing orders in three districts. In three of the four districts — the Southern District of Florida, the Northern District of Texas, and the Northern District of Ohio — we found nothing. That is, we did not find a single standing order or similar provision issued by any individual judge prescribing paragraph-by-paragraph requirements for summary judgment motions and oppositions. Nor did we find any standing orders of the court as a whole addressing this point.

In the Southern District of Florida, we found that only a minority of the district judges have issued, and posted on the court’s web site, any individual standing orders or “procedures” at all. But in the Northern District of Texas and the Northern District of Ohio, virtually every district judge has done so. None of these standing orders, again, contain summary judgment provisions of the type the subcommittee is interested in.

3. Eight relevant standing orders in the Central District of California. The Central District of California, however, is another story. Virtually every judge in that district has issued individual standing orders or “procedures.” Although the majority of them do not prescribe the requirements the subcommittee is interested in, eight of them do. The eight judges are Judges Percy Anderson, Valerie Baker Fairbank, Gary A. Feess, Dale S. Fischer, Philip S. Gutierrez, Stephen G. Larson, A. Howard Matz, and S. James Otero.

The provisions prescribed by these eight judges — in every case embedded in a larger document headed “standing order” or “scheduling order” — are very similar. Ninety to ninety-five percent of the language is identical in each of the eight provisions, although most judges appear to have added a bit of idiosyncratic language here and there as well.

Here is an example, taken from Judge Otero’s “initial standing order”:

18. Motions – Form and Length:

* * * * *

- b. Statement of Undisputed Facts and Statement of Genuine Issues: The separate statement of undisputed facts shall be prepared in a two-column format. The left hand column sets forth the allegedly undisputed fact. The right hand column sets forth the evidence that supports the factual statement. The factual statements should be set forth in sequentially

numbered paragraphs. Each paragraph should contain a narrowly focused statement of fact. Each numbered paragraph should address a single subject as concisely as possible.

The opposing party's statement of genuine issues must be in two columns and track the movant's separate statement exactly as prepared. The left hand column must restate the allegedly undisputed fact, and the right hand column must state either that it is undisputed or disputed. The opposing party may dispute all or only a portion of the statement, but if disputing only a portion, it must clearly indicate what part is being disputed, followed by the opposing party's evidence controverting the fact. The court will not wade through a document to determine whether a fact really is in dispute. To demonstrate that a fact is disputed, the opposing party must briefly state why it disputes the moving party's asserted fact, cite to the relevant exhibit or other piece of evidence, and describe what it is in that exhibit or evidence that refutes the asserted fact. No legal argument should be set forth in this document.

The opposing party may submit additional material facts that bear on or relate to the issues raised by the movant, which shall follow the format described above for the moving party's separate statement. These additional facts shall continue in sequentially numbered paragraphs and shall set forth in the right hand column the evidence that supports that statement.

* * * * *

4. Eastern District of Pennsylvania. Again, your staff found that of 35 judges in the Eastern District of Pennsylvania, 12 have practice rules requiring the movant to include a statement of undisputed facts in support of its motion for summary judgment and non-moving party to respond, fact by fact, to the moving party's statement. Seven judges also have a "deemed admitted" provision in their practice rules if the respondent party fails to adequately dispute a proposed undisputed fact by the movant.

APPENDIX

Districts Not Requiring Fact-by-Fact Response to Movant's Statement of Undisputed Facts

- 1) Southern District of Alabama Local Rule 7.2(b) (the non-moving party must identify facts in dispute from the movant's list of undisputed facts);
- 2/3) Eastern District of Arkansas and Western District of Arkansas Local Rule 56.1(b) and (c) (if the non-moving party opposes the motion for summary judgment, it must file, in addition to any response and brief, a separate, short and concise statement of the material facts as to which it contends a genuine issue exists to be tried. All material facts set forth in the statement filed by the moving party will be deemed admitted unless controverted by the statement filed by the non-moving party);
- 4) Central District of California L.R. 56-2 and 56-3 (any party who opposes the motion must serve and file with the opposing papers a separate document containing a concise "Statement of Genuine Issues" setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated. In determining any motion for summary judgment, the court will assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are controverted by declaration or other written evidence filed in opposition to the motion);
- 5) District of the District of Columbia LCvR 56.1 (an opposition to a summary judgment motion must be accompanied by a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated. In determining a motion for summary judgment, the court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion);
- 6) Southern District of Florida Rule 7.5(B) (the papers opposing a motion for summary judgment must include a memorandum of law, necessary affidavits, and a single concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried);
- 7) Northern District of Florida Local Rule 56.1 (a motion for summary judgment must be accompanied by a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. The party opposing the motion must, in addition to other papers or matters permitted by the rules, file and serve a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried);

- 8) Southern District of Georgia LR 56-1 (the non-moving party must include, in addition to the brief, a separate, short, and concise statement of the material facts as to which it is contended there exists no genuine issue to be tried as well as any conclusions of law. Each statement of material fact must be supported by a citation to the record. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by a statement served by the opposing party);
- 9) District of Hawaii LR 56.1(b) and (g) (any party who opposes the motion for summary judgment must file and serve with his or her opposing papers a separate document containing a concise statement that: (i) accepts the facts set forth in the moving party's concise statement; or (ii) sets forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated. Material facts set forth in the moving party's concise statement will be deemed admitted unless controverted by a separate concise statement of the opposing party);
- 10) District of Idaho Civil Rule 7.1(c)(2) (the responding party must file a statement of facts which are in dispute not to exceed ten (10) pages in length);
- 11) Northern District of Indiana L.R. 56.1 (a) and (b) (any party opposing the motion for summary judgment must file and serve a response that includes a "Statement of Genuine Issues" setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated);
- 12) Southern District of Indiana Local Rule 56-1(b) and (e) (the non-moving party may file and serve in opposition to the motion a brief that includes a section labeled "Statement of Material Facts in Dispute," which responds to the movant's asserted material facts by identifying the potentially determinative facts and factual disputes which the nonmoving party contends demonstrate that there is a dispute of fact precluding summary judgment. For purposes of deciding the motion for summary judgment, the Court will assume the facts claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are specifically controverted in the opposing party's "Statement of Material Facts in Dispute");
- 13) District of Kansas Rule 56.1(b) (a memorandum in opposition to a motion for summary judgment must include a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute must be numbered by paragraph, must refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, must state the number of movant's fact that is disputed. All material facts set forth in the statement of the movant will be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party);

- 14-16) Eastern, Middle, and Western Districts of Louisiana LR 56.2 (the uniform local rules for the Eastern, Middle, and Western Districts of Louisiana require that papers opposing a motion for summary judgment must include a separate, short and concise statement of the material facts as to which there exists a genuine issue to be tried. All material facts set forth in the statement required to be served by the moving party will be deemed admitted, for purposes of the motion, unless controverted as required by this rule);
- 17) District of Massachusetts Rule 56.1 (any opposition to a motion for summary judgment must include a concise statement of the material facts of record as to which it is contended that there exists a genuine issue to be tried. Material facts of record set forth in the statement required to be served by the moving party will be deemed for purposes of the motion to be admitted by opposing parties unless controverted by the statement required to be served by opposing parties);
- 18) Eastern District of Missouri Local Rule 7-4.01(E) (every memorandum in opposition must include a statement of material facts as to which the party contends a genuine issue exists. All matters set forth in the statement of the movant will be deemed admitted for purposes of summary judgment unless specifically controverted by the opposing party);
- 19) Western District of Missouri Local Rule 56.1(a) (a suggestion in opposition to a motion for summary judgment must begin with a section containing a concise statement of material facts that the non-moving party contends there exists a genuine issue for trial. All facts set forth in the movant's statement will be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party);
- 20) District of Montana Local Rule 56.1(b) (any party opposing a motion for summary judgment must file a Statement of Genuine Issues setting forth the specific facts, if any, that establish a genuine issue of material fact precluding summary judgment in favor of the moving party. There is no "deemed admitted" provision);
- 21) District of Nevada Local Rule 56.1 (motions for summary judgment and responses thereto must include a concise statement setting forth each fact material to the disposition of the motion which the party claims is or is not genuinely in issue, citing the particular portions of any pleading, affidavit, deposition, interrogatory, answer, admission, or other evidence upon which the party relies);
- 22) District of New Hampshire Local Rule 7.2(b)(2) (a memorandum in opposition to a summary judgment motion must incorporate a short and concise statement of material facts, supported by appropriate record citations, as to which the adverse party contends a genuine dispute exists so as to require a trial. All properly supported material facts set forth in the moving party's factual statement will be deemed admitted unless properly opposed by the adverse party);

- 23) District of New Jersey Civ. Rule 56.1 (on motions for summary judgment, each side shall furnish a statement that sets forth material facts as to which there exists or does not exist a genuine issue. No “deemed admitted provision);
- 24) District of New Mexico Local Rule 56.1(b) (a party opposing the motion must file a written memorandum containing a short, concise statement of the reasons in opposition to the motion with authorities. All material facts set forth in the statement of the movant will be deemed admitted unless specifically controverted);
- 25) Western District of New York Local Rule 56.1 (the papers opposing a motion for summary judgment must include a separate, short, and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party);
- 26) Middle District of North Carolina Local Rules 7.2 and 56.1 (a party requesting summary judgment must set out a statement of the nature of the matter before the court, a statement of facts, and a statement of the questions presented as provided in LR7.2(a)(1)-(3). The party must also set out the elements that it must prove (with citations to supporting authority), and the specific, authenticated facts existing in the record or set forth in accompanying affidavits that would be sufficient to support a jury finding of the existence of those elements. In a responsive brief, the opposing party may set out the statements required by LR7.2(a)(1)-(3) and also set out the elements that the claimant must prove (with citations to supporting authority), and either identify any element as to which evidence is insufficient (and explain why the evidence is insufficient), or point to specific, authenticated facts existing in the record or set forth in accompanying affidavits that show a genuine issue of material fact, or explain why some rule of law (e.g., an applicable statute of limitations) would defeat the claim. The failure to file a response may cause the court to find that the motion is uncontested);
- 27) Eastern District of Oklahoma Local LCivR 56.1(c) (the response brief in opposition to a motion for summary judgment must begin with a section which contains a concise statement of material facts to which the party asserts genuine issues of fact exist. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies and, if applicable, shall state the numbered paragraphs of the movant’s facts that are disputed. All material facts set forth in the statement of the material facts of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of material facts of the opposing party);
- 28) Northern District of Oklahoma Local LCivR 56.1(c) (the response brief in opposition to a motion for summary judgment must begin with a section that contains a concise

statement of material facts to which the party asserts genuine issues of fact exist. All material facts set forth in the statement of the material facts of the movant must be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of material facts of the opposing party);

- 29) Western District of Oklahoma Local LCivR 56.1(c) (the brief in opposition to a motion for summary judgment must begin with a section which contains a concise statement of material facts to which the party asserts genuine issues of fact exist. All material facts set forth in the statement of the material facts of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of material facts of the opposing party);
- 30) Eastern District of Pennsylvania LCivR 56.1 (the movant must include a brief in support of the motion for summary judgment that contains a section with a concise statement of material facts that the moving party contends there are no genuine issues of material fact. The respondent's brief must contain a concise statement of material facts which the non-moving party asserts genuine issues of material facts exist);
- 31) Eastern District of Texas Local Rule CV 56 (a motion for summary judgment must include: (1) a statement of the issues to be decided by the Court; and (2) a "Statement of Undisputed Material Facts." Any response to a motion for summary judgment must include: (1) any response to the statement of issues; and (2) any response to the "Statement of Undisputed Material Facts");
- 32) District of Utah DUCivR 56-1(c) (a memorandum in opposition to a motion for summary judgment must begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute must be numbered, must refer with particularity to those portions of the record on which the opposing party relies and, if applicable, must state the number of the movant's fact that is disputed. All material facts of record meeting the requirements of Fed. R. Civ. P. 56 that are set forth with particularity in the statement of the movant will be deemed admitted for the purpose of summary judgment, unless specifically controverted by the statement of the opposing party identifying material facts of record meeting the requirements of Fed. R. Civ. P. 56);
- 33) District of Vermont Local Rule 7.1(c)(2) and (3) (a separate, short and concise statement of disputed material facts must accompany an opposition to a motion for summary judgment or a motion under Fed.R.Civ.P. 12(b)(6) or 12(c) that is converted to a summary judgment motion. All material facts in the movant's statement of undisputed facts are deemed to be admitted unless controverted by the opposing party's statement);
- 34) District of the Virgin Islands Local Rule 56.1(b) (any party adverse to a motion submitted under this rule may respond by serving a notice of response, opposition, brief, affidavits

and other supporting documentation, accompanied by a separate concise counterstatement of all material facts about which the respondent contends there exist genuine issues necessary to be litigated, which shall include references to the parts of the record relied on to support the response and statement);

- 35) Eastern District of Virginia Local Civil Rule 56(B) (each brief in support of a motion for summary judgment must include a specifically captioned section listing all material facts as to which the moving party contends there is no genuine issue and citing the parts of the record relied on to support the listed facts as alleged to be undisputed. A brief in response to such a motion shall include a specifically captioned section listing all material facts as to which it is contended that there exists a genuine issue necessary to be litigated and citing the parts of the record relied on to support the facts alleged to be in dispute. In determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its listing of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion); and
- 36) District of Wyoming Rule 7.1(b)(2)(A) (a party who files a dispositive motion must serve and file with the motion a written brief containing a short, concise statement of the arguments and authorities in support of the motion, together with proposed findings of fact and conclusions of law in accordance with Local Rule 7.1(b)(2)(D). Affidavits and other supportive papers must be filed together with the motion and brief. Each party opposing the motion shall, within ten (10) days after service of said motion, serve upon all parties a written brief containing a short, concise statement of the argument and authorities in opposition to the motion, together with proposed findings of fact and conclusions of law in accordance with Local Rule 7.1(b)(2)(D). In the event a motion for summary judgment is filed, the parties shall include in their respective briefs a list of all claimed undisputed and disputed facts, together with a short statement of evidence and any other basis which supports a claim that a fact is disputed or undisputed. Failure of a responding party to serve a response within the ten (10) day time limit may be deemed by the Court in its discretion as a confession of the motion)).

**LOCAL RULES¹ PROCEDURES re SUMMARY JUDGMENT PRACTICE
IN FEDERAL DISTRICT COURTS**

I. NUMBER OF SUMMARY JUDGMENT MOTIONS ALLOWED

- A. Generally, no limit. A few districts, however, provide that a party may file only one motion for summary judgment, unless otherwise permitted by the court.²

II. TIME FOR FILING SUMMARY JUDGMENT MOTION

- A. FRCP 56(a). A party may move for summary judgment “after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party[.]”
- B. Timetable for filing and serving motion and opposition. There is much variation among the districts.³
1. FRCP 56(c). “The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits.”

¹A sample of 20 districts with standing orders or general orders posted on their court web sites turned up nothing relevant to summary judgment practice.

²N.D.Okla. LCvR 56.1(a); W.D.Okla. LCvR 56.1(a); N.D.Tex. LR 56.2(b). *See also* E.D. Va. LCR 56(C) (unless permitted by court, separate motions for summary judgment shall not be filed addressing separate grounds for summary judgment); E.D. Va. LCR 56(C) (unless allowed by the court, a party may not file separate summary judgment motions that address separate grounds for summary judgment).

³*See, e.g.*, N.D. Ga. LR 56.1(D)(as soon as possible, but no later than 20 days after close of discovery); D. Guam LTR 9(b)(2) (any time 30 days after last pleading filed and within time so as not to delay trial); S.D. Ill. Rule 7.1(f) (must be filed 100 days before the first day of the trial month); D. Md. Rule 105(2)(b) (last-minute filing prohibited; supporting memoranda must be filed no later than 4:00 pm before the last business day preceding the hearing day to which the memorandum relates); D. N.M. Rule 56.1(a) (must be filed by deadline established in the “Initial Pretrial Report”); W.D. Tenn. LR 7.2(d)(1) (must be filed at least 45 days before trial, unless good cause shown or other deadline set by scheduling order); N.D. Tex. LR 56.2(a) (unless otherwise ordered, motion may not be filed within 90 days of trial); E.D. Va. LCR 56(A) (must be filed and set for hearing within “reasonable time” before trial).

III. FORM OF MOTION FOR SUMMARY JUDGMENT

- A. Motion must list all material facts where there is no genuine issue in dispute. Most local rules require the movant to set forth the specific material facts where there are no genuine issues to be tried.⁴
1. FRCP 56(c). “The judgment sought shall be rendered forthwith if the pleadings [etc.] . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”

⁴S.D. Ala. LR 7.2(a) (“suggested Determinations of Undisputed Fact and Conclusions of Law”); D. Ariz. LRCiv 56.1(a) (the parties may also submit a stipulation setting forth the undisputed material facts, which are entered into only for the purpose of the summary judgment motion); E.D. Ark. Local Rule 56.1(a); W.D. Ark. Local Rule 56.1(a); C.D. Cal. L.R. 56-1 (must submit proposed “Statement of Uncontroverted Facts and Conclusions of Law.” The parties may also submit a statement of stipulated facts agreed to only for the purpose of deciding the motion for summary judgment); E.D. Cal. L.R. 56-1(a) (must submit “Statement of Undisputed Facts”); N.D. Cal. LR 56-2(a) (unless required by the court, the parties must not submit a separate statement of undisputed facts); D. Conn. Local Rule 56(a)1 (facts must be set forth in “Local Rule 56(a)1 Statement”); D.D.C. LCvR 7(h) and 56.1; M.D. Ga. Local Rule 56; N.D. Ga. LR 56.1; S.D. Ga. LR 56.1 (motion to include list of material facts and conclusions of law which are contended there are no genuine issues to be tried); D. Haw. LR 56.1(a), (c), and (d) (party shall reference only the material facts that are absolutely necessary to decide the motion and must be no longer than five pages or 1500 words); C.D. Ill. LR 7.1(D)(1)(b); N.D. Ill. LR 56.1(a)(3); N.D. Ind. L.R. 56.1(a); S.D. Ind. L.R. 56.1(a); N.D. and S.D. Iowa LR 56.1(a)(3); D. Kans. Rule 56.1(a); E.D. and W.D. La. LR 56.1; D. Me. Rule 56(a); D. Mass. Rule 56.1; D. Mont. Rule 56.1(a) and (c) (parties may also file statement of stipulated facts); E.D. Mo. Rule 7-4.01(E); D. Nebr. Civil Rule 56.1(a)(1) and (a)(2)(defines “material fact” as one pertinent to the outcome of the issues identified in the motion for summary judgment); D. Nev. LR 56-1; D. N.J. Civ. Rule 56.1; D. N.M. Rule 56.1(b); E.D. and S.D. N.Y. Local Civil Rule 56.1(a); N.D. N.Y. L.R. 7.1(a)(3); W.D. N.Y. L.R. 56.1(a); D. N.H. LR 7.2(b)(1); E.D. Okla. Local Rule 56.1(A); N.D.Okla. LCvR 56.1(b); W.D.Okla. LCvR 56.1(a); D. Ore. LR 56.1(a); M.D. Pa. LR 56.1; W.D. Pa. LR 56.1 (B)(1) (movant may also include facts that are assumed to be true); D.P.R. LR 56(b); D. S.D. LR 56.1(B); M.D. Tenn. Rule 8(b)(7)(b) (after each paragraph, the word “response” must be inserted and a blank space provided to allow the non-moving party an opportunity to respond); W.D. Tenn. LR 7.2(d)(2); E.D. Tex. Local Rule CV-56(a) (movant should identify both the factual and legal basis for the summary judgment motion); N.D.Tex. LR 56.3 (movant must identify both the factual and legal grounds for the summary judgment motion and include a concise statement that identifies the elements of each claim or defense to which summary judgment is sought. The motion for summary judgment itself must not contain arguments and authorities); D. Vt. DUCivR 56-1(a) (motion must set forth succinctly, but without argument, the specific grounds of the judgment sought); D. V.I. Rule 56.1(a)(1); E.D. Va. LCR 56(B); E.D. Wash. LR 56.1(a).

2. Undisputed facts must be separately numbered.⁵
3. Movant must cite to specific part of the record. Many local rules require movant to cite to specific parts of the record supporting the contention that there is no genuine issue of material fact.⁶
4. Movant must attached supporting documentation. When a party cites to documents or other discovery, the party must attach or submit the relevant

⁵S.D. Ala. LR 7.2(a); D. Ariz. LRCiv 56.1(a); D. Conn. Local Rule 56(a)1; M.D. Ga. Local Rule 56; N.D. Ga. LR 56.1; C.D. Ill. LR 7.1(D)(1)(b); N.D. Ill. LR 56.1(a)(3); N.D. and S.D. Iowa LR 56.1(a)(3); D. Kans. Rule 56.1(a); D. Me. Rule 56(a); E.D. Mo. Rule 7-4.01(E); D. Nebr. Civil Rule 56.1(a)(1) (failure to provide record references is grounds to deny the motion); D. N.M. Rule 56.1(b); E.D. and S.D. N.Y. Local Civil Rule 56.1(a); N.D. N.Y. L.R. 7.1(3); E.D. Okla. Local Rule 56.1(A); N.D.Okla. LCvR 56.1(b); W.D.Okla. LCvR 56.1(b); D. Ore. LR 56.1(c)(1) (a party may reference only material facts necessary for the court to determine the summary judgment motion, and no others); M.D. Pa. LR 56.1; W.D. Pa. LR 56.1 (B)(1); D.P.R. LR 56(b); D. S.D. LR 56.1(B); M.D. Tenn. Rule 8(b)(7)(b); W.D. Tenn. LR 7.2(d)(2); E.D. Tex. Local CV Rule 56(a); D. Vt. DUCivR 56-1(b); D. V.I. Rule 56.1(a)(1); E.D. Va. LCR 56(B); E.D. Wash. LR 56.1(a).

⁶S.D. Ala. LR 7.2(a); D. Ariz. LRCiv 56.1(a); E.D. Cal. L.R. 56-1(a); D. Conn. Local Rule 56(a)1; D.D.C. LCvR7(h); M.D. Ga. Local Rule 56; N.D. Ga. LR 56.1; S.D. Ga. LR 56.1; D. Haw. LR 56.1(c); N.D. Ill. LR 56.1(a)(3); S.D. Ill. LR 7.1(e); N.D. Ind. L.R. 56.1(a); S.D. Ind. L.R. 56.1(a); D. Kans. Rule 56.1(a); D. Me. Rule 56(a) and (f); D. Mass. Rule 56.1; D. Mont. Rule 56.1(a); E.D. Mo. Rule 7-4.01(E); D. Nebr. Civil Rule 56.1(a)(1); D. Nev. LR 56-1; D. N.M. Rule 56.1(b); E.D. and S.D. N.Y. Local Civil Rule 56.1(d); N.D. N.Y. L.R. 7.1(a)(3) (the record for purposes of the Statement of Material Facts includes the pleadings, depositions, answers to interrogatories, admissions, and affidavits, but does not include attorney's affidavits); W.D. N.Y. L.R. 56.1(d) (all citations must identify the relevant page and paragraph or line number); D. N.H. LR 7.2(b)(1); E.D. Okla. Local Rule 56.1(A); N.D.Okla. LCvR 56.1(b); W.D.Okla. LCvR 56.1(b); D. Ore. LR 56.1(c)(1); M.D. Pa. LR 56.1; W.D. Pa. LR 56.1 (B)(1); D.P.R. LR 56(b) (court may disregard statement of fact not supported by a record citation); D. S.D. LR 56.1(B); M.D. Tenn. Rule 8(b)(7)(b) and (f) (the "record: includes deposition transcripts, answers to interrogatories, affidavits, and documents filed in support of or in opposition to the motion or other documents in the court files); W.D. Tenn. LR 7.2(d)(2) (if the movant contends that the opposing party cannot produce evidence to create a genuine issue of material fact, the movant must include relevant portions of the record that support the contention); E.D. Tex. Local Rule CV-56(a) and (d) ("proper summary judgment evidence" means excerpted copies of pleadings, depositions, answers to interrogatories, admissions, affidavits, and other admissible evidence. Parties are strongly encouraged to highlight cited portion of any attached evidentiary materials, unless citation compasses the entire page); D. Vt. DUCivR 56-1(b); D. V.I. Rule 56.1(a)(1); E.D. Va. LCR 56(B); E.D. Wash. LR 56.1(a).

document.⁷

• FRCP 56(e):

“Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.”

5. Movant required to submit proposed order. A few courts require the movant to submit a proposed order with the motion for summary judgment.⁸

⁷E.D. Cal. L.R. 56-1(a); D. Colo. LCivR 56.1 (voluminous exhibits discouraged. Parties to limit exhibits to essential portions of documents); D. Conn. Local Rule 56(a)1; D. Haw. LR 56.1(c) (only relevant excerpts); N.D. Ill. LR 56.1(a)(3); D. Kans. Rule 56.1(a); D. Mass. Rule 56.1; W.D. N.Y. L.R. 56.1(d) (all cited authority must be separately filed and served as an appendix to the statement of material facts); D. Ore. LR 56.1(c)(3) (the party must file excerpts of the document, not the entire document); W.D. Pa. LR 56.1 (B)(3) (must be included in an appendix but need not include the entire document. Excerpts to cited documents are acceptable); D. S.D. LR 56.1(A) (may also append a summary but must make the original documents available to the opposition); W.D. Teñ. LR 7.2(d)(2); E.D. Tex. Local Rule CV-56(a) and (d) (movant should identify both the factual and legal basis for the summary judgment motion. Parties are strongly encouraged to highlight cited portion of any attached evidentiary materials, unless citation compasses the entire page); N.D. Tex. LR 56.6 (a party that relies on affidavits, depositions, answers to interrogatories, or admissions on file must include such evidence in an appendix); D. Vt. DUCivR 56-1(e); D. V.I. Rule 56.1(a)(1); E.D. Wash. LR 56.1(a).

⁸S.D. Ala. LR 7.2(a); C.D. Cal. L.R. 56-4.

- B. Motion must contain legal grounds demonstrating movant is entitled to judgment as a matter of law.⁹
1. Motion must be accompanied by notice, brief, memorandum, affidavits, exhibits, evidence, and other supporting documents.¹⁰
- C. Page limitation. There is some variation among the districts.¹¹
- D. Sanctions for Noncompliance with rules. The court may deny the motion or impose other sanction for noncompliance with the rules.¹²

⁹D. Alaska LR 7.1 (d)(2); S.D. Ala. LR 7.2(a) (movant must include with motion “suggested Determinations of Undisputed Fact and Conclusions of Law”); C.D. Ill. LR 7.1(D)(1)(c); N.D. Ill. LR 56.1(a)(3); S.D. Ill. LR 7.1(e); D. Nebr. Civil Rule 56.1(a)(1); D. Ore. LR 56.1(a)(1); W.D. Pa. LR 56.1 (B)(2); E.D. Tex. Local CV Rule 56(a) (movant should identify both the factual and legal basis for the summary judgment motion).

¹⁰S.D. Ala. LR 7.2(a) (brief required. Failure to append brief may result in denial of motion); N.D. Cal. LR 56-1 (court may sua sponte reschedule hearing to give movant time to file supporting affidavits); D. Colo. LCivR 56.1(A); D. Conn. Local Rule 56(a)3 and 4; D.D.C. LCvR 7(h) and 56.1; N.D. Ga. LR 56.1(C); S.D. Ga. LR 56.1; D. Haw. LR 56.1(a); C.D. Ill. LR 7.1(D)(1)(b); N.D. Ill. LR 56.1(a)(2); S.D. Ill. LR 7.1(e); S.D. Ind. L.R. 56.1(a); N.D. and S.D. Iowa LR 56.1(a)(2); N.D. and S.D. Iowa LR 56.1(a)(4); D. Kans. Rule 56.1(a); D. Md. Rule 105 (1) and (5); E.D. Mo. Rule 7-4.01(A); D. N.M. Rule 56.1(b); D. Ore. LR 56.1(a)(1); W.D. Pa. LR 56.1 (B)(2); W.D. Tenn. LR 7.2(d)(2); N.D. Tex. LR 56.5(a) (a summary judgment motion must be accompanied by a brief setting forth the argument and authorities on which the party relies. The brief must be filed as a separate document from the motion); D. V.I. Rule 56.1(a)(1).

¹¹S.D. Ala. LR 7.2(b) (a brief in support or opposition must not exceed 30 pages. A reply by movant must not exceed 15 pages); D. Md. Rule 105(3) (memorandum in support or opposition must not exceed 50 pages and reply must generally not exceed 25 pages); D. Ore. LR 56.1(d) (the concise statement of material facts may not be longer than 5 pages); W.D. Tenn. LR 7.2(e) (memoranda in support or opposition must not exceed 20 pages without prior court approval); D. Vt. DUCivR 56-1(b) (memorandum supporting motion must not exceed 25 pages).

¹²D. Alaska LR 7.1(d)(1); S.D. Ala. LR 7.2(a) (brief required. Failure to append brief may result in denial of motion); D. Conn. Local Rule 56(a)3 (failure to provide citation to evidence may result in motion being denied); D. Me. Rule 56(f) (court may disregard any fact not supported by any citation to the record); D. Mass. Rule 56.1 (motion without concise statement of material facts may be denied); D. Nebr. Civil Rule 56.1(a)(1) (failure to submit a statement of facts constitutes grounds for denying the motion); E.D. and S.D. N.Y. Local Civil Rule 56.1(a) (failure to submit statement of material facts not in dispute may be grounds for denying the motion); N.D. N.Y. L.R. 7.1(a)(3) (the failure to include an accurate and complete Statement of

- E. Motion for Partial Summary Judgment. Some rules make special provision for partial summary judgment motions.¹³

IV. SERVICE OF MOTION

- A. In General.¹⁴

1. FRCP 56(c). “The motion shall be served at least 10 days before the time fixed for the hearing.”

V. OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

- A. Form of Opposition. Most courts generally require the non-moving party to identify the material facts where there is a genuine issue to be tried.¹⁵

Material Facts will result in the denial of the motion); W.D. N.Y. L.R. 56.1(a) (failure to attach statement of material facts may constitute grounds for denying the motion); D.P.R. LR 56(e) (court may disregard statement of fact not supported by a record citation); M.D. Tenn. Rule 8(b)(7)(g) (failure to respond to a non-moving party’s statement of additional facts will indicate that the additional facts are not in dispute for purposes of the summary judgment motion); D. Vt. DUCivR 56-1(a) (failure to comply may result in sanctions including (i) returning motion to counsel for resubmission, (ii) denial of the motion, or (iii) other sanction as appropriate).

¹³See N.D.Tex. LR 56.3(c) (if a moving party seeks summary judgment on fewer than all claims or defenses, the motion must be styled as a motion for partial summary judgment).

¹⁴D. V.I. Rule 56.1(a)(1) (the moving party must serve all parties with the notice and all pleadings and supporting documentation. The moving party must also file the notice of motion with the clerk of court (with a copy to the judge’s law clerk), which extends the time for filing an answer if one has not yet been filed).

¹⁵S.D. Ala. LR 7.2(b) (opposition must identify disputed facts citing documents filed in the action); D. Ariz. LRCiv 56.1(a) (the parties may also submit a stipulation setting forth the undisputed material facts, which are entered into only for the purpose of the summary judgment motion); E.D. Ark. Local Rule 56.1(b); W.D. Ark. Local Rule 56.1(b) (all material facts are deemed admitted unless controverted by the non-moving party); C.D. Cal. L.R. 56-2 (non-moving party must file and serve a “Statement of Genuine Issues” setting forth all material facts contended to have genuine issues to be litigated); E.D. Cal. L.R. 56-1(b) (must deny all disputed facts contained in moving party’s “Statement of Undisputed Facts”); D. Conn. Local Rule 56(a)2 (non-moving party must submit “Local Rule 56(a)2 Statement,” which indicates whether facts material asserted by movant are admitted or denied); D.D.C. LCvR 7(h) and 56.1 (must include citation to the record and supporting memorandum); M.D. Ga. Local Rule 56 (insufficient knowledge to admit or deny is not an acceptable response unless party complied with FRCP

56(f)); N.D. Ga. LR 56.1(B)(2) (court will deem each of movant's facts as admitted unless non-moving party (i) directly refutes movant's facts with concise responses supported by record references; (ii) states a valid objection to the admissibility of the movant's facts; or (iii) points out the movant's citation does not support the movant's facts, facts are not material, or other nonconformity with the rules. Insufficient knowledge to admit or deny is not an acceptable response unless party complied with FRCP 56(f)); D. Haw. LR 56.1(b) (party opposing summary judgment must file and serve a concise statement identifying all material facts where there is a genuine issue to be litigated or all material facts that are accepted); C.D. Ill. LR 7.1(D)(2)(b) (non-moving party must set forth: (i) undisputed material facts, (ii) disputed material facts, (iii) immaterial facts, and (iv) additional material facts); N.D. Ill. LR 56.1(b) (non-moving party must file and serve opposing affidavits, a supporting memorandum, and a response to the movant's statement of material facts); N.D. and S.D. Iowa LR 56.1(b) (non-moving party must file: (i) brief that responds to each ground asserted in summary judgment motion, (ii) response to movant's material facts that admits, denies, or qualifies movant's facts, (iii) any additional material facts, and (iv) an appendix); D. Kans. Rule 56.1(b) and (e) (responding party must fairly meet substance of matter asserted. If responding party cannot admit or deny factual matter asserted, the response must state why); D. Mass. Rule 56.1 (opposition must contain statement of facts that non-moving party contends are material and there is genuine issue to be litigated); D. Mont. Rule 56.1(b); E.D. Mo. Rule 7-4.01(E); D. Nebr. Civil Rules 7.1(b)(1)(A), (b)(2)(A), and 56.1(b)(1); D. Nev. LR 56-1; N.J. Civ. Rule 56.1; D. N.M. Rule 56.1(b) (memorandum in opposition must include concise statement of material facts in dispute, numbered sequentially and with references to the record. All material facts set forth in the movant's statement will be deemed admitted unless specifically controverted); E.D. and S.D. N.Y. Local Civil Rule 56.1(a) (the movant's statement of undisputed facts are deemed admitted unless the non-moving party specifically denies them in the opposition statement, referring to them by the same numbering scheme as movant. Non-moving party must also include citation to the evidence for each statement controverting any statement of material fact); N.D. N.Y. L.R. 7.1(a)(3) (opposing party must file a response to the movant's Statement of Material Facts, which must include record references and any additional material facts in separately numbered paragraphs. All facts set forth in the moving party's Statement of Material Facts are deemed admitted unless specifically controverted); W.D. N.Y. L.R. 56.1(b) and (c) (all material facts set forth in the moving party's statement are deemed admitted unless specifically controverted); D. N.H. LR 7.2(b)(2) (statement of material facts in dispute must contain record references. All material facts set forth by the movant are deemed admitted unless properly opposed by the non-moving party); E.D. Okla. Local Rule 56.1(B) (non-moving party must file a statement of material facts that set forth disputed material facts. Each material fact in dispute must be numbered, contain a record reference, and if applicable, state the number of the movant's fact that is in dispute); N.D. Okla. LCvR 56.1(c); W.D. Okla. LCvR 56.1(c) (must be numbered and contain record references. If applicable, must also state the number of the movant's facts that are in dispute); D. Ore. LR 56.1(b) (non-moving party must response to movant's statement of undisputed facts by accepting or denying each fact, articulating opposition to the movant's contention or interpretation of the undisputed material fact, or offering other relevant material facts. A party may reference only

material facts necessary for the court to determine the summary judgment motion, and no others); M.D. Pa. LR 56.1 (opposing papers must include statement of material facts that non-moving party contends there is a genuine issue to be litigated. Statement must include references to the record); W.D. Pa. LR 56.1(C)(1) (non-moving party must file concise statement of material facts that (1) admits or denies each material fact contained in movant's papers, (2) sets forth the basis for the denial, and (3) sets forth in separately numbered paragraphs any other material fact that are allegedly at issue. Non-moving party must also include memorandum of law explaining why the movant is not entitled to judgment as a matter of law); D.P.R. LR 56(c) (opposing party must include in its opposition papers a separate, concise statement of material facts. The opposing statement must admit, deny, or qualify the movant's material facts and support each denial or qualification with a record reference. The opposing statement may include additional material facts in separate numbered paragraphs supported by references to the record); D. S.D. LR 56.1(C) (opposing party's statement of material facts must respond to each numbered paragraph in movant's statement with appropriate citation to the record); M.D. Tenn. Rule 8(b)(7)(c) and (d) (the non-moving party must respond to each of the movant's material facts by (i) agreeing that the fact is undisputed, (ii) agreeing that the fact is undisputed for purposes of the summary judgment motion only, or (iii) demonstrating that the fact is disputed. Each disputed fact must be supported by a record reference. The response must be set forth on the movant's statement of fact or a copy thereof. In either case, the non-moving party's response must be below the movant's material facts. The non-moving party may also include additional material facts. If the non-moving party sets forth additional material facts, the moving party must respond to the additional material facts within 10 days of the filing of the non-moving party's response); W.D. Tenn. LR 7.2(d)(3); E.D. Tex. Local Rule CV-56(b) (opposing papers must include a statement of genuine issues, which contain citation to proper summary judgment evidence); N.D. Tex. LR 56.4 (non-moving party must identify both the factual and legal grounds in response to the summary judgment motion. The response itself must not contain arguments and authorities. The response must be accompanied by a brief setting forth the argument and authorities on which the party relies. The brief must be filed as a separate document from the response); D. Vt. DUCivR 56-1(c) (memorandum in opposition must include concise statement of material facts that party contends a genuine issue exists. Each disputed fact must be separately numbered, refer to the specific part in the record, and, if possible, reference the movant's fact that is in dispute); D. V.I. Rule 56.1(b) (opposing party may respond to motion by serving a notice of response, opposition, brief, affidavits, other supporting documents, and a counterstatement of all material facts where there exists a genuine issue to be litigated); E.D. Va. LCR 56(B) (non-moving party must include statement of disputed material facts with record references); E.D. Wash. LR 56.1(b) (opposition papers must include specific material facts, with record references, establishing a genuine issue for litigation. Non-moving party must explicitly identify any fact asserted by movant that non-moving party disputes or clarifies. The non-moving party may briefly state the evidentiary reason why the movant's fact is disputed).

- B. Time Limit. There is much variation among the districts.¹⁶
- C. Page limitation. There is some variation among the districts.¹⁷

¹⁶ D. Alaska LR 7.1(e) (opposition must be filed and served within 15 days of service of motion and reply must be filed and served within 5 days of service of the opposition); S.D. Ala. LR 7.2(b) (Nonmoving party has 30 days to file opposition); D. Ariz. LRCiv 56.1(a) (opposing party has 30 days after service of summary judgment motion to file and serve memorandum in opposition. Moving party has 15 days after service of opposition to file reply); E.D. Ark. Local Rule 7.2(b); W.D. Ark. Local Rule 7.2(b) (non-moving party has 11 days after service of motion to file and serve opposition); S.D. Cal. CivLR 7.1.e.2 (opposition must be filed and served no later than 14 calendar days prior to the noticed hearing date); D. Colo. LCivR 56.1(A) (response must be filed within 20 days after the motion was filed, or other time that the court may order. A reply may be filed within 15 days of the filing of the opposing brief); S.D. Ga. LR 56.1 (response to summary judgment motion must be made within 20 days of service of the motion); C.D. Ill. LR 7.1(D)(2) (non-moving party must file a response within 21 days after service of the summary judgment motion. Reply is due 14 days after service of response); S.D. Ill. Rule 7.1(c) (non-moving party has 30 days after service of summary judgment motion to file and serve opposition papers. Reply must be filed within 10 days of service of the opposition papers. A reply is not favored and should be filed only in exceptional circumstances); S.D. Ind. L.R. 56.1(b) and (c) (opposing party must file and serve papers in response no later than 30 days after service of the motion. Reply brief is due 15 days after service of the opposing party's submission); N.D. and S.D. Iowa LR 56.1(b) (non-moving party must file response within 21 days after service of summary judgment motion); E.D. Mo. Rule 7-4.01(B) (opposing memorandum, containing any relevant argument, citations to authorities, and documentary evidence, within 20 days after service of the motion. Reply memorandum is due within 5 days after service of the opposition); D. Nebr. Civil Rule 56.1(b)(2) (opposing brief may be filed no later than 20 days after service of the motion and supporting brief); W.D. N.Y. L.R. 56.1(e) (the opposing party has 30 days after service of the motion to file and serve opposition papers. The moving party has 15 days after service of the opposition papers to file and serve a reply. Surreply papers are not permitted unless with leave of court); W.D. Pa. LR 56.1(C) (opposition papers due 30 days after service of motion); M.D. Tenn. Rule 8(b)(7)(a) (non-moving party has 20 days after service of motion to serve a response, unless otherwise ordered by the court); D. Vt. DUCivR 56-1(b) (memorandum in opposition must be filed within 30 days after service of motion, or within time specified by court. A reply may be filed within 10 days after service of opposition); D. V.I. Rule 56.1(b) (original and two copies of opposing papers must be served on movant within 20 days after service of notice and motion);

¹⁷S.D. Ala. LR 7.2(b) (a brief in support or opposition must not exceed 30 pages. A reply by movant must not exceed 15 pages); C.D. Ill. LR 7.1(D)(2) (memorandum in support and opposition may not exceed 15 pages); S.D. Ill. Rule 7.1(d) (briefs in favor of and opposed to summary judgment motion must not exceed 20 pages. A reply must not exceed 5 pages); D. Md. Rule 105(3) (memorandum in support or opposition must not exceed 50 pages and reply must

- D. Sanctions for Nonconformity. If the non-moving party's opposition papers do not comply with the rules, many courts deem the moving party's material facts admitted.¹⁸

VI. COURT REVIEW AND DETERMINATION OF MOTION FOR SUMMARY JUDGMENT

- A. Court review.¹⁹ Some rules emphasize the court has no independent duty to search and consider any part of the record not referenced in the statements of material facts.²⁰
- B. Determination. Many rules provide that material facts not contested by the non-moving party are deemed admitted.²¹ However, one district court will not enter

generally not exceed 25 pages); E.D. Mo. Rule 7-4.01(D) (motion, memorandum in opposition, and reply must generally not exceed 15 pages); W.D. Tenn. LR 7.2(e) (memoranda in support or opposition must not exceed 20 pages without prior court approval).

¹⁸S.D. Ala. LR 7.2(b) (failure will be construed as an admission that no material factual dispute exists, however, the rule is not construed to require non-moving party to respond where the moving party has not carried its burden of establishing that there is no dispute as to any material fact); D. Conn. Local Rule 56(a)3 (failure to provide citation to evidence may result in facts being deemed admitted); S.D. Ill. Rule 7.1(d) (allegations of fact not supported by citations may not be considered); N.D. and S.D. Iowa LR 56.1(b); D. Me. Rule 56(f) (court may disregard any fact not supported by any citation to the record); D. Mass. Rule 56.1 (opposition must contain statement of facts that non-moving party contends are material and there is genuine issue to be litigated. Failure to file will result in facts being deemed admitted); E.D. Mo. Rule 7-4.01(E); D.P.R. LR 56(e) (court may disregard statement of fact not supported by a record citation); D. Vt. DUCivR 56-1(f) (failure to respond timely to summary judgment motion may result in the court granting the motion without further notice).

¹⁹D. V.I. Rule 56.1(a)(3) (after the motion has been addressed by all parties and is ready for submission to the court, the moving party must file a cover letter listing all documents filed and all papers with the clerk of court (with a copy to the judge's law clerk), with copies served on all parties).

²⁰D. Haw. LR 56.1(f) (the court has no independent duty to search through and consider any part of the court record not otherwise reference in the parties' papers); D. Me. Rule 56(f); D. Ore. LR 56.1(e); D.P.R. LR 56(e); E.D. Tex. Local Rule CV-56(c) (the court will not scour the record to find an undesignated genuine issue of material fact before entering summary judgment).

²¹ E.D. Ark. Local Rule 56.1(b); W.D. Ark. Local Rule 56.1(b) (all material facts are deemed admitted unless controverted by the non-moving party); D.D.C. LCvR 7(h) and 56.1;

summary judgment on an unopposed motion unless the court finds no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.²²

VII. HEARING AND ORAL ARGUMENT

- A. Hearing/Oral Argument. Many courts do not ordinarily schedule oral argument on motions for summary judgment. A party must usually request oral argument.²³

M.D. Ga. Local Rule 56; S.D. Ga. LR 56.1; D. Haw. LR 56.1(g); N.D. Ill. LR 56.1(b)(3)(B); N.D. Ind. L.R. 56.1(b); S.D. Ind. L.R. 56.1(e); N.D. and S.D. Iowa LR 56.1(b) (court may grant motion if no opposition is filed); D. Kans. Rule 56.1(b); E.D., M.D., and W.D. La. LR 56.2; D. Me. Rule 56(f); D. N.M. Rule 56.1(b) (memorandum in opposition must include concise statement of material facts in dispute, numbered sequentially and with references to the record. All material facts set forth in the movant's statement will be deemed admitted unless specifically controverted); E.D. and S.D. N.Y. Local Civil Rule 56.1(a) (the movant's statement of undisputed facts are deemed admitted unless the non-moving party specifically denies them in the opposition statement, referring to them by the same numbering scheme as movant. Non-moving party must also include citation to the evidence for each statement controverting any statement of material fact); N.D. N.Y. L.R. 7.1(a)(3) (opposing party must file a response to the movant's Statement of Material Facts, which must include record references and any additional material facts in separately numbered paragraphs. All facts set forth in the moving party's Statement of Material Facts are deemed admitted unless specifically controverted); W.D. N.Y. L.R. 56.1(b) and (c) (all material facts set forth in the moving party's statement are deemed admitted unless specifically controverted); D. N.H. LR 7.2(b)(2) (statement of material facts in dispute must contain record references. All material facts set forth by the movant are deemed admitted unless properly opposed by the non-moving party); E.D. Okla. Local Rule 56.1(B); N.D.Okla. LCvR 56.1(c); W.D.Okla. LCvR 56.1(c); D. Ore. LR 56.1(f); M.D. Pa. LR 56.1; W.D. Pa. LR 56.1(E); D.P.R. LR 56(e); D. S.D. LR 56.1(D); M.D. Tenn. Rule 8(b)(7)(g); E.D. Tex. Local Rule CV-56(c); D. Vt. DUCivR 56-1(c); E.D. Va. LCR 56(B); E.D. Wash. LR 56.1(b).

²²D. Alaska LR 7.1(d)(2).

²³D. Ariz. LRCiv 7.2(f) and 56.1(b) (parties may request oral argument); C.D. Ill. LR 7.1(D)(4) (parties may file a request for oral argument, otherwise court may take the motion under advisement); S.D. Ill. Rule 7.1(h) (party must move for oral argument); N.D. Ind. L.R. 56.1(c); S.D. Ind. L.R. 56.1(g); N.D. and S.D. Iowa LR 56.1(f); D. Md. Rule 105(6); D. Nebr. Civil Rules 7.1(d) and 56.1.

VIII. PRO SE LITIGANTS

- A. Special Notice. Some courts require special notice to pro se litigants in summary judgment proceedings.²⁴

²⁴D. Conn. Local Rule 56(b) (represented party moving against pro se party must file and serve “Notice to Pro Se Litigant Opposing Motion for Summary Judgment”); D. Haw. LR 56.2; N.D. Ill. LR 56.2; N.D. Ind. L.R. 56.1(e); S.D. Ind. L.R. 56.1(h); D. Mont. Rule 56.2; E.D. and S.D. N.Y. Local Civil Rule 56.2.



memorandum

DATE: April 2, 2007
TO: Honorable Michael Baylson
FROM: Joe Cecil and George Cort
SUBJECT: FRCivP 56(g) Motions for Sanctions

Our search of CM/ECF codes and docket entries for 273,193 cases terminated in FY2006 revealed no instance of sanctions awarded under FRCivP 56(g) for a bad faith affidavit. We found a single pro se civil rights case in which the judge denied a plaintiff's handwritten motion for sanctions under FRCivP 56(g) (*Gyadu v. O'Connell*, 3:2002cv1271, D. Conn. 2/28/06). The judge then granted the defendant's motion for summary judgment.

We first identified the 680 cases terminated in FY2006 that included one or more motions for summary judgment and one or more orders regarding sanctions, as indicated by CM/ECF codes entered by each court. (There is no specific CM/ECF code for sanctions under FRCivP 56(g).) We then examined each sanctions order and related motion to determine if the sanction related to a bad faith affidavit submitted within a summary judgment proceeding. As noted, we found only a single pro se case which denied the motion for sanctions under 56(g). We found no other motion for sanctions for bad faith affidavits under FRCivP 11 or any other authority.

Please let me know if you require additional information on this topic.

THE FEDERAL JUDICIAL CENTER
THURGOOD MARSHALL FEDERAL JUDICIARY BUILDING
ONE COLUMBUS CIRCLE, N.E.
WASHINGTON, DC 20002-8003

April 12, 2007

Memorandum

To: Hon. Michael Baylson
From: Joe Cecil and George Cort
Subject: Estimates of Summary Judgment Activity in Fiscal Year 2006

The following tables contain the results of our analyses of summary judgment activity in 179,969 cases terminated in the 78 federal district courts that had fully implemented the CM/ECF reporting system in Fiscal Year 2006. These figures exclude class action cases, multi-district litigation cases, and reopened cases. The tables indicate the following:

- Nationwide, approximately 17 motions for summary judgment are filed for every 100 cases terminated. Of course, some cases may have more than one motion filed, so the proportion of actual cases with summary judgment motions is somewhat lower. This estimate is based on all terminated cases, including those cases terminated before the issue was joined and before a summary judgment motion would have been appropriate. (Table 1)
- Summary judgment activity in the circuits ranges from a low of 7 motions per 100 cases in the Second Circuit to a high of 34 motions per 100 cases in the District of Columbia Circuit. (Table 1)
- Summary judgment activity varies greatly within circuits, due in part to differences in the composition of the districts' caseloads. Some of the districts with high rates of summary judgment activity also have a high percentage of social security cases, which are typically resolved by the grant or denial of a summary judgment motion. Some of the districts with especially low rates of summary judgment motions have local rules or standing orders that encourage consultation with the judge before filing a summary judgment motion. (Table 1)

- Approximately 9 percent of the motions are for partial summary judgment, and less than 1 percent of the motions seek summary judgment under FRCivP 54. (Table 2)
- Summary judgment activity varies greatly across types of cases, from a low of 9 motions per 100 cases in torts cases to a high of 28 motions per 100 cases in civil rights cases. Summary judgment activity in personal injury product liability cases is difficult to assess due to the frequent consolidation of such cases in class actions and multi-district litigation proceedings. (Table 3)
- Approximately 60 percent of the summary judgment motions are granted in whole or in part, with a somewhat higher rate of motions granted in civil rights cases. (Table 3)
- Over 70 percent of the summary judgment motions in employment discrimination cases are granted in whole or in part, with considerable variation across circuits and across districts within circuits. (Table 4)

Methodology

The information in the following tables was extracted from the CM/ECF replication database. The individual courts follow somewhat different data recording practices and this may account for some of the variation across districts. For example, summary judgment motions under FRCivP 54 may simply be recorded as summary judgment motions in some districts. Summary judgments arising from a magistrate judge's report and recommendation that is adopted by the district judge may not be noted other than as adoption of the magistrate judge's report. Motions to dismiss that become summary judgment motions when affidavits are filed in support of the motion may not be properly identified as summary judgment motions in all districts. These tables exclude cases designated as class actions and multi-district litigation transfers because summary judgment activity may not be recorded separately for each case that is affected by a consolidated motion. Finally, these tables exclude cases that are reopened, because such cases may not indicate summary judgment activity that occurred earlier in the case, before it was reopened. Together these exclusions eliminated almost 35,000 product liability personal injury cases, 7,000 asbestos cases, and smaller numbers of other types of cases terminated in Fiscal Year 2006.

Please let me know if you wish to discuss these tables or wish to see other analyses.

cc: Hon. Lee Rosenthal
Professor Edward Cooper
Professor Richard Marcus

Table 1: Summary Judgment Motions Across Circuits and Districts

	SJ Motions per 100 Case Terminations	SJ Orders Granting Motion
TOTAL (28,748 motions)	17	60%
First Circuit (862 motions)	16	55%
Highest Rate Among Districts	32	57%
Lowest Rate Among Districts	13	51%
Second Circuit (1,276 motions)	7	63%
Highest Rate Among Districts	25	68%
Lowest Rate Among Districts	4	54%
Third Circuit (3,013 motions)	16	56%
Highest Rate Among Districts	32	64%
Lowest Rate Among Districts	13	47%
Fourth Circuit (2,626 motions)	17	60%
Highest Rate Among Districts	39	75%
Lowest Rate Among Districts	13	49%
Fifth Circuit (2,338 motions)	11	60%
Highest Rate Among Districts	21	65%
Lowest Rate Among Districts	8	52%
Sixth Circuit (3,328 motions)	20	59%
Highest Rate Among Districts	37	70%
Lowest Rate Among Districts	14	57%
Seventh Circuit (2,999 motions)	21	58%
Highest Rate Among Districts	40	65%
Lowest Rate Among Districts	13	56%
Eighth Circuit (2,176 motions)	18	59%
Highest Rate Among Districts	36	68%
Lowest Rate Among Districts	13	26%
Ninth Circuit (4,803 motions)	18	59%
Highest Rate Among Districts	47	71%
Lowest Rate Among Districts	11	40%
Tenth Circuit (1,542 motions)	18	59%
Highest Rate Among Districts	22	67%
Lowest Rate Among Districts	14	54%

Eleventh Circuit (2,867 motions)	16	59%
Highest Rate Among Districts	25	73%
Lowest Rate Among Districts	8	48%
District of Columbia (918 motion)	34	68%

Table 2: Types of Summary Judgment Motions Across Circuits

	Type of Motion		
	Summary Judgment	Partial Summary Judgment	Rule 54 Motion
TOTAL	91%	9%	0%
First Circuit	91%	8%	2%
Second Circuit	95%	4%	1%
Third Circuit	93%	7%	0%
Fourth Circuit	95%	5%	0%
Fifth Circuit	89%	10%	0%
Sixth Circuit	93%	7%	0%
Seventh Circuit	93%	7%	0%
Eighth Circuit	93%	6%	0%
Ninth Circuit	83%	17%	0%
Tenth Circuit	83%	16%	1%
Eleventh Circuit	90%	9%	1%
DC Circuit	94%	6%	0%

Table 3: Summary Judgment Activity by Type of Case

NOS Code - Description	Total FY2006 Cases Term'd	Total SJ Motions Filed	SJ Motions per 100 Cases	Orders Decided	
				Denied	Granted
TOTAL	205,058	30,556	15	40%	60%
Contracts	22,489	4,682	21	47%	53%
110 Insurance	7229	2071	29	46%	54%
120 Marine Contract Actions	1295	118	9	50%	50%
130 Miller Act	352	28	8	63%	37%
140 Negotiable Instruments	307	45	15	50%	50%
160 Stockholders Suits	280	25	9	64%	36%
190 Other Contract Actions	12642	2347	19	47%	53%
195 Contract Product Liability	209	39	19	46%	54%
196 Franchise	175	9	5	44%	56%
Tort	30,574	2,871	9	46%	54%
310 Airplane Personal Injury	237	24	10	43%	57%
315 Airplane Product Liability	74	22	30	59%	41%
320 Assault, Libel, and Slander	596	78	13	32%	68%
330 Federal Employers Liability	645	89	14	39%	61%
340 Marine Personal Injury	1358	204	15	54%	46%
345 Marine - Product Liability	25	9	36	44%	56%
350 Motor Vehicle Pers Injury	3864	363	9	52%	48%
355 Motor Vehicle Prod Liability	463	92	20	39%	61%
360 Other Personal Injury	7752	987	13	44%	56%
362 Medical Malpractice	1089	185	17	47%	53%
365 Personal Injury - Prod Liab	11505	581	5	45%	55%
368 Asbestos - Prod Liability	1704	3	0	33%	67%
370 Other Fraud	1262	234	19	47%	53%
Civil Rights	32,277	8,924	28	30%	70%
440 Other Civil Rights	14319	3962	28	32%	68%
441 Civil Rights Voting	117	28	24	35%	65%
442 Civil Rights Jobs	15679	4716	30	27%	73%
443 Civ Rts Accommodation	592	124	21	53%	47%
444 Civil Rights Welfare	40	4	10	0%	100%
445 Am Disab Act Employment	509	48	9	25%	75%
446 Am Disab Act Other	1021	42	4	53%	48%

NOS Code - Description	Total FY2006 Cases Term'd	Total SJ Motions Filed	SJ Motions per 100 Cases	Orders Decided	
				Denied	Granted
Prisoner	50,403	3,418	7	36%	64%
510 Pris Pet - Vacate Sentence	7118	65	1	50%	50%
530 Pris Pet - Habeas Corpus	19619	497	3	46%	54%
535 Habeas Corp Death Pen	161	27	17	44%	56%
540 Prisoner -Mandamus Other	1084	26	2	42%	58%
550 Prisoner - Civil Rights	14052	1652	12	35%	65%
555 Prisoner - Prison Condition	8369	1151	14	33%	67%
Other	69,315	10,661	15	47%	53%
150 Overpayments - Judgment	271	43	16	72%	28%
151 Overpayments - Medicare	187	107	57	17%	83%
152 Recovery Student Loans	2189	38	2	18%	82%
153 Recovery of Vet Benefits	11	2	18	0%	100%
210 Land Condemnation	215	7	3	14%	86%
220 Foreclosure	2567	132	5	24%	76%
230 Rent, Lease, Ejectment	117	19	16	32%	68%
240 Torts to Land	369	49	13	40%	60%
245 Tort to Land Prod Liability	96	21	22	12%	88%
290 Other Real Property Actns	680	142	21	58%	42%
371 Truth in Lending	458	53	12	38%	62%
380 Other Pers Prop Damage	949	160	17	42%	58%
385 Prop Damage - Prod Liab	413	70	17	40%	60%
400 State Re-Appportionment	3	4	133	100%	0%
410 Antitrust	397	103	26	47%	53%
423 Bankruptcy Withdrawal	706	79	11	46%	54%
430 Banks and Banking	184	25	14	23%	77%
450 Interstate Commerce	420	67	16	57%	43%
460 Deportation	120	6	5	67%	33%
470 Civil (RICO)	589	185	31	65%	35%
480 "Consumer Credit"	1423	63	4	48%	52%
490 "Cable Sat TV"	685	9	1	14%	86%
610 Agricultural Acts	27	1	4	100%	0%
625 Drug Related Seizure	1246	56	4	44%	56%
690 Forfeiture and Penalty	673	38	6	50%	50%
710 Fair Labor Standards Act	2779	300	11	42%	58%
720 Labor/Mgmt Relations Act	1246	354	28	37%	63%
730 Labor/Mgmt Report	69	22	32	18%	82%
740 Railway Labor Act	102	42	41	44%	56%
790 Other Labor Litigation	1182	247	21	37%	63%
791 ERISA	10052	1367	14	46%	54%
820 Copyright	5072	279	6	53%	47%
830 Patent	2352	645	27	53%	47%

NOS Code - Description	Total FY2006 Cases Term'd	Total SJ Motions Filed	SJ Motions per 100 Cases	Orders Decided	
				Denied	Granted
840 Trademark	3318	333	10	50%	50%
850 SEC	1296	143	11	55%	45%
861 Medicare	46	5	11	60%	40%
862 Black Lung	16	2	13	50%	50%
863 D.I.W.C./D.I.W.W.	6296	1285	20	54%	46%
864 S.S.I.D.	6927	1721	25	52%	48%
865 R.S.I.	615	212	34	49%	51%
870 Tax Suits	1175	208	18	44%	56%
871 IRS 3rd Party Suits	88	1	1	0%	100%
875 Customer Challenge	15	1	7	100%	0%
890 Other Statutory Actions	9842	1420	14	41%	59%
891 Agricultural Acts	336	45	13	62%	38%
892 Economic Stabilization Act	4	4	100	50%	50%
893 Environmental Matters	877	270	31	48%	52%
895 FOIA	280	179	64	30%	70%
950 State Statute Constitutional	262	90	34	47%	53%
990 Other	73	7	10	50%	50%

Note: This table excludes the following case types that did not reveal any summary judgment activity: Bankruptcy Appeals (2450 cases); Food and Drug Acts (46); Liquor Laws (2); Airline Regulations (4); Occupational Safety/Health (9); Selective Service (16); Energy Allocation Act (4); and Appeal of Fee - Equal Access to Justice (9). Motions granted in part and denied in part are recorded as granted rather than denied. Orders with no indication of dispositive action are excluded from the table.

Table 4: Summary Judgment Activity in Employment Discrimination Cases

CIRCUIT	DISTRICT*	Percent Granted (in whole or in part)
TOTAL		73%
FIRST		56%
	Highest Rate Among Districts	60%
	Lowest Rate Among Districts	48%
SECOND		76%
	Highest Rate Among Districts	82%
	Lowest Rate Among Districts	71%
THIRD		69%
	Highest Rate Among Districts	85%
	Lowest Rate Among Districts	54%
FOURTH		74%
	Highest Rate Among Districts	85%
	Lowest Rate Among Districts	67%
FIFTH		78%
	Highest Rate Among Districts	86%
	Lowest Rate Among Districts	66%
SIXTH		73%
	Highest Rate Among Districts	78%
	Lowest Rate Among Districts	67%
SEVENTH		75%
	Highest Rate Among Districts	79%
	Lowest Rate Among Districts	68%
EIGHTH		70%
	Highest Rate Among Districts	87%
	Lowest Rate Among Districts	59%
NINTH		74%
	Highest Rate Among Districts	93%
	Lowest Rate Among Districts	59%
TENTH		72%
	Highest Rate Among Districts	79%
	Lowest Rate Among Districts	64%

ELEVENTH		75%
	Highest Rate Among Districts	95%
	Lowest Rate Among Districts	56%
DC		58%

*Includes the 65 federal district courts that had fully implemented the CM/ECF system in FY2006 and had more than 15 employment discrimination cases (i.e., nature of suit code 442) with summary judgment orders terminated during that year.

Rule 56 Revision: The Effort that Failed in 1992
(Rule 56 Agenda Materials from October 2005 Meeting)

The Advisory Committee took up revision of Rule 56 in the wake of the 1986 Supreme Court decisions. In September 1992 the Judicial Conference rejected the proposed revision. A few years later the Reporter prepared a first-draft revision of Rule 56(c) based on the earlier proposal. This draft responded to one set of purposes underlying the proposal. Rule 56(c) does not provide much detail about the procedure of moving for summary judgment. Many districts have adopted local rules that spell out detailed requirements. Rule 56 can be improved by adopting the best features of these rules, and some measure of national uniformity may be gained in the bargain. The Rule 56(c) draft remains for initial consideration. The present question is whether to undertake broader revision of Rule 56. If Rule 56 is to be revamped, the Rule 56(c) draft would be revised to fit within the new overall structure. For present purposes, Rule 56(c) questions are relegated to the separate memorandum.

The earlier effort pursued a multitude of objectives. This initial description is rough, but should present most of the questions that should be considered in deciding whether to renew the study of Rule 56.

Purpose of Revision

The first paragraph of the final Committee Note seems to reflect a desire to increase the use of Rule 56:

This revision is intended to enhance the utility of the summary judgment procedure as a means to avoid the time and expense of discovery, preparation for trial, and trial itself as to matters that, considering the evidence to be presented and received at trial, can have but one outcome — while at the same time assuring that parties are not deprived of a fair opportunity to show that a trial is needed to resolve such matters.

The first question to confront is what motives might prompt Rule 56 revision. Is there a sense that Rule 56 should be used more vigorously to weed out cases — or parts of cases — that do not deserve elaborate pretrial preparation or trial? That use of Rule 56 has gone too far, so that parties are “deprived of a fair opportunity to show that a trial is needed”? Or that practice varies, not simply in the way courts express themselves but in the actual willingness to dispatch cases by Rule 56? Any of these reasons would prompt a thorough-going reframing of the entire rule.

Less ambitious goals might be pursued. The core of current Rule 56 practice could be taken as given, turning attention to matters affecting the procedure of moving for summary judgment. These goals could be reasonably ambitious, or instead could seek more modest gains. Omissions and unfortunate drafting could be cured. Unrealistically short times for response could be adjusted. The 1992 draft undertakes many changes within this general range, to be explored here in no particular order.

Standard

The present standard allows summary judgment only if presentation of the same record at a jury trial would require judgment as a matter of law. The directed verdict standard applies even if jury trial has been waived, or even if there is no right to jury trial. There is no discretion to grant summary judgment in a case that does not meet this standard. But the equation is not exact. Many cases recognize discretion to deny summary judgment even though the directed-verdict standard is

Rule 56 Agenda Materials from October 2005 Meeting
(August 2005 slightly revised draft)

satisfied — Style Rule 56(c) recognizes this discretion by saying that summary judgment “should” be granted when there is no genuine issue as to any material fact.

It would be possible to reconsider each of these points. It might be argued that if the case is to be tried to the court without a jury, the judge should be able to grant summary judgment on the basis of some standard more open-ended than the directed-verdict standard. Indeed, it might be urged that the efficiency gained by summary judgment justifies departure from the directed-verdict standard even in a jury case.

The 1992 proposal did not attempt to make these changes, apart from recognizing discretion to deny summary judgment even when the required showing has been made. The initial effort, indeed, was to integrate Rule 56 more directly with judgment as a matter of law, emphasizing the identity of standards. Application of the jury standard in judge-tried cases was recognized and carried forward. The Rule 50 standard for judgment as a matter of law was expressly incorporated in subdivision (b), while subdivision (a) carried forward the concept of “facts not genuinely in dispute.”

The proposal did undertake a task that has been accomplished by the Style Project. The several different phrases that present Rule 56(d) and (e) deploys to describe the “genuine issue” concept are replaced by uniform terminology. The thought was to use the same words to express the same standard, not to suggest that the different expressions had led to different standards.

There is no apparent reason to reconsider the basic standard. The tie to directed verdict standards in jury cases is apparent, and probably wise. Strong resistance to any change is certain. Nor is there any clear reason to reconsider the standard for judge-tried cases. Any party who wishes to present live witnesses should have the opportunity to do so, limited only by predictive application of the directed-verdict standard. If no party wishes to present live witnesses, the case can be tried on a paper record. Trial on a paper record is different from summary judgment. It entails Rule 52 findings and review for clear error.

The 1992 draft did write into Rule 56 discretion to deny summary judgment even when a verdict would be directed if the opposing party does not improve its showing at trial. It did this in a way that anticipated but goes beyond the Style Project outcome. Proposed Rule 56(a) said that the court “may” enter summary judgment or “may” summarily determine an issue. The Committee Note explained that discretion to deny has been recognized in the cases, and that the “purpose of the revision is not to discourage summary judgment, but to bring the language of the rule into conformity with this practice.” This change may be resisted, however, on the ground that it might increase the rate of denials. In addition, the 1992 Committee Note suggests complications: discretion to deny may be limited, or may disappear, when summary judgment is sought on specially protected grounds such as official immunity or First Amendment rights. Although slight, the distinction from “should” in Style Rule 56(c) is real; the Committee Note to Style Rule 56 says that “courts will seldom exercise the discretion to deny summary judgment when there is no genuine issue as to any material fact.”

Moving and Opposing Burdens

The Rule 56 moving burden depends on allocation of the trial burden. A party who would have the burden at trial must support a summary-judgment motion by showing evidence that would entitle it to a directed verdict at trial. A party who would not have the burden at trial may carry the

Rule 56 burden in either of two ways. It may undertake a positive showing that negates an essential element of the opposing party's case. But it need not do that. Instead, it suffices to "show" that the opposing party does not have evidence sufficient to carry its trial burden.

The language of Rule 56 has not been changed since the Supreme Court first clearly articulated the Rule 56 burden for a party who does not have the trial burden. The 1992 proposal undertook to express the distinctions derived from the allocation of trial burdens. The words chosen do not accomplish a clear articulation:

- (b) *Facts Not Genuinely in Dispute.* A fact is not genuinely in dispute if it is stipulated or admitted by the parties who may be adversely affected thereby or if, on the basis of the evidence shown to be available for use at a trial, or the demonstrated lack thereof, and the burden of production or persuasion and standards applicable thereto, a party would be entitled at trial to a favorable judgment or determination with respect thereto as a matter of law under Rule 50.

This drafting distinguishes between the moving burdens first by looking to "the evidence shown to be available for use at trial" and complementing this showing with "the demonstrated lack thereof." Either party may rely on evidence to establish a right to judgment as a matter of law "under Rule 50," presumably meaning according to the standard for judgment as a matter of law expressed in Rule 50. A party who would not have the trial burden may invoke "the demonstrated lack" of evidence standard, a result ensured by "and the burden of production or persuasion." The reference to "standards applicable thereto" seems calculated to invoke the rule that the trial standard of proof affects the directed verdict standard and with it the Rule 56 standard: if the trial burden requires clear and convincing evidence, stronger evidence is needed to justify a reasonable jury finding.

Although this drafting is a reasonably neat job, it is fair to wonder whether it would mean anything to a reader who does not already understand the Rule 56 burden.

Smaller questions also might be raised. One comment on the drafting, for example, expressed concern that "[a] fact * * * admitted by the parties" might be read to give conclusive effect to a party's out-of-court statement admissible under the "admission" exception to the hearsay rule. Nothing of the sort was intended, but the comment reflects the anxiety that will accompany any effort to state the moving burden.

In this dimension, then, the questions are whether it would be useful to describe the moving burdens in Rule 56; whether the 1992 draft does the job adequately; and whether a better job can be done. These questions may become entangled with residual disagreements about the Supreme Court's rulings.

The 1992 proposal also addressed the burden on a party opposing a summary-adjudication motion. The details are described in the Rule 56(c) memorandum. The immediately relevant provision was the final sentence of proposed 56(c)(2). A party that fails to respond in the required detail "may be treated as having admitted" a fact asserted in the motion. This provision seems to establish discretionary authority to grant summary judgment without independently determining whether the moving party has carried its burden to show lack of a genuine dispute. Presumably the purpose is to give teeth to the requirement of detailed response. But this approach is likely to be resisted on the ground that an opposing party should be entitled to rely simply on the argument that

the moving party has not carried its burden. Much will turn on a determination whether — either to help the court consider the motion or to encourage summary disposition — a moving party can impose a burden of detailed response simply by making the motion.

Finally, proposed Rule 56(e)(2) addressed a distinct aspect of the parties' burdens, whether moving or opposing: "The court is required to consider only those evidentiary materials called to its attention pursuant to subdivision (c)(1) or (c)(2)." Without invading subdivision (c) territory, the value of this proposition is apparent. At trial a court is not required to embark on a quest for evidence the parties have not submitted. It should not be required to comb through whatever materials have been filed by the time of summary judgment to determine whether the parties have failed to refer to decisive material. The only question is whether this proposition need be stated in the rule. One advantage of explicit statement may be that it goes part way toward imposing an obligation to respond — the opposing party knows that absent a response the court will consider only the adverse portions of the record pointed out by the moving party.

"Evidence" Considered

The 1992 proposal described the basis for decision as "evidence shown to be available for use at trial." Proposed Rule 52(b). The Committee Note explains that this language "clarifies that the obligation to consider only matters potentially admissible at trial applies not just to affidavits, but also to other evidentiary materials submitted in support or opposition to summary adjudication."

More elaborate provisions were set out in proposed Rule 56(e):

(e) Matters to be Considered.

(1) Subject to paragraph (2), the court, in deciding whether an asserted fact is genuinely in dispute, shall consider stipulations, admissions, and, to the extent filed, the following: (A) depositions, interrogatory answers, and affidavits to the extent such evidence would be admissible if the deponent, person answering the interrogatory, or affiant were testifying at trial and, with respect to an affidavit, if it affirmatively shows that the affiant would be competent to testify to the matters stated therein; and (B) documentary evidence to the extent such evidence would, if authenticated and shown to be an accurate copy of original documents, be admissible at trial in the light of other evidence. A party may rely upon its own pleadings, even if verified, only to the extent of allegations therein that are admitted by other parties.

(2) The court is required to consider only those evidentiary materials called to its attention pursuant to subdivision (c)(1) or (c)(2).

The Committee Note begins by stating that subdivision (e) implements the principle stated in (b).

The Note says that facts may be "admitted" for Rule 56 purposes in pleadings, motions, briefs, statements in court (as a Rule 16 conference), or through Rule 36. It states that submission of a document under Rule 56 is sufficient authentication and that there is no need for independent

assurances that a copy is accurate. Other evidence required to establish admissibility should be supplied by deposition, interrogatory answers, or affidavit.

Proposed Rule 56(g)(4) rounded out these provisions by stating that the court may conduct a hearing to rule on the admissibility of evidence.

There is no further discussion of the need to state the admissibility requirement in the rule, nor of the reasons for dispensing with authentication of documents or assurance that a document copy is accurate. Presumably admissibility is required because the purpose of Rule 56 is to determine whether there is a need for trial. The availability of inadmissible evidence does not show the need to try an issue that cannot be supported by admissible evidence.

Apart from wondering whether the admissibility requirement should be addressed in rule text, these provisions tie directly to the timing provisions. The parties must be afforded an opportunity for investigation and discovery that will enable them to find admissible evidence, including the opportunity to find admissible substitutes for inadmissible information. The timing provisions are described below. The proposed amendments to Rule 56(f) also expressly recognized the authority to deny a Rule 56 motion because an opposing party shows good cause why it cannot present materials needed to support its opposition.

A novel feature of redrafted Rule 56(f) would allow a party who cannot present materials needed to oppose a motion to make an “offer of proof.” This provision seems to contemplate a statement of the admissible evidence a party hopes to secure, perhaps supported by pointing to information in an inadmissible form that may lead to admissible evidence. A showing that a bystander heard a witness say that the light was red might not be admissible, but could lead to discovering the identity of the witness and development of the same information in admissible form. Surely that approach is recognized in present practice. The questions are whether it need to be stated in the rule, and whether reference to an “offer of proof” is the most useful description of the practice.

Together, these opportunities to delay decision seem to address the major potential difficulties of the admissibility requirement.

The provision barring reliance on verified pleadings, unless admitted, is curious. At least at times, a sworn pleading has been given the same effect as an affidavit — each is a unilateral, self-serving instrument, not independently admissible, but each is sworn to. It is required that the verified pleading satisfy the formal requirements of a Rule 56 affidavit, showing that the person signing is competent to testify. This practice is not often invoked, in part because verification is not often required and perhaps in part because verified pleadings do not often meet the formal requirements for a Rule 56 affidavit. This provision may reflect a view that as compared to affidavits, pleadings are verified with less scrupulous concern for truth. It might reflect experience that verified pleadings have been used to support or oppose summary judgment, to undesirable effect. Perhaps the view is that little work is required to copy the verified pleading into a complaint, so this additional assurance is properly required.

Timing

The time provisions in present Rule 56 clearly require revision. Rule 56(a) allows a party making a claim to move at any time more than 20 days after commencement of the action, or at any time after an adverse party has served a motion for summary judgment. That means that a party

making a counterclaim, for instance, can file a Rule 56 motion at the same time that it serves the counterclaim.¹ A party defending against a claim can move at any time. The motion must be served at least 10 days before the time set for hearing. Opposing affidavits can be “served” — including service by depositing in the mail — “prior to the day of hearing.” All of these time periods are too short for many cases — often much too short.

The proposed rule sought to establish a functional test to control the motion. Proposed Rule 56(c) provided:

A party may move for summary adjudication at any time after the parties to be affected have made an appearance in the case and have had a reasonable opportunity to discover relevant evidence pertinent thereto that is not in their possession or under their control.

Response time was set at 30 days after the motion is served. (There is no explicit provision for hearing, so no time period was geared to the hearing. Present Rule 56(d) refers to “the hearing on the motion.” The 1992 version deleted this reference; the Committee Note explained that the reference was confusing because the court may decide on the basis of written submissions alone. Some of the comments expressed concern at the lack of a hearing requirement. Compare the Style Project understanding that a provision for “hearing” can be satisfied without an in-person appearance before the court.)

These provisions were supplemented by express recognition in proposed 56(g)(1) and (2) of the court’s authority to specify the period for filing motions and to “enlarge or shorten the time for responding * * *, after considering the opportunity for discovery and the time reasonably needed to obtain or submit pertinent materials.”

Setting motion time in relation to the opportunity to discover relevant evidence is attractive in the abstract. It is likely to work well — indeed to be largely irrelevant — in actively managed cases. It is not clear that it would work well in cases left to management by the parties. There can easily be disputes whether there has been a reasonable opportunity to discover evidence. But the same disputes can arise under present Rule 56(f), in the form of seeking a continuance to permit affidavits to be obtained, or discovery to be had. And substituting the close of the discovery period is not a good idea — there may not be a defined discovery period, and in any event one stated purpose of the revisions is to cut short the discovery process when dispositive issues can be resolved without further discovery on other issues.

Another possible shortcoming of the reliance on reasonable opportunity for discovery may not be real. One “simplified” procedure that might be encouraged is to permit a motion for summary adjudication with the complaint. Actions that are essentially collection actions are the most likely

¹ An intriguing observation. Rule 56(a) says that a party seeking to recover on a counterclaim may move for summary judgment at any time after 20 days from commencement of the action. That seems to say that the counterclaim cannot be included in an answer filed 10 days after the action is filed. But Rule 56(b) says that a party against whom a claim is asserted may move at any time. The apparent reconciliation is that the defendant can move for summary judgment against the plaintiff’s claim on the 10th day, but cannot move for summary judgment on its counterclaim until the 21st day. Does that make sense?

candidates for such treatment. Perhaps this practice could be fit under the proposed rule by arguing that in such actions there is no need to discover evidence not already known to the defendant. An explicit subdivision describing this possible practice might be useful, however, if the practice seems desirable.

Explanation of Court's Action

The final sentence of 1992's Rule 56(a) reads: "In its order, or by separate opinion, the court shall recite the law and facts on which the summary adjudication is based." The Committee Note says that "[a] lengthy recital is not required, but a brief explanation is needed to inform the parties (and potentially an appellate court) what are the critical facts not in genuine dispute * * *." It also says something not in the Rule — an "opinion" also should be prepared if a denial of summary judgment is immediately appealable. Since 1992 many appellate opinions wrestling with official-immunity appeals have bewailed the absence of any district-court explanation of the reasons for denying summary judgment. This may prove to be an issue that pits the interests of appellate courts against the needs of trial courts; it would be easier to strike a balance if we could know how often denial of an official-immunity motion for summary judgment is not followed by an appeal, and whether there is a practicable way to impose a duty to explain only when there is an appeal.

Reasoned explanation of a decision granting summary judgment is obviously valuable. It is also burdensome. The choice made in 1992 seems right, but must be thought through again.

Explanation of a decision denying summary judgment was urged by some of the comments on the 1992 proposal. This question ties to the question of "partial summary judgment." If a court decides to leave for trial all of the issues presented by the motion, it may be better to leave to Rule 16 conferences or other devices the opportunity to guide further party preparation for trial. Again, the choice made in 1992 may be the best outcome. But there is at least one competing concern. A summary-judgment denial may be appealable. By far the most common example is denial of a motion based on official immunity. There are lots of those appeals. Appellate courts regularly bewail the absence of any statement of the reasons that led to the denial. If it could be done, it might be useful to draft a rule that requires explanation when a denial may be appealed. The most obvious difficulty is to cabin any such rule to circumstances with a realistic basis for appeal in final-judgment doctrine. A rule might be drafted for immunity appeals only — perhaps including not only official immunity, but also Eleventh Amendment, foreign sovereign, and qualifying state-law immunities. It also might include any denial certified for § 1292(b) appeal. Venturing further, account might be taken of circumstances in which denial of summary judgment might arguably be appealable as a denial of interlocutory injunction relief for purposes of a § 1292(a) appeal. Even this much speculation illustrates the difficulty.

Partial Summary Judgment: Nomenclature and Limits

The 1992 proposal elected to retain "summary judgment" as the Rule 56 caption, but was drafted to distinguish three concepts. The general concept, "summary adjudication," embraces both "summary judgment" and "summary determination." Summary judgment refers to disposition of at least a claim; summary determination to disposition of a defense or issue. It is not clear whether the distinction is employed in a way that enhances clarity, but it may prove useful.

Two limits are created for summary determination. The first no doubt reflects much present practice. Present Rule 56(d) does not use the term "partial summary judgment," but commonly is

described that way. It says that if a Rule 56 motion does not dispose of the entire case, the court “shall if practicable ascertain what material facts exist without substantial controversy.” The 1992 proposal explicitly changes “shall” to “may,” recognizing that the court should have discretion to refuse any summary determination. The Style Project has done the same thing, although in a rather different way. Rather than “may,” it says the court “should,” to the extent practicable, determine what material facts are not genuinely at issue. This revision, reflecting actual practice, seems safe.

The other limitation on summary determination appears in proposed Rule 56(a). Summary determination is authorized only as to “an issue substantially affecting but not wholly dispositive of a claim or defense.” The Committee Note explains this limit: “the point being that motions affecting only part of a claim or defense should not be filed unless summary adjudication would have some significant impact on discovery, trial, or settlement.” The underlying concern seems reasonable. It would be good to restrict the opportunity to use Rule 56 for purposes of delay or harassment. A motion for determination of incidental issues may impede, not advance, ultimate disposition. But the practical value of this limit deserves some thought. The effort to sort out issues that do not substantially affect a claim or defense may itself impede progress, particularly if the parties take to responding to Rule 56 motions by arguing the “significant impact” point. And some parties might avoid the attempt to determine whether an issue substantially affects a claim by moving for summary judgment on the claim. Under proposed Rule 56(c) the motion must specify the facts that are established beyond genuine issue, providing an obvious map for summary determination of some issues.

Partial summary disposition was extended by proposed Rule 56(d) to include an order “specifying the controlling law.” It went on to provide that “[u]nless the order is modified by the court for good cause, the trial shall be conducted in accordance with the law so specified * * *.” The theory is that it can be useful to establish the law as a guide for further trial preparation and trial. The most obvious question is whether this sort of procedure should be added to the traditionally fact-sorting function of Rule 56, or instead should be relegated to Rule 16. There also may be questions of the relationship between this provision and Rule 51 as revised in 2003.

The 1992 version of Rule 56(d) concluded by stating that “An order that does not adjudicate all claims with respect to all parties may be entered as a final judgment to the extent permitted by Rule 54(b).” Current Style conventions suggest that such gratuitous cross-references be deleted. This one may particularly deserve deletion because it gives no hint of the Rule 54(b) doctrine that requires final disposition of all parts of a “claim,” or of all claims between a pair of parties. This provision was complemented by a Committee Note statement that denial of a Rule 56 motion does not establish the law of the case; the motion may be reconsidered, or a new motion may be filed. The implicit determination that there is no need to refer to this proposition in the rule may suggest that the Committee Note also can remain silent.

Parties Affected

The 1992 Committee Note says something not clearly anchored in the proposed rule text: When summary judgment is warranted as a matter of law because there are no genuine factual disputes,

the judgment or determination may be entered as to all affected parties, not just those who may have filed the motion or responses. When the court has concluded as the result of one motion that certain facts are not genuinely in dispute, there is no reason

to require additional motions by or with respect to other parties who have had the opportunity to support or oppose that motion and whose rights depend on those same facts.

It is easy enough to understand the sense of frustration that may underlie this statement. If the facts are so clear as to warrant summary judgment in favor of the moving party against the party targeted by the motion, why should the court have to revisit the issue on a later motion or actually have to carry the same facts through to trial as among other parties? But of course another party may do a more effective job in resisting a motion explicitly addressed to that party. Although it is more than frustrating to have to conclude that there is a genuine issue after all — and to have to deal with the contrary earlier ruling — this thought requires careful attention.

Court-Initiated Summary Judgment

Current practice recognizes the court's authority to initiate summary judgment by giving notice to the parties that it is considering summary judgment and providing an opportunity to respond at least equal to the times provided to respond to a motion. Proposed Rule 56(g)(3) expressed this practice by providing notice to the parties "to show cause within a reasonable period why summary adjudication based on specified facts should not be entered." This language may restrict present practice by the requirement that the notice specify the facts the court thinks to be established beyond genuine issue. That may be difficult for the court, and might carry an undesirable aura of predisposition. Apart from those questions, it may be asked whether a rule that explicitly recognizes authority to act without motion may create a negative-implication limit on authority to act without motion under other rules that do not expressly recognize action on the court's initiative.

Oral Testimony

Present Rule 43(e) provides that when a motion is based on facts not appearing in the record the court may direct that the matter be heard wholly or partly on oral testimony. This authority can be used on a summary-judgment motion, but not to consider the credibility of the witnesses. The 1992 proposal adapted this practice into Rule 56(g)(4), authorizing a hearing to "receive oral testimony to clarify whether an asserted fact is genuinely in dispute." The Committee Note explains that the hearing, "as under Rule 43(e)," may be useful "to clarify ambiguities in the submitted materials — for example, to clarify inconsistencies within a person's deposition or between an affidavit and the affiant's deposition testimony. In such circumstances, the evidentiary hearing is held not to allow credibility choices between conflicting evidence but simply to determine just what the person's testimony is."

The Committee Note explanation puts this provision half-way in the middle of a familiar problem. Many cases rule that a self-serving affidavit cannot be used to contradict deposition testimony. If summary judgment is warranted on the deposition testimony, the witness cannot defeat summary judgment simply by changing the testimony. This practice recognizes that the self-contradicting affidavit may defeat summary judgment after all if a persuasive explanation is offered. The proposed rule extends this qualification by suggesting that hearing the witness "to determine just what the person's testimony is" will help. The idea is attractive. Whether it really can be separated from clandestine credibility determinations is not apparent.

Rule 11 Overlap

Present Rule 56(g) provides that the court “shall” order payment of reasonable expenses, including reasonable attorney fees, caused by filing Rule 56 affidavits “in bad faith or solely for the purpose of delay.” It further provides that an offending party or attorney may be adjudged guilty of contempt.

The 1992 proposal eliminated Rule 56(g). The Committee Note observes that Rule 11 applies to Rule 56 motions, responses, briefs, and other supporting materials. In that respect Rule 11 goes far beyond the affidavits targeted by Rule 56(g). But there are at least two respects in which Rule 11 falls short of Rule 56(g). The Committee Note was written at a time when the Advisory Committee had determined to carry forward mandatory sanctions in what became the 1993 Rule 11. Now that Rule 11 sanctions are discretionary, Rule 56(g) — which appears to require sanctions — goes beyond Rule 11 with respect to Rule 56 affidavits. Rule 11, moreover, does not authorize contempt sanctions; a Rule 11(c)(2) direction to pay a penalty into court approaches contempt, but is not contempt.

The question here is whether Rule 56(g) should be abrogated in favor of Rule 11. Severe penalties are available independently for false swearing in an affidavit, or for falsity in a § 1746 unsworn declaration under penalty of perjury. Those penalties, however, may not reach every affidavit presented in “bad faith,” and more particularly may not reach an affidavit presented solely for the purpose of delay. 10B FP&P § 2742 describes cases in which sanctions were imposed without any indication that the affidavits were false. It also cites a 1968 district court ruling that sanctions are discretionary, notwithstanding “shall,” and agrees: “Although this conclusion appears to be contrary to the language of Rule 56(g), it seems sound.” There is so much discretion in determining bad faith or a sole purpose to delay that insisting on mandatory sanctions seems pointless. It also points out that Rule 56(g) applies to an affidavit offered under Rule 56(f) to support a request for additional time; applying a falsity test in that situation might be difficult.

Perhaps the most important observation is that there has not been much apparent use of Rule 56(g). Rule 11 may well suffice.

“Sham Affidavit”

The theory that the summary-judgment standard is the same as the standard for judgment as a matter of law is sorely tested by a common practice sometimes referred to as the “sham affidavit.” Courts frequently refuse to accept a self-interested and self-contradicting affidavit offered by a party to change the party’s own deposition testimony. The common explanation is that this approach is necessary to preserve summary judgment as an effective procedure. In keeping with this explanation, the practice is complicated by recognizing that the affidavit may be recognized if a plausible explanation is offered — there really is no contradiction despite the appearances, new information justifies the contradiction, the affidavit version of facts is supported by other evidence, and so on. A lengthier description than most is provided by *Baer v. Chase*, 3d Cir.2004, 392 F.3d 609, 621-626.

The conceptual difficulty with this practice is that it often seems to justify summary judgment when the same contradiction in trial testimony would not justify judgment as a matter of law.

This brief description suggests two good reasons for ignoring the “sham affidavit” practice in any Rule 56 revision. As a practical matter, it would be difficult to capture present practice in rule text. As a conceptual matter, an explicit rule provision could be adopted only by attempting to develop a coherent theory that supports some version of this practice — whether the present version

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or a modified version — in the standards for judgment as a matter of law and the right to jury trial. It seems better to pass by this set of issues in any Rule 56 project.

Proposed New Civil Rule 62.1 on Indicative Rulings

Proposed new Civil Rule 62.1 emerged from a recommendation by the Solicitor General that was referred to the Civil Rules Committee by the Appellate Rules Committee. Earlier versions have been considered by the Standing Committee, most recently in January 2007. Changes have been made to reflect those deliberations. More importantly, further changes have been made to integrate Rule 62.1 with the proposed new Appellate Rule 12.1. The materials presenting Rule 12.1 provide the framework for considering both proposals together.

The Civil Rules Committee recommends proposed Civil Rule 62.1 for publication for comment. The clean version of Rule 62.1 set out below is specifically integrated with proposed Appellate Rule 12.1. The over- and underlined version of the Rule and Committee Note show how Rule 62.1 would be reconstructed if Rule 12.1 had not been proposed for publication.

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CIVIL PROCEDURE**

**Rule 62.1. Indicative Ruling on Motion for Relief That Is
Barred by a Pending Appeal**

- 1 **(a) Relief Pending Appeal.** If a timely motion is made for
2 relief that the court lacks authority to grant because of an
3 appeal that has been docketed and is pending, the court
4 may:
- 5 **(1)** defer consideration of the motion;
- 6 **(2)** deny the motion; or
- 7 **(3)** state either that it would grant the motion if the
8 court of appeals remands for that purpose or that
9 the motion raises a substantial issue.
- 10 **(b) Notice to the Court of Appeals.** The movant must
11 promptly notify the circuit clerk under Federal Rule of
12 Appellate Procedure 12.1 if the district court states that
13 it would grant the motion or that the motion raises a
14 substantial issue.
- 15 **(c) Remand.** The district court may decide the motion if
16 the court of appeals remands for that purpose.

Committee Note

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment

that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the action is remanded or that the motion raises a substantial issue. Experienced appeal lawyers often refer to the suggestion for remand as an “indicative ruling.”

This clear procedure is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. Rule 62.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court’s authority to act in face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Rule 62.1 applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the clerk of the appellate court under Federal Rule of Appellate Procedure 12.1 when the district court states that it would grant the motion or that the motion raises a substantial issue. Remand is in the appellate court’s discretion under Appellate Rule 12.1.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the case is remanded for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion

raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

Discussion

A year ago the Advisory Committee recommended approval for publication of a new Civil Rule 62.1 on “indicative rulings.” The recommendation was to defer publication to August 2007 as part of a larger package of Civil Rules proposals. The recommendation was discussed at the June 2006 and January 2007 Standing Committee meetings. The Appellate Rules Committee became convinced that it should consider a parallel provision in the Appellate Rules. The attached Appellate Rules Committee materials and draft Appellate Rule 12.1 provide the background not only for the Appellate Rules Committee’s work but also for earlier work on Civil Rule 62.1.

The rule text recommended for approval for publication has been revised to reflect proposed Appellate Rule 12.1. An over- and underlined version is set out below to illustrate the revisions and to show the version that the Civil Rules Committee approved for publication before the Appellate Rules Committee recommended publication of Appellate Rule 12.1. The most important change results from the opportunity to rely on Appellate Rule 12.1 to address the form of the remand for further district-court proceedings. Subdivision (c) is shortened to become a formal recognition of remand that closes the circle opened by subdivisions (a) and (b).

Subdivision (b) also was revised to coordinate with Appellate Rule 12.1. It had been designed to invite comment on the choice between two alternatives for giving notice to the court of appeals. One alternative would require notice to the court of appeals when the motion for relief is filed in the district court and a second notice when the district court acts on the motion. That alternative had the advantage of giving the court of appeals early warning that it might want to adjust the progress of the appeal. It had a potential disadvantage arising from the frequent uncertainty whether a pending appeal ousts the district court’s authority to grant the relief requested by a motion. In practice, notice would likely be given only when the

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question of district-court authority is identified. The other alternative, and the one adopted by Appellate Rule 12.1, requires notice to the court of appeals only when the district court states that it would grant the motion or that the motion raises a substantial issue. This second approach has been adopted for Rule 62.1(b) without suggesting any alternative for comment.

Other changes reflect the discussion at the January Standing Committee meeting. The Rule title was settled. There was rather extensive discussion of the question whether the court of appeals should be asked to consider remand if the district court indicates only that it “might” grant the motion for relief. The interim resolution was a recommendation to publish as “[might or] would grant”; the letter transmitting the proposal for publication would have invited comment on the question whether the rule should require that the district court state that it “would” grant relief, or should pave the way for appellate consideration if the district court states only that it “might” grant relief. This approach has been modified to acquiesce in the Appellate Rules Committee’s recommendation. Proposed Rule 62.1 now imitates Appellate Rule 12.1, allowing the district court to state either that it would grant the motion on remand or instead to state that the motion raises a substantial issue. If a statement that the motion raises a substantial issue implies a slightly lower degree of district-court consideration or commitment, the difference does not warrant further negotiation. The most important point is that the court of appeals remains in control, deciding whether to remand in light of the progress of the appeal, the importance of the issues raised by the motion for relief, the prospect that relief would change or perhaps moot the issues on appeal, and the persuasiveness of the district court’s explanation of the reasons for remand.

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Revisions To Conform to Proposed Appellate Rule 12.1

Rule 62.1 Indicative Ruling on Motion for Relief That Is Barred by a Pending Appeal

- 1 (a) **Relief Pending Appeal.** If a timely motion is made for
2 relief that the court lacks authority to grant because of an
3 appeal that has been docketed and is pending, the court
4 may:
- 5 (1) defer consideration of the motion;
 - 6 (2) deny the motion; or
 - 7 (3) indicate state either that it ~~{might or}~~ would grant
8 the motion if the appellate court of appeals should
9 remands for that purpose or that the motion raises
10 a substantial issue.
- 11 (b) **Notice to Appellate the Court of Appeals.** The
12 movant must promptly notify the circuit clerk of the
13 appellate court under Federal Rule of Appellate
14 Procedure [12.1] ~~{when the motion is filed and when the~~
15 district court acts on it the motion}~~{if the district court~~
16 indicates states that it ~~{might or}~~ would grant the
17 motion or that the motion raises a substantial issue.
- 18 (c) **Remand.** The district court may decide the motion if
19 the court of appeals remands for that purpose. If the
20 district court states that it ~~{might or}~~ would grant the
21 motion, the appellate court may remand for further

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22 ~~proceedings in the district court[, and if it remands may~~
23 ~~retain jurisdiction of the appeal].~~

Committee Note

This new rule adopts and generalizes for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot on its own reclaim the case to grant a Rule 60(b) motion. But it can entertain the motion and either deny it, defer consideration, or indicate state either that it ~~might~~ or would grant the motion if the action is remanded or that the motion raises a substantial issue. Experienced appeal lawyers often refer to the suggestion for remand as an “indicative ruling.”

This clear procedure is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. Rule 62.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court’s authority to act in face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Rule 62.1 applies only when those rules, ~~as they are or as they develop~~, deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the “indicative ruling” procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the clerk of the appellate court under Federal Rule of Appellate Procedure [12.1] ~~[when the motion is filed in the district court and again when the district court rules on the motion]]~~ when the district court states that

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it ~~{might or}~~ would grant the motion ~~{and when the district court grants or denies the motion}.~~ or that the motion raises a substantial issue. Remand is in the appellate court's discretion under Appellate Rule [12.1]. ~~The appellate court may remand all proceedings, terminating the initial appeal. The appellate court may instead choose to or may remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the appeal after the district court rules if any party wishes to proceed~~ after the district court rules on the motion.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the case is remanded for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it might grant the motion and why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after indicating stating that it might do so the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

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II. Information Items

A. EXPERT-WITNESS DISCOVERY

The Discovery Subcommittee continues to study four questions relating to discovery of testifying expert witnesses. As noted in the Introduction, two “miniconferences” were held to discuss these questions with practicing lawyers.

Two of the expert-witness questions address trial witnesses who are not required to provide reports under the pretrial disclosure provisions of Civil Rule 26(a)(2)(B). A report is not required from an expert who is not retained or specially employed to give testimony in the case, nor from an expert whose duties as an employee of the party do not regularly involve the giving of expert testimony. Treating physicians are the standard example of expert witnesses who are not retained or specially employed to give testimony, but some difficulties have occurred in determining whether a particular physician is testifying on subjects that require a report. As to employee experts, several opinions have required reports by strained readings of Rule 26(a)(2)(B). The Subcommittee is considering a proposal to require an attorney disclosure that would provide information of the sort obtained by expert-witness interrogatories under the pre-1993 version of Rule 26(b)(4). The disclosure would be made with the Rule 26(a)(2)(A) disclosure identifying these witnesses.

The other two questions involve discovery of draft expert-witness reports and discovery of communications between an attorney and the attorney’s expert witness. The ABA has proposed tight restrictions on such discovery. The April miniconference explored experience under New Jersey rules that appear to impose sharp limits and that in practice seem to impose even sharper limits. The New Jersey lawyers who appeared at the miniconference expressed great and unanimous enthusiasm for the state practice.

The Discovery Subcommittee continues to work on these questions. It expects to present proposals for amending Rule 26 at the fall Advisory Committee meeting.

B. OTHER TOPICS

Rule 68. The Committee continues to study suggestions to amend the offer-of-judgment provisions of Rule 68 advanced in law review articles and judicial opinions. Earlier advisory

committees have worked intensively on Rule 68 only to abandon the enterprise. The Committee is likely to decide whether to take up the topic after the appearance of the second of a set of two articles based on a recent empirical examination of Rule 68 practices in employment and civil rights cases.

Rule 12(e). The Federal Judicial Center undertook a study of Rule 12(e) at the Committee's request. The study will be useful in the long-range effort to determine whether Rule 12(e) might be amended to provide for greater use of case-specific orders directing more specific pleading.

Class Action Fairness Act. The Federal Judicial Center is carrying forward its study of the impact of the Class Action Fairness Act on the numbers and types of class actions brought to federal courts. Information developed by this study may prove useful in determining whether to consider revising Rule 23 to address developing class-action practices.

DRAFT MINUTES
CIVIL RULES ADVISORY COMMITTEE
APRIL 19-20, 2007

1 The Civil Rules Advisory Committee met on April 19 and 20, 2007, at the Brooklyn Law
2 School. The meeting was attended by Judge Lee H. Rosenthal, Chair; Judge Michael M. Baylson;
3 Judge David G. Campbell; Professor Steven S. Gensler; Daniel C. Girard, Esq.; Judge C. Christopher
4 Hagy; Justice Nathan L. Hecht; Robert C. Heim, Esq.; Hon. Peter D. Keisler; Judge Paul J. Kelly,
5 Jr.; Chief Justice Randall T. Shepard; Chilton Davis Varner, Esq.; Anton R. Valukas, Esq.; and
6 Judge Vaughn R. Walker. Professor Edward H. Cooper was present as Reporter, and Professor
7 Richard L. Marcus was present as Special Reporter. Judge Sidney A. Fitzwater and Professor Daniel
8 R. Coquillette, Reporter, represented the Standing Committee. Judge Eugene R. Wedoff attended
9 as liaison from the Bankruptcy Rules Committee. Professor Catherine T. Struve represented the
10 Appellate Rules Committee. Peter G. McCabe, John K. Rabiej, James Ishida, and Jeffrey Barr
11 represented the Administrative Office. Joe Cecil and Thomas Willging represented the Federal
12 Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Matthew Hall, Rules Clerk for
13 Judge David F. Levi, attended. Alfred W. Cortese, Jr., Esq., and Jeffrey Greenbaum (ABA Litigation
14 Section liaison) were present as observers. Judge David Trager and Dean Joan G. Wexler
15 represented the Brooklyn Law School.

16 Judge Rosenthal began the meeting by noting that the Committee was fortunate to enjoy the
17 elegant meeting spaces and the generous hospitality of the Brooklyn Law School. Judge Trager has
18 been most helpful and kind in preparing the Law School's welcome. Judge Trager noted that the
19 conference center had been his "baby" while he was the Law School's Dean. He praised the staff
20 who made possible the flawless arrangements and elegant food. The Committee responded to his
21 welcome with warm applause. Dean Wexler appeared later to add her welcome and wishes for a
22 productive meeting. Judge Rosenthal renewed the Committee's expressions of appreciation for the
23 elegant hospitality, and noted that "we always leave here with better rules."

24 Judge Rosenthal delivered sad news. Judge Levi has undergone three surgeries for an eye
25 problem, but is carrying on in good spirit. Mark Kasanin, a long-time Committee member who
26 contributed greatly in many ways, particularly in guiding the Committee through periodic encounters
27 with the Supplemental Rules, is ill; the Committee expressed its best wishes for a speedy and
28 complete recovery.

29 Judge Rosenthal noted that Justice Hecht was attending to enjoy a "ceremonial" meeting after
30 the conclusion of his two terms as a Committee member. Justice Hecht has played a critical role
31 both in the rules the Committee has made and in the rules it has decided not to make. He commands
32 an extraordinary level of respect in the Texas bar that cannot be described in words. He has been
33 a lifelong servant of the people of Texas. The Style Project bears his fingerprints all over it. The
34 Rules refer to "electronically stored information," not "digital information," because he reminded the
35 Committee of fingerprints. He came to the Committee because of his great work on the Texas rules
36 of procedure. The Committee will miss his work, and his company. Justice Hecht was presented
37 a Judicial Conference diploma of recognition for his service from 2000 through 2006.

38 Justice Hecht responded that he had worked on Texas procedure for 18 years. Work on the
39 Federal Civil Rules has been enjoyable, despite the occasional tedium. His years on the Committee
40 included intense work on class actions, discovery of electronically stored information, and the Style
41 Project. Electronically stored information "has got me on a lot of programs around the country,
42 showing the great interest in what the Committee does." The Rules are more than rules. They
43 describe the civil justice system around the country.

44 Judge Rosenthal noted that this meeting also would be the final meeting for two members
45 who were unable to attend. Frank Cicero wrote that it had been a privilege to work with the
46 Committee. He recognizes the outstanding knowledge and experience of the Administrative Office

47 Rules Committee Support staff. And, to his surprise, Committee work taught him much about rules
48 that he had thought to know thoroughly well. The Committee expressed its thanks for his hard work
49 and devotion to Committee business.

50 Judge Thomas Russell wrote that he was impressed with the intellectual rigor and knowledge
51 the Committee brought to each rule that came up for consideration. He met and enjoyed many new
52 friends. "All good things shall — I mean must — come to an end." The Committee expressed its
53 thanks to Judge Russell — "a country judge" — for his devotion to its work, including service as
54 chair of subcommittees for the Style Project and the Time-Computation Project.

55 Judge Rosenthal noted that three miniconferences had been held since the September
56 Committee meeting. One was held in New York in January to explore Rule 56 revisions with a
57 large, diverse, and very helpful group of lawyers. Two were held on disclosure and discovery of
58 expert trial witnesses. The first was held in Scottsdale, Arizona, in conjunction with the January
59 meeting of the Standing Committee, with another large, diverse, and very helpful group of lawyers.
60 The second was held yesterday in New York with a group of New Jersey lawyers to explore
61 experience with a New Jersey rule that closes off discovery of draft expert reports and some parts
62 of communications between trial counsel and trial expert witnesses. Never has a group of lawyers
63 been so unanimous in providing an upbeat endorsement of a rule of procedure.

64 The Standing Committee met in January. It approved publication this summer of
65 amendments that would delete Rule 13(f) and amend Rules 15(a) and 48. Rule 62.1 was discussed
66 to good effect. The Appellate Rules Committee made clear its willingness to create an Appellate
67 Rule to dovetail with Rule 62.1; their draft rule will be discussed later in this meeting. The goal is
68 to achieve simultaneous publication of both civil and appellate rules on "indicative rulings."

69 The March Judicial Conference meeting was uneventful from a Civil Rules perspective. The
70 Conference approved correction of a typo in Supplemental Rule C(6) that occurred in the process
71 of conforming that rule to new Supplemental Rule G on civil forfeiture.

72 The Style Rules are before the Supreme Court. The time to send to them to Congress is fast
73 approaching. If all goes as hoped, they will take effect on December 1, 2007.

74 Judge Baylson reported on the Evidence Rules Committee work on proposed Evidence Rule
75 502. This rule on waiver of attorney-client privilege and work-product protection has been
76 considered by the Committee for some time. The rule will be advanced as a recommendation by the
77 Judicial Conference for legislation by Congress. The rule addresses the scope of intentional waiver;
78 inadvertent disclosure; and impact on state courts. The most controversial portion of the rule
79 published for comment dealt with "selective waiver" — the question whether privileged or protected
80 information can be disclosed to the United States or an office of the United States without waiving
81 the privilege or protection as to anyone else. This portion will be excised from the rule and reported
82 as a separate item without any recommendation. Final language remains to be worked out. Judge
83 Rosenthal noted that if Rule 502 is adopted, it will provide a secure foundation for the provisions
84 recently adopted in Civil Rules 16(b)(6) and 26(f)(4) referring to agreements for asserting privilege
85 or protection after disclosure. There will be less reason for concern that a court may, in the interest
86 of accelerating discovery, pressure the parties to agree to measures that will not protect them against
87 waiver in favor of nonparties. The two sets of rules will mesh well. The opportunity the Evidence
88 Rules Committee afforded the Civil Rules Committee to be part of the process was welcome.

89 *September Minutes*

90 The draft minutes for the September, 2006 meeting were approved, subject to correction of
91 typographical and similar errors.

92 *Rule 56*

93 Judge Rosenthal introduced the discussion of Rule 56 by observing that the work has been
94 fascinating. A first attempt to revise Rule 56 was pursued as far as a recommendation for adoption
95 to the Judicial Conference in 1992. The project was picked up again because several other projects
96 demonstrated the need to bring Rule 56 closer to actual contemporary practice. The Style Project
97 showed many areas in which practice has diverged sharply from the Rule 56 text, but these questions
98 could not be addressed within the "no-substantive-change" approach of that Project. The Time-
99 Computation Project showed a real need to revise the Rule 56 timing provisions. And the Local
100 Rules Project showed a wealth of local rules that supplement and improve Rule 56.

101 Judge Baylson, who chaired the Rule 56 Subcommittee, thanked the Subcommittee for its
102 hard work.

103 **WISDOM OF REVISION**

104 The first question is whether the time has come to revise Rule 56. There are many local
105 rules. Judge Fitzwater, who participated in drafting the Northern District of Texas local rule, has
106 helped the Committee to understand the needs that have led to the proliferation of local rules. James
107 Ishida and Jeffrey Barr have done great work in assembling, sorting, and analyzing scores of local
108 rules. And in districts that do not have local rules, many individual judges have standing orders.
109 The sheer number of local rules, and the substantial differences among them, provide strong
110 evidence that the time has come to restore a greater measure of national uniformity by amending
111 Rule 56 to incorporate the best of the local practices. The impetus toward uniformity, however,
112 should be matched in some provisions by recognizing the need to adjust practices developed to fit
113 most cases to meet the needs of particular cases. Providing for departure by case-specific orders will
114 be important in some parts of Rule 56.

115 Discussion began with the statement that the Committee tries to develop rules that will make
116 practice more consistent in all districts. Actual practice can be better met in moving toward
117 consistency, in adopting what courts generally do.

118 Further support for amending Rule 56 was expressed by a practitioner who practices in
119 different districts. "Practice under Rule 56 is diverse, even random." There are many local rules,
120 and some individual judge rules. "You have to be very careful with the practice." A national rule,
121 even if only a default rule, that expedites careful and considered disposition of summary-judgment
122 motions will be a good thing. To be sure, some people will try to make something of it that it should
123 not be. But the goal remains important.

124 Another practitioner with a nationwide practice supported a national approach to summary
125 judgment. The Committee should be careful about the extent to which departures from the national
126 rule are permitted.

127 A judge said that it is appropriate to adopt a general national rule that serves as a template,
128 offering "very broad-scale provisions on what the motion is and should be." A national rule can
129 conform to general practice.

130 The Committee was reminded that the rules committees are charged with recommending
131 rules of practice and procedure "as may be necessary to maintain consistency and otherwise promote
132 the interest of justice," 28 U.S.C. § 2073(b).

133 The Committee agreed that the time has come to consider Rule 56 amendments.

134 **RULE 56(A): TIMING**

135 Judge Baylson introduced the time provisions by noting that an amended Rule 56(a) was
136 approved as part of the Time-Computation Project last September. The present timing provisions
137 were found inadequate. The response was to create a default rule, subject to change by order in the
138 case or by local rule. The expectation was, and remains, that case-specific timing provisions will
139 be provided by scheduling orders in most cases. But a default rule remains important. The
140 September version allowed a motion to be made at any time, up to alternative deadlines set at the
141 earlier of 30 days after the close of all discovery or 60 days before the date set for trial. On further
142 consideration, the Subcommittee recommends that the deadline be set at 30 days after the close of
143 all discovery, without the alternate reference to the date set for trial. There are too many variations
144 in the ways in which cases are set for trial to support a deadline geared to the trial date. A deadline
145 set at 30 days after the close of all discovery is frequently used.

146 Support was offered for carrying forward with a deadline geared to the date set for trial.
147 Lawyers do not always understand when it is that discovery is closed. If no date has been set for
148 trial, there is no need to set a deadline even after discovery has been completed. The problem is the
149 "late-hit" motion that is made when the nonmovant is caught up in the rush of preparing for trial; that
150 problem is better addressed by a deadline set by the trial date.

151 Reference to the trial date was challenged, however, by noting that many judges do not set
152 a trial date until summary-judgment motions have been decided. A date 30 days after discovery may
153 be set by district practice either as a deadline for summary-judgment motions or as a deadline to file
154 a pretrial order that triggers a Rule 16 conference to consider, among other things, the timing of
155 summary-judgment motions.

156 The first response was that the judge can do these things by order in the case. The national
157 rule still should include a default deadline measured by the time set for trial.

158 A broader response noted that the value of any national default rule can be questioned. The
159 choice to gear a default deadline to discovery rather than trial need be faced only if it seems useful
160 to have a default rule in face of the expectation that most cases will be governed by scheduling
161 orders. Judges participating in the miniconference feared that a deadline measured by the date set
162 for trial would make trial dates unreliable and often would require resetting the trial.

163 A question asked whether the problem of insufficient time to act after a motion made 60 days
164 before the trial date is affected by an assumption whether the court has to rule on the motion. If it
165 is proper to "carry the motion with the case," so that trial happens on schedule even if the motion has
166 not been decided, the pressure to reset trial is much reduced.

167 This question was met with an observation that Rule 56 does not say that the judge must
168 grant the motion if the standards are met. The Style Project concluded that practice is properly
169 described by directing that the court "should" grant the motion. That direction carries greatest force
170 when the motion shows that the entire action can be terminated. As the number of claims and issues
171 that must be tried in any event increases, the value of disposing of only part of the case through Rule
172 56 diminishes. Still, there is an assumption that ordinarily the court should rule on the motion.

173 Further discussion noted that the value of a default rule has provoked thought about the vague
174 zone that distinguishes "routine" or "normal" cases from "complex" cases. Many of the lawyers at
175 the miniconference deal with complex cases, cases in which the judge takes an active management
176 role. But there are other cases that, while important, do not elicit active case management. These
177 are the cases sensibly governed by a default rule. These are the cases that draft Rule 56(a) aims at.
178 The default time provision is not designed to work in the complex cases.

179 The need for any default rule was questioned by suggesting a different approach. Rule 56(a)
180 could say simply that the court has power to set a deadline. It is difficult to set a deadline that
181 anticipates a trial date, but there are difficulties also in attempting to identify the close of discovery
182 and in the prospect that the close of discovery may fall very close to trial. There may be some
183 tension between present Rule 56 and present Rule 16; this approach to Rule 56 would clearly avoid
184 any such tension.

185 Another comment observed that the court takes control in complex cases. The Rule 56
186 motion often will be set for a time before expert-witness discovery in order to determine whether the
187 expensive process of expert-witness discovery can be avoided. But something should be done to
188 avoid late motions. The idea that the court can refuse to rule at all on the motion is unattractive.

189 The role of the deadline was identified by observing that a deadline does not prevent a party
190 from moving before the deadline. The draft indeed allows a motion at any time up to the deadline.
191 It is better to make the motion as soon as can be in hopes of avoiding wasted time in preparing for
192 trial. A bright line deadline — 30 days after the close of all discovery — would be welcome.

193 It was added that summary judgment began as a plaintiff's device in collection cases.
194 Practice has grown beyond that use, and perhaps has moved away from it in substantial part.

195 The alternative trial-date deadline was criticized again. The draft allows 21 days to respond
196 and an additional 14 days to reply. If the motion is made 60 days before the date set for trial, it will
197 be submitted 25 days before trial. That means the parties have to begin preparing for trial, indeed
198 to be well into full preparation. A general national rule tied to the close of discovery will be useful.
199 Judges are pretty good about setting a date for the conclusion of discovery. "30 days after that you
200 know whether there will be a motion." This approach will work better in a great majority of cases.

201 Another member agreed that the present rule is unworkable and should be improved. The
202 discovery deadline would be a big improvement.

203 The discovery cutoff was questioned again, however, by asking how it will work when the
204 parties are uncertain whether discovery has closed. It was suggested that discovery may continue
205 up to trial, and in some cases may carry on even during trial. The response was that the judge can
206 set a case-specific deadline for such cases.

207 It was asked whether the importance of setting a closing date for discovery should be
208 addressed by revising Rule 16(b). The response was that there is no inconsistency between the draft
209 proposal and Rule 16(b). The close of all discovery is determined by any Rule 16(b) order that
210 addresses the question.

211 The relationship to Rule 16(b) was questioned from another direction. Some lawyers might
212 argue that a national default rule implies that a judge cannot set a deadline at all. Others may argue
213 that the judge can set a deadline before the default deadline, but cannot set a later deadline. Apart
214 from those arguments — which clearly will fail given the express authorization of orders in the case
215 — it seems likely that some judges will view the default deadline as the presumptively correct
216 deadline.

217 Concern with late motions was expressed again. A motion at trial, or so close to trial that
218 the parties must prepare for trial, "can seldom do much good. We should try to push the parties
219 toward a realistic deadline." Thirty days after the close of all discovery may not be enough time in
220 complex cases. But in most cases, it will afford sufficient time — the parties ordinarily can begin
221 to prepare the motion, and to anticipate a response, before discovery is completed.

222 Further support was provided by suggesting that it is important to flush out these motions so
223 that tardy motions do not become a problem. Tying the deadline to a trial date would be a problem.

224 Bankruptcy experience was offered as a counter-example. Setting a deadline before the trial
225 date will protect the judge against a late motion. Bankruptcy Rules accept Rule 56 not only for
226 adversary proceedings but also for contested matters. Discovery often closes a week, or even a day,
227 before trial. If there is no trial date set, the close-of-discovery alternative will provide the only
228 deadline. If the only default rule is measured by the close of discovery, "we would have to adopt
229 local rules across the board." The problem of late motions is handled in bankruptcy today by
230 ignoring the implication of Rule 56 that the court must rule on the motion, one way or the other; the
231 court simply holds trial and moots the motion. It was responded that if this is the present practice,
232 the proposal to look only to a deadline measured from the close of all discovery would not change
233 the practice. The rejoinder asked whether adopting a default deadline would strengthen the
234 implication that the court must rule on the motion; doubt was expressed whether it would.

235 Doubts about using discovery to measure the deadline were expressed in still different terms.
236 It is important to create incentives for early motions. But in cases that do not include a fixed date
237 to complete discovery a party may realize belatedly that discovery has indeed concluded and that it
238 has gone past the deadline without realizing that the 30 days had started to run. The result will be
239 motions for an extension, adding "an extra layer of motion practice."

240 Experience in the Northern District of Georgia was offered as an illustration that a deadline
241 measured by discovery can work. The deadline there is 20 days after the completion of discovery.
242 The parties meet the deadline in 80% of the cases. In the rest of the cases the common response is
243 to move for more discovery time.

244 It was observed that the deadline forces the parties to focus on the motion and its timing.
245 "Any deadline invites a motion to extend."

246 An observer said that a deadline must be set so as to support mediation. Mediation is
247 increasingly common, and often is undertaken after summary-judgment motions have been decided.
248 That means that the summary-judgment deadline must allow time to decide the motion and still
249 allow time for mediation after that. Two additional points were made. The first asked why local rule
250 variations should be permitted. The second suggested that the Committee Note should say that the
251 completion of all discovery means the completion of expert-witness discovery as well as other
252 discovery.

253 Permission to adopt a different default deadline by local rule was explained to rest on
254 variations in local motion practice. It may be that the national default rule would not work well in
255 the full context of local motion practice; room should be allowed for local adjustments.

256 Committee Note statements about the completion of expert-witness discovery were resisted
257 as a potential source of confusion. Rule 26(a)(2)(B) establishes a default time for initial trial-expert
258 witness disclosures and reports, absent a time set by the court, at 90 days before the trial date or the
259 date the case is to be ready for trial. The deadline is extended to 30 days after the disclosures made
260 by another party if the evidence is intended solely to contradict or rebut expert evidence identified

261 by the other party. An expert witness who is required to disclose a report can be deposed only after
262 the report is provided. Working through these provisions may become confused if there is no trial
263 date or apparent date the case is to be ready for trial.

264 The alternative suggestion that the deadline should be set in reference to the time designated
265 to complete discovery was resisted by observing that some cases proceed without designation of a
266 time to complete discovery.

267 A motion to revise draft Rule 56(a) to set the default deadline at 30 days after the completion
268 of all discovery, deleting the alternative reference to 60 days before the date set for trial, was adopted
269 by unanimous vote. The recommendation will be to publish this provision for comment as part of
270 the Time-Computation Project and also, if the Committee votes to recommend publication for
271 comment of an amended Rule 56, as part of Rule 56.

272 LOCAL RULES

273 Discussion of the local-rule option in the Rule 56(a) default deadline provision led to general
274 discussion of the relationship between all of proposed Rule 56 and local rules. Many districts have
275 local summary-judgment rules. Rule 56(a) is the only part of the draft that authorizes local rule
276 exceptions. The Committee Note suggests that adoption of the new rule should cause district courts
277 to examine their local rules for consistency with the new rule. "But you may not get that." Would
278 it be better to delete even the Rule 56(a) authorization?

279 It was noted that from time to time Congress becomes concerned with local rules. The Local
280 Rules Projects have responded to these concerns. But on some subjects they surrendered to local
281 practices. Rules of attorney conduct were one. Summary judgment was another. The reason for
282 accepting summary-judgment variations was the conclusion that often the local rules improved on
283 the national rule. A new and improved national rule will provide a new opportunity to establish
284 greater national uniformity.

285 The Subcommittee thought about these issues and decided to authorize deviation by local rule
286 only with respect to time. Many courts have their own timing practices for motions in general; they
287 should be authorized to integrate summary-judgment motions with their general practices.

288 A broader perspective is provided by experience showing that once a district has a local rule
289 it becomes closely attached to the rule. Efforts to displace local rules will provoke strong reactions.
290 A strong case must be made by crafting an amended Rule 56 that addresses the concerns reflected
291 in the local rules. In subdivision (c), for example, it has been decided to adopt a national procedure
292 that begins with a statement of facts that are not genuinely in dispute and to track this statement
293 through response and reply. Departures are authorized only by order in the case, not by local rule.
294 This is an important policy step in a sensitive area. But the authorization for departure by order in
295 the case should go part way toward assuaging distress about the role of local rules.

296 RULE 56(A)(2): CROSSMOTIONS

297 Draft 56(a)(2) provides for a response or crossmotion within 21 days after the motion is
298 served. The Subcommittee carried the crossmotion provision forward for discussion, but
299 recommends against adoption.

300 The crossmotion provision was suggested by several participants in the January
301 miniconference. The purpose was described in clear terms. A party may believe that it has a strong
302 foundation for summary judgment, but also believe that the cost and delay entailed by the motion
303 outweigh the potential gain; it is better to go to trial than to hazard an expensive motion with an

304 outcome that can never be quite certain. This calculation is changed completely if another party
305 moves for summary judgment. The incremental cost and delay entailed by a crossmotion may be
306 minor, and the crossmotion may be the most effective form of response. The situation is very much
307 like the Appellate Rules provision for additional appeals.

308 Doubts about the crossmotion were expressed on several fronts. The first suggestion was that
309 a crossmotion makes sense to the extent that it addresses facts raised by the motion, but no more:
310 there is no genuine dispute as to that fact, and it is I who win, not you. A crossmotion in that setting
311 simply raises the same question as appears when a court grants summary judgment for a nonmovant.
312 Another doubt was that the "crossmotion" concept simply generates confusion. The questions are
313 properly framed by a motion made by the nonmovant without characterizing it as a crossmotion. The
314 only issue is one of time — a crossmotion would a useful characterization only if the time to make
315 a separate motion has run. And even the time function will raise drafting questions — some are
316 likely to argue that a rule requiring a crossmotion within 21 days of the first motion impliedly
317 excludes an independent motion made after the 21 days but before the deadline for motions. Finally,
318 it was urged that it sends a wrong message to seem to encourage retaliatory motions.

319 The Committee agreed to delete the crossmotion provision.

320 **OTHER RULE 56(a) QUESTIONS**

321 The draft expands earlier versions by setting the time for a response at the later of 21 days
322 after the motion is served or 21 days after a responsive pleading is due. The alternative set for a
323 responsive pleading addresses a motion made at the beginning of the action. The motion might be
324 served with the complaint. Most defendants have 20 days to answer after the complaint is served;
325 requiring a response to a summary-judgment motion one day after that could be oppressive. (The
326 Time Project, moreover, proposes to extend to 21 days the time to answer; answer and response
327 would be due on the same day.) The problem is not as severe when the defendant has 60 days to
328 answer, but the circumstances that justify a lengthier time to answer also justify an additional period
329 to gather information sufficient to respond to a summary-judgment motion.

330 For similar reasons, the time to respond is set by the time of service, not the time of filing.
331 Measuring time from filing is desirable because filing is a clear event, seldom allowing any fact
332 dispute. Measuring time from service presents an additional problem — if service is made by mail,
333 actual delivery may come as much as a week later, reducing by one-third the already brief 21-day
334 period to respond. But filing will not work in this context. If a summary-judgment motion were filed
335 with the complaint, for example, 21 days after filing could easily run out before the defendant is
336 served. Some courts have followed a practice of allowing a summary-judgment motion to be filed
337 only after all briefing is done; if that practice persists anywhere, it would have to be revised to avoid
338 inconsistency with the national rule. In any event, electronic case filing may reduce the practical
339 consequences of the distinction between filing and service — commonly service is effected
340 electronically and is virtually simultaneous with filing. Finally, it was observed that many districts
341 have many pro se prisoner filings and that government motions for summary judgment are common
342 in such cases. The prisoner needs time for a response; service will work better.

343 **RULE 56(b): AFFIDAVITS OR DECLARATIONS**

344 Subdivision (b) begins with a sentence carried forward from Style Rule 56(e)(1), modified
345 to include a "declaration" as well as an affidavit. 28 U.S.C. § 1746 allows a written unsworn
346 declaration, certificate, verification, or statement, subscribed as true under penalty of perjury, to
347 substitute for an affidavit. It seems useful to draw attention to this option in the rule text. This
348 sentence describes the requirements that an affidavit or declaration be based on personal knowledge,

349 set out facts that would be admissible in evidence, and show that the affiant or declarant is competent
350 to testify on the matters stated. (The reference to a declaration was later removed from the rule text.
351 Professor Kimble, the Style Consultant, pointed out that no other Civil Rule refers to a declaration;
352 adding the word here might imply that only an affidavit will satisfy other rules that refer only to an
353 affidavit.)

354 The Subcommittee recommends deletion of the second sentence in the draft, which would
355 carry forward and expand the second sentence of Style Rule 56(e)(1). This sentence would provide:
356 "If an affidavit or declaration refers to material that is not already on file, a sworn or certified copy
357 must be attached to or served with the affidavit or declaration." The Subcommittee believes that this
358 provision is redundant because the affidavit or declaration must set out facts that would be
359 admissible in evidence and because subdivision (c)(5) will require filing.

360 Discussion of the second sentence began with the observation that subdivision (c)(5) requires
361 a party to attach to a motion, response, or reply the pertinent parts of any cited materials that have
362 not been filed. This direction will do the job. But it may be desirable to add an observation in the
363 Committee Note pointing out that the filing requirement extends to things referred to in an affidavit
364 or declaration. This suggestion was elaborated by suggesting that the Note should remind readers
365 that the filing requirement covers fact materials, not cited cases.

366 Deletion of the second sentence was approved.

367 **RULE 56(C): STATEMENT OF FACTS, RESPONSE, AND REPLY**

368 Judge Rosenthal introduced Rule 56(c) by noting that intense discussion has been prompted
369 by this attempt to build on a welter of local rules that require a statement of "undisputed facts" as part
370 of a summary-judgment motion. Judge Baylson concurred. The doubts about a statement of
371 undisputed facts expressed at the January miniconference were explored intensively at the
372 Subcommittee meeting that followed the miniconference and in later conference calls. The
373 Subcommittee recommendation presents a procedure that permits departure by order in a particular
374 case, but does not allow deviation by local rule.

375 The procedure provided by subdivision (c) begins with a motion that describes the claims,
376 defenses, or issues as to which summary judgment is sought and then states in separately numbered
377 paragraphs "only those specific material facts that are not genuinely in dispute and are relied upon
378 to support summary judgment." A response must, by correspondingly numbered paragraphs, state
379 what material facts are in dispute. A response also may state additional facts that preclude summary
380 judgment, and may state that the facts asserted by the movant do not support judgment as a matter
381 of law. A reply may dispute any additional fact stated in the response, using the same form as the
382 response.

383 The question is whether this structure, built on the examples of numerous local rules, is so
384 attractive that it should be made national by adopting it in Rule 56.

385 The first question was whether the 1992 defeat of the most recent attempt to revise Rule 56
386 serves as a warning against further attempts. The response was that opposition in 1992 seemed to
387 focus on the restatement of the *Celotex* identification of the moving burdens, not on general hostility
388 to any Rule 56 amendments. The present project does not attempt to articulate the *Celotex* standards.
389 Instead it aims to reform the procedures of Rule 56, accepting without change the standard for
390 summary judgment, including the distinctions that shape the moving burden according to allocation
391 of the trial burdens. Care has been taken to avoid anything in the amendments that might be seen
392 to affect these matters.

393 The next question asked whether the subdivision (c) procedures should be made available
394 for adoption by order in a particular case, rather than established for all cases subject to alteration
395 by order in a particular case. This approach still would help to move toward national uniformity.
396 And it will avoid the risk that some districts will attempt to opt out of the rigmarole of this procedure
397 by local rule. The Committee should aim toward developing a procedure that will command general
398 agreement. Judge Baylson replied that the Subcommittee thought the proposal is the right default
399 rule for the "routine" case, recognizing that it may be unsatisfactory in many "complex" cases.
400 Without these requirements for clearly identified specificity, a judge may be saddled with a mass of
401 papers that impose a heavy burden to identify just what facts are asserted and to find the materials
402 relied upon to support them. Requiring specific paragraphs that separately identify particular
403 material facts, and response by correspondingly numbered paragraphs, and reply in the same form
404 as the response, will enable the court to quickly find where the facts are. The court will be able to
405 make a more prompt, accurate, and decisive determination whether there are disputed facts, and then
406 to determine the legal consequences of any facts that have been established beyond genuine dispute.

407 The doubt was renewed by suggesting that the proposal adopts "a level of specificity, of
408 granularity, unsuited to a national rule." Many local rules do this. Some judges do it. Some states
409 do it. It may be useful in courts that do not have single-judge case assignment systems. But in a
410 single-judge assignment system of the sort used in nearly all federal courts, this procedure simply
411 adds a layer of work for the parties. It will encourage responses that generate disputes that otherwise
412 would not exist. The parties will put into play many facts that are not material. This will increase
413 the cost of disposing of the cases that do need to be disposed of under Rule 56. The rule should
414 require only that the motion identify the issues on which a party wants summary judgment and state
415 the reasons.

416 Judge Rosenthal noted that James Ishida and Jeffrey Barr had gathered and sorted local rules
417 embodying procedures like subdivision (c). Many local rules adopt the first step, requiring
418 identification of undisputed facts in separately numbered paragraphs. A smaller number require that
419 the response adopt the same numbers. Different judges on the Committee have had different
420 experiences with these questions. It will be important to sort through these experiences to determine
421 whether subdivision (c) is desirable.

422 Subdivision (c) was further challenged by noting that the Northern District of California had
423 a local rule similar to subdivision (c) and abandoned it. The parties did not manage to focus the fact
424 issues. The rule did not help. And lawyers at the January miniconference said that this procedure
425 simply establishes one more obstacle on the way to summary judgment.

426 It was agreed that lawyers at the miniconference who deal in complex cases had encountered
427 inappropriate uses of procedures like those embodied in subdivision (c). Statements of undisputed
428 facts have run beyond a hundred pages, and responses have met and even outstripped the statements.
429 Subdivision (c) addresses this problem primarily by recognizing the authority to establish a different
430 procedure by order in the cases that are too complex — that present too many potentially disputed
431 or undisputed facts — to bear the general procedure. It also attempts to address the problem by
432 referring to "specific material facts," with the hope that these words will inspire movants to narrow
433 their focus. For most cases in the federal courts, however, the subdivision (c) procedure should work
434 well. Many summary-judgment motions, for example, are made in employment cases, civil rights
435 cases, and like cases that present a reasonably manageable universe of potential fact disputes. This
436 procedure will enable the judge to determine more easily and rapidly whether there are disputed
437 facts.

438 The next comment was that much of the opposition to subdivision (c) reflects dislike of Rule
439 56 in its entirety. Experience with the Northern District of Georgia local rule similar to subdivision
440 (c) shows that it works very well. The judge can winnow the statement of undisputed facts down
441 to a reasonable number and can readily turn to the cited record support to determine which of them
442 are genuinely in dispute.

443 The tales of very long statements of undisputed facts were met by asking why lawyers do
444 that? A good advocate should much prefer to say there is very little fact material to be considered
445 under the law that should be recognized and applied to this case. A response was that the lengthy
446 statements seem to come more from nonmovants' responses than from the motions. And it was
447 rejoined that nonmovants will do this whether we adopt subdivision (c) or not.

448 A different explanation was offered for long statements of undisputed facts. The statement
449 may arise from a fear that any fact not listed will be taken as recognizedly in dispute. And so for
450 respondents, who fear that failure to contest a fact they do not care about in the present case will
451 come back to haunt them in some future case. It is difficult to draft a rule that makes clear the desire
452 to focus only on the central facts; there can be no guarantee that any drafting will work as intended.

453 Support for subdivision (c) was found in the thought that the requirement of specifying
454 material facts separately will discourage motions based on the vague thought that "I have the better
455 case." Too many motions are made without focusing on what Rule 56 requires. Both sides talk
456 about what they think important without delineating what the facts are or focusing on why they are
457 — or are not — in dispute. The idea of subdivision (c) is to force identification of what each party
458 thinks is material and in dispute. An unequivocal response should be required. "This will advance
459 the ball a lot over what I see."

460 A judge observed that while a practicing lawyer he had often been told at conferences that
461 Rule 56 is a tool to educate the judge about your position. That is an improper use of Rule 56, and
462 it should be drafted to discourage such uses.

463 Another judge described subdivision (c) as directing that the motion identify the issues and
464 then list the facts; a separate memorandum then briefs the arguments on the facts and law. The
465 response and supporting memorandum take the same form. So for the reply. In practice, lawyers
466 often tend to add new facts in the reply, which leads to a sur-reply and on beyond to successive steps
467 without ready names. His court refuses to consider new facts added in a reply. The Committee Note
468 should say explicitly that the reply can only aim at new facts stated in the response, as the rule text
469 seems to provide. This suggestion for the Note was accepted. It was further agreed that (c)(3)
470 should include language that had been enclosed in brackets: "reply by stating in the form required
471 for a response * * *."

472 Indiana practice was described. For 25 years it was much like present Civil Rule 56.
473 Motions were made in ways that did not enable trial judges to figure out, in the limited time
474 available, what might be in the record to show a genuine dispute. Grants of summary judgment were
475 often reversed because on appeal the loser did the work that should have been done in the trial court,
476 pointing to the record materials that established a genuine issue. The Indiana rule was amended to
477 require greater specificity, although not at the level exacted by subdivision (c). The result has been
478 a decline in the rate of reversals. The amended rule has been useful. In later discussion, the Indiana
479 rule was explained further. It does require specific designation by page or similarly precise reference
480 to the facts that are relied on. It does not "look as tidy" as subdivision (c); it does not require a
481 separate statement. "But it avoids the hidden truffle" problem.

482 An interim summary suggested that subdivision (c) will face some serious challenges. It has
483 been defended as useful for the general run of cases, recognizing the need for flexible modification
484 or disregard in complex cases where it may invite self-defeating volumes of detail. But it will be
485 challenged on the ground that although there is no intent to put a thumb on the scale favoring
486 summary judgment, that will be the effect. The rule places a premium on responding in the correct
487 form. Consider civil rights and employment cases. If the price of failing to respond in proper form
488 is serious disadvantage — if a wrong-form response is treated as close to default — the rule will
489 raise new obstacles for litigants who already may be at a serious disadvantage. But if there are no
490 consequences for failures to comply, why create a new demand? Is it because many will comply,
491 even though they might survive the motion with an improperly framed response? Is it because the
492 risk of an inadequate response is the loss of the opportunity to have the nonmovant's position
493 reviewed in its best light — a risk that will grow as courts become ever more reliant on proper-form
494 responses?

495 A judge observed that pro se cases must be treated sympathetically, "but we still can enforce
496 the rules." Another judge agreed that all judges practice forgiveness for pro se parties. But the court
497 needs to be able to decide whether a party is entitled to summary judgment.

498 This theme was extended by pointing to the Federal Judicial Center study of activity by types
499 of cases. In the category of civil rights-jobs, summary judgment was sought in 30% of the cases
500 counted; 73% of the motions were granted in whole or in part. This is the kind of statistic that is
501 used to criticize rules changes. The criticism, however, can be met in part by pointing out that
502 subdivision (c) first increases the movant's responsibility — when it is the defendant who moves for
503 summary judgment, the defendant must be the first to identify the supposedly controlling facts and
504 to point to the record information that supports its position. And it also must be remembered that
505 the figure for grants includes cases that are only partly resolved on summary judgment. Summary
506 judgment often is used to weed out claims that might as well not have been raised in the first place
507 — they are advanced only to be sure that nothing has been overlooked. The detailed motion, spelling
508 out facts paragraph-by-paragraph, moreover, may help the pro se litigant by providing a clear focus
509 for the response. Bankruptcy practice includes many cases with summary-judgment motions against
510 pro se parties; it is more difficult to respond to the motion when there is no clear framework to guide
511 the response.

512 (The sanction for replying in improper form is addressed by draft subdivision (c)(8), a matter
513 that came on for discussion and revision later in the meeting.)

514 The general concern about prolix motions returned. The problem was said to be general. The
515 task is to convey the message that a motion should focus only on the "key facts." But even
516 sophisticated lawyers struggling with complex cases are unable to work free from their attention to
517 even the finest points. General advice can be given, but it is very difficult to persuade lawyers in a
518 way that elicits an effective response. Local rules provide examples. One calls for facts "that are
519 essential for the court to decide only the motion for summary judgment — not the entire case."
520 Another describes "facts which are absolutely necessary for the court to determine the limited issues
521 presented in the motion for summary judgment (and no others)."

522 A different perspective suggested that what the lawyer wants is to be free to tell a story.
523 Facts that may not seem necessary to decide on summary judgment may in fact be persuasive on
524 matters of inference — detail counts. It is difficult to identify a tipping point that shifts the balance
525 beyond usefulness into the pit of too much detail.

526 A particular language choice was raised: (c)(1)(B) calls for "only those *specific* material facts
527 that are not genuinely in dispute and are *relied upon to support* summary judgment." It was
528 suggested that "specific" should be deleted; it may invite too much detail, focusing on the trees rather
529 than the forest. This suggestion was picked up in later discussion. The Subcommittee labored over
530 the wording of (c)(1)(B) at length. It is difficult to define the appropriate level of detail in rule text.
531 It should be enough to improve the rule without demanding perfection. "Specific" seemed the best
532 word to focus the statement of facts. An alternative was suggested: "only those material facts not
533 genuinely in dispute essential to summary judgment." This version struck others as "dense." A
534 motion to strike "specific" passed by unanimous vote.

535 Similar questions were raised as to "relied upon." Should it be "to obtain" summary
536 judgment?

537 Other words were suggested to replace "material" facts: "essential" facts? "core" facts?
538 "necessary facts"? "critical facts"? Such words as "necessary" may cause greater confusion —
539 whether a fact is necessary to decide the motion often is contingent on the disposition of other facts.
540 Whether a fact is "material" also is conditional on the disposition of other facts, but the dependency
541 may be more apparent. "Essential" may take practice off in unanticipated directions. Some members
542 thought "essential" too subjective, while another pointed out that it is used in subdivision (f) in an
543 apparently objective sense. Subdivision (f) was distinguished, however, on the ground that it aims
544 at facts a party does not have and wants time to find; subdivision (c)(1)(B) deals with fact
545 information the movant has. It is difficult to guess which of these words is most likely to discourage
546 excessive detail. A movant, for example, may include too many facts in the motion for fear they will
547 prove to be "essential" later, encouraging a response that elaborates in still greater detail. All of
548 these choices were confronted by the observation that "the purpose is to restrain excessive assertions
549 of fact. There is no penalty for throwing in too many facts. This is all hortatory."

550 A different word choice was challenged. (c)(1)(B) directs a statement of *material* facts.
551 Should that be defined in rule text, or at least in the Committee Note? It was responded that it is
552 dangerous to attempt to define a word that for so long has been tightly bound up with the summary-
553 judgment standard. No attempt will be made to define "material."

554 The Subcommittee will consider these word choices further, and invites other suggestions.

555 A judge suggested that the reality of the subdivision (c)(1) and (2) draft can be tested against
556 a typical employment case. Summary-judgment motions are made in all of these cases. "I spend
557 more time on Rule 56 than in trial." The defendant says: "I did not fire the plaintiff based on race."
558 The plaintiff says: "You did." The plaintiff then supports the claim by comparing the treatment of
559 other named employees. "Practitioners will be prolix. They are afraid to leave things out." Most
560 of the motions are "no-evidence" motions, pointing to the lack of evidence to support a claim. They
561 are not prolix. The response is prolix.

562 Another judge agreed that many summary-judgment motions assert "no evidence" to support
563 a claim. The responding party has to come forward with specific evidence. The movant then can
564 reply to these specific facts; it has to demonstrate that there is no genuine issue as to the facts made
565 material by local circuit law. Are comparisons to other employees alone sufficient? The use of
566 racial epithets? In dealing with these problems, a detailed motion, response, and reply are helpful.

567 This exchange continued by emphasizing the importance of supporting the competing
568 positions by citation to the record. The Committee Note provides assurance that the citation
569 requirements in subdivision (c)(4) are consistent with local rules or orders requiring an appendix.
570 That is good. But even with that help, employment cases are made difficult by the rules involving

571 a "prima facie case," articulated nondiscriminatory motives, and "pretext."

572 The references to "no-evidence" motions brought a reminder that the draft does not seek to
573 change the substantive Rule 56 standard or the Rule 56 moving burdens. How does a nonmovant
574 respond to a "no-evidence" motion? The first answer was that a movant who does not have the trial
575 burden can support a motion by simply showing — "pointing out" — that the nonmovant does not
576 have sufficient evidence to carry its trial burden. But this is an abiding issue of understanding
577 *Celotex*, addressed in part in draft subdivision (c)(4)(B).

578 The "no-evidence" motion problem relates to present Rule 56(f), carried forward in the draft
579 as subdivision (f). Often the defendant makes a no-evidence motion before the close of discovery,
580 asserting that the plaintiff has no evidence. The plaintiff seeks relief under Rule 56(f), pointing to
581 the need for further discovery to respond to the motion. This happens repeatedly. If subdivision
582 (c)(1) requires the motion to set out the facts in a granular way, defendants may find it harder to
583 make these motions, at least in a way that interferes with the plaintiff's opportunity to win time for
584 more discovery under subdivision (f). But even at that, the nonmovant faced with a motion before
585 the close of discovery "has to spin facts in extremely complete ways for fear of losing the whole
586 case."

587 A judge observed that he has encountered "35-page statements of fact" in a summary-
588 judgment brief. Separating the statement of facts from the brief may not make the package any
589 longer. In an employment case the motion must address the elements of the prima facie case; if the
590 defendant relies on a reason for its employment action, it has the burden to articulate the reason.

591 Another judge noted that his concerns about the level of detail required in subdivision (c)
592 arise from experience with a now-abandoned local rule system that was not as well developed as
593 subdivision (c) because it did not require that the response line up with the motion. One of the real
594 problems in practice is the statements of movant and nonmovant that do not match up — the
595 proverbial ships passing in the night.

596 A member renewed the suggestion that it would be better to provide for one motion and
597 memorandum. The Subcommittee considered three alternatives — everything in a single document;
598 two documents — a motion that includes a statement of specific material facts, accompanied by a
599 memorandum or brief; and three documents — a motion that identifies the issues, claims, or
600 defenses to be resolved by summary judgment, a separate statement of specific material facts, and
601 a memorandum or brief. The choice in favor of two documents reflected a decision to emphasize
602 the importance of the statement of facts without separating it artificially from the basic elements of
603 the motion. Separating the motion from the memorandum or brief will help to focus the response
604 on the statement of facts in the motion.

605 This suggestion led to the observation that it is possible to separate several elements. One
606 is the requirement of specific citations to the record to support fact positions. Another is the
607 requirement that facts be separated out into individual numbered paragraphs. Yet another is the
608 requirement that the response address the motion's statement of facts by correspondingly numbered
609 paragraphs. Fifty-six districts have local rules requiring a separate statement of facts with the
610 motion. Only 20 have local rules that require that the response track the motion paragraphs. Even
611 in districts that do not have either requirement good lawyers point to record support for their fact
612 positions. Should subdivision (c) be cut back to require only specific record citations? But the
613 citation requirement is in proposed subdivision (c)(4); it can be dealt with separately after deciding
614 what to do about the (1), (2), and (3) provisions for motion, response, and reply.

615 In response to a question, it was stated that (c)(2)(A) requires a response to address each of
616 the facts stated by the movant. But greater clarity may be possible: the words could be revised to say
617 something like this: the response "must, by correspondingly numbered paragraphs, accept, qualify,
618 or deny each fact in the Rule 56(c)(1)(B) statement." Heightened specificity is desirable because this
619 provision establishes a requirement that is not found in many of the local rules that require specific
620 identification of facts with the motion but do not address the response. A motion to add these words,
621 subject to editing, passed by unanimous vote.

622 The form of the motion was pursued further by arguing against "magnification of the
623 process." It was accepted that the 2-document format can be helpful. But the motion should require
624 only a statement of issues framed by the elements of the action: (c)(1) would require that the motion
625 "state the claims, defenses, or issues as to which summary judgment is sought and the grounds on
626 which the motion should be granted." (c)(2) would be similar: the response would state "the grounds
627 on which the motion should be denied." The (c)(4) requirement for references to the record could
628 be brought back into the motion. In later discussion, a variation was advanced: the motion would
629 state the facts, while the memorandum would provide the record citations and the briefing of law.
630 This argument was supported by the observation that this seems to reflect practice under present
631 Rule 56 in many districts. District-court practice will be made easier by requiring the movant to
632 identify facts 1, 2, 3, and 4, and requiring the nonmovant to respond to those facts and list additional
633 facts 5, 6, and 7.

634 It was observed again that these questions tie to the (c)(8) provisions for court action when
635 the response does not comply with the requirements of (c)(2) and (c)(4).

636 A motion to recommend publication of a prescriptive structure like subdivision (c)(1), (2),
637 and (3), subject to further editing, was approved, 11 yes and 1 no.

638 Further discussion renewed the question whether the permission to depart from (c)(1), (2),
639 and (3) by order in the case should be expanded to permit local rules that abandon the practice in
640 more general terms. Local rule departures are permitted from the timing provisions in subdivision
641 (a). The response recalled the justification for local-rule departures in subdivision (a): some districts
642 have general practices for timing motion practice that may integrate poorly with the general timing
643 rule. Uniformity is more important on format than it is on timing. It was further observed that the
644 Standing Committee holds divided views on local rules. One advantage of local rules is that they
645 may encourage greater uniformity among judges of a single court — it is easier for a judge to take
646 a nonconforming position with respect to a national rule. Allowing departure only by order in the
647 case means that a party does not know what the practice will be until the judge announces it.

648 It was asked whether subdivision (c) will supersede inconsistent local rules. Both 28 U.S.C.
649 § 2071 and Civil Rule 83 require that local rules be consistent with the Civil Rules. The Advisory
650 Committee should be sensitive to local attachments to local rules, but it should opt for national
651 uniformity when it thinks that is right. The draft Committee Note language addresses this problem
652 by language included in the second paragraph for purposes of illustration, urging local rules
653 committees to consider the consistency of their rules with the new national rule. It was urged that
654 the authority to depart by order in the case suffices; the Committee's determination that the
655 requirements of subdivision (c) will enhance practice and promote uniformity should not be
656 undermined by allowing a local-rule opt-out. Experience with the original opportunity to opt out of
657 initial disclosure requirements by local rule demonstrates how difficult it may be to restore
658 uniformity after local rules become entrenched. To be sure, some judges may adopt a routine of
659 ordering different procedures in all cases; that may be as well, since a litigant should want to know
660 what the judge finds useful and to provide it.

661 A motion to omit any opportunity to opt out of subdivision (c) by local rule passed by
662 unanimous vote.

663 **RULE 56(C)(4): FACT CITATIONS**

664 Subdivision (c)(4) requires record citations to support a proposition of fact stated in a motion,
665 response, or reply. It was presented with drafting alternatives. Should it refer to a "qualification"
666 of a fact statement? Should negation of another party's fact statement be described as a "denial," as
667 in Rules 8 and 36, or should it be described as a "dispute" in keeping with other parts of Rule 56?

668 Discussion of (c)(4) began with the observation that there has not been much difficulty with
669 subparagraph (A), which directs citation to particular parts of record materials to support a statement,
670 qualification, or denial of fact. Subparagraph (B) is a response to a greater challenge. It says that a
671 party may show that materials cited to support a fact do not establish the absence of a genuine
672 dispute; this recognizes the opportunity to say nothing more than that the movant has not carried the
673 summary-judgment burden. It also says that a party may show that no material can be cited to
674 support a fact; this recognizes the opportunity of a movant who does not have the trial burdens on
675 a fact to carry the summary-judgment burden by showing that a nonmovant who does have the trial
676 burdens cannot carry them.

677 The first question renewed earlier concerns about a motion made before discovery is
678 completed. In some types of litigation, at least, such motions are common. Should (c)(4) reflect
679 the opportunity to respond by a Rule 56(f) showing that the nonmovant should not yet be required
680 to respond in any of the ways listed in (c)(4)? The draft note suggests that a nonmovant seeking
681 additional time ordinarily should ask for an extension of the time to respond, but it is not clear that
682 the Note should address this issue at all. Another suggestion was that the nonmovant should be able
683 both to point to the need for additional discovery and to provide such response as it can on the basis
684 of information available without further discovery. (c)(4) could be expanded to include a specific
685 cross-reference to subdivision (f) — by whatever letter it may come to be designated — but it was
686 suggested that this added complication is not needed. Subdivision (f) takes care of the problem.
687 And a specific cross-reference might imply that the court cannot grant the motion. For that matter,
688 a cross-reference might fit better with the (a)(2) time limit for responding to the motion. For
689 example, it could say that the response must be filed by the stated time "unless the court grants a
690 motion under Rule 56(f)." This suggestion was resisted because it might generate an unintended
691 sense that the time to respond always should be extended when a party seeks time for additional
692 discovery. It will not do to extend the time to respond whenever a nonmovant requests more time
693 for discovery. A judge agreed that the time to respond should not be qualified by a cross-reference
694 to subdivision (f); it is better to raise the question in the briefs on the motion. Another judge
695 observed that different cases will call for different approaches. A nonmovant may assert that it is
696 not yet possible to make any response. The assertion instead may be that the nonmovant believes
697 it is possible to defeat the motion with the information currently available, but also believes that
698 further discovery will provide better support.

699 This discussion continued with a suggestion to add a new (c)(4)(B)(iii): or "(iii) for specified
700 reasons it is not yet possible to present facts essential to support a response or reply."

701 A motion to exclude any cross-reference to subdivision (f) from either subdivision (a)(2) or
702 (c)(4) passed, 10 yes, 2 no.

703 There was some discussion of subparagraph (c)(4)(B). It does not duplicate (c)(2)(C), which
704 recognizes that a response "may state that the facts asserted by the movant do not support judgment
705 as a matter of law." (c)(2)(C) is the equivalent of a demurrer — as if it said "state that even if

706 established the facts asserted" do not support judgment. That is different from pointing out that there
707 is no support to carry the trial burden on a fact ((4)(B)(ii)), or not enough support to establish the
708 absence of a genuine dispute ((4)(B)(i)). It is important to identify for the judge the opportunity to
709 decide the motion as a matter of law alone, without need to determine whether there is a genuine
710 dispute as to facts that would not establish the right to judgment even if there were no genuine
711 dispute. A motion to add "even if established" to the rule text failed with only one yes vote. A
712 motion to delete (c)(2)(C) failed, 6 yes and 7 no.

713 Further discussion of (c)(4)(B) observed that the Committee understands the ways in which
714 it captures the necessary distinctions in the Rule 56 moving burdens. No matter who has the trial
715 burdens on a fact, a nonmovant need not cite to any additional portions of the record to argue that
716 the movant's citations do not establish the absence of a genuine dispute. A movant who does not
717 have the trial burdens can carry the summary-judgment burden by showing that the nonmovant does
718 not have sufficient evidence to carry the trial burdens. But will the lawyer reading the rule text
719 understand these propositions? The draft was defended by pointing out that the Subcommittee had
720 considered a version that included specific rule text statements of the summary-judgment burdens.
721 This alternative was found too complicated to justify adoption. The references in (c)(4)(B) are
722 necessary to avoid misstating the available forms of response. They will enable the court and
723 practitioner to get it right. The complications are there in the Supreme Court opinions and in
724 practice. They will not disappear if the rule text ignores them. The rule cannot be a primer for
725 practitioners, but it should not, by omission, impliedly contradict the established rules on summary-
726 judgment burdens. A motion to retain (c)(4)(B) passed by unanimous vote.

727 Questions were raised about application of the rule in "shifting burden" cases, but there was
728 no further elaboration.

729 The connection between (c)(4) and the consequences of failing to satisfy (c)(4) was pointed
730 out. The more severe the sanctions, the more important (c)(4) becomes. But all agreed that
731 (c)(4)(A), requiring citation to the record, is important.

732 The reference to "qualification" of a fact was questioned: what does the response "qualify"?
733 Is this an invitation to quibble about subtle word distinctions when it is not possible to deny the fact?
734 Lawyers will find a way not to accept a part of a statement they do not agree to — we do not need
735 to invite them to engage in additional wordchopping. This word was defended as offering a useful
736 alternative to a blanket admission or denial. One party's statement of fact may be partly true; another
737 party should be able to recognize the true part while disputing other parts. If response by
738 qualification is not permitted, the party who states the facts is put at increased risk of its own inept
739 statement — other parties will deny because the statement is only partly true as expressed. Present
740 Rule 8 and both present and Style Rules 36 provide for qualification as well as denial. A motion to
741 delete "qualification" failed, 6 yes and 7 no.

742 Brief discussion led to unanimous agreement that (c)(4) should refer to a "denial of fact"
743 rather than a "dispute as to a fact."

744 It was agreed that (c)(4) should be edited to make it clear that it applies to a motion, response,
745 or reply.

746 **RULE 56(C)(5): ATTACH UNFILED MATERIALS**

747 Draft subdivision (c)(5) directs a party to "attach to a motion, response, or reply the pertinent
748 parts of any cited materials that have not been filed." A judge asked whether it is necessary to chase
749 back to the files — it is better to have all of the materials assembled with the motion, in an appendix.

750 On the other hand, if there is a large record there may be disadvantages in having a large mass of
751 material filed a second time. It was suggested that the rule should be expanded to direct a party to
752 file materials "that have not been filed with the motion, response, or reply." A motion to adopt this
753 idea was passed by unanimous vote, with permission to edit the language.

754 Later discussion in connection with subdivision (b) led the Committee to add another word
755 to (c)(5): the party must attach "the pertinent parts of any cited factual materials." This word makes
756 it clear that a party need not file copies of cited statutes, decisions, or other legal materials.

757 **SUBDIVISION (C)(6): SUPPLEMENTAL SUPPORTING MATERIALS**

758 Subdivision (c)(6) would provide that the court may permit a party to supplement the
759 materials supporting a motion, response, or reply. Fear was expressed that this language might seem
760 to invite new motions for summary judgment, with the observation that courts have long recognized
761 the authority to permit supplemental filings so this paragraph serves no real need. It was agreed that
762 it should be deleted.

763 **SUBDIVISION (C)(7)[6]: MEMORANDUM OF CONTENTIONS**

764 Subdivision (c)(7) — to become (6) with the deletion of former (6) — was largely explored
765 in the earlier discussion of the allocation of functions among motion, statement of facts, and
766 memorandum of contentions. The designation of a separate memorandum for contentions was
767 approved then. "Contentions" seems to be as good a word as any for argument. But it was suggested
768 that there was no need to supplement the direction to file the memorandum with the motion,
769 response, or reply with "or at a time the court directs." It is important that the court be able to direct
770 a different time, but if (c) is structured in a way that makes this authority clear at the outset there is
771 no apparent need to repeat the thought here. Subject to possible deletion of these words, this
772 subdivision was approved.

773 **SUBDIVISION (C)(8)[d]: FAILURE TO RESPOND, OR TO RESPOND IN PROPER FORM**

774 Subdivision (c)(8) was introduced by Judge Baylson. This subdivision addresses the
775 consequences of a failure to respond to a motion or of a response that fails to comply with Rule
776 56(c). The draft includes in brackets language that would allow the court to grant summary
777 judgment in these circumstances only if examination of the motion and supporting materials shows
778 that the movant is entitled to summary judgment. Some circuits have announced this rule. The
779 Subcommittee voted to omit these words, believing that adherence to the requirements of subdivision
780 (c) will be enhanced by the ability to grant summary judgment by default if there is no response or
781 even if there is a response that fails to comply with the requirements of subdivision (c). Omitting
782 these words would change the law in some circuits.

783 The Subcommittee also considered a possible middle ground between granting the motion
784 by default and requiring the court to determine whether the motion should be granted on the merits.
785 Many districts have local rules that deem admitted a fact stated in a movant's statement of
786 undisputed facts when the response fails to satisfy the local rule's requirements. If the response
787 properly addresses some of the facts, only the facts not properly addressed are deemed admitted. The
788 court then decides the motion by accepting the facts deemed admitted without further inquiry but
789 examining the record as to any facts properly denied and applying the law to the set of facts deemed
790 admitted or established beyond genuine dispute.

791 The first comment was that in the Ninth Circuit, as well as some districts in other circuits,
792 a party moving for summary judgment against a pro se litigant must notify the pro se litigant of the
793 steps required to respond to the motion.

794 The next observation was that omission of the bracketed words may not do the job if the
795 Committee intends to authorize summary judgment by default for want of a proper response or any
796 response. Circuits that do not now allow summary judgment by default may not be persuaded that
797 silence on the issue abrogates their law.

798 Support was expressed for the "deemed admitted" approach on the ground that the court
799 should not be obliged to examine the materials offered to support a fact when the nonmovant has not
800 bothered to assist the court.

801 But a question was asked: How does the "deemed admitted" approach work? Suppose a
802 prisoner says that he was beaten excessively and without reason. The defendant moves for summary
803 judgment, stating in an affidavit that "I did not beat him; it was reasonable force; and he was not
804 hurt." The motion should be denied because there is a credibility problem. But if the plaintiff fails
805 to respond properly to the motion, can the defendant's statements be deemed admitted?

806 A different question was asked: is the "deemed admitted" approach a substantive change in
807 the law, a denial of the substantive right to go to trial unless the Rule 56 burden is carried? It was
808 suggested that if the right to go to trial is found in interpreting Rule 56, then Rule 56 can be amended
809 to change the result. But that does not mean that the change should be made.

810 The distinction between default and "deemed admitted" approaches was noted again. The
811 deemed admission of facts does not establish a right to summary judgment if under the law the facts
812 do not support the movant's position.

813 The situation of pro se litigants was noted again. Prisoners are in a special category. But
814 suppose a non-prisoner pro se plaintiff in a civil rights case is told what to do to respond but fails
815 to do it. Is the court obliged to go to trial? Or at least to examine the materials offered to support
816 the motion?

817 An observer asked what should be done when a response may deliberately address only part
818 of a motion. The motion, for example, might assert that there is no genuine dispute as to facts A and
819 B. The response might dispute only B. Why should the court be required to check the record
820 support cited to support the motion on A? A judge agreed that courts do encounter responses that
821 address some of the movant's stated facts but not others.

822 Support was offered for requiring the court to examine the motion and the materials cited to
823 support it. Even with this requirement the nonmovant has a strong incentive to respond, and to
824 respond in proper form. Failure to respond properly sacrifices the right to have the court consider
825 information that conflicts with the information cited by the movant. And the failure to respond is
826 particularly dangerous when the movant does not have the trial burdens and makes the motion by
827 showing that the nonmovant does not have sufficient evidence to carry its trial burdens.

828 Further support was found in the suggestion that since several circuits require examination
829 of the materials cited to support summary judgment even when there is no response, any change
830 might seem to conflict with the avowed intent to make no change in the summary-judgment standard.
831 A reply observed that whatever choice is made on this question, it will be desirable to express it in
832 rule text. "We owe it to judges to indicate their authority."

833 Another committee member confessed to "mixed emotions." The Rule 56(c) procedure is
834 new to the national rule. Severe sanctions for failure to respond in the newly required form "do not
835 feel right." The first time summary judgment is granted without examining the materials cited in
836 support, simply as a sanction for responding in proper form, there will be an uproar of protest.

837 A similar view was expressed. Rule 56 should tell the movant that the motion must itself be
838 sufficient to support judgment if there is no response. We should not tell judges that they do not
839 even have to read the motion or — if the asserted facts would justify summary judgment on the law
840 — do not have to read the materials cited to support the motion. "Workload does not justify that."

841 It was asked whether it might be suitable to grant summary judgment as a sanction but also
842 provide for an award against an attorney who fails to respond properly to compensate the summary-
843 judgment loser's loss. But this possible substitute for a malpractice action may seem too close to
844 establishing a new substantive tort right to be comfortable under the Rules Enabling Act. It may be
845 better to refrain from saying anything about this subject either in rule text or Committee Note.

846 Further support for requiring the court to examine the motion and materials cited to support
847 it was expressed by observing that this approach does not amount to a sanction. It simply tells the
848 nonmovant that there is an opportunity to respond and that failure to seize the opportunity means that
849 "your side of the story will not be heard or considered." This view was expanded. If there is no
850 "deemed admitted" provision, the court looks only at the (c)(1) statement and the (c)(4) citations of
851 supporting materials. If the materials, unopposed, show no genuine issue, an order granting the
852 motion is not a sanction. There is no change in present summary-judgment law. The judgment is
853 based on the summary-judgment record that results from an inadequate response or from no response
854 at all. But what happens if the response says only "I dispute," without citing any supporting
855 materials? Does that lead to a deemed admission? Or is it, better, simply another variation — the
856 court still must examine the materials cited in support, albeit without the illumination that might be
857 provided by a response that explains why those materials do not establish the absence of a genuine
858 dispute.

859 This discussion led one member to suggest that the rule should say only this: The court "may
860 grant summary judgment against a party who fails to respond as required by Rule 56(c)." Courts
861 would be left to sort out on their own just what approach to take.

862 A somewhat different suggestion was that default is appropriate when there is no response
863 at all. But filing an inadequate response might lead the court to examine the motion more closely.
864 This approach might be taken indirectly by eliminating "fails to respond" from the rule text. Then
865 the rule would require examination of the motion and cited materials if there is a response, although
866 in improper form, but leave it to the courts to decide what to do when there is no response. But
867 silence as to a complete failure to respond might be read as an implication that the court can grant
868 the motion by default. It would be better to decide the matter in rule text.

869 A clear statement was suggested: the rule should cover both failure to respond and an
870 improper response, and should require examination of the motion and cited materials. Further
871 support was offered. The absence of a response should not be a basis to grant the motion without
872 any examination of the motion and supporting materials. That proposition holds even more clearly
873 when the nonmovant has attempted to respond but has failed to respond in the form required by
874 subdivision (c)(2). At the same time the rule should clearly state the consequences of failure to
875 comply, without leaving the judge at risk of being lost part way through consideration of the motion.

876 A judge asked about the difficulty of implementing this approach. Suppose the response fails
877 on a single point. Should the judge simply rely on the materials cited by the movant, or should
878 consideration of the motion be suspended to afford opportunity for a better response on that point?
879 It was answered that the judge can do that, but also can grant the motion if the point is supported by
880 the cited materials.

881 An expanded view was then offered. It is not enough to authorize the court to grant the
882 motion after inspecting the materials cited to support the asserted facts and applying the law.
883 Summary judgment is a more serious matter than discovery. But the Rule 37 approach to discovery
884 sanctions requires that modest sanctions be tried before resorting to the drastic sanctions of dismissal
885 or judgment by default. "You have to use the least severe sanction that will deter and protect."
886 Default is too severe, at least when there is a response but the response is imperfect. The rule should
887 list alternative sanctions, beginning with less severe sanctions and progressing to granting the motion
888 by examining the supporting materials and applying the law.

889 This approach was supported with the suggestion that the list of alternative sanctions should
890 include deemed admission of facts not properly responded to. Other sanctions were suggested: the
891 court could strike the inadequate response, or award the movant costs — including reasonable
892 attorney fees — caused by the inadequate response.

893 A motion was made to revise subdivision (c)(8) to direct the court to enter suitable orders
894 following a failure to respond or an improper response. The orders could include granting summary
895 judgment if consideration of the motion and materials cited to support the motion show the movant
896 has carried the summary-judgment burden. There might be a graduated list. It may prove desirable
897 to detach this provision from subdivision (c), making it a new subdivision (d). The motion passed,
898 7 yes and 6 no.

899 **SUBDIVISION (f): ADDITIONAL TIME FOR DISCOVERY**

900 Draft subdivision (f) adds a new element to former subdivision (f) by requiring a party who
901 requests time for additional discovery to "describe[] the facts it intends to support." The draft
902 Committee Note includes three sentences in brackets that attempt to illustrate a flexible approach
903 to this requirement: "In some cases it may be appropriate to sketch a direction of inquiry without
904 attempting to describe facts not yet known, or to state a need to depose a person who has given an
905 affidavit or declaration."

906 This new element was questioned. The reference to "facts" seems too precise. The party
907 requesting more time can describe the elements of claim or defense that will benefit from additional
908 discovery, but cannot describe facts that it has not yet found. Some cases, of course, may involve
909 a clear historic fact that can be described. But others involve such abstract constructs as
910 "manipulative intent." Great masses of detailed fact may be needed to support an inference of
911 manipulative intent. Without discovery it may not be possible to describe in detail the kinds of
912 testimonial fact that may support the required fact inferences. "This ratchets up the heat." The
913 present rule does refer to facts, but only in the context of explaining why they are not available.

914 Alternatives were suggested: "the facts it hopes to use to prove its claim." Or all reference
915 to describing the facts the party intends to support could be deleted, relying on the requirement that
916 the party show "specified reasons" why it cannot present facts essential to justify its opposition to
917 the summary-judgment motion.

918 A motion to make one change passed, 8 yes and 4 no: "describes the facts it intends to
919 support prove." Further changes may be submitted for Committee consideration after the meeting,
920 if suitable illumination can be provided by further research into the ways in which courts apply
921 present Rule 56(f).

922 **TIME-COMPUTATION PROJECT**

923 Judge Rosenthal introduced discussion of the Time-Computation Project by noting that it is
924 important to coordinate the work of all of the Advisory Committees to converge on
925 recommendations for publication. Changes in the time periods provided by various Civil Rules were
926 approved at the September meeting. Those changes and Committee Notes are included in the agenda
927 materials in publication format.

928 Computation Template. The core time-computation revisions are reflected in the template prepared
929 by the Standing Committee's Time-Computation Subcommittee. They graciously used Civil Rule
930 6(a) as the model, providing a specific illustration that is aimed for adoption in the Appellate,
931 Bankruptcy, and Criminal Rules as well.

932 Professor Catherine Struve, Reporter for the Appellate Rules Committee and for the Time-
933 Computation Project Subcommittee, introduced the template. She observed that the draft has
934 continued to evolve from the version considered by this Committee at the meeting last September.
935 Some of the changes were identified.

936 The template continues to provide the method for calculating time periods set by statute, but
937 now limits application to statutes that do not specify a method of computing time. Some statutes,
938 for example, specify a "business days" method. It would be confusing to attempt to supersede them
939 — practitioners and judges often would look to the statute without pausing to recognize the impact
940 of a superseding rule provision.

941 There have been style refinements. As one illustration, the paragraph on inaccessibility of
942 the clerk's office has been moved up in the rule to become paragraph (3). That approach improves
943 the flow, leaving the definition paragraphs in sequence from (4) through (6).

944 The Committee Note has been expanded to include a paragraph that explains the convention
945 that prefers one-week intervals for short time periods — 7 days, 14 days, or 21 days. It also notes
946 continuation of 30-day and longer periods in the original form. This Note will facilitate brief
947 statements in the Committee Notes that identify changes in the time periods set by specific rules.

948 A neat solution has been found for a drafting problem that once seemed difficult. Some time
949 periods are "backward looking" in the sense that they command action measured by a number of days
950 before an event. A rule might direct, for example, that a motion be served 14 days before a stated
951 event. The general rule is that when the last day to act falls on a Saturday, Sunday, or legal holiday,
952 computation of the period is made by continuing to count in the same direction. So if the 14th day
953 before the event falls on a legal holiday, say a Wednesday, the filing will be due on Tuesday. That
954 rule works for holidays. But it creates a problem when the 14th day is a day on which the clerk's
955 office is inaccessible — it may not be until Wednesday that a party learns that it had to file on
956 Tuesday one day earlier. This problem was resolved in subdivision (a)(3) by directing that if the
957 clerk's office is inaccessible on the last day, the time to file is "extended." Inaccessibility on
958 Wednesday means that the filing may be made on Thursday if the office is accessible on Thursday,
959 and so on.

960 One other question remains. Rule 6(a)(6)(B) defines legal holiday to include state holidays.
961 Other sets of rules include holidays in the District of Columbia and in any commonwealth, territory,
962 or possession of the United States. Parallelism could be achieved by adopting a definition in Rule
963 6(a). But it also is possible to expand the definition of "state" more generally by amending Rule 81.
964 A later decision approved an amendment of Rule 81 that, if adopted, will pretermitt any need to
965 amend Rule 6(a).

966 The Committee approved a recommendation to publish Rule 6(a) by unanimous vote.

967 Specific Rule Time Periods. Turning to the specific Civil Rules recommended for publication last
968 September, questions were raised about the Committee Notes for Rules 50, 52, and 59. These Notes
969 explain the decision to do two things: retain the provision in Rule 6(b) that forbids extension of most
970 of the time limits set by these rules, but to expand the non-extendable time limits from 10 days to
971 30 days. The first question asked how the 30-day period was chosen. This decision was made on
972 recommendation of a Subcommittee last September, reflecting the experience that the 10-day periods
973 have often proved too short. Courts have adjusted by various strategies such as delaying entry of
974 judgment or setting briefing schedules long after the motion is filed. There is little need for extreme
975 urgency in the post-trial setting. Although there is an inevitable element of arbitrariness in any time
976 period, 30 days seemed a reasonable choice. The second question asked whether it is necessary to
977 refer to the sensitivity that arises from the integration of these rules with Appellate Rule 4. This part
978 of the Committee Note was designed to remind readers of the risk that a party will mistakenly
979 believe that appeal time has been suspended by a motion that in fact is not timely, a risk that should
980 be reduced by extending the period to 30 days. It was agreed that further thought will be given to
981 revising the Note discussion of this topic.

982 The Committee was reminded that it had approved time provisions in Rule 56(a). If Rule
983 56 and the Time-Computation packages are both approved for publication at the same time, a way
984 will be found to ensure that there is no confusion about the independent role of Rule 56(a) as part
985 of the Time-Computation package.

986 The Committee unanimously approved a recommendation to publish the specific time-period
987 amendments set out in the agenda materials.

988 Statutory Time Provisions. The question of computing statutory time periods has proved vexing.
989 Rule 6(a) now applies the rule method of computing time to statutory time periods. It is useful to
990 have a single method for computing all time periods. The Time-Computation Subcommittee and
991 the Advisory Committees have agreed that the better method would eliminate the present rule that
992 excludes intermediate Saturdays, Sundays, and legal holidays in computing periods of less than 11
993 days. The effect of that change is to reduce the effective length of these shorter periods. A 10-day
994 period, for example, now runs for a minimum of 14 days. Removing the exclusion of Saturdays,
995 Sundays, and legal holidays reduces the period to 10 days. That effect can be offset in the rules by
996 amendments that extend former 10-day periods to 14 days when that seems appropriate. It would
997 be very difficult, however, to attempt to identify all relevant statutory periods and then determine
998 which of them might be addressed by superseding rules provisions, even if supersession is a wise
999 approach. Professor Struve has identified an astonishing number of statutes that set time periods less
1000 than 11 days, and there may be others not yet identified.

1001 The Standing Committee has concluded that these statutory time-computation problems
1002 should be addressed by identifying and recommending that Congress amend periods that seem too
1003 short under the new computation method.

1004 A good illustration is provided by Civil Rule 72 and 28 U.S.C. § 636(b). Section 636(b) sets
1005 a 10-day period to serve and file written objections to a magistrate judge's proposed findings and
1006 recommendations "as provided by rules of court." Section 636(d) also provides that the practice and
1007 procedure for the trial of cases before magistrate judges "shall conform to rules promulgated by the
1008 Supreme Court pursuant to section 2072 of this title." Rule 72 has adopted the 10-day period. Under
1009 present Rule 6(a), both the statutory 10-day period and the Rule 72 10-day period are calculated by
1010 excluding intermediate Saturdays, Sundays, and legal holidays. The proposed amendment of Rule

1011 6(a) would be matched by adopting a 14-day period in Rule 72. The result is to carry forward the
1012 same basic result that follows from the present rule; the only difference is the reduction that occurs
1013 when legal holidays extend the present 10-day period beyond 14 days. It is important to accomplish
1014 this result, which supersedes the statute somewhat less than the present rules do. But it also will be
1015 important to amend § 636 so that lawyers who look only at the statute are not misled. If possible,
1016 it will be desirable to propose statutory amendments to take effect on the same day as the amended
1017 rules take effect — December 1, 2009, if the proposals proceed through the ordinary course.

1018 The agenda materials include Professor Struve's spreadsheet of brief statutory time periods.
1019 They also include memoranda identifying a few time periods that deserve consideration for
1020 amendment, but only a few. There is no need to decide on these recommendations by the time the
1021 rules proposals are published for comment. Many of the statutory time periods address temporary
1022 restraining orders. 10-day periods are common, but some are shorter. It was noted that in
1023 considering the no-notice TRO provisions in Rule 65, the Committee has recommended amendment
1024 of the 10-day period to 14 days. But that recommendation does not imply a recommendation that
1025 the statutory provisions be extended. Rule 65(e), indeed, addresses several of the statutes by
1026 providing that the Civil Rules do not modify any federal statute relating to temporary restraining
1027 orders or preliminary injunctions in actions affecting employer and employee.

1028 The Standing Committee has not yet settled on the approach to be adopted in recommending
1029 specific statutory time amendments. The several advisory committees will coordinate their
1030 recommendations through the Standing Committee. It may prove desirable to identify a few statutes
1031 for comment in the memorandum that transmits the Time-Computation Project amendments for
1032 publication.

1033 **RULE 81(e) - STYLE RULE 81(d)(2): DEFINITION OF "STATE"**

1034 The definition of state holidays for purposes of Rule 6(a) raised the question whether the
1035 general definition of states in Rule 81(e), Style Rule 81(d)(2), should be expanded.

1036 Style Rule 81(d)(2) provides:

1037 **(2) District of Columbia.** The term "state" includes, where appropriate, the District
1038 of Columbia. When these rules provide for state law to apply, in the District
1039 Court for the District of Columbia:

1040 **(A)** the law applied in the District governs; and

1041 **(B)** the term "federal statute" includes any Act of Congress that applies
1042 locally in the District.

1043 Several reasons can be advanced to amend this rule to include at least territories and
1044 commonwealths in the definition. "Possessions" also might be included.

1045 A modest reason to amend is to avoid including different definitions of "state" in Rule 6(a)
1046 for identifying state holidays and in Rule 81 for all other purposes. Negative implications might be
1047 drawn.

1048 More positively, the reasons for referring to states in the Civil Rules seem to apply to other
1049 places where federal "district courts" sit. State law is adopted for service in Rules 4 and 4.1; for
1050 some matters of capacity in Rule 17; for serving subpoenas in Rule 45; for stay of execution in Rule
1051 62(f); for prejudgment remedies in Rule 64(a); for execution in Rule 69; and for jury trial in
1052 condemnation actions exercising the power of eminent domain under state law in Rule 71A(k).

1053 Adoption of state law establishes uniformity with state practice; often in matters that involve
1054 significant state interests. And adoption of state law spares federal courts the need to develop their
1055 own rules to address problems that often require complex rules. Similar advantages follow for a
1056 federal court sitting in a territory or commonwealth.

1057 Criminal Rule 1(b)(9) defines "state" to "include[]" the District of Columbia, and any
1058 commonwealth, territory, or possession of the United States." Parallelism may suggest that Civil
1059 Rule 81 include "possession," subject to further research to determine whether there are any
1060 difficulties not now understood. The Criminal Rules have encountered some difficulties with
1061 warrants for searches in American Samoa; that experience may help in deciding whether Rule 81
1062 should adhere to the Criminal Rule model. "Possession" also may play a role in the Criminal Rules
1063 because of military bases and "status of forces" agreements.

1064 Finally, Rule 81 has a built-in safeguard: the definition applies only "where appropriate."
1065 Any unforeseen complications that might arise from exotic local law can be met by finding it not
1066 appropriate to apply the definition in that particular setting.

1067 The Committee agreed that Style Rule 81(d) should be revised to include a "commonwealth,
1068 territory, or possession of the United States," subject to further research to determine whether
1069 "possession" should be included in the definition.

1070 The means of accomplishing the amendment presented some difficulty. Style Rule
1071 81(d)(2)(A), as quoted above, states that when the rules call for state law to apply, "in the District
1072 Court for the District of Columbia the law applied in the District governs." This statement seems
1073 to be redundant once the District is defined as a state for rules purposes. The redundancy can be
1074 cured by deleting the phrase. But that leaves another problem. Present Rule 81(e) includes this
1075 sentence:

1076 When the term "statute of the United States" is used, it includes, so far as concerns
1077 proceedings in the United States District Court for the District of Columbia, any Act
1078 of Congress locally applicable to and in force in the District of Columbia.

1079 Style Rule 81(d)(2)(B) incorporates this provision awkwardly. The second sentence says: "When
1080 these rules provide for state law to apply, in the District Court for the District of Columbia: * * * (B)
1081 the term 'federal statute' includes any Act of Congress that applies locally to the District." The
1082 difficulty is that this literally narrows the definition of federal statute to circumstances in which the
1083 rules provide for state law to apply. That is not the scope of present Rule 81(e).

1084 There has not been occasion to consider whether the definition of "federal statute" should be
1085 expanded to include any Act of Congress that applies locally in a commonwealth, territory, or
1086 possession.

1087 The upshot of these considerations was a recommendation to publish for comment a new
1088 Rule 81(d)(2) and (3), subject to any further review that may be possible before the June Standing
1089 Committee meeting:

1090 (2) *State Defined.* The term "state" includes, where appropriate, the District of
1091 Columbia and any commonwealth, territory[, or possession] of the United
1092 States.

1093 (3) *District of Columbia.* The term "federal statute" includes any Act of Congress
1094 that applies locally to the District of Columbia.

1095 In over- and underlining on Style Rule 81(d), the result is:

1096 **(d) Law Applicable.**

1097 (1) *State Law.* When these rules refer to state law, the term "law" includes the
1098 state's statutes and the state's judicial decisions.

1099 (2) ~~*District of Columbia State Defined.*~~ The term "state" includes, where
1100 appropriate, the District of Columbia and any commonwealth, territory[, or
1101 possession] of the United States. When these rules provide for state law to
1102 apply, in the District Court for the District of Columbia:

1103 ~~(A) the law applied in the District governs; and~~

1104 (3) *District of Columbia.* ~~(B)~~ The term "federal statute" includes any Act of
1105 Congress that applies locally to the District of Columbia.

1106 **RULE 6(b): EXTENDING STATUTORY TIME PERIODS**

1107 Present Rule 6(b) allows a court to enlarge a time period, or to permit an act to be done after
1108 time has expired on a showing of excusable neglect. The rule applies "[w]hen by these rules or by
1109 a notice given thereunder or by order of court an act is required or allowed to be done at or within
1110 a specified time." Style Rule 6(b), written in terms borrowed from the Criminal Rules, allows a
1111 court to extend time "When an act may or must be done within a specified time." On its face, Style
1112 Rule 6(b) seems to allow extension of a time specified by statute. That may be a good thing, even
1113 though it may entail a change of meaning. Of course some statutes set time periods that should not
1114 be extended by court order. A quick survey of cases that consider present Rule 6(b) shows that
1115 courts have not attempted to extend statutes of limitations or "jurisdictional" time limits such as
1116 those set for removing an action from state court to federal court.

1117 Judge Rosenthal expressed the appreciation and thanks of the Committee to Professor Struve
1118 and Judge Kravitz for the great work done to advance the Time-Computation Project.

1119 **RULE 62.1: "INDICATIVE RULINGS"**

1120 In May 2006 the Committee recommended publication of a new Rule 62.1 in August 2007,
1121 deferring the publication date to allow an interval between the new rules aimed to take effect on
1122 December 1, 2007 and the next set of new rules. The Rule would address district court responses
1123 to a motion seeking relief that the district court cannot grant because of a pending appeal. The
1124 recommendation was discussed at the June 2006 Standing Committee meeting, the September 2006
1125 Committee meeting, and the January 2007 Standing Committee meeting. The Appellate Rules
1126 Committee, having initially referred the matter to the Civil Rules Committee, determined that it
1127 should consider adoption of a new Appellate Rule to complement the Civil Rule. A draft Appellate
1128 Rule 12.1 is set for consideration one week after this meeting.

1129 Rule 62.1 is built on the procedure that most circuits follow when a party moves under Rule
1130 60 to vacate a judgment that is pending on appeal. The district court can defer consideration, deny
1131 the motion, or "indicate" that it would be inclined to grant the motion if the case is remanded for that
1132 purpose. Rule 62.1 extends this procedure to any motion for relief that cannot be granted because
1133 of an appeal that has been docketed and is pending.

1134 The question whether remand should be available only if the district court indicates that it
1135 will grant the motion upon remand remains unsettled. After the Standing Committee discussion in
1136 January the Civil Rules proposal is to publish as "state that it [might or] would grant the motion,"

1137 and to invite comment on the choice. The argument that remand should be available only if the
1138 district court states that it will grant the motion rests on an anticipation that the court of appeals may
1139 prefer to remand only on assurance that disruption of the appeal will be repaid by the opportunity
1140 to avoid decision of issues that will be altered or mooted when the case is remanded and the
1141 judgment is vacated. In addition, a survey of the circuit clerks yielded responses by three; two of
1142 them preferred to be notified of the motion only if the district court states that the motion will be
1143 granted if the case is remanded.

1144 The argument that remand should be possible if the district court states that it "might" grant
1145 relief on remand rests on efficient use of both trial-court and appellate-court resources. A motion
1146 may present complex questions that can be resolved only by investing much time and effort.
1147 Requiring the district court to decide the motion before it knows whether the decision will be mooted
1148 by the ruling on appeal exacts a high price. The process of deciding the motion, moreover, may be
1149 derailed if the appeal is decided in mid district-court passage. The court of appeals is in a much
1150 better position to decide whether, in light of the progress of the appeal, it is better to proceed to
1151 decide the appeal, potentially mooting or changing the issues raised by the motion, or instead to
1152 remand to avoid the risk that the decision on appeal will be superseded by decision of the motion on
1153 remand. Notifying the court of appeals that the district court might grant the motion leaves
1154 determination of the best next step in court of appeals control.

1155 Professor Struve noted that the issue whether to provide for remand on an indication that the
1156 district court might grant the motion will be considered by the Appellate Rules Committee.
1157 Integration of the two rules, if an Appellate Rule 12.1 goes forward, will depend on as-yet
1158 unforeseeable determinations.

1159 The "might" grant alternative was supported by two judges. One observed that it would be
1160 counter-productive to recognize remand only if the district court is prepared to decide the motion on
1161 the merits before remand becomes possible. Both the district court and the appellate court would
1162 benefit from the "might" alternative. Another suggested that so long as the district court has a choice
1163 to defer consideration of the motion, some busy judges will simply defer consideration rather than
1164 divert from other cases the time needed to decide the motion on the merits. Professor Struve added
1165 that the alternative to defer consideration will be useful in the circuits that seem to say that the judge
1166 cannot defer consideration.

1167 A practitioner noted that a statement that the district court "would" grant relief upon remand
1168 will carry great weight in the court of appeals. A less forceful statement that the court "might" grant
1169 relief is less likely to lead to remand, but the statement and any accompanying information will
1170 enable the court of appeals to decide on the better course.

1171 A separate question was raised by the observation that outside Rule 60(b) there may be many
1172 circumstances in which the district court is uncertain whether a pending appeal ousts its authority
1173 to act on a motion. Should the rule apply whenever the court "may" lack jurisdiction to grant the
1174 motion? The response was that this approach could extend the rule too far. The district court may
1175 decide to make an indicative ruling if it is unsure of its authority to grant a motion without remand,
1176 but that risk exists now. To limit the court to an indicative ruling whenever there is a possibility that
1177 a pending appeal may oust its authority to grant the motion would disrupt orderly proceedings when
1178 the court concludes on balance that it does have authority to grant.

1179 The problem that neither the parties nor the court may know whether the court has
1180 jurisdiction to grant a particular motion while an appeal is pending ties to the question of when
1181 notice should be given to the court of appeals. Two alternatives are presented: notice should be

1182 given when the motion is filed, or notice should be given if the district court indicates that it might
1183 or would grant the motion on remand.

1184 The discussion noted advantages in directing that a party notify the court of appeals when the
1185 motion is filed. The court of appeals may wish to postpone further consideration of the appeal when
1186 there is a prospect that the appeal may be undone by action on the motion, whether the remand is
1187 made before the appeal is decided or after. A practitioner observed that it is better to notify the court
1188 of appeals when the motion is filed — the court may be justifiably disconcerted to find that it has
1189 wasted time deciding issues that prove unnecessary to the ultimate judgment.

1190 The argument against notice when the motion is filed rests on concerns expressed by the
1191 circuit clerks surveyed for the Appellate Rules Committee. They point out that many Rule 60(b)
1192 motions are filed by pro se litigants, who are not always sources of fully reliable information. They
1193 prefer not to be afflicted with notice of motions that often will be denied without further incident.
1194 They also believe that practice in this area is better left to regulation by local circuit rules that can
1195 reflect different local cultures. A different question asked whether filing notice when the motion is
1196 filed in the district court would impair the calendaring process — lawyers like more time.

1197 A further observation was that a rule directing that notice must be given to the court of
1198 appeals when the district court states that it might or would grant the motion does not prevent a
1199 lawyer from giving notice when the motion is filed.

1200 A further difficulty with requiring notice when the motion is filed is that the movant is faced
1201 with determining whether the district court has jurisdiction to grant the motion. A practitioner
1202 observed that "it doesn't come up that way." The motion will seek relief. In cases of doubt the
1203 lawyer may notify the court that the lawyer believes the court has jurisdiction to grant the motion,
1204 but that in the alternative the court may wish to make an indicative ruling. The resolution is to file
1205 notice with the court of appeals when you become aware there is a question whether the district court
1206 has jurisdiction to grant relief.

1207 A participant suggested that the rule might direct notice when a Rule 60(b) motion is filed.
1208 But the Committee was reminded of the lengthy deliberations that led to the decision to generalize
1209 this procedure to apply to any motion that cannot be granted because of a pending appeal. It was
1210 suggested that perhaps the first paragraph of the Committee Note should be revised to make this
1211 point even more explicit.

1212 Proposed Rule 62.1(c) has been revised to integrate with the draft Appellate Rule 12.1. If
1213 Rule 12.1 is adopted, Rule 62.1 need not address the appellate court's determination whether to
1214 remand for all purposes or to remand only for decision of the motion, retaining jurisdiction of the
1215 appeal. The most important need is to encourage careful appellate attention to the distinction
1216 between a full remand and a special or limited remand. There is a danger that a party dissatisfied
1217 with the outcome in the district court may not recognize that a full remand may require a new notice
1218 of appeal. It is better to address this concern in an Appellate Rule than to attempt to regulate
1219 appellate court behavior by a Civil Rule.

1220 Two final questions are presented by the reference to a motion "that the court lacks authority
1221 to grant because of an appeal that has been docketed and is pending." The more obvious question
1222 is whether this provision should identify docketing of the appeal as the point of transferring authority
1223 from district court to court of appeals. Rule 60(a) draws the line at this point. Some courts of
1224 appeals have recognized it as the appropriate line in facing Rule 60(b) motions. It has real
1225 advantages. It is clear. It recognizes that at all times there should be a court that clearly has
1226 authority to act. And it may be difficult to ask a court of appeals to address a question in the

1227 interlude between filing a notice of appeal in the district court and the docketing that first informs
1228 the court of appeals that the case has come to it. The period between filing the notice of appeal and
1229 docketing in the court of appeals is likely to be quite brief as electronic filing takes hold; the bright
1230 line can be established at very little cost. The Committee agreed that this is the proper line.

1231 The other question is raised by a style suggestion to delete two words: "lacks authority to
1232 grant because of an appeal that has been docketed and is pending." This seemingly innocuous saving
1233 on the word count may generate confusion about the effect of a pending appeal. It seems to imply
1234 that any docketed and pending appeal defeats district-court authority to act on any motion. But that
1235 is not at all the case. Many appeals leave the district court free to act on many motions. One well-
1236 established example is the district court's authority to dismiss an action while an interlocutory
1237 injunction appeal is pending. It is important to retain the restrictive words.

1238 The Committee renewed the recommendation to publish Rule 62.1 for comment, subject to
1239 any revisions needed to integrate with any Appellate Rule that may be recommended for publication,
1240 or to compensate for a decision not to recommend an Appellate Rule.

1241 **RULE 26: EXPERT-WITNESS DISCOVERY**

1242 Judge Campbell introduced the report of the Discovery Subcommittee. No action is
1243 recommended at this meeting. The Subcommittee has devoted substantial time and two
1244 miniconferences to studying four issues with respect to disclosure and discovery of expert trial
1245 witnesses.

1246 Two sets of issues go to the categories of expert trial witnesses that must disclose reports
1247 under Rule 26(a)(2)(B). The report requirement is limited to an expert witness "retained or specially
1248 employed to provide expert testimony in the case or whose duties as an employee of the party
1249 regularly involve giving expert testimony." This rule apparently means that a report need not be
1250 provided by an employee whose duties do not regularly involve giving expert testimony, but some
1251 courts have found ways to require reports from such employees. The Committee Note is clear that
1252 treating physicians frequently fall outside the ranks of those specially employed to provide expert
1253 testimony, so they too fall outside the report requirement. But courts have found difficulty in
1254 drawing a line beyond which a treating physician has become retained or specially employed.

1255 The treating physician question is whether a report should be required when the testimony
1256 will offer an opinion that goes beyond diagnosis or treatment. The opposing party may claim
1257 surprise by such testimony.

1258 Professor Marcus provided additional background. Between 1970 and 1993, discovery of
1259 all expert trial witnesses began with interrogatories seeking the substance of the opinions to be given.
1260 In some courts depositions were routinely allowed to supplement the interrogatory responses, but
1261 other courts were more conservative. The 1993 amendments established the disclosure requirement,
1262 but stripped out experts not retained or specially employed — including treating physicians — and
1263 employees who do not regularly give expert testimony. Such witnesses must be disclosed under
1264 Rule 26(a)(2)(A), although there may be problems with compliance.

1265 Lawyers at the January miniconference wanted attorney disclosure for the witnesses
1266 exempted from the 26(a)(2)(B) report requirement. The disclosure would closely resemble the
1267 answers that were provided to expert-discovery interrogatories under the pre-1993 system. The
1268 attorney would write the disclosure, and provide it at the same time as disclosing the witness's
1269 identity under Rule 26(a)(2)(A). The draft in the agenda materials "cribs from the pre-1993 version."
1270 A more elaborate attorney disclosure could be required, approaching closer to the report required

1271 from a witness covered by 26(a)(2)(B). But the more limited disclosure seems to fill the gap that
1272 some find in the present rules. The disclosure will help opposing attorneys in determining whether
1273 to depose the witness. It will prevent surprise. It addresses the concerns that have been expressed
1274 about employee witnesses who do not regularly give expert testimony.

1275 Judge Campbell noted that the lawyers at the January miniconference were adamant in the
1276 view that treating physicians will stop testifying if required to give 26(a)(2)(B) reports. They also
1277 thought there would be few problems if they were provided attorney disclosure of the testimony
1278 expected from an employee witness who does not regularly give expert testimony.

1279 The ambiguities that arise from treating physician testimony were noted. The physician
1280 ordinarily should be disclosed under 26(a)(2)(A) as an Evidence Rule 702 witness. The physician
1281 may be asked questions of causation or the length of treatment. The opposing party objects that
1282 these topics go beyond the role of treating physician. Objections even may be made when a
1283 physician is asked what was observed in treating a party. Opposing lawyers want to know what the
1284 physician will address. Attorney disclosure will provide that.

1285 Treating physicians also may create another problem. The physician may have been deposed
1286 before the 26(a)(2)(A) disclosure. The other side may then wish to depose the physician a second
1287 time to explore new topics, requiring a stipulation of the parties or court order under Rule
1288 30(a)(2)(B). There is no ready solution to this problem.

1289 The attorney disclosure proposal was commended by a Committee member whose office
1290 defends a large number of medical malpractice cases. The disclosure will provide the information
1291 other parties need without putting a heavy burden on the physician.

1292 An observer noted the decisions that have seemed to misinterpret present Rule 26(a)(2)(B)
1293 by requiring reports from employees whose duties as employees do not regularly involve giving
1294 expert testimony and asked whether the Committee Note to an amended rule would say that the new
1295 attorney disclosure provision supersedes those decisions. It may be that clear new rule text will
1296 suffice without need for comment in the Note.

1297 The Committee consensus was that the Subcommittee seems to be moving in the right
1298 direction with the attorney disclosure proposal.

1299 Judge Campbell resumed the Subcommittee Report, noting that the other two expert-witness
1300 topics being studied by the Subcommittee involve discovery of communications between an attorney
1301 and a trial-expert witness and discovery of draft expert witness reports. Last August the ABA
1302 adopted a resolution that these materials should not be discoverable absent "exceptional
1303 circumstances." Discovery is opposed on several grounds. Among them is the view that the
1304 discovery is expensive but seldom yields anything of value. Perhaps more important is the concern
1305 that exposure to discovery induces costly behavior that impairs the quality of expert testimony.

1306 Seven of the nine lawyers who attended the January miniconference favored the ABA
1307 proposal. They represented many different types of practice. Two, plaintiffs' lawyers from the east
1308 coast and the west coast, disagreed. They advanced the view that an expert appears as a witness
1309 sworn to tell the truth, not an advocate, and that discovery should be available to show how far the
1310 testimony may have been shaped to meet the needs of the case as viewed by the attorney. They did
1311 not seem to offer concrete examples of discovery that made a difference. But their view is important
1312 and must be weighed carefully in developing any proposed amendments.

1313 New Jersey recently adopted a rule that seems to restrict discovery of draft reports and
1314 attorney-expert communications. There has been enough experience with the rule that it seemed a
1315 likely source of at least anecdotal information about operation in practice. The April 18
1316 miniconference in New York convened 11 New Jersey lawyers from a wide variety of backgrounds
1317 to test their experience. They provided an impressive — nearly unique — show of agreement. They
1318 did not merely favor the rule. They were genuinely enthusiastic about it. They report that lawyers
1319 and experts can really collaborate when freed from the shadows of discovery. The expert-witness
1320 reports are better, the testimony is better, the experts who are willing to be witnesses at all are better.
1321 Depositions are shorter. They do not miss the opportunity for discovery of attorney-witness
1322 communications or draft reports; they have not given up anything useful in return for the benefits.

1323 Some of the New Jersey lawyers were involved in the process that adopted the rule. They
1324 reported that there was no opposition even at the time of adoption. And the lack of opposition did
1325 not reflect a lack of awareness — the rule was well publicized along the way to adoption.

1326 Professor Marcus continued the Subcommittee report. The 1993 disclosure requirements
1327 created a better way to deal with what might be a lawyer speaking through an expert. But there seem
1328 to have been some downside consequences.

1329 One of the most interesting and important points made in the miniconference was that the
1330 New Jersey rule means more than it says. It seems to distinguish between communications before
1331 the report is served and communications after; they say that this distinction is not observed — full
1332 protection carries over. The bar has converged on this practice because all agree on its great benefits.

1333 The agenda materials include alternative models to limit discovery of draft expert-witness
1334 reports. One concern is that a bar on discovery might intrude on effective deposition questioning.
1335 The New Jersey lawyers say that is not a problem. "They seem to have achieved an understanding
1336 that is better than the rule text."

1337 A Committee member observed that there are no opinions interpreting the New Jersey rule.
1338 The miniconference lawyers said that the absence of opinions reflects the fact that the rule works.
1339 And they asked "why should experts be the only witnesses who cannot interact with lawyers about
1340 what will happen at trial," free from discovery.

1341 Another Committee member observed that there is some value in showing how hard a lawyer
1342 had to push the expert to get a favorable opinion. The current rule could work, but lawyers do not
1343 understand how to make that happen.

1344 Still another Committee member said that the Subcommittee made a point of trying to find
1345 the downside of the bright-line rule described by the New Jersey lawyers. They said there was none.
1346 The rule allows full access to all facts and data considered by the expert. Facts and data considered
1347 are discoverable, and can be examined at trial, whatever the source — if the attorney asserted a fact
1348 to be assumed in framing an opinion, that is discoverable. The New Jersey lawyers say that is what
1349 they need. And the New Jersey lawyers also said that they are uncomfortable with the federal
1350 practice when they appear in federal court; they often stipulate to adopt the state practice.

1351 A practitioner offered a caution. If something like the New Jersey rule is adopted, courts will
1352 have to be ever more alert to the danger that experts will be advocates. But in a recent case with 18
1353 experts all parties agreed to a stipulation that adopted rules very much like the New Jersey practice.
1354 They did so for self-serving reasons. Each wanted to be able to help its experts "improve the ways
1355 of presenting their entirely objective reports." A rule like this will help a lot. But the experts who
1356 will say anything for a fee will be a problem; jurors have to understand what we're doing.

1357 Massachusetts practice was described as quite similar to New Jersey practice. The plaintiffs'
1358 bar has developed ways to undercut bad experts by using their own experts.

1359 A participant in the miniconference noted that New Jersey experience may not transfer
1360 automatically to other settings — the New Jersey lawyers think they have a collegial bar. But they
1361 did assert that they contest their cases vigorously, including discovery disputes. It is only these
1362 issues of expert discovery that find them united.

1363 A judge suggested that the New Jersey practice could save a lot of court time. He has never
1364 found draft reports useful in assessing a trial expert's testimony.

1365 Texas practice was described briefly. The rule emerged from lawyers' concerns that expert
1366 discovery not become a sideshow. In allowing for discovery of documents and things "provided to,
1367 or reviewed by or for the expert in anticipation of testifying," the rule excludes discovery of the
1368 expert's own draft reports. Communications between lawyer and expert witness are not
1369 discoverable; if they were, at least in theory discovery could take the form of deposing the attorney.
1370 "Anything oral is off limits in discovery."

1371 The Subcommittee report concluded with the statement that proposals for rules amendments
1372 will be made, probably for the fall Advisory Committee meeting.

1373 **RULE 68**

1374 The agenda materials include a brief memorandum reporting on survey research on Rule 68
1375 offers of judgment being done by Professors Thomas A. Eaton and Harold S. Lewis, Jr.. Rule 68
1376 escaped revision in each of two lengthy Advisory Committee undertakings in the 1980s and 1990s.
1377 But suggestions for revision regularly appear on the agenda, fueled by a desire to find ways to
1378 encourage earlier settlements reached before unnecessary litigation costs are incurred. Completion
1379 of the articles reporting on this research and making recommendations supported by it may provide
1380 an occasion to return once again to Rule 68.

1381 **CLASS ACTION FAIRNESS ACT: FJC STUDY**

1382 Thomas Willging reported on the most recent phase of the Federal Judicial Center study of
1383 the impact of the Class Action Fairness Act on federal court dockets. He began by observing that
1384 Emery Lee, "an expert in statistical analysis as well as a wonderful lawyer," had done much of the
1385 analysis in the report. The whole research team, indeed, is excellent.

1386 Last September's report projected that the Act would lead to an annual increase of about 370
1387 additional class actions filed in, or removed to, federal courts. The study now has analyzed 16
1388 months of data. For the most recent 12 months there have been 364 additional filings. "That's pretty
1389 close."

1390 The types of cases in the increase have been pretty much the types that the Act was expected
1391 to influence. Most were diversity cases.

1392 Figure 2a in the report illustrates contract cases — mostly insurance cases. The filing trend
1393 was downward before CAFA. There has been an increase since, all of it in diversity cases. Of an
1394 average 16 new cases a month, 11 were original filings. The relationship between original filings
1395 and removal also is contrary to the pre-CAFA trend.

1396 Figure 2b shows there have been few tort personal injury or property damage cases, either
1397 before CAFA or after. Property damage cases increased slightly, all of them original filings.

1398 Figure 2c shows that "other fraud" cases increased at a rate of about 8 a month, 5 original
1399 filings and 3 removals.

1400 Diversity cases are charted in figure 3. It shows that the numbers were falling before CAFA
1401 and then went up dramatically in the first 6 months after CAFA. They rose again in the next 6-
1402 month period, and now have leveled off. Figure 4 separates original diversity filings from removals.
1403 Original filings skyrocketed in the first year of CAFA, and then leveled off. Removals went up in
1404 the first 6 months, and then fell. The proportions between original filings and removals have
1405 reversed as compared to pre-CAFA experience — original filings now outnumber removals.

1406 Figure 5 shows filings in district courts grouped by circuits. There are dramatic increases
1407 across the circuits. At least 7 circuits have doubled or more than doubled class-action activity
1408 comparing the 12 months before CAFA to the 12 months after. Filings in the 2d, 3d, 5th, and 11th
1409 Circuits more than doubled; it is difficult to know what is going on. And it is difficult to know how
1410 many of these cases could have been filed in districts in more than one circuit — whether "universal
1411 venue" is drawing lawyers to prefer filings in some circuits over others.

1412 Figure 6 shows filings in the 10 districts that have the greatest class-action activity. Filings
1413 have doubled in 9 of the 10. "There is an indication that lawyers are choosing federal courts for
1414 diversity actions."

1415 The next step will be to look at 306 pre-CAFA cases to document litigation activities: are
1416 there state claims or federal claims, and how many of each; motion practice; remand motions;
1417 certification; trial.

1418 A participant observed that the most dramatic changes seem to be in California. The
1419 California Judicial Council is studying state-court class-action practice, and will generate
1420 information parallel to the FJC work. Mr. Willging replied that the FJC has talked extensively with
1421 the people conducting the California study. The FJC also has talked with RAND researchers, who
1422 are looking for a state to study. The FJC is willing to coordinate the federal study with any state
1423 study. But most states do not collect data. It would be terrific to encourage states to develop better
1424 data.

1425 A recent RAND study reported on class actions against insurance companies. It found that
1426 only 10% of them were filed originally in federal court, while another 20% were removed to federal
1427 court.

1428 Brief note was made of the goals of CAFA that lie beyond the allocation of class actions
1429 between state courts and federal courts. It will be interesting to see whether there is a decline in
1430 "coupon settlements."

1431 **FJC STUDY: RULES 56 AND 12(e)**

1432 Joe Cecil reported briefly on the FJC study of Rules 56 and 12(e) that had been discussed
1433 with the Subcommittee report on Rule 56. He noted that there is a rather high rate of granting
1434 summary judgment in whole or in part. Part of the explanation is that Rule 56 is often used in cases
1435 with many defendants, trimming back the number of parties without disposing of the claims.

1436 Rule 12(e) has been used with greater frequency in some types of cases than in others.
1437 Greater frequency is found in civil rights cases and civil RICO actions. The RICO actions may be
1438 special because the Manual for Complex Litigation includes a model order that directs complex case
1439 statements. That approach may prove useful for other types of cases.

1440

NEXT MEETING

1441

It was decided that the next meeting should be set for November 8 and 9 at a place to be determined.

Respectfully submitted,

Edward H. Cooper, Reporter

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

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EVIDENCE RULES

MEMORANDUM

DATE: May 25, 2007

TO: Judge David F. Levi, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Carl E. Stewart, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 26 and 27, in Santa Fe, New Mexico. The Committee approved for publication a number of proposed amendments and a proposed new Rule.

Part II.A. of this report describes the Committee's proposed amendments relating to the Time-Computation Project. Part II.B. sets forth proposed new Rule 12.1 concerning indicative rulings; this Rule is designed to dovetail with the Civil Rules Committee's proposed new Civil Rule 62.1. Part II.C. presents proposed amendments to Rules 4(a)(4) and 22 in the light of the Criminal Rules Committee's proposed new Rules 11 of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255. Parts II.D. through II.G. present a proposed amendment to Rule 4(a)(4)(B)(ii) regarding notices of appeal; proposed amendments to Rules 4(a)(1)(B) and 40(a)(1) to clarify the treatment of U.S. officers or employees sued in an individual capacity; a proposed amendment to Rule 26(c) to clarify operation of the three-day rule; and a proposed amendment to Rule 29 requiring disclosures concerning drafting and funding of amicus briefs.

Part III covers other matters. The Committee discussed and retained three additional items on the study agenda, and removed two other items. The Committee also discussed correspondence relating to circuit-specific briefing requirements.

The Committee has tentatively scheduled its next meeting for November 2007.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the April meeting¹ and in the Committee's study agenda, both of which are attached to this report.

II. Action Items

The Advisory Committee seeks the Standing Committee's permission to publish the following proposed amendments and new rule in August 2007.

A. Time Computation package: Amendments to Rule 26(a) and to certain Rules containing time periods

1. Adoption of time-computation template as Rule 26(a)

At our April 2007 meeting, the Advisory Committee unanimously approved a proposed amendment that adopts as Appellate Rule 26(a) the template developed by the Time-Computation Subcommittee.

Due to issues peculiar to the Appellate Rules, proposed subdivisions (a)(4) and (a)(6)(B) diverge from the template. Instead of referring to a "day declared a holiday by ... the state where the district court is located," proposed subdivision (a)(6)(B) carries forward the formulation in current Appellate Rule 26(a)(4) by referring to a "day declared a holiday by ... the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office." Proposed Rule 26(a)(6)(B) defines the term "state" because the Appellate Rules (unlike the Criminal Rules) do not contain a global definition of that term. (As noted in Part III below, the Advisory Committee is considering a proposed amendment that would provide such a global definition, but has not fully evaluated that proposal at this time.)

At our spring meeting, the Committee decided that because some circuits span more than one time zone, Rule 26(a)(4)(A) should read: "for electronic filing, at midnight in the time zone of the circuit clerk's principal office." Subsequent to the meeting, it was pointed out that Rule 26(a) covers a number of deadlines for filings in the district court, including the deadlines for filing a notice of appeal. The language adopted at the meeting would have meant that a litigant filing a notice of appeal electronically in the district court for the District of Hawaii must file it some hours before midnight, Hawaii time. Because this would not be the result that lawyers would intuitively expect, it was suggested that Rule 26(a)(4) should contain separate subsections to deal with electronic filings in the district court and the court of appeals. During the course of these discussions, a member pointed out that the Appellate Rules have special rules for filing by mail, third-party commercial carriers, and prison mail systems. Because it makes more intuitive sense – when considering those filing methods – to think of the filer's time zone than to think of

¹ These minutes have not yet been approved by the Committee.

the court's time zone, it was proposed that those methods be treated in a separate subdivision of Rule 26(a)(4). The Committee then discussed – by email – the wording of what had become subdivision (a)(4)(D). An initial proposal suggested that this subdivision should read “for filing by other means, when the relevant clerk’s office is scheduled to close.” A member suggested that it would be clearer to say “when the clerk’s office in which the filing is made is scheduled to close.” A couple of members suggested that brevity was preferable, and it was suggested that “relevant” was superfluous. The proposed language shown below deletes “relevant” and thus tracks the template’s language: “for filing by other means, when the clerk’s office is scheduled to close.” The Note to subdivision (a)(4)(D) explains that the subdivision refers to the clerk’s office in which the filing is made. The language of subdivision (a)(4) was circulated to the Committee by email, and as of the date of this writing, no members had voiced disapproval of it.

The Committee Note tracks the template’s Note, but is customized in several places to reflect the issues discussed above and to provide citations that are relevant to the Appellate Rules.

**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF APPELLATE PROCEDURE²**

Rule 26. Computing and Extending Time

- 1 **(a) Computing Time.** The following rules apply in
2 computing any period of time specified in these rules or
3 in any local rule, court order, or applicable statute:
- 4 ~~— (1) Exclude the day of the act, event, or default that~~
5 begins the period.
- 6 ~~— (2) Exclude intermediate Saturdays, Sundays, and legal~~
7 holidays when the period is less than 11 days, unless
8 stated in calendar days.
- 9 ~~— (3) Include the last day of the period unless it is a~~
10 Saturday, Sunday, legal holiday, or—
11 if the act to be done
12 is filing a paper in court—a day on which the weather or
 other conditions make the clerk's office inaccessible.

²New material is underlined; matter to be omitted is lined through.

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13 — (4) ~~As used in this rule, “legal holiday” means New~~
14 ~~Year's Day, Martin Luther King, Jr.'s Birthday,~~
15 ~~Washington's Birthday, Memorial Day, Independence~~
16 ~~Day, Labor Day, Columbus Day, Veterans' Day,~~
17 ~~Thanksgiving Day, Christmas Day, and any other day~~
18 ~~declared a holiday by the President, Congress, or the~~
19 ~~state in which is located either the district court that~~
20 ~~rendered the challenged judgment or order, or the circuit~~
21 ~~clerk's principal office. The following rules apply in~~
22 ~~computing any time period specified in these rules, in~~
23 ~~any local rule or court order, or in any statute that does~~
24 ~~not specify a method of computing time.~~

25 (1) ***Period Stated in Days or a Longer Unit.*** When
26 the period is stated in days or a longer unit of time:
27 (A) exclude the day of the event that triggers the
28 period;

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29 (B) count every day, including intermediate

30 Saturdays, Sundays, and legal holidays; and

31 (C) include the last day of the period, but if the

32 last day is a Saturday, Sunday, or legal

33 holiday, the period continues to run until the

34 end of the next day that is not a Saturday,

35 Sunday, or legal holiday.

36 (2) ***Period Stated in Hours.*** When the period is stated

37 in hours:

38 (A) begin counting immediately on the

39 occurrence of the event that triggers the

40 period;

41 (B) count every hour, including hours during

42 intermediate Saturdays, Sundays, and legal

43 holidays; and

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44 (C) if the period would end on a Saturday,
45 Sunday, or legal holiday, the period continues
46 to run until the same time on the next day that
47 is not a Saturday, Sunday, or legal holiday.

48 (3) ***Inaccessibility of Clerk's Office.*** Unless the court
49 orders otherwise, if the clerk's office is
50 inaccessible:

51 (A) on the last day for filing under Rule 26(a)(1),
52 then the time for filing is extended to the first
53 accessible day that is not a Saturday, Sunday,
54 or legal holiday; or

55 (B) during the last hour for filing under Rule
56 26(a)(2), then the time for filing is extended
57 to the same time on the first accessible day
58 that is not a Saturday, Sunday, or legal
59 holiday.

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- 60 (4) “Last Day” Defined. Unless a different time is set
61 by a statute, local rule, or court order, the last day
62 ends:
- 63 (A) for electronic filing in the district court, at
64 midnight in the court's time zone;
- 65 (B) for electronic filing in the court of appeals, at
66 midnight in the time zone of the circuit
67 clerk's principal office;
- 68 (C) for filing under Rules 4(c)(1), 25(a)(2)(B),
69 and 25(a)(2)(C) – and filing by mail under
70 Rule 13(b) – at the latest time for the method
71 chosen for delivery to the post office,
72 third-party commercial carrier, or prison
73 mailing system; and
- 74 (D) for filing by other means, when the clerk’s
75 office is scheduled to close.

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76 (5) “Next Day” Defined. The “next day” is
77 determined by continuing to count forward when
78 the period is measured after an event and backward
79 when measured before an event.

80 (6) “Legal Holiday” Defined. “Legal holiday” means:

81 (A) the day set aside by statute for observing New
82 Year’s Day, Martin Luther King Jr.’s
83 Birthday, Washington’s Birthday, Memorial
84 Day, Independence Day, Labor Day,
85 Columbus Day, Veterans’ Day, Thanksgiving
86 Day, or Christmas Day; and

87 (B) any other day declared a holiday by the
88 President, Congress, or the state in which is
89 located either the district court that rendered
90 the challenged judgment or order, or the
91 circuit clerk’s principal office. The word

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92 ‘state,’ as used in this Rule, includes the
93 District of Columbia and any commonwealth,
94 territory, or possession of the United States.

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a statute that does not specify a method of computing time, a Federal Rule of Appellate Procedure, a local rule, or a court order. In accordance with Rule 47(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) “does not apply to situations where the court has established a specific calendar day as a deadline”), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). If, for example, the date for filing is “no later than November 1, 2007,” subdivision (a) does not govern. But if a filing is required to be made “within 10 days” or “within 72 hours,” subdivision (a) describes how that deadline is computed.

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Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g.*, 20 U.S.C. § 7711(b)(1) (requiring certain petitions for review by a local educational agency or a state to be filed “within 30 working days (as determined by the local educational agency or State) after receiving notice of” federal agency decision).

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years; though no such time period currently appears in the Federal Rules of Appellate Procedure, such periods may be set by other covered provisions such as a local rule. *See, e.g.*, Third Circuit Local Appellate Rule 46.3(c)(1). Subdivision (a)(1)(B)’s directive to “count every day” is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 26(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 26(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and the 10-day period not infrequently ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int’l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days —

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including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the “act, event, or default” that triggers the deadline, new subdivision (a) refers simply to the “event” that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. *See, e.g.*, Rules 5(b)(2), 5(d)(1), 28.1(f), & 31(a).

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace

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20-day periods. Thirty-day and longer periods, however, were retained without change.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Appellate Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be “rounded up” to the next whole hour. Subdivision (a)(3) addresses situations when the clerk’s office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:00 a.m. on Friday, November 2, 2007, will run until 9:00 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk’s office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When

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determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g., Tchakmakjian v. Department of Defense*, 57 Fed. Appx. 438, 441 (Fed. Cir. 2003) (unpublished per curiam opinion) (inaccessibility "due to anthrax concerns"); *cf. William G. Phelps, When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition, local provisions may address inaccessibility for purposes of electronic filing.

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in

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hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may, for example, address the problems that might arise under subdivision (a)(4)(A) if a single district has clerk's offices in different time zones, or provide that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that “[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders.” A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g., Casaldue v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

Subdivision (a)(4)(A) addresses electronic filings in the district court. For example, subdivision (a)(4)(A) would apply to an electronically-filed notice of appeal. Subdivision (a)(4)(B) addresses electronic filings in the court of appeals.

Subdivision (a)(4)(C) addresses filings by mail under Rules 25(a)(2)(B)(i) and 13(b), filings by third-party commercial carrier under Rule 25(a)(2)(B)(ii), and inmate filings under Rules 4(c)(1) and 25(a)(2)(C). For such filings, subdivision (a)(4)(C) provides that the “last day” ends at the latest time (prior to midnight in the filer's time zone) that the filer can properly submit the filing to the post office, third-party commercial carrier, or prison mail system (as applicable)

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using the filer's chosen method of submission. For example, if a correctional institution's legal mail system's rules of operation provide that items may only be placed in the mail system between 9:00 a.m. and 5:00 p.m., then the "last day" for filings under Rules 4(c)(1) and 25(a)(2)(C) by inmates in that institution ends at 5:00 p.m. As another example, if a filer uses a drop box maintained by a third-party commercial carrier, the "last day" ends at the time of that drop box's last scheduled pickup. Filings by mail under Rule 13(b) continue to be subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

Subdivision (a)(4)(D) addresses all other non-electronic filings; for such filings, the last day ends under (a)(4)(D) when the clerk's office in which the filing is made is scheduled to close.

Subdivision (a)(5). New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Appellate Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e.g.,* Rule 4(a)(1)(A) (subject to certain exceptions, notice of appeal in a civil case must be filed "within 30 days after the judgment or order appealed from is entered"). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.,* Rule 31(a)(1) ("[A] reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing."). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an

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event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31.

Subdivision (a)(6). New subdivision (a)(6) defines “legal holiday” for purposes of the Federal Rules of Appellate Procedure, including the time-computation provisions of subdivision (a). Subdivision (a)(6)(B) includes certain state holidays within the definition of legal holidays, and defines the term “state” – for purposes of subdivision (a)(6) – to include the District of Columbia and any commonwealth, territory or possession of the United States. Thus, for purposes of subdivision (a)(6)’s definition of “legal holiday,” “state” includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

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- 8 the order disposing of the last such remaining
9 motion:
- 10 (i) for judgment under Rule 50(b);
 - 11 (ii) to amend or make additional factual
12 findings under Rule 52(b), whether or
13 not granting the motion would alter the
14 judgment;
 - 15 (iii) for attorney's fees under Rule 54 if the
16 district court extends the time to appeal
17 under Rule 58;
 - 18 (iv) to alter or amend the judgment under
19 Rule 59;
 - 20 (v) for a new trial under Rule 59; or
 - 21 (vi) for relief under Rule 60 if the motion is
22 filed no later than ~~10~~ 30 days after the
23 judgment is entered.

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24

* * * * *

25

(5) Motion for Extension of Time.

26

* * * * *

27

(C) No extension under this Rule 4(a)(5)

28

may exceed 30 days after the prescribed

29

time or ~~10~~ 14 days after the date when

30

the order granting the motion is entered,

31

whichever is later.

32

(6) Reopening the Time to File an Appeal. The

33

district court may reopen the time to file an

34

appeal for a period of 14 days after the date

35

when its order to reopen is entered, but only

36

if all the following conditions are satisfied:

37

* * * * *

38

(B) the motion is filed within 180 days after

39

the judgment or order is entered or

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56 (3) **Effect of a Motion on a Notice of Appeal.**

57 (A) If a defendant timely makes any of the
58 following motions under the Federal Rules of
59 Criminal Procedure, the notice of appeal from
60 a judgment of conviction must be filed within
61 10 14 days after the entry of the order
62 disposing of the last such remaining motion,
63 or within 10 14 days after the entry of the
64 judgment of conviction, whichever period
65 ends later. This provision applies to a timely
66 motion:

- 67 (i) for judgment of acquittal under Rule 29;
68 (ii) for a new trial under Rule 33, but if
69 based on newly discovered evidence,
70 only if the motion is made no later than

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71 to 14 days after the entry of the
72 judgment; or
73 (iii) for arrest of judgment under Rule 34.
74 * * * * *

Committee Note

Subdivision (a)(4)(A)(vi). Subdivision (a)(4) provides that certain timely post-trial motions extend the time for filing an appeal. Lawyers sometimes move under Civil Rule 60 for relief that is still available under another rule such as Civil Rule 59. Subdivision (a)(4)(A)(vi) provides for such eventualities by extending the time for filing an appeal so long as the Rule 60 motion is filed within a limited time. Formerly, the time limit under subdivision (a)(4)(A)(vi) was 10 days, reflecting the 10-day limits for making motions under Civil Rules 50(b), 52(b), and 59. Subdivision (a)(4)(A)(vi) now contains a 30-day limit to match the revisions to the time limits in the Civil Rules.

Subdivision (a)(5)(C). The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26.

Subdivision (a)(6)(B). The time set in the former rule at 7 days has been revised to 14 days. Under the time-computation approach set by former Rule 26(a), “7 days” always meant at least 9 days and could mean as many as 11 or even 13 days. Under current Rule 26(a), intermediate weekends and holidays are counted. Changing the period from 7 to 14 days offsets the change in computation approach. See the Note to Rule 26.

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Subdivisions (b)(1)(A) and (b)(3)(A). The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

Rule 5. Appeal by Permission

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(b) Contents of the Petition; Answer or Cross-Petition;

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Oral Argument.

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(2) A party may file an answer in opposition or a

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cross-petition within ~~7~~ 10 days after the petition is

7

served.

8

* * * * *

9

(d) Grant of Permission; Fees; Cost Bond; Filing the

10

Record.

11

(1) Within ~~10~~ 14 days after the entry of the order

12

granting permission to appeal, the appellant must:

13

(A) pay the district clerk all required fees; and

FEDERAL RULES OF APPELLATE PROCEDURE

14 (B) file a cost bond if required under Rule 7.

15 * * * * *

Committee Note

Subdivision (b)(2). Subdivision (b)(2) is amended in the light of the change in Rule 26(a)'s time computation rules. Subdivision (b)(2) formerly required that an answer in opposition to a petition for permission to appeal, or a cross-petition for permission to appeal, be filed "within 7 days after the petition is served." Under former Rule 26(a), "7 days" always meant at least 9 days and could mean as many as 11 or even 13 days. Under current Rule 26(a), intermediate weekends and holidays are counted. Changing the period from 7 to 10 days offsets the change in computation approach. See the Note to Rule 26.

Subdivision (d)(1). The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26.

Rule 6. Appeal in a Bankruptcy Case From a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel

* * * * *

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel

FEDERAL RULES OF APPELLATE PROCEDURE

Exercising Appellate Jurisdiction in a Bankruptcy

Case.

* * * * *

- (2) **Additional Rules.** In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

* * * * *

(B) The record on appeal.

- (i) Within ~~10~~ 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8006 — and serve on the appellee — a statement of the issues to be presented on appeal and a

FEDERAL RULES OF APPELLATE PROCEDURE

designation of the record to be certified
and sent to the circuit clerk.

- (ii) An appellee who believes that other parts of the record are necessary must, within ~~10~~ 14 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

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Committee Note

Subdivision (b)(2)(B). The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

Rule 10. The Record on Appeal

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2

(b) The Transcript of Proceedings.

FEDERAL RULES OF APPELLATE PROCEDURE

19 the appellee must, within ~~10~~ 14 days after the
20 service of the order or certificate and the
21 statement of the issues, file and serve on the
22 appellant a designation of additional parts to
23 be ordered; and

24 (C) unless within ~~10~~ 14 days after service of that
25 designation the appellant has ordered all such
26 parts, and has so notified the appellee, the
27 appellee may within the following ~~10~~ 14 days
28 either order the parts or move in the district
29 court for an order requiring the appellant to
30 do so.

31 * * * * *

32 **(c) Statement of the Evidence When the Proceedings**
33 **Were Not Recorded or When a Transcript Is**
34 **Unavailable.** If the transcript of a hearing or trial is

FEDERAL RULES OF APPELLATE PROCEDURE

1 * * * * *

2 **(b) Filing a Representation Statement.** Unless the court
3 of appeals designates another time, the attorney who
4 filed the notice of appeal must, within ~~10~~ 14 days after
5 filing the notice, file a statement with the circuit clerk
6 naming the parties that the attorney represents on appeal.

7 * * * * *

Committee Note

Subdivision (b). The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26.

Rule 15. Review or Enforcement of an Agency Order—How Obtained; Intervention

1 * * * * *

2 **(b) Application or Cross-Application to Enforce an**
3 **Order; Answer; Default.**

4 * * * * *

FEDERAL RULES OF APPELLATE PROCEDURE

6 must within ~~7~~ 10 days file with the clerk and serve the agency
7 with a proposed judgment that the party believes conforms to
8 the opinion. The court will settle the judgment and direct
9 entry without further hearing or argument.

Committee Note

Rule 19 formerly required a party who disagreed with the agency's proposed judgment to file a proposed judgment "within 7 days." Under former Rule 26(a), "7 days" always meant at least 9 days and could mean as many as 11 or even 13 days. Under current Rule 26(a), intermediate weekends and holidays are counted. Changing the period from 7 to 10 days offsets the change in computation approach. See the Note to Rule 26.

Rule 25. Filing and Service

1 **(a) Filing.**

2 * * * * *

3 **(2) Filing: Method and Timeliness**

4 * * * * *

FEDERAL RULES OF APPELLATE PROCEDURE

Committee Note

Under former Rule 26(a), short periods that span weekends or holidays were computed without counting those weekends or holidays. To specify that a period should be calculated by counting all intermediate days, including weekends or holidays, the Rules used the term “calendar days.” Rule 26(a) now takes a “days-are-days” approach under which all intermediate days are counted, no matter how short the period. Accordingly, “3 calendar days” in subdivisions (a)(2)(B)(ii) and (c)(1)(C) is amended to read simply “3 days.”

Rule 26. Computing and Extending Time

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(c) Additional Time after Service. When a party is required

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or permitted to act within a prescribed period after a paper is

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served on that party, 3 calendar days are added to the

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prescribed period unless the paper is delivered on the date of

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service stated in the proof of service. For purposes of this

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Rule 26(c), a paper that is served electronically is not treated

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as delivered on the date of service stated in the proof of

9

service.

FEDERAL RULES OF APPELLATE PROCEDURE

11 only if the court gives reasonable notice to
12 the parties that it intends to act sooner.

13 * * * * *

14 (4) **Reply to Response.** Any reply to a response must
15 be filed within 5 7 days after service of the
16 response. A reply must not present matters that do
17 not relate to the response.

18 * * * * *

Committee Note

Subdivision (a)(3)(A). Subdivision (a)(3)(A) formerly required that a response to a motion be filed “within 8 days after service of the motion unless the court shortens or extends the time.” Prior to the 2002 amendments to Rule 27, subdivision (a)(3)(A) set this period at 10 days rather than 8 days. The period was changed in 2002 to reflect the change from a time-computation approach that counted intermediate weekends and holidays to an approach that did not. (Prior to the 2002 amendments, intermediate weekends and holidays were excluded only if the period was less than 7 days; after those amendments, such days were excluded if the period was less than 11 days.) Under current Rule 26(a), intermediate weekends and holidays are counted for all periods. Accordingly, revised subdivision (a)(3)(A) once again sets the period at 10 days.

FEDERAL RULES OF APPELLATE PROCEDURE

Subdivision (a)(4). Subdivision (a)(4) formerly required that a reply to a response be filed “within 5 days after service of the response.” Prior to the 2002 amendments, this period was set at 7 days; in 2002 it was shortened in the light of the 2002 change in time-computation approach (discussed above). Under current Rule 26(a), intermediate weekends and holidays are counted for all periods, and revised subdivision (a)(4) once again sets the period at 7 days.

Rule 28.1. Cross-Appeals

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(f) Time to Serve and File a Brief. Briefs must be served and filed as follows:

(4) the appellee’s reply brief, within 14 days after the appellant’s response and reply brief is served, but at least ~~3~~ 7 days before argument unless the court, for good cause, allows a later filing.

Committee Note

Subdivision (f)(4). Subdivision (f)(4) formerly required that the appellee’s reply brief be served “at least 3 days before argument

FEDERAL RULES OF APPELLATE PROCEDURE

unless the court, for good cause, allows a later filing.” Under former Rule 26(a), “3 days” could mean as many as 5 or even 6 days. See the Note to Rule 26. Under revised Rule 26(a), intermediate weekends and holidays are counted. Changing “3 days” to “7 days” alters the period accordingly. Under revised Rule 26(a), when a period ends on a weekend or holiday, one must continue to count in the same direction until the next day that is not a weekend or holiday; the choice of the 7-day period for subdivision (f)(4) will minimize such occurrences.

Rule 30. Appendix to the Briefs

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(b) All Parties’ Responsibilities.

(1) **Determining the Contents of the Appendix.** The parties are encouraged to agree on the contents of the appendix. In the absence of an agreement, the appellant must, within ~~10~~ 14 days after the record is filed, serve on the appellee a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. The

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 39. Costs

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(d) Bill of Costs: Objections; Insertion in Mandate.

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(2) Objections must be filed within ~~10~~ 14 days after

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service of the bill of costs, unless the court extends

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the time.

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Committee Note

Subdivision (d)(2). The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26.

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

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2

(b) When Issued. The court's mandate must issue 7

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calendar days after the time to file a petition for

FEDERAL RULES OF APPELLATE PROCEDURE

4 rehearing expires, or 7 calendar days after entry of an
5 order denying a timely petition for panel rehearing,
6 petition for rehearing en banc, or motion for stay of
7 mandate, whichever is later. The court may shorten or
8 extend the time.

9 * * * * *

Committee Note

Under former Rule 26(a), short periods that span weekends or holidays were computed without counting those weekends or holidays. To specify that a period should be calculated by counting all intermediate days, including weekends or holidays, the Rules used the term “calendar days.” Rule 26(a) now takes a “days-are-days” approach under which all intermediate days are counted, no matter how short the period. Accordingly, “7 calendar days” in subdivision (b) is amended to read simply “7 days.”

3. Proposals concerning certain statutory deadlines

At our April 2007 meeting, the Committee unanimously voted to recommend that the following statutes be considered for amendment in the light of the proposed shift in time-computation approach: 28 U.S.C. § 2107(c); 18 U.S.C. § 3771(d); Classified Information Procedures Act § 7(b); and 28 U.S.C. § 1453(c).

FEDERAL RULES OF APPELLATE PROCEDURE

B. New Rule 12.1: Indicative rulings

At our April 2007 meeting, the Committee voted 5 to 3 in favor of adopting an Appellate Rule 12.1 concerning indicative rulings. The Committee then considered specific choices concerning the wording of proposed Rule 12.1; as to those choices, the Committee votes were unanimous.

Appellate Rule 12.1 is designed to work with proposed Civil Rule 62.1. Both rules will formalize the practice of indicative rulings. Appellate Rule 12.1's text could encompass indicative rulings in criminal as well as civil cases; however, the Note's discussion of the indicative-ruling practice in criminal cases is bracketed because of uncertainty among some members of the Appellate Rules Committee as to whether the Rule should extend to criminal cases.

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Rule 12.1. [Remand After an] Indicative Ruling by the District Court [on a Motion for Relief That Is Barred by a Pending Appeal]

- 1 **(a) Notice to the Court of Appeals.** If a timely motion is
2 made in the district court for relief that it lacks authority
3 to grant because of an appeal that has been docketed and
4 is pending, the movant must promptly notify the circuit
5 clerk if the district court states either that it would grant
6 the motion or that the motion raises a substantial issue.
- 7 **(b) Remand After an Indicative Ruling.** If the district
8 court states that it would grant the motion or that the
9 motion raises a substantial issue, the court of appeals
10 may remand for further proceedings but retains
11 jurisdiction unless it expressly dismisses the appeal. If
12 the court of appeals remands but retains jurisdiction, the
13 parties must promptly notify the circuit clerk when the
14 district court has decided the motion on remand.

FEDERAL RULES OF APPELLATE PROCEDURE

Committee Note

This new rule corresponds to Federal Rule of Civil Procedure 62.1, which adopts and generalizes the practice that most courts follow when a party moves under Civil Rule 60(b) to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant relief under a rule such as Civil Rule 60(b) without a remand. But it can entertain the motion and deny it, defer consideration, or indicate that it might or would grant the motion if the action is remanded. Experienced appeal lawyers often refer to the suggestion for remand as an “indicative ruling.”

[Appellate Rule 12.1 is not limited to the Civil Rule 62.1 context; Rule 12.1 may also be used, for example, in connection with motions under Criminal Rule 33. *See United States v. Cronin*, 466 U.S. 648, 667 n.42 (1984).] The procedure formalized by Rule 12.1 is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal.

Rule 12.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court’s authority to act in face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Appellate Rule 12.1 applies only when those rules deprive the district court of authority to grant relief without appellate permission.

To ensure proper coordination of proceedings in the district court and in the court of appeals, the movant must notify the circuit clerk if the district court states that it would grant the motion or that

FEDERAL RULES OF APPELLATE PROCEDURE

the motion raises a substantial issue. The “substantial issue” standard may be illustrated by the following hypothetical: The district court grants summary judgment dismissing a case. While the plaintiff’s appeal is pending, the plaintiff moves for relief from the judgment, claiming newly discovered evidence and also possible fraud by the defendant during the discovery process. If the district court reviews the motion and indicates that the motion “raises a substantial issue,” the court of appeals may well wish to remand rather than proceed to determine the appeal.

If the district court states that it would grant the motion or that the motion raises a substantial issue, the movant may ask the court of appeals to remand the action so that the district court can make its final ruling on the motion. In accordance with Rule 47(a)(1), a local rule may prescribe the format for the litigants’ notifications and the district court’s statement.

Remand is in the court of appeals’ discretion. The court of appeals may remand all proceedings, terminating the initial appeal. In the context of postjudgment motions, however, that procedure should be followed only when the appellant has stated clearly its intention to abandon the appeal. The danger is that if the initial appeal is terminated and the district court then denies the requested relief, the time for appealing the initial judgment will have run out and a court might rule that the appellant is limited to appealing the denial of the postjudgment motion. The latter appeal may well not provide the appellant with the opportunity to raise all the challenges that could have been raised on appeal from the underlying judgment. *See, e.g., Browder v. Dir., Dep’t of Corrections of Ill.*, 434 U.S. 257, 263 n.7 (1978) (“[A]n appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review.”). The Committee does not endorse the notion that a court of appeals should decide that

FEDERAL RULES OF APPELLATE PROCEDURE

the initial appeal was abandoned – despite the absence of any clear statement of intent to abandon the appeal – merely because an unlimited remand occurred, but the possibility that a court might take that troubling view underscores the need for caution in delimiting the scope of the remand.

The court of appeals may instead choose to remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the appeal after the district court rules on the motion (if the appeal is not moot at that point and if any party wishes to proceed). This will often be the preferred course in the light of the concerns expressed above. It is also possible that the court of appeals may wish to proceed to hear the appeal even after the district court has granted relief on remand; thus, even when the district court indicates that it would grant relief, the court of appeals may in appropriate circumstances choose a limited rather than unlimited remand.

If the court of appeals remands but retains jurisdiction, subdivision (b) requires the parties to notify the circuit clerk when the district court has decided the motion on remand. This is a joint obligation that is discharged when the required notice is given by any litigant involved in the motion in the district court.

When relief is sought in the district court during the pendency of an appeal, litigants should bear in mind the likelihood that a separate notice of appeal will be necessary in order to challenge the district court's disposition of the motion. *See, e.g., Jordan v. Bowen*, 808 F.2d 733, 736-37 (10th Cir. 1987) (viewing district court's response to appellant's motion for indicative ruling as a denial of appellant's request for relief under Rule 60(b), and refusing to review that denial because appellant had failed to take an appeal from the

FEDERAL RULES OF APPELLATE PROCEDURE

denial); *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990) (“[W]here a 60(b) motion is filed subsequent to the notice of appeal and considered by the district court after a limited remand, an appeal specifically from the ruling on the motion must be taken if the issues raised in that motion are to be considered by the Court of Appeals.”).

FEDERAL RULES OF APPELLATE PROCEDURE

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Committee Note

Subdivision (a)(4)(A). New Rule 11(b) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 concerns motions for reconsideration in Section 2254 and 2255 proceedings. Subdivision (a)(4)(A) is revised to provide that a timely motion under Rule 11(b) has the same effect on the time to file an appeal as the other motions listed in subdivision (a)(4)(A).

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 22. Habeas Corpus and Section 2255 Proceedings

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(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). ~~If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue.~~ The district clerk must send the certificate ~~or~~ and the statement described in Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 to

FEDERAL RULES OF APPELLATE PROCEDURE

10 order disposing of the last such remaining
11 motion is entered.

12 (ii) A party intending to challenge an order
13 disposing of any motion listed in Rule
14 4(a)(4)(A), or a ~~judgment altered or amended~~
15 judgment's alteration or amendment upon such
16 a motion, must file a notice of appeal, or an
17 amended notice of appeal — in compliance
18 with Rule 3(c) — within the time prescribed by
19 this Rule measured from the entry of the order
20 disposing of the last such remaining motion.

21 * * * * *

Committee Note

Subdivision (a)(4)(B)(ii). Subdivision (a)(4)(B)(ii) is amended to address problems that stemmed from the adoption — during the 1998 restyling project — of language referring to “a judgment altered or amended upon” a post-trial motion.

FEDERAL RULES OF APPELLATE PROCEDURE

Prior to the restyling, subdivision (a)(4) instructed that “[a]ppellate review of an order disposing of any of [the post-trial motions listed in subdivision (a)(4)] requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding.” After the restyling, subdivision (a)(4)(B)(ii) provided: “A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.”

One court has explained that the 1998 amendment introduced ambiguity into the Rule: “The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment.” *Sorensen v. City of New York*, 413 F.3d 292, 296 n.2 (2d Cir. 2005). The current amendment removes that ambiguous reference to “a judgment altered or amended upon” a post-trial motion, and refers instead to “a judgment’s alteration or amendment” upon such a motion. Thus, subdivision (a)(4)(B)(ii) requires a new or amended notice of appeal when an appellant wishes to challenge an order disposing of a motion listed in Rule 4(a)(4)(A) or a judgment’s alteration or amendment upon such a motion.

FEDERAL RULES OF APPELLATE PROCEDURE

E. Rules 4(a)(1)(B) and 40(a)(1): U.S. officers or employees sued in an individual capacity

The Advisory Committee in November 2004 approved amendments to Rules 4(a)(1)(B) and 40(a)(1) to clarify those Rules' application to cases in which a federal officer or employee is sued in his or her individual capacity. As is the Committee's practice, it held these proposed amendments to await a time when there were additional amendments to place before the Standing Committee.

As discussed at further length in the draft minutes, the Committee is currently evaluating a proposal to treat state-government litigants the same as federal-government litigants for purposes of Rules 4(a)(1)(B) and 40(a)(1). That proposal, however, requires additional study. The Committee therefore decided not to hold the proposed amendments concerning the treatment of federal officials, but rather to seek permission to publish those proposed amendments at the present time.

Rule 4. Appeal as of Right — When Taken

1 **(a) Appeal in a Civil Case.**

2 **(1) Time for Filing a Notice of Appeal.**

3 (A) In a civil case, except as provided in Rules
4 4(a)(1)(B), 4(a)(4), and 4(c), the notice of
5 appeal required by Rule 3 must be filed with
6 the district clerk within 30 days after the
7 judgment or order appealed from is entered.

FEDERAL RULES OF APPELLATE PROCEDURE

8 (B) ~~When the United States or its officer or~~
9 agency is a party, ~~t~~The notice of appeal may
10 be filed by any party within 60 days after
11 entry of the judgment or order appealed from
12 is entered. if one of the parties is:
13 (i) the United States;
14 (ii) a United States agency;
15 (iii) a United States officer or employee
16 sued in an official capacity; or
17 (iv) a United States officer or employee
18 sued in an individual capacity for an act
19 or omission occurring in connection
20 with duties performed on behalf of the
21 United States.

22 * * * * *

FEDERAL RULES OF APPELLATE PROCEDURE

Committee Note

Subdivision (a)(1)(B). Rule 4(a)(1)(B) has been amended to make clear that the 60-day appeal period applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 40(a)(1) makes clear that the 45-day period to file a petition for panel rehearing also applies in such cases.) The amendment to Rule 4(a)(1)(B) is consistent with a 2000 amendment to Civil Rule 12(a)(3)(B), which specified an extended 60-day period to respond to complaints in such cases. The Committee Note to the 2000 amendment explained: “Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity.” The same reasons justify providing additional time to the Solicitor General to decide whether to file an appeal.

Rule 40. Petition for Panel Rehearing

- 1 **(a) Time to File; Contents; Answer; Action by the Court**
2 **if Granted.**
3 **(1) Time.** Unless the time is shortened or extended by
4 order or local rule, a petition for panel rehearing

FEDERAL RULES OF APPELLATE PROCEDURE

5 may be filed within 14 days after entry of
6 judgment. But in a civil case, if ~~the United States~~
7 ~~or its officer or agency is a party, the time within~~
8 ~~which any party may seek rehearing is 45 days~~
9 ~~after entry of judgment, unless an order shortens or~~
10 ~~extends the time.~~, a petition for panel rehearing
11 may be filed by any party within 45 days after entry
12 of judgment if one of the parties is:
13 (A) the United States;
14 (B) a United States agency;
15 (C) a United States officer or employee sued in
16 an official capacity; or
17 (D) a United States officer or employee sued in
18 an individual capacity for an act or omission
19 occurring in connection with duties
20 performed on behalf of the United States.

FEDERAL RULES OF APPELLATE PROCEDURE

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Committee Note

Subdivision (a)(1). Rule 40(a)(1) has been amended to make clear that the 45-day period to file a petition for panel rehearing applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 4(a)(1)(B) makes clear that the 60-day period to file an appeal also applies in such cases.) In such cases, the Solicitor General needs adequate time to review the merits of the panel decision and decide whether to seek rehearing, just as the Solicitor General does when an appeal involves the United States, a United States agency, or a United States officer or employee sued in an official capacity.

FEDERAL RULES OF APPELLATE PROCEDURE

F. Rule 26(c): Clarifying the operation of the three-day rule

The Advisory Committee in November 2003 approved an amendment to Rule 26(c) that would clarify the operation of the three-day rule. Due to the Committee's practice of bundling, it did not immediately submit the amendment to the Standing Committee.

The amendment will be useful whether or not the time-computation project's recommendations are adopted. In any event, the amendment will clarify the operation of the three-day rule when a time period ends on a weekend or holiday, and the amendment will bring Rule 26(c) into line with the approach taken in Civil Rule 6. If the time-computation project were not to be adopted, then the amendment would also clarify the three-day rule's interaction with the Rule 26(a) provision directing that short time periods be computed without counting intermediate weekends and holidays.

Because the amendment would serve an additional function if the time-computation project were not to proceed, the Committee proposes to publish the proposed amendment with two alternative versions of the Committee Note – one for use if the time-computation amendments are adopted (Option A), and one for use if they are not (Option B). For ease of reference, portions of Option B are bolded to show how they differ from Option A.

Rule 26. Computing and Extending Time

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(c) Additional Time after Service. When a party is

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~~required or permitted to act within a prescribed period~~

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~~after a paper is served on that party may or must act~~

5

~~within a specified time after service, 3 calendar days are~~

FEDERAL RULES OF APPELLATE PROCEDURE

6 added to after the prescribed period would otherwise
7 expire under Rule 26(a) unless the paper is delivered on
8 the date of service stated in the proof of service. For
9 purposes of this Rule 26(c), a paper that is served
10 electronically is not treated as delivered on the date of
11 service stated in the proof of service.

Committee Note [Option A]

Subdivision (c). Rule 26(c) has been amended to eliminate uncertainty about application of the 3-day extension. Civil Rule 6(e) was amended in 2004 to eliminate similar uncertainty in the Civil Rules.

Under the amendment, a party that is required or permitted to act within a prescribed period should first calculate that period, without reference to the 3-day extension provided by Rule 26(c), but with reference to the other time computation provisions of the Appellate Rules. After the party has identified the date on which the prescribed period would expire but for the operation of Rule 26(c), the party should add 3 calendar days. The party must act by the third day of the extension, unless that day is a Saturday, Sunday, or legal holiday, in which case the party must act by the next day that is not a Saturday, Sunday, or legal holiday.

To illustrate: A paper is served by mail on Thursday, November 1, 2007. The prescribed time to respond is 30 days. The

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prescribed period ends on Monday, December 3 (because the 30th day falls on a Saturday, the prescribed period extends to the following Monday). Under Rule 26(c), three calendar days are added — Tuesday, Wednesday, and Thursday — and thus the response is due on Thursday, December 6.

Committee Note [Option B]

Subdivision (c). Rule 26(c) has been amended to eliminate uncertainty about application of the 3-day extension. Civil Rule 6(e) was amended in 2004 to eliminate similar uncertainty in the Civil Rules.

Under the amendment, a party that is required or permitted to act within a prescribed period should first calculate that period, without reference to the 3-day extension provided by Rule 26(c), but with reference to the other time computation provisions of the Appellate Rules. **(For example, if the prescribed period is less than 11 days, the party should exclude intermediate Saturdays, Sundays, and legal holidays, as instructed by Rule 26(a)(2).)** After the party has identified the date on which the prescribed period would expire but for the operation of Rule 26(c), the party should add 3 calendar days. The party must act by the third day of the extension, unless that day is a Saturday, Sunday, or legal holiday, in which case the party must act by the next day that is not a Saturday, Sunday, or legal holiday.

To illustrate: A paper is served by mail on Wednesday, June 4, 2008. The prescribed time to respond is 10 days. Assuming there are no intervening legal holidays, the prescribed period ends on Wednesday, June 18. (See Rules 26(a)(1) and (2).) Under Rule 26(c), three calendar days are added — Thursday,

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Friday, and Saturday. Because the last day is a Saturday, the time to act extends to the next day that is not a Saturday, Sunday, or legal holiday. Thus, the response is due on Monday, June 23.

To illustrate **further**: A paper is served by mail on Thursday, November 1, 2007. The prescribed time to respond is 30 days. The prescribed period ends on Monday, December 3 (because the 30th day falls on a Saturday, the prescribed period extends to the following Monday). Under Rule 26(c), three calendar days are added — Tuesday, Wednesday, and Thursday — and thus the response is due on Thursday, December 6.

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G. Rule 29: Disclosures concerning drafting and funding of amicus briefs

At our April 2007 meeting, the Advisory Committee unanimously approved the following proposed amendment to Rule 29. The amendment would add a new subdivision (c)(7) requiring amicus briefs to indicate whether counsel for a party authored the brief in whole or in part and to identify every person or entity (other than the amicus, its members and its counsel) who contributed monetarily to the brief's preparation or submission. The provision would exempt from the disclosure requirement amicus filings by various government entities. The amendment also moves the requirement of a corporate disclosure statement from the initial block of text in Rule 29(c) to a new subdivision (c)(6).

Subdivision (c)(7)'s requirement is designed to parallel Supreme Court Rule 37.6. Subsequent to the Advisory Committee's April meeting, the Supreme Court published for comment a proposed amendment to Rule 37.6. That proposed amendment reads as follows:

Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part, whether such counsel or a party is a member of the *amicus curiae*, or made a monetary contribution to the preparation or submission of the brief, and shall identify every person or entity, other than the amicus curiae, its members, or its counsel, who made such a monetary contribution to the preparation or submission of the brief. The disclosure shall be made in the first footnote on the first page of text.

The Clerk's Comment to the proposed rule change states that "the change would require the disclosure that a party made a monetary contribution to the preparation or submission of an *amicus curiae* brief in the capacity of a member of the entity filing as *amicus curiae*."

Our Reporter suggested to the Committee that it consider an alternative formulation of the proposed amendment to Rule 29, for use in the event that the Supreme Court rule is amended. As of this writing, no Committee member has voiced an objection to the proposed alternative language. Accordingly, the amendment is presented in two versions. We would request that the Standing Committee authorize publication of Option A if the proposed Rule 37.6 amendment is rejected, and

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of Option B if the Rule 37.6 amendment is adopted. It is unclear at this time whether the Supreme Court will adopt the proposed rule change. Public comment on the Rule 37.6 proposal closes June 4; the proposal is slated for adoption as of June 25 and, if adopted, would take effect August 1.

Option A:

Rule 29. Brief of an Amicus Curiae

1

* * * * *

2

(c) Contents and Form. An amicus brief must comply

3

with Rule 32. In addition to the requirements of Rule

4

32, the cover must identify the party or parties supported

5

and indicate whether the brief supports affirmance or

6

reversal. ~~If an amicus curiae is a corporation, the brief~~

7

~~must include a disclosure statement like that required of~~

8

~~parties by Rule 26.1.~~ An amicus brief need not comply

9

with Rule 28, but must include the following:

10

(1) a table of contents, with page references;

11

(2) a table of authorities — cases (alphabetically

12

arranged), statutes and other authorities — with

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- 13 references to the pages of the brief where they are
14 cited;
- 15 (3) a concise statement of the identity of the amicus
16 curiae, its interest in the case, and the source of its
17 authority to file;
- 18 (4) an argument, which may be preceded by a
19 summary and which need not include a statement
20 of the applicable standard of review; and
- 21 (5) a certificate of compliance, if required by Rule
22 32(a)(7);
- 23 (6) if filed by an amicus curiae that is a corporation, a
24 disclosure statement like that required of parties by
25 Rule 26.1; and
- 26 (7) unless filed by an amicus curiae listed in the first
27 sentence of Rule 29(a), a statement that, in the first
28 footnote on the first page:

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amicus, its members, or its counsel) who contributed monetarily to the preparation or submission of the brief. Entities entitled under subdivision (a) to file an amicus brief without the consent of the parties or leave of court are exempt from this disclosure requirement.

The disclosure requirement, which is modeled on Supreme Court Rule 37.6, serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs. *See Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (noting the majority's suspicion "that amicus briefs are often used as a means of evading the page limitations on a party's briefs"). It also may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief.

It should be noted that coordination between the amicus and the party whose position the amicus supports is desirable, to the extent that it helps to avoid duplicative arguments. This was particularly true prior to the 1998 amendments, when deadlines for amici were the same as those for the party whose position they supported. Now that the filing deadlines are staggered, coordination may not always be essential in order to avoid duplication. In any event, mere coordination – in the sense of sharing drafts of briefs – need not be disclosed under subdivision (c)(7). *Cf.* Robert L. Stern et al., *Supreme Court Practice* 662 (8th ed. 2002) (Supreme Court Rule 37.6 does not "require disclosure of any coordination and discussion between party counsel and *amici* counsel regarding their respective arguments . . .").

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Option B:

Rule 29. Brief of an Amicus Curiae

1

* * * * *

2

(c) Contents and Form. An amicus brief must comply

3

with Rule 32. In addition to the requirements of Rule

4

32, the cover must identify the party or parties supported

5

and indicate whether the brief supports affirmance or

6

reversal. ~~If an amicus curiae is a corporation, the brief~~

7

~~must include a disclosure statement like that required of~~

8

~~parties by Rule 26.1.~~ An amicus brief need not comply

9

with Rule 28, but must include the following:

10

(1) a table of contents, with page references;

11

(2) a table of authorities — cases (alphabetically

12

arranged), statutes and other authorities — with

13

references to the pages of the brief where they are

14

cited;

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- 15 (3) a concise statement of the identity of the amicus
16 curiae, its interest in the case, and the source of its
17 authority to file;
- 18 (4) an argument, which may be preceded by a
19 summary and which need not include a statement
20 of the applicable standard of review; and
- 21 (5) a certificate of compliance, if required by Rule
22 32(a)(7);
- 23 (6) if filed by an amicus curiae that is a corporation, a
24 disclosure statement like that required of parties by
25 Rule 26.1; and
- 26 (7) unless filed by an amicus curiae listed in the first
27 sentence of Rule 29(a), a statement that, in the first
28 footnote on the first page:
- 29 (A) indicates whether a party's counsel authored
30 the brief in whole or in part;

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- 31 (B) indicates whether a party or a party’s counsel
32 is a member of the amicus curiae or
33 contributed money toward preparing or
34 submitting the brief; and
35 (C) identifies every person or entity — other than
36 the amicus curiae, its members, or its counsel
37 — who contributed money toward preparing
38 or submitting the brief.

39 * * * * *

Committee Note

Subdivision (c). Two items are added to the numbered list in subdivision (c). The items are added as subdivisions (c)(6) and (c)(7) so as not to alter the numbering of existing items. The disclosure required by subdivision (c)(6) should be placed before the table of contents, while the disclosure required by subdivision (c)(7) should appear in the first footnote on the first page of text.

Subdivision (c)(6). The requirement that corporate amici include a disclosure statement like that required of parties by Rule 26.1 was previously stated in the third sentence of subdivision (c). The requirement has been moved to new subdivision (c)(6) for ease of reference.

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Subdivision (c)(7). New subdivision (c)(7) requires amicus briefs to disclose whether counsel for a party authored the brief in whole or in part, and whether a party or a party's counsel is a member of the amicus or contributed money toward the preparation or submission of the brief. Subdivision (c)(7) also requires the amicus brief to identify every person or entity (other than the amicus, its members, or its counsel) who contributed monetarily to the preparation or submission of the brief. Entities entitled under subdivision (a) to file an amicus brief without the consent of the parties or leave of court are exempt from subdivision (c)(7)'s disclosure requirement.

The disclosure requirement, which is modeled on Supreme Court Rule 37.6, serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs. *See Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (noting the majority's suspicion "that amicus briefs are often used as a means of evading the page limitations on a party's briefs"). It also may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief.

It should be noted that coordination between the amicus and the party whose position the amicus supports is desirable, to the extent that it helps to avoid duplicative arguments. This was particularly true prior to the 1998 amendments, when deadlines for amici were the same as those for the party whose position they supported. Now that the filing deadlines are staggered, coordination may not always be essential in order to avoid duplication. In any event, mere coordination – in the sense of sharing drafts of briefs – need not be disclosed under subdivision (c)(7). *Cf.* Robert L. Stern et al., *Supreme Court Practice* 662 (8th ed. 2002) (Supreme Court Rule 37.6 does not "require disclosure of any coordination and

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discussion between party counsel and *amici* counsel regarding their respective arguments . . .”).

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III. Information Items

As you know, the Committee has extensively discussed practitioners' concerns about idiosyncratic briefing requirements in the circuits. Last fall I wrote to the Chief Judge of each circuit to express the Committee's concern over circuit-specific briefing requirements, to emphasize the need to make each circuit's briefing requirements readily accessible to practitioners, and to urge each circuit to consider whether the circuit's additional briefing requirements are truly necessary. To date, eight circuits have responded to the letter.

A pending proposal by the Virginia State Solicitor General would amend Rules 4(a)(1)(B) and 40(a)(1) so as to treat state-government litigants the same as federal-government litigants for purposes of the time to take an appeal or to seek rehearing. The Committee has appointed an informal subcommittee to study the relevant issues. At our April meeting the Committee noted the need for further information in order to assess the possible effects of the proposed amendments. The Committee has decided to retain this item on the study agenda, and will seek data concerning the number of appeals in cases involving state or local government litigants.

At the suggestion of the time-computation subcommittee, the Committee considered whether to adopt a global definition of the term "state" for the Appellate Rules. The proposed definition would encompass the District of Columbia and any commonwealth, territory or possession of the United States. The Committee decided that it needs further information on the definition of relevant terms such as "territory" and "possession," and that it would like to consult the potentially affected entities for their views on the proposed definition. The Department of Justice has undertaken to perform that research. This item has been retained on the Committee's study agenda.

In 2003 the Committee approved an amendment to Rule 7 to resolve a circuit split by making clear that attorney's fees are not among the 'costs on appeal' that may be secured by a Rule 7 bond. At our April meeting the Committee reconsidered the wording of the proposed amendment and concluded that further study concerning that wording would be helpful; thus, this item has been retained on the study agenda.

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Two proposals were considered by the Committee and removed from the study agenda. One proposed amendment would have required the courts of appeals to give at least ten days' advance notice of the identity of members of an oral argument panel. The Committee discussed the possible costs and benefits of this proposal. It was noted that circuit practice concerning the disclosure of panel composition relates to the local culture of each circuit, and that the proposed rule would likely be vigorously opposed by some circuits. The other proposal related to the recently-adopted Rule 32.1; the Committee determined that consideration of any proposed changes to Rule 32.1 should await further experience with the new Rule.

DRAFT

Minutes of Spring 2007 Meeting of Advisory Committee on Appellate Rules April 26 and 27, 2007 Santa Fe, New Mexico

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 26, 2007, at 8:30 a.m. at the La Posada Hotel in Santa Fe, New Mexico. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Judge T.S. Ellis III, Dean Stephen R. McAllister, Mr. James F. Bennett, Mr. Mark I. Levy, and Ms. Maureen E. Mahoney. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Also present were Judge Harris L. Hartz, liaison from the Standing Committee; Professor Daniel Coquillette, Reporter to the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office; and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Judge Paul J. Kelly, Jr., attended the portion of the meeting that concerned proposed Appellate Rule 12.1. Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Stewart welcomed the meeting participants and, in particular, welcomed Judge Hartz as the new Standing Committee liaison to the Appellate Rules Committee. Judge Stewart noted his regret that Justice Randy J. Holland was unable to attend.

II. Approval of Minutes of November 2006 Meeting

The minutes of the November 2006 meeting were approved.

III. Report on January 2007 Meeting of Standing Committee and on Status of Pending Amendments (new FRAP 32.1 and amendments to FRAP 25)

The Appellate Rules Committee had no action items on the agenda for the Standing Committee's January 2007 meeting. Judge Stewart reported to the Standing Committee that the Appellate Rules Committee had tentatively approved proposed amendments to Appellate Rule 4(a)(4)(B) and Appellate Rule 29 and that the Committee would finalize those proposed amendments at its April 2007 meeting. Judge Stewart also reported on the Appellate Rules Committee's work on the Time-Computation project; he provided the Committee's feedback on

the time-computation template rule and noted that the Committee's Deadlines Subcommittee was reviewing all appellate rule-based and statutory deadlines with a view to recommending adjustments to some deadlines in the light of the proposed shift to a days-are-days time-counting approach. Judge Stewart conveyed the fact that some Committee members have misgivings about the advisability of the time-computation project, but also noted that if the other Committees decide to proceed with the project the Appellate Rules Committee stands ready to proceed as well.

Judge Rosenthal and Professor Cooper reported to the Standing Committee on the status of various Civil Rules Committee projects. Of particular note to the Appellate Rules Committee, they reviewed the ongoing work on proposed Civil Rule 62.1 concerning indicative rulings. Judge Rosenthal noted that the Appellate Rules Committee had indicated it would consider adding a cross-reference to Civil Rule 62.1 in the Appellate Rules, and she stated that this would be very helpful.

Judge Kravitz and Professor Struve reported to the Standing Committee on the status of the Time-Computation Project. Judge Kravitz noted that the Time-Computation Subcommittee, after consultation, had decided not to attempt to define the concept of inaccessibility of the clerk's office, and that the Subcommittee had decided to retain state holidays in the definition of legal holidays. Judge Kravitz noted that members of the Appellate Rules Committee had expressed reservations about the project, and that those members assert that the proposed change in time-computation approach is unneeded and will create problems regarding statutory deadlines. But Judge Kravitz noted that despite members' reservations, the Appellate Rules Committee is moving forward with its review of appellate deadlines so as to be ready to proceed along with the other Advisory Committees. Judge Zilly discussed the special issues facing the Bankruptcy Rules Committee, including the fact that there are numerous proposed amendments that are currently out for public comment – which could complicate the prospects for proceeding at this time with the proposed time-computation changes for the Bankruptcy Rules. After the discussion of the various time-computation issues, the Standing Committee indicated its wish that the Advisory Committees proceed with the time-computation project. (The possibility that the Bankruptcy Rules Committee might seek to delay publication of its package of time-computation proposals was noted.)

In connection with the discussion of the Bankruptcy Rules issues, it was noted that at its March 2007 meeting the Bankruptcy Rules Committee expressed the goal of publishing its time-computation package in summer 2007 along with the other Advisory Committees. It was also noted that the Bankruptcy Rules Committee has decided to propose that the time to appeal in bankruptcy cases be enlarged from 10 to 14 days.

After the discussion of the January 2007 Standing Committee meeting, the Reporter reviewed the status of pending Appellate Rules items. New Rule 32.1 (concerning unpublished opinions) and amended Rule 25(a)(2)(D) (authorizing local rules to require electronic filing subject to reasonable exceptions) took effect December 1, 2006. New Rule 25(a)(5) (addressing

privacy concerns relating to court filings) is on track to take effect December 1, 2007. A judge member noted that since Rule 32.1 took effect, he has observed an increase in citations to unpublished opinions. In addition, he noted that his court sometimes gets requests to change an opinion's status from unpublished to published.

IV. Report on Responses to Letter to Chief Judges Regarding Circuit Briefing Requirements

Judge Stewart updated the Committee on the responses to his letter to the Chief Judges of each circuit concerning circuit-specific briefing requirements. Since the November 2006 meeting, Judge Stewart has received written responses from the Fifth and Ninth Circuits. The Second, Third, Sixth, Seventh, Eighth and Eleventh Circuits have not yet responded; obtaining responses from all circuits may take time because some circuits may wish to consider the issues raised in the letter at circuit meetings or retreats. Mr. Fulbruge offered to raise the issue with the clerks of the relevant circuits at the next clerks' meeting. Professor Coquillette seconded that suggestion, and noted that local appellate rules had not historically received the same extended and systematic scrutiny accorded to local district court rules.

A judge member suggested that circuits are unlikely to discard their circuit-specific briefing requirements unless appellate practitioners make their complaints known to the relevant circuit; circuit judges, he suggested, do not perceive their local requirements as a problem. It was noted that on a prior occasion when a Ninth Circuit local rule concerning capital cases had come under scrutiny, the issue arose because a group of state attorneys general had written to complain about the rule. An attorney member noted that the clerk's office may not always make the judges aware of the many problems that arise; he stated that a large percentage of the briefs filed by his office are bounced by the relevant clerk's office for failure to comply with a local requirement. The member stressed the importance of urging each circuit to make its requirements readily available on the court's website. Ms. Leary agreed, noting that even after diligent searching it was very difficult to be sure that she had found all the relevant provisions for some of the circuits. A judge member stated that, realistically, the best approach to this issue is the one that the Committee is currently taking. Another attorney member suggested that some of the local requirements may be useful, and that the Committee may wish to consider compiling a list of 'best practices' based on the local requirements that seem like good ideas. Mr. Ishida noted that the Standing Committee has asked Professor Capra and Mr. Barr to look into ideas for improving and standardizing the way in which courts make their local rules available on their websites. An attorney member suggested that such a standard should include the requirement that each circuit summarize the ways in which their local requirements differ from those in the national rules. Judge Stewart noted that the Committee would continue to monitor developments concerning local rules; and he thanked Ms. Leary for producing the excellent FJC study concerning local briefing rules.

V. Action Items

A. Item No. 05-06 (FRAP 4(a)(4)(B)(ii) — amended NOA after favorable or insignificant change to judgment)

Judge Stewart invited the Reporter to introduce the following proposed amendment and Committee Note:

Rule 4. Appeal as of Right--When Taken

(a) Appeal in a Civil Case.

* * * * *

(4) Effect of a Motion on a Notice of Appeal.

* * * * *

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment — but before it disposes of any motion listed in Rule 4(a)(4)(A) — the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a ~~judgment altered or amended~~ judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

* * * * *

Committee Note

Subdivision (a)(4)(B)(ii). Subdivision (a)(4)(B)(ii) is amended to address problems that stemmed from the adoption — during the 1998 restyling project — of language referring to “a judgment altered or amended upon” a post-trial motion.

Prior to the restyling, subdivision (a)(4) instructed that “[a]ppellate review of an order disposing of any of [the post-trial motions listed in subdivision (a)(4)] requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding.” After the restyling, subdivision (a)(4)(B)(ii) provided: “A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.”

One court has explained that the 1998 amendment introduced ambiguity into the Rule: “The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment.” *Sorensen v. City of New York*, 413 F.3d 292, 296 n.2 (2d Cir. 2005). The current amendment removes that ambiguous reference to “a judgment altered or amended upon” a post-trial motion, and refers instead to “a judgment’s alteration or amendment” upon such a motion.

The Reporter briefly reviewed the reasons for the Committee’s decision, at the November 2006 meeting, to amend Rule 4(a)(4)(B)(ii). The goal of the amendment is to eliminate ambiguity that arose from the 1998 restyling of Rule 4. Prior to 1998, the Rule provided that “[a] party intending to challenge *an alteration or amendment of the judgment* shall file a notice, or amended notice, of appeal” The relevant language was altered during the 1998 restyling, and the current Rule reads in relevant part: “A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or *a judgment altered or amended* upon such a motion, must file a notice of appeal, or an amended notice of appeal” As Judge Leval noted in *Sorensen v. City of New York*, 413 F.3d 292 (2d Cir. 2005), it is possible that a court might read the current Rule to require an appellant to amend a prior notice of appeal after the district court amends the judgment in the appellant’s favor. At the November 2006 meeting, the Committee voted to address this problem by amending the Rule to refer to “an alteration or amendment of a judgment” upon a post-trial motion. Subsequently, the Reporter consulted Professor Kimble concerning the style of the proposed amendment. Professor Kimble indicates that for style

reasons the proposed amendment should instead refer to “a judgment’s alteration or amendment.”

A member suggested that, because Judge Leval’s *Sorensen* opinion initially drew the issue to the Committee’s attention, the Committee might wish to seek Judge Leval’s input on the proposed amendment. The member volunteered to let Judge Leval know when the proposed amendment goes out for notice and comment. Another member noted that the previously suggested language (“an alteration or amendment of a judgment”) seems better than Professor Kimble’s suggested language (“a judgment’s alteration or amendment”); the Reporter noted, however, that on this matter of style the practice is to defer to Professor Kimble.

A member suggested that it would be helpful to add a sentence to the Note stating when a new or amended notice of appeal is required under Rule 4(a)(4)(B)(ii). The additional sentence fits at the end of the Note and reads as follows: Thus, subdivision (a)(4)(B)(ii) requires a new or amended notice of appeal when an appellant wishes to challenge an order disposing of a motion listed in Rule 4(a)(4)(A) or a judgment’s alteration or amendment upon such a motion.

Without objection, the Committee by voice vote approved the proposed amendment (with the addition to the Note).

B. Item No. 06-01 (FRAP 26(a) — time-computation template) & Item No. 06-02 (adjust deadlines to reflect time-computation changes)

Judge Stewart invited Judge Sutton to present the report of the Deadlines Subcommittee. Judge Sutton began by noting the three tasks before the Committee. First is the adoption of the time-computation template in the form of a proposed amendment to Appellate Rule 26(a). Second is the question of adjusting the Appellate Rules deadlines to account for the shift in time-computation approach. The third issue concerns the time-computation project’s impact on statutory deadlines that affect appellate practice.

Judge Sutton invited the Reporter to present the Subcommittee’s recommendation concerning the following proposed amendment to Rule 26(a):

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) *Period Stated in Days or a Longer Unit.* When the period is stated in

days or a longer unit of time:

- (A) exclude the day of the event that triggers the period;
- (B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and
- (C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) ***Period Stated in Hours.*** When the period is stated in hours:

- (A) begin counting immediately on the occurrence of the event that triggers the period;
- (B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and
- (C) if the period would end on a Saturday, Sunday, or legal holiday, then continue the period until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) ***Inaccessibility of Clerk's Office.*** Unless the court orders otherwise, if the clerk's office is inaccessible:

- (A) on the last day for filing under Rule 26(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or
- (B) during the last hour for filing under Rule 26(a)(2), then the time for filing is extended to the same time on the first accessible day that is

not a Saturday, Sunday, or legal holiday.

- (4) ***"Last Day" Defined.*** Unless a different time is set by a statute, local rule, or order in the case, the last day ends:
- (A) for electronic filing, at midnight in the court's time zone; and
 - (B) for filing by other means, when the clerk's office is scheduled to close.
- (5) ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.
- (6) ***"Legal Holiday" Defined.*** "Legal holiday" means:
- (A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and
 - (B) any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.
- [The word 'state,' as used in this Rule, includes the District of Columbia and any commonwealth, territory, or possession of the United States.]

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the

provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of Appellate Procedure, a statute, a local rule, or a court order. In accordance with Rule 47(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) “does not apply to situations where the court has established a specific calendar day as a deadline”), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). If, for example, the date for filing is “no later than November 1, 2007,” subdivision (a) does not govern. But if a filing is required to be made “within 10 days” or “within 72 hours,” subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g.*, [CITE].

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years; though no such time period currently appears in the Federal Rules of Appellate Procedure, such periods may be set by other covered provisions such as a local rule. *See, e.g.*, Third Circuit Local Appellate Rule 46.3(c)(1). Subdivision (a)(1)(B)’s directive to “count every day” is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 26(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 26(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and the 10-day period not infrequently ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int’l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk’s office

is inaccessible.

Where subdivision (a) formerly referred to the “act, event, or default” that triggers the deadline, new subdivision (a) refers simply to the “event” that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. See, e.g., [CITE].

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were retained without change.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Appellate Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:30 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:30 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be “rounded up” to the next whole hour. Subdivision (a)(3) addresses situations when the clerk’s office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:00 a.m. on Friday, November 2, 2007, will run until 9:00 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk’s office is not accessible because

of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g., Tchakmakjian v. Department of Defense*, 57 Fed. Appx. 438, 441 (Fed. Cir. 2003) (unpublished per curiam opinion) (inaccessibility "due to anthrax concerns"); *cf. William G. Phelps, When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition, local provisions may address inaccessibility for purposes of electronic filing.

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may provide, for example, that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g., Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

Subdivision (a)(5). New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Appellate Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after*

an event. *See, e.g.*, Rule 4(a)(1)(A) (subject to certain exceptions, notice of appeal in a civil case must be filed “within 30 days after the judgment or order appealed from is entered”). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 31(a)(1) (“[A] reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing.”). In determining what is the “next” day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31.

Subdivision (a)(6). New subdivision (a)(6) defines “legal holiday” for purposes of the Federal Rules of Appellate Procedure, including the time-computation provisions of subdivision (a).

The Reporter highlighted changes made to the template since the Committee’s November 2006 meeting. Various style changes have been made. Rule 26(a) now opens by stating that it applies to the computation of “any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.” The latter phrase accounts for the fact that some statutes *do* specify a computation method (e.g., a statute that sets a time period of “ten business days”); under the new formulation, the time-computation rule will not affect statutes that specify a method of computing time. The template’s provisions concerning inaccessibility of the clerk’s office are now set forth in a new subdivision (a)(3); splitting inaccessibility out into a separate subdivision improves the template’s treatment of backward-counted filing deadlines. Subdivision (a)(4)’s definition of the “last day” no longer refers explicitly to after-hours in-person filing by delivery to a court official. However, subdivision (a)(4)’s definition applies “[u]nless a different time is set by a statute, local rule, or order in the case” – a formulation which is intended to leave undisturbed the caselaw that has developed under 28 U.S.C. § 452 concerning after-hours in-person filing. Subdivision (a)(6)(B) contains in brackets a definition of the term “state”; this definition is included in the proposed amendment to Rule 26(a) because the Appellate Rules do not currently define the term.¹ Among the changes to the Note, a paragraph has been added that explains that, when lengthening the Appellate Rules deadlines to offset the shift in time-computation approach, the Committee followed a presumption in favor of time periods set in multiples of seven days.

Judge Sutton observed that the Note’s discussion of subdivision (a)(2) gives an example using the time “2:30 p.m.” He stated that, on consideration, the note should use the example

¹ Another proposal, Item 07-AP-D, would add a definition that applies to the Appellate Rules generally; the Committee’s discussion of that proposal is described below.

“2:17 p.m.,” so as to correspond to the examples used in the notes that will accompany the proposed amendments to the other sets of Rules.

An attorney member asked why subdivision (a)(2)(C) provides that a deadline stated in hours that ends on a weekend or holiday is extended to “the same time” on the next day that is not a weekend or holiday. Why not provide that it is extended to the *beginning* of the next day that is not a weekend or holiday? The Reporter suggested that there might be difficulty in defining the beginning of the next day, since courts may open at varying times. Judge Sutton suggested that the Committee consult the Civil Rules Committee for its views on this issue.

Judge Sutton pointed out that subdivision (a)(4)(A)’s reference to “midnight in the court’s time zone” is ambiguous. A better formulation would be “midnight in the time zone of the circuit clerk’s principal office.” It was noted that this issue can also arise in the district courts, because some districts span more than one time zone (e.g., the Eastern District of Tennessee). Judge Sutton noted that this issue should also be raised with the other Advisory Committees.

Judge Hartz asked whether subdivision (a)(3)’s definition of inaccessibility will be compatible with existing local rules concerning inaccessibility of the clerk’s office. The Reporter noted that the Time-Computation Subcommittee had studied the issue of local rules concerning electronic filing and inaccessibility, and had found a variety of approaches. Notably, most local rules that address e-filing and inaccessibility do so without reference to the time-computation rules. The Reporter mentioned her understanding that a memo will be sent to the various local rulemaking bodies to alert them to the need to review their local rules in the light of the proposed changes in time-computation approach. That memo could also mention the need for local rules that address the question of inaccessibility, especially with respect to electronic filing.

Without objection, the Committee by voice vote approved the proposed amendment (with the changes, described above, to subdivision (a)(4)(A) and the Note to subdivision (a)(2)).

Judge Sutton next invited the Reporter to present the Subcommittee’s recommendations concerning the changes to Appellate Rules deadlines in the light of the shift in time-computation approach.² The Reporter highlighted a few aspects of the changes. Time periods stated in terms of “calendar days” will be stated simply in terms of “days.” Ten-day deadlines are in most

² These recommendations are contained in the Subcommittee’s March 23, 2007 memo and can be summarized as follows. References to “calendar days” in Rules 25, 26 and 41 become simply references to “days.” Three-day periods in Rules 28.1(f) and 31(a) become seven-day periods. The five-day period in Rule 27(a)(4) becomes a seven-day period. The seven-day period in Rule 4(a)(6) lengthens to 14 days. The seven-day periods in Rules 5(b)(2) and 19 become ten days. The eight-day period in Rule 27(a)(3)(A) becomes ten days. The ten-day period in Rule 4(a)(4)(A)(vi) becomes 30 days to correspond with changes in the Civil Rules. The ten-day periods in Rules 4(a)(5)(C), 4(b), 5, 6, 10, 12, 30 and 39 become 14 days. The 20-day period in Rule 15(b) becomes 21 days.

instances lengthened to 14 days; this recommendation differs from the Subcommittee's tentative recommendation last fall. Last fall, the Subcommittee did not suggest lengthening the 10-day deadlines because those deadlines, prior to the 2002 amendments to the Appellate Rules, were computed using a days-are-days approach. But after learning that the other Advisory Committees are applying a robust presumption in favor of setting Rules-based deadlines in multiples of seven days, the Subcommittee reconsidered its position and recommends lengthening the 10-day periods to 14 days. There are three periods, however, for which the Subcommittee's proposals depart from the 7-day-multiple presumption: The 7-day periods in Rules 5(b)(2) and 19 and the 8-day period in Rule 27(a)(3)(A) should become 10 days rather than 14 days because lengthening to 14 days would increase the actual time significantly and would contravene the need for promptness in the contexts covered by these rules. By contrast, the Subcommittee recommends lengthening the 7-day period in Rule 4(a)(6) to 14 days; lengthening to 14 days comports with the 7-day-multiple presumption and does not unduly threaten any principle of repose. It should be noted that lengthening this 7-day period will make it advisable to ask Congress to make a corresponding change in 28 U.S.C. § 2107.

Without objection, the Committee by voice voted adopted the Deadlines Subcommittee's recommendations concerning adjustments in the time periods set by the Appellate Rules.

Next, the Subcommittee presented its recommendations concerning statutory deadlines relating to appellate practice; these recommendations are summarized in the Subcommittee's March 23, 2007 memo. Although the Committee need not finalize a list of specific recommendations concerning statutory time periods, it is important to get a sense of the provisions that the Committee believes should likely be changed in light of the proposed shift to a days-are-days time-computation approach; that tentative list will be helpful when the proposed amendments are published for comment and will become part of the working list of provisions as to which the rulemakers contemplate seeking legislative changes. The Reporter noted that the Subcommittee is not recommending changes in the various 10-day deadlines for taking appeals; prior to 2002 these deadlines would have been calculated using a days-are-days approach, and thus the Subcommittee does not believe that changes are needed. The Subcommittee's approach to these 10-day periods differs from its approach to the Rules-based 10-day periods because it is much easier to amend the Rules than to seek congressional action; thus, for the statutory 10-day periods the presumption in favor of 7-day multiples did not prevail. The Subcommittee recommends that the following statutes be considered for amendment: 28 U.S.C. § 2107(c); 18 U.S.C. § 3771(d); Classified Information Procedures Act § 7(b); and 28 U.S.C. § 1453(c).

Mr. McCabe noted that Judge Levi has met with members of the staffs of Congressman Conyers and Senator Leahy to discuss the possibility of legislation that would implement the recommended statutory changes effective December 1, 2009.

Without objection, the Committee by voice vote adopted the Subcommittee's recommendations concerning statutory deadlines.

C. Item No. 06-04 (FRAP 29 – amicus briefs – disclosure of authorship or monetary contribution)

29: Judge Stewart invited the Reporter to present the following proposed amendment to Rule

Rule 29. Brief of an Amicus Curiae

* * * * *

(c) **Contents and Form.** An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1. An amicus brief need not comply with Rule 28, but must include the following:

- (1) a table of contents, with page references;
- (2) a table of authorities — cases (alphabetically arranged), statutes and other authorities — with references to the pages of the brief where they are cited;
- (3) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;
- (4) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and
- (5) a certificate of compliance, if required by Rule 32(a)(7); and
- (6) except in briefs filed by the United States, its officer or agency, a State, Territory, or Commonwealth, or the District of Columbia, a statement that,

in the first footnote on the first page:

- (A) indicates whether a party’s counsel authored the brief in whole or in part; and
- (B) identifies every person or entity — other than the amicus curiae, its members, or its counsel — who contributed money toward preparing or submitting the brief.

* * * * *

Committee Note

Subdivision (c). Subdivision (c) is amended to require amicus briefs to disclose whether counsel for a party authored the brief in whole or in part and to identify every person or entity (other than the amicus, its members, or its counsel) who contributed monetarily to the preparation or submission of the brief. Entities entitled under subdivision (a) to file an amicus brief without the consent of the parties or leave of court are exempt from this disclosure requirement.

The disclosure requirement, which is modeled on Supreme Court Rule 37.6, serves to deter counsel from using an amicus brief to circumvent page limits on the parties’ briefs. *See Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (noting the majority’s suspicion “that amicus briefs are often used as a means of evading the page limitations on a party’s briefs”). It also may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief.

It should be noted that coordination between the amicus and the party whose position the amicus supports is desirable, to the extent that it helps to avoid duplicative arguments. This was particularly true prior to the 1998 amendments, when deadlines for amici were the same as those for the party whose position they supported. Now that the filing deadlines are staggered, coordination may not always be essential in order to avoid duplication. In any event, mere coordination – in the sense of sharing drafts of briefs – need not be disclosed under subdivision (c)(6). *Cf.* Robert L. Stern et al., *Supreme Court Practice* 662 (8th ed. 2002) (Supreme Court Rule 37.6 does not “require disclosure of any coordination and discussion between party counsel and *amici* counsel regarding their respective arguments . . .”).

The Reporter noted that the Committee had approved this amendment in principle at its November 2006 meeting, and needed only to determine how to implement the change. Although the Committee decided to track the disclosure requirement in Supreme Court Rule 37.6, certain adjustments are necessary in order to adapt the provision to the context of the Appellate Rules. Supreme Court Rule 37.6 exempts entities that are permitted under Supreme Court Rule 37.4 to file amicus briefs without court permission. Likewise, the proposed amendment to Rule 29(c) exempts entities that are permitted under Rule 29(a) to file amicus briefs without court permission or party consent. A member suggested that a cleaner way to accomplish this would be to refer to “an amicus listed in the first sentence of Rule 29(a)” instead of to “the United States, its officer or agency, a State, Territory, or Commonwealth, or the District of Columbia.” It was also suggested that the corporate disclosure requirement imposed by the third sentence of Rule 29(c) should be moved into the numbered list as a new subdivision (c)(6); the new disclosure requirement concerning authorship and monetary contributions then becomes new subdivision (c)(7). Another member noted that the numbering of the list will not follow the order in which the requisite components must be placed in the amicus brief. It was suggested that the Note could clarify the question of appropriate ordering.

Without objection, the Committee by voice vote approved the proposed amendment (with the changes described in the preceding paragraph).

VI. Discussion Items

A. Item No. 06-06 (FRAP 4(a)(1)(B) and 40(a)(1) – extend time for NOA and petitions for rehearing in cases involving state-government litigants)

Judge Stewart invited Dean McAllister to present the report of the subcommittee tasked with researching the proposal by William Thro, the Virginia State Solicitor General, to amend Rules 4(a)(1)(B) and 40(a)(1) so as to treat state-government litigants the same as federal-government litigants for purposes of the time to take an appeal or to seek rehearing. Dean McAllister chairs the subcommittee, which also includes Mr. Letter and Mr. Levy.

Dean McAllister summarized the results of the subcommittee’s research, which are described in detail in the Reporter’s March 27, 2007 and April 23, 2007 memoranda on behalf of the subcommittee. Richard Ruda of the State and Local Legal Center supports the proposal and argues that municipalities should be included within its scope. With respect to the question of whether Native American tribes should be included, Mr. Letter inquired of colleagues within the DOJ and his inquiries so far have produced no indication of any problem caused by the current FRAP deadlines in cases involving Native American tribes. The subcommittee has raised with Mr. Thro the question of the number of appeals that would be affected by the proposed amendment given that the amendment would extend to all appeals in litigation involving a state entity whether or not the state is the appellant.

A member noted that it would arguably be unfair to amend the Rules to give state litigants more time without also giving more time to other parties in the same case. Another member observed that such asymmetry would be unseemly and could lead litigants to believe that state government litigants were receiving preferential treatment. A third member stated that an asymmetrical rule would be untenable; this member also guessed that adoption of a symmetrical proposal (i.e., one that extended the time for all parties in cases involving state litigants) would cause significant delay.

A judge noted that filing a notice of appeal does not require a great deal of work, and that the courts can provide extensions if needed. The judge observed that the extra time in cases involving federal government litigants makes sense because the United States carefully considers policy concerns prior to taking an appeal; Mr. Letter agreed with this assessment.

Judge Stewart suggested that the Committee retain this item on its study agenda. A judge member stressed that the Committee should take time to consider the proposal carefully. Dean McAllister suggested that it would be helpful to obtain more information concerning the number of appeals taken in cases involving state litigants. Members suggested that the Subcommittee ask the states to provide more data on this question, and that the Subcommittee alert Mr. Thro to the fact that the Committee would not favor an asymmetrical provision. By consensus, the matter was retained on the study agenda.

B. Items Awaiting Initial Discussion

1. Item No. 07-AP-B (Proposed new FRAP 12.1 concerning indicative rulings)

Judge Stewart welcomed Judge Kelly, who is a member of the Civil Rules Committee and who joined the Appellate Rules Committee for its discussion of proposed new Appellate Rule 12.1. Judge Stewart invited the Reporter to present the proposed Rule:

Rule 12.1 [Remand After an] Indicative Ruling by the District Court [on a Motion for Relief That Is Barred by a Pending Appeal]

- (a) Notice to the Court of Appeals.** If a timely motion is made in the district court for relief that it lacks authority to grant because an appeal has been docketed and is pending, the movant must notify the circuit clerk [when the motion is filed and when the district court acts on it] [if the district court states that it [might or]

would grant the motion].

- (b) **Remand After an Indicative Ruling.** If the district court states that it [might or] would grant the motion, the court of appeals may remand for further proceedings [and, if it remands, may retain jurisdiction of the appeal] [but retains jurisdiction [of the appeal] unless it expressly dismisses the appeal]. [If the court of appeals remands but retains jurisdiction, the parties must notify the circuit clerk when the district court has decided the motion on remand.]

Committee Note

This new rule corresponds to Federal Rule of Civil Procedure 62.1, which adopts and generalizes the practice that most courts follow when a party moves under Civil Rule 60(b) to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot on its own reclaim the case to grant relief under a rule such as Civil Rule 60(b). But it can entertain the motion and deny it, defer consideration, or indicate that it might or would grant the motion if the action is remanded. Experienced appeal lawyers often refer to the suggestion for remand as an "indicative ruling."

Appellate Rule 12.1 is not limited to the Civil Rule 62.1 context; Rule 12.1 may also be used, for example, in connection with motions under Criminal Rule 33. *See United States v. Cronin*, 466 U.S. 648, 667 n.42 (1984). The procedure formalized by Rule 12.1 is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal.

Rule 12.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Appellate Rule 12.1 applies only when those rules, as they are or as they develop, deprive the district court of authority to grant relief without appellate permission.

To ensure proper coordination of proceedings in the district court and in the court of appeals, the movant must notify the circuit clerk [when the motion is filed in the district court and again when the district court rules on the motion] [if the district court states that it [might or] would grant the motion]. If the district court states that it [might or] would grant the motion, the movant may ask the court of appeals to remand the action

so that the district court can make its final ruling on the motion. In accordance with Rule 47(a)(1), a local rule may prescribe the format for the notification[s] under subdivision[s] (a) [and (b)] and the district court's statement under subdivision (b).

Remand is in the court of appeals' discretion. The court of appeals may remand all proceedings, terminating the initial appeal. In the context of postjudgment motions, however, that procedure should be followed only when the appellant has stated clearly its intention to abandon the appeal. The danger is that if the initial appeal is terminated and the district court then denies the requested relief, the time for appealing the initial judgment will have run out and a court might rule that the appellant is limited to appealing the denial of the postjudgment motion. The latter appeal may well not provide the appellant with the opportunity to raise all the challenges that could have been raised on appeal from the underlying judgment. *See, e.g., Browder v. Dir., Dep't of Corrections of Ill.*, 434 U.S. 257, 263 n.7 (1978) (“[A]n appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review.”). The Committee does not endorse the notion that a court of appeals should decide that the initial appeal was abandoned – despite the absence of any clear statement of intent to abandon the appeal – merely because an unlimited remand occurred, but the possibility that a court might take that troubling view underscores the need for caution in delimiting the scope of the remand.

The court of appeals may instead choose to remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the appeal after the district court rules on the motion (if the appeal is not moot at that point and if any party wishes to proceed). This will often be the preferred course in the light of the concerns expressed above. It is also possible that the court of appeals may wish to proceed to hear the appeal even after the district court has granted relief on remand; thus, even when the district court indicates that it would grant relief, the court of appeals may in appropriate circumstances choose a limited rather than unlimited remand.

[If the court of appeals remands but retains jurisdiction, subdivision (b) requires the parties to notify the circuit clerk when the district court has decided the motion on remand. This is a joint obligation that is discharged when the required notice is given by any litigant involved in the motion in the district court.]

When relief is sought in the district court during the pendency of an appeal, litigants should bear in mind the likelihood that a separate notice of appeal will be necessary in order to challenge the district court's disposition of the motion. *See, e.g., Jordan v. Bowen*, 808 F.2d 733, 736-37 (10th Cir. 1987) (viewing district court's response to appellant's motion for indicative ruling as a denial of appellant's request for relief under Rule 60(b), and refusing to review that denial because appellant had failed to take an appeal from the denial); *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990) (“[W]here a 60(b) motion is filed subsequent to the notice of appeal and considered by the district court after a limited

remand, an appeal specifically from the ruling on the motion must be taken if the issues raised in that motion are to be considered by the Court of Appeals.”).

The Reporter reviewed the genesis of the proposed Rule. It grows out of a proposal originally made by the Solicitor General in 2000. The proposal is designed to promote awareness of and uniformity in the practice of indicative rulings concerning motions which the district court lacks authority to grant due to a pending appeal. In 2001, the Appellate Rules Committee referred the question to the Civil Rules Committee; that Committee has now decided to propose a new Civil Rule 62.1 which would formalize the indicative-ruling practice in civil cases. The Civil Rules Committee will seek permission to publish the proposed Civil Rule in August 2007. Thus, if the Appellate Rules Committee decides to propose a corresponding Appellate Rule, the goal would be to seek permission to publish that Appellate Rule in August 2007 as well.

The Reporter gave a brief overview of current practice. A district court faced with a motion that it lacks authority to grant due to a pending appeal may defer consideration of the motion; in most circuits (but not the Ninth Circuit) it may deny the motion; or it may indicate that it would grant the motion if the court of appeals were to remand for that purpose. Local rules in the Sixth and Seventh Circuits address the practice, as does the D.C. Circuit's Handbook of Practice and Internal Procedures.

Assuming that an Appellate Rule should be adopted, several questions arise. One issue is whether the Rule should cover appeals in criminal cases. The Seventh Circuit and D.C. Circuit provisions cover criminal cases, and a Supreme Court case – *United States v. Cronin*, 466 U.S. 648, 667 n.42 (1984) – approves the use of the procedure with respect to new trial motions under Criminal Rule 33. Mr. Letter stated that the Department of Justice might prefer that the proposed Appellate Rule not cover criminal cases, but that the Department is still studying the matter. It was decided that the Note's reference to Rule 12.1's applicability to criminal cases should be placed in brackets for the purposes of publication.

Another question is whether the Rule should cover appeals in bankruptcy cases. There is some sparse caselaw reflecting the use of the indicative-ruling procedure in bankruptcy, but the Reporter's impression is that the procedure is much less common in bankruptcy. Mr. Ishida noted that Judge Wedoff has stated that the indicative-ruling procedure is very rarely used in the bankruptcy context.

A key question concerns the nature of the indicative ruling that would be necessary before a remand occurs. The Civil Rules Committee has debated at length the relative merits of requiring the district judge to state that he or she “would” grant the motion in the event of a remand, versus requiring merely a statement that the district judge “might” grant the motion. The Civil Rules Committee intends to publish its Civil Rule 62.1 using the formulation “[might or] would.” A judge member expressed a preference for “would,” but he noted that the Committees will obtain further feedback on this issue when the proposed rules are published for

comment. An attorney member likewise expressed a preference for “would” rather than “might.” Another attorney member, though, noted that “would” would require a lot of work on the part of the district court. A judge observed that requiring “would” might make the district court feel that it needs full briefing before issuing the indicative ruling. An attorney member responded that the district court would have the indicative-ruling motion before it. A judge member noted that the district court’s docket pressures might preclude it from providing a full treatment of the issue in an expeditious fashion; but he also noted that “might” did not seem like a useful standard. Another judge member suggested that if a district judge’s indicative ruling merely said the district judge “might” grant the motion, the court of appeals would probably not remand the case – unless the appeal presented very difficult issues. An attorney member suggested that even an indicative ruling that used “might” could give the appellate court useful information. Another attorney member suggested that wording other than “might” could be preferable.

The proposed Rule 12.1 contains alternative options concerning the timing of the notification to the Court of Appeals. One option would require that the movant notify the Court of Appeals both when the motion is filed in the district court and when the district court acts on the motion; the other option would require notification only if the district court indicates an interest in granting the motion. The circuit clerks who have reviewed the proposed Rule 12.1 voice a strong preference for the latter. Judge Kelly observed that this choice presents an important question. At the Civil Rules meeting, Mr. Keisler had voiced the concern that a litigant could get in trouble if they moved in the district court for an indicative ruling and did not notify the appellate court. Mr. Letter echoed this concern, pointing out that it could pose a particular problem in circuits that hear appeals relatively quickly. Mr. Fulbruge stated that, in his experience, indicative-ruling motions are usually made by prisoners, and that the circuit clerk usually first hears of the matter from the district court itself. He also observed that the use of electronic filing will reduce the problems associated with notification.

Another question is whether docketing of the appeal is the right point of demarcation with respect to the passing of jurisdiction from the district court to the court of appeals, or whether jurisdiction passes at the time the notice of appeal is filed. Arguments can be made in support of either position; the clerks favor using docketing as the point of demarcation. The Reporter observed that the Civil Rules Committee appears to lean toward using the phrase “because of an appeal that has been docketed and is pending,” so as to avoid a strong position on the question of whether the docketing is key to the lack of jurisdiction. No objections to this adjustment in phrasing were voiced.

A judge member stated that he had never encountered a request for an indicative ruling. Another judge member stated that he, likewise, did not recall encountering remand requests associated with an indicative ruling. He noted, however, that the Civil Rules Committee has indicated its intention to proceed with the proposed Civil Rule 62.1, and not having a corresponding Appellate Rule would make the Civil Rules Committee’s task more complex.

A member noted that the procedure often arises in the context of appellate mediation:

parties to the mediation may agree to settle, but only if the judgment below is vacated as a condition of settlement. A judge member expressed strong disapproval of this practice. The Reporter suggested that she could convey to the Civil Rules Committee a request that the Note not use the practice of settlement on appeal as an example of the ways in which Civil Rule 62.1 would be useful beyond the context of Rule 60(b).

It was decided that the Committee should consider whether to propose an Appellate Rule on the subject at all, and after that the Committee could address particular choices concerning the wording of the proposed Rule. A member moved that the Committee adopt a proposed Rule designed to mirror proposed Civil Rule 62.1. The motion was seconded. A member observed that if the proposed Civil Rule 62.1 goes forward, the Appellate Rules Committee should be involved in the process; it is appropriate for the Appellate Rules Committee to have a say in the drafting of rules on this question. A judge member agreed that if a Civil Rule on the subject is adopted, there probably should also be an Appellate Rule; he stated, however, that he did not believe that a Civil Rule on the subject should be adopted. Judge Stewart assured the Committee that, whether or not the Committee voted to adopt Rule 12.1, he would convey to the Civil Rules Committee the concerns discussed by members of the Appellate Rules Committee. By a vote of 5 to 3, the Committee voted to adopt a proposed Appellate Rule concerning indicative rulings.

A judge suggested, as a possible alternative to “might,” the phrase “raises a substantial issue.” Two attorney members and a judge member agreed that “substantial issue” was a better choice than “might.” A judge illustrated the way in which the “substantial issue” language might apply: Suppose that the district court grants summary judgment dismissing the case. While the plaintiff’s appeal is pending, the plaintiff discovers new evidence, and moves for relief from the judgment, claiming newly discovered evidence and also possible fraud by the defendant during the discovery process. If the district court reviews the motion and indicates that the motion “raises a substantial issue,” the court of appeals may well wish to remand rather than proceeding to hear the appeal. Judge Stewart observed that the Note should explain the meaning of “raises a substantial issue.” A member suggested that another possible phrasing would be “or that there is a substantial probability that it would grant the motion.” A judge member disagreed, stating that “raises a substantial issue” is the better formulation. A judge member suggested deleting the alternative “would grant,” because the inclusion of that option might lead the district court to box itself in when ruling on the motion. An attorney member disagreed, noting that if the district court is willing to state that it “would” grant the motion, this conveys information that the court of appeals would want to know. A judge member asserted that there is no downside to including “would grant” as one of the two alternatives. A motion was made and seconded that the indicative ruling contemplated in Rule 12.1(a) & (b) be described as follows: “if the district court states that it would grant the motion or that the motion raises a substantial issue.” The motion passed unanimously.

The Committee voted unanimously to delete from Rule 12.1(a) the bracketed phrase “when the motion is filed and when the district court acts on it.”

The Committee next discussed whether Rule 12.1(b) should set a default rule that the court of appeals retains jurisdiction (when it remands) unless it expressly dismisses the appeal. A motion in favor of this default rule was moved and seconded and passed without opposition.

The Committee concluded that the word “promptly” should be added in both subdivisions to qualify the duties of notification set by those provisions.

2. Item No. 07-AP-C (FRAP 4(a)(4) and 22 – proposed changes in light of pending amendments to the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255)

Judge Stewart invited the Reporter to present the following proposed amendments to Rules 4 and 22:

Rule 4. Appeal as of Right--When Taken

(a) Appeal in a Civil Case.

* * * * *

(4) Effect of a Motion on a Notice of Appeal.

- (A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure — or a motion for reconsideration under Rule 11(b) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 —; the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
- (i) for judgment under Rule 50(b);
 - (ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

- (iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;
- (iv) to alter or amend the judgment under Rule 59;
- (v) for a new trial under Rule 59; or
- (vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

* * * * *

Committee Note

Subdivision (a)(4)(A). New Rule 11(b) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 concerns motions for reconsideration in Section 2254 and 2255 proceedings. Subdivision (a)(4)(A) is revised to provide that a timely motion under Rule 11(b) has the same effect on the time to file an appeal as the other motions listed in subdivision (a)(4)(A).

Rule 22. Habeas Corpus and Section 2255 Proceedings

* * * * *

(b) Certificate of Appealability.

- (1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C.

§ 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or

~~state why a certificate should not issue.~~ The district clerk must send the certificate ~~or~~, if any, and the statement described in Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

* * * * *

Committee Note

Subdivision (b)(1). The requirement that the district judge who rendered the judgment either issue a certificate of appealability or state why a certificate should not issue has been moved from subdivision (b)(1) to Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255. Subdivision (b)(1) continues to require that the district clerk send the certificate, if any, and the statement of reasons for grant or denial of the certificate to the court of appeals along with the notice of appeal and the file of the district-court proceedings.

The Reporter explained that these proposed amendments are designed to track the requirements set in the proposed new Rules 11 governing proceedings under 28 U.S.C. §§ 2254 and 2255. The Criminal Rules Committee voted at its spring meeting to seek permission to publish the new Rules 11 for comment in summer 2007. The Rules 11 are designed to define the mechanism for seeking reconsideration of a district court's order in a Section 2254 or Section 2255 proceeding. The proposed rules will also make the certificate-of-appealability ("COA") requirements more prominent by placing references to them in the Section 2254 and Section 2255 rules, and will change the timing of COA determinations by requiring the district court to grant or deny the COA at the time that it issues its decision rather than at the time the notice of appeal is filed.

The Reporter noted that the proposed Rules 11 adopted by the Criminal Rules Committee will not include the existing requirement that a district court state its reasons for denying a COA. The requirement of an explanation for such a denial is of long standing and was retained by Congress when it rewrote Appellate Rule 22 as part of the Antiterrorism and Effective Death Penalty Act of 1996. The Criminal Rules Committee, however, considered this point and concluded that the explanation for denials of the COA is superfluous and not required by statute. A judge member agreed with this assessment, noting that an explanation of the COA's denial

would not add anything to the reasoning provided in the underlying district court decision. The consensus of the Committee was that the requirement of an explanation for COA denials need not be retained.

In the light of that consensus, the Reporter suggested that the proposed amendment to Rule 22 be reworded by deleting “, if any,” from the text of the Rule and that the Note be reworded. By voice vote without opposition, the Committee approved the reworded proposed amendment to Rule 22 and approved the proposed amendment to Rule 4.

3. Item No. 07-AP-D (FRAP 1 – definition of “state”)

Judge Stewart invited the Reporter to introduce the following proposed amendment:

Rule 1. Scope of Rules; Definition; Title

(a) Scope of Rules.

- (1) These rules govern procedure in the United States courts of appeals.
- (2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

(b) [~~Abrogated~~] Definition. In these rules, “state” includes the District of Columbia and any commonwealth, territory, or possession of the United States.

(c) Title. These rules are to be known as the Federal Rules of Appellate

Procedure.

Committee Note

Subdivision (b). New subdivision (b) defines the term “state” to include the District of Columbia and any commonwealth, territory or possession of the United States. Thus, as used in these Rules, “state” includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

The Reporter explained that this proposed amendment grows out of the time-computation project. The time-computation template includes state holidays within the definition of legal holidays. But the relevant sets of rules apply to courts that sit in the District of Columbia, or a commonwealth, or a territory, as well as to courts that sit within a state. Thus, it seems advisable to define “state” to include D.C. and any commonwealth, territory or possession of the United States. The Appellate Rules do not contain an overarching definition of “state,” so a definition should be added either in Rule 26(a) or for the Appellate Rules more generally.

Professor Coquillette noted the need for care in working through the possible consequences of an overarching definition. He noted that American Samoa has objected in the past to a proposed rule change that would have affected it. The Reporter responded that defining “state” to include territories such as American Samoa would only result in additional protections for American Samoa’s interests, so it is to be hoped that American Samoa would not object to inclusion within the proposed definition. Mr. Letter seconded Professor Coquillette’s caution regarding possible unintended consequences. Mr. Letter undertook to consult with all the affected entities and to report his findings to the Committee. By consensus, the Committee retained this item on its study agenda.

A member asked how the Committee’s decision not to proceed at this time with the proposed definition would affect the time-computation project. The Reporter responded that Rule 26(a) can be published for comment with the definition of the term “state” in subdivision 26(a)(6)(B). Although the proposed overarching definition of “state” in Rule 1(b) presumably will not catch up with the time-computation package (assuming that package continues to move forward), if the Committee later decides to proceed with the overarching definition it can make a conforming change to Rule 26(a)(6)(B) at that time.

4. Item No. 06-07 (Proposed new rule concerning advance disclosure of panel composition)

Judge Stewart invited the Reporter to describe the proposal for a new rule concerning advance disclosure of panel composition. Howard J. Bashman, an appellate litigator who maintains a widely-read weblog on appellate practice, has suggested that the Committee consider proposing an Appellate Rule that would require the courts of appeals to give at least ten days’ advance notice of the identity of the members of an oral argument panel.

The Reporter noted that current practice in the courts of appeals spans a spectrum. At one end is the D.C. Circuit, which in civil cases provides more than two months’ advance notice of panel identity (with the result that counsel ordinarily knows the panel’s identity before the briefs are filed). The Eighth Circuit provides a month’s notice, the Sixth Circuit two weeks, and the Third Circuit ten days. The First, Fifth, Ninth, Tenth and Eleventh Circuits each provide a week’s notice. The Second Circuit announces the panel composition the Thursday prior to

argument. And the Fourth, Seventh and Federal Circuits announce the panel's identity only on the day of argument.

Advocates of advance disclosure of panel identity point to a number of benefits. Advance disclosure would help lawyers prepare for argument, and would be particularly useful to lawyers who are unfamiliar with the judges of the relevant circuit. Advance disclosure would facilitate recusal requests; it is more awkward to request recusal after the oral argument has already occurred. But critics of the practice contend that it may encourage an undue focus on panel judges' prior opinions. They also worry that lawyers might engage in strategic attempts to postpone argument (and thus obtain a different panel) or to moot the appeal. Strategic postponements can be headed off by pinning down the lawyers' schedules prior to announcing the panel composition. But strategic mooting may be a less tractable problem, as suggested by some who have commented on the Federal Circuit's recent and unsuccessful experiment with advance disclosure. Mr. Bashman's proposal would significantly alter the practice in three circuits, and judges on at least one of those circuits would be likely to oppose the proposal vigorously.

An attorney member stated that the proposed rule might be useful to lawyers but also that it makes sense to defer to the views of the judges on this issue. Another attorney member noted that the proposed rule would be useful with respect to recusal requests. For example, a Department of Justice attorney may represent (in an unrelated proceeding) a judge who turns out to be on an argument panel in another case the attorney is litigating. Knowing the panel's identity in advance would assist with handling recusal requests. A judge agreed that the proposed rule might help with recusal requests, but he asked whether the same goal could not be accomplished by requiring attorneys to list the circuit judges who should not sit to hear a case. The attorney member responded that the latter approach would be of little use in a circuit in which a great deal of time elapses between briefing and argument.

A judge member noted that the circuits' varying practices stem from the great variation in circuit cultures, and predicted that the proposed Rule would never be adopted. Professor Coquillette observed that the circuits' current practices are contained in Internal Operating Procedures, and he noted that practices that affect outsiders (as opposed to affecting only internal court procedures) should be placed in local rules.

By consensus, the Committee decided to remove this item from its study agenda.

5. Item No. 07-AP-A (Comments concerning FRAP 32.1)

Judge Stewart invited the Reporter to summarize the suggestions made by Robert Kantowitz concerning the recently-adopted Appellate Rule 32.1. The Reporter's memo attaching Mr. Kantowitz's suggestions detailed the following considerations. Mr. Kantowitz's proposal that the Rule be clarified to make clear that its ban on restriction or prohibition of citation applies

both to the issuing court and to other courts is unnecessary, since the Rule is clear on that point. Mr. Kantowitz's second suggestion is that the Rule be amended to require the courts of appeals to permit citation of pre-2007 unpublished opinions under certain circumstances. But the question of retroactivity was fully aired during the debate over Rule 32.1 and it seems unlikely that one would wish to revisit the question at this point. Mr. Kantowitz also raises issues relating to state court practice and to the citation of foreign court opinions; it is not evident, though, that rulemaking on those issues is called for. Finally, Mr. Kantowitz asks whether a panel or circuit could suspend Rule 32.1(a) in a particular case or in general under the authority of Rule 2. It is clear that Rule 2 does not authorize a general suspension of Rule 32.1(a), and suspensions of Rule 32.1(a) in a particular case seem unlikely.

By consensus, the Committee decided to remove this item from its study agenda. It was noted that there will be further occasions to consider Rule 32.1's operation after the Rule has been in effect for a longer period of time.

VII. Additional Old Business and New Business

A. Status of previously approved amendments

The Committee's practice is to hold approved amendments for submission to the Standing Committee in a package, rather than sending up a single proposal by itself. As a result, three proposals which the Committee approved in 2003 or 2004 have not yet been submitted to the Standing Committee. Now that the Committee is requesting permission to publish a number of other proposed amendments, it seems useful to consider whether to send up the previously approved amendments as well.

1. Item No. 01-03 (FRAP 26 – clarify operation of three-day rule)

Judge Stewart invited the Reporter to describe the proposed amendment to Rule 26(c). In 2003, the Committee approved an amendment to Rule 26(c) that would clarify the interaction between the three-day rule and Rule 26(a)'s time-computation provisions. At the time the amendment was proposed, the major goal was to clarify how the three-day rule interacted with Rule 26(a)'s directive to omit intermediate weekends and holidays when computing short time periods: Should the three days be ignored when determining how short the relevant period is, or should the three days be included for that purpose? The amendment's goal was to make clear that the three days should be ignored rather than included. That issue will be obviated if the time-computation project goes forward, since that project adopts a days-are-days approach to the computation of all time periods.

However, there are two reasons why the adoption of the proposed time-computation changes will not render Item 01-03 moot. First, the Civil Rules Committee already adopted a

parallel amendment to Civil Rule 6, and it is worthwhile for the Appellate Rules' approach to parallel that taken in the Civil Rules. Second, the proposed amendment will clarify the approach to be taken when a time period (computed without reference to the three-day rule) ends on a weekend or holiday. Suppose the period ends on a Saturday: Should one count forward to the Monday, and then add three days for an end point of Thursday? Or should one just add three days counting from the Saturday, for an end point of Tuesday? The proposed amendment will make clear that one should employ the former, not the latter, approach.

Two attorney members agreed that the amendment would provide a useful clarification. Because Item No. 01-03 will likely be published for comment at the same time as the time-computation project, it seems useful to include two versions of the Note to Item No. 01-03 – one that could be used if the time-computation project is adopted, and one that could be used if it is not.

Without opposition, the Committee by voice vote approved the proposed amendment to Rule 26(c).

2. Item No. 03-02 (FRAP 7 – clarify reference to “costs”)

Judge Stewart invited the Reporter to discuss the proposed amendment to Rule 7. This amendment, which the Committee approved in 2003, is designed to resolve a circuit split on whether the items secured by a Rule 7 bond can include attorney fees. The Reporter suggested that further study would be useful concerning the wording of the proposed amendment.

By consensus, the Committee decided to retain the proposed amendment on its study agenda rather than sending it forward to the Standing Committee at this time.

3. Item No. 03-09 (FRAP 4(a)(1)(B) & 40(a)(1) – treatment of U.S. officer or employee sued in individual capacity)

Judge Stewart invited the Reporter to discuss Item 03-09, which concerns proposed amendments to Rules 4 and 40. These amendments, which the Committee approved in 2004, are designed to clarify the application of the extended time periods for taking an appeal or seeking rehearing in cases where an officer or employee of the United States is sued in his or her individual capacity. As discussed earlier in the meeting, the pending proposal (Item 06-06) with respect to state-government litigants concerns the same two Rules; thus, one question is whether Item 03-09 should be held pending the Committee's further discussion of Item 06-06.

A member stated that the amendments concerning federal officers or employees should be sent forward without awaiting the Committee's further deliberations concerning the treatment of state-government litigants. By consensus, the Committee decided to request permission to

publish Item 03-09 in summer 2007.

B. New Business

The Reporter noted that Mr. Levy has proposed that the Committee consider adopting a Rule concerning amicus briefs with respect to rehearing en banc. Due to the press of other business, the Reporter was unable to fully investigate the merits of this proposal in advance of the Committee's spring meeting; but she expects to make a presentation on this issue at the fall meeting.

VIII. Date and Location of Fall 2007 Meeting

The Committee tentatively chose November 1 and 2 as the dates for the Committee's fall 2007 meeting. The location will be announced.

IX. Adjournment

The Committee adjourned at 10:15 a.m. on April 27, 2007.

Respectfully submitted,

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Memorandum To: Standing Committee on Rules of Practice and Procedure
From: Professor Daniel Capra
Re: **Discussion Paper on Standing Orders**
Date: May 25, 2007

Judge Levi has asked me to submit a preliminary report on how and whether the implementation of standing orders might be regulated. Concern about proliferation of standing orders is analogous to the concern that gave rise to the Standing Committee's two previous projects on the local rules, i.e., that proliferation of rules from district-to-district can lead to disuniformity in federal practice, an undermining of the national rules, and various traps for the unwary. But standing orders potentially can raise even more serious problems than local rules, for at least three reasons: 1) standing orders are promulgated without the benefit of public input and comment; 2) standing orders are on the whole harder to find than local rules; and 3) when standing orders are entered by individual judges – as distinct from general orders — there is a risk of disuniformity of practice even within the same district.

This is not to say, however, that standing orders are always improper. As will be discussed below, standing orders may be useful and even necessary to address matters that cannot be addressed by a local rule, or that are of no direct concern to practicing attorneys or litigants. The questions addressed by this memo are therefore:

- 1) Where should the line be drawn between subject matter properly addressed by a standing order and subject matter that should instead be covered by a local or national rule?
- 2) What might the Standing Committee do to a) assist the courts in negotiating the proper line between standing orders and local rules, and b) eliminate standing orders that are problematic?

This memo carries two important provisos, one for each of the questions addressed:

1. As to the first question, the proviso is that there is no authoritative source for drawing the line between standing orders and local rules. Of course standing orders cannot be inconsistent with the national rules. See Civil Rule 83 and Criminal Rule 57. But short of conflict with the national

rules, there is a difference of opinion on just what problems standing orders can be used to solve. This memo can only, as a preliminary matter, attempt to lay out some “best practices” for allocating subject matter to local rules instead of standing orders.

2. As to the second question, the proviso is that the Standing Committee has no direct authority to oversee or regulate standing orders. Such orders, like local rules, are regulated directly by the judicial council of each circuit. 28 U.S.C. § 2071(c). One of the possible lessons of the last local rules project is that judges are satisfied with their rules and may understandably take umbrage at attempts by a Judicial Conference Committee to interfere in local rulemaking. But the local rulemaking project may also teach another lesson: that the districts do appreciate advice from the Standing Committee as to whether local rules are outmoded or conflicting with national standards.

One final introductory point is to acknowledge the fine work of Jeff Barr, Tim Dole, and others in the Administrative Office in researching the use of Standing Orders in 11 district courts. That research indicated a wide divergence in the use of standing orders, both in the number of issued orders and in the subject matter treated by such orders. The AO research is used heavily throughout this memo, and the AO report is available upon request. Also, Professor Carl Tobias, a noted expert on local rules, provided invaluable assistance and advice on the approach that should be taken toward standing orders.

This memo will be divided into three parts. Part One provides an overview of the use of standing orders in the district courts, relying on the research conducted by the AO as well as some independent research and review of case law. Part Two discusses whether there is a reasonable and administrable line that can be drawn between matters usefully addressed by standing order and matters that should be left to local or national rules. Part Three provides some tentative suggestions on how the Standing Committee might provide assistance in minimizing the use of standing orders that are problematic.

I. Use of Standing Orders in the District Courts

Research:

The AO surveyed the use of standing orders in 11 district courts. The research involved collecting and reviewing the standing orders in these districts, as well as receiving information directly from clerks and judges in those districts. That research (supplemented by some independent research conducted by this writer in some other districts) can be summarized as follows:

1. *Varying number of standing orders:* The districts vary widely in their use of standing orders. Some districts have very few standing orders issued by the district court as a whole. Others have orders in the hundreds.

2. *Variance in subject matter treated by standing orders:* There is little uniformity on whether a particular subject matter is to be treated by standing order or local rule. For every district treating a matter by standing order, there are others treating the same matter by local rule. Examples include:

Use of Electronic Devices in Courthouse: Addressed by standing order in five districts reviewed and by local rule in 10. (One district addresses the issue in *both* local rule and a standing order, i.e., it revises the local rule from time to time by standing order, meaning that a lawyer must look in both places to determine how to comply.)

Referrals to Magistrate Judges: Addressed by standing order in five districts and by local rule in eight. (In one district there is a standing order on the subject that references a previous standing order, but the previous order is no longer on the court's website).

Procedure for Filing Documents under Seal: Addressed by standing order in four districts and by local rule in six.

Applications for Attorneys' Fees: Addressed by standing order in four districts and by local rule in seven.

E-government, Redaction of Personal Identifiers: Addressed by standing order in three districts and by local rule in seven. In one district, the standing order "supersedes and vacates" the local rule on the subject, to the extent the local rule is inconsistent. One hopes that it is uncontroversial to say that standing orders should not be used to vacate local rules.¹

Attorney Admissions Matters: Addressed by standing order in three districts and by local rule in ten.

Electronic Filing: Addressed by standing order in seven districts and by local rule in five. [Note that many districts using local rules have also posted on their website a user manual to deal with technological developments and other particular problems.]

Court Appearances by Legal Interns or Law Students: Addressed by standing order in two districts and by local rule in seven.

ADR, Settlement, or Mediation Program: Addressed by standing order in two districts and by local rule in ten.

3. *Subject matter most likely to be treated by standing orders:* While there is no uniformity

¹ Note that the local redaction rules (whether by local rule or standing order) will probably need to be revisited when the national rules become effective on December 1, 2007.

in the use of standing orders, it does appear that there are certain matters that are highly likely to be handled by standing orders rather than local rules. These matters include:

- Electronic filing
- Use of electronic devices in the courthouse
- Court security matters
- Internal personnel matters, e.g., appointments, EEO, etc.
- Referrals to Magistrate Judges
- Case allocations between Judges and/or Divisions
- Juror pools and selection
- Use of non-appropriated funds
- Criminal Justice Act plans
- Schedules for forfeiture of collateral
- Conditions of probation and supervised release
- Speedy Trial Act implementation
- Waiver of PACER fees in individual circumstances
- Court reporters and transcripts
- Attorney admissions and discipline matters
- Naturalization ceremonies

4. Attempts by some districts to delineate the proper use of standing orders: Some districts have, by local rule, tried to define the scope of the topics to be properly covered by standing orders. For example, N.D. Okla. Local Civil Rule 1.1, states in pertinent part as follows:

General Orders, which are available on the Court’s website, are issued by the Court to establish procedures on administrative matters and less routine matters which do not affect the majority of practitioners before this Court.

In some contrast, D. Kan. LR 83.1.2(a) provides that the court may issue “standing orders dealing with administrative concerns or with matters of temporary or local significance.” This iteration is similar to N.D. Okla. in that it covers administrative concerns. But it also allows standing orders on “matters of temporary or local significance,” as opposed to “less routine matters which do not affect the majority of practitioners before the court.”

Eastern District of California, in Local Rule 1-102(a) provides in pertinent part as follows:

Outside the scope of these Rules are matters relating to internal court administration that, in the discretion of the Court en banc, may be accomplished through the use of General Orders, provided, however, that no matter appropriate for inclusion in these Rules shall be treated by General Order. No litigant shall be bound by any General Order.

The Eastern District of California rule is the most limited iteration of the three examples, seemingly limiting standing orders to issues such as funding, PACER fees, evacuation plans, case assignment, personnel appointments, and the like. It might be argued, though, that standing orders could permissibly cover the topics listed in the somewhat more expansive iterations in the other two districts' local rules. For example, "matters of local significance" may arise in which one division in a district has a particularized problem that is not district-wide. And matters of "temporary significance" might be appropriately dealt with because implementing and abrogating a local rule may not be feasible with respect to some temporary problems. For example, a standing order in one district was implemented to announce that the court was considering a moratorium on sentencing proceedings until the impact of *Blakely* could be analyzed. The order directed the U.S. Attorney to identify any case in which a delay might violate the Speedy Trial Act. It can be argued that this directive was properly placed in a standing order because it dealt with a temporary problem. By the time notice and comment for a local rule took place, the problem might be over.

5. *Finding standing orders on the court's website:* The AO reports that in the 11 districts reviewed, there was considerable variance in locating the district's general standing orders on the court's website. Some districts have a link for "general orders" or "standing orders", but others do not. One district has a link entitled "local documents" which then has a sub-link to "administrative orders." Another district has a link entitled "rules." Another district locates standing orders under "general information"; the separate link to "rules" leads only to the local rules. And so on.

Once the link to standing orders is found, the question then is how to find a particular order that might be relevant to a case. In most courts, it is not very difficult to review the standing orders for relevance. For example, in the District of New Jersey, there are five standing orders on the website, and they are listed by topic:

- * 06-01 Extending Suspension of Some Requirements of Local Civil Rules 10.1(b); 81.2(b);501.1
- * 05-04 Suspension of some Requirements of Local Civil Rule 10.1(b)
- * 05-03 Adoption and Implementation of the Model Third Circuit Electronic Device Policy
- * 05-02 Multiple, Unrelated Defendants in Matters
- * 05-01 Mandatory Electronic Filing
- * Guideline Sentencing

But some districts simply list their standing orders chronologically by number, with no indication of subject matter. This requires the practitioner to open and review every standing order to review it for relevance.

One of the major concerns arising from standing orders is lack of notice, so it might be thought especially troubling that a practitioner will have difficulty even finding the court's standing orders, and further difficulty in reviewing orders for relevance. I am unaware of any district that provides a search function for its standing orders.

5. *Standing orders of individual courts*: Besides general orders of the district, almost every judge has issued standing orders for the individual court. The AO found that in some districts, these individual standing orders are not even posted. In other courts, the individual standing orders are posted as a single document for each particular judge; the link is found next to the name of the judge, after “Judges” is clicked on the main web page. These documents can be up to 50 pages long, usually in pdf form and so not easily searchable; and they are supplemented from time to time, so that a review on one day does not assure complete familiarity with the order on a later day.

Besides the variance on the manner and even the existence of posting, individual standing orders differ greatly in coverage of subject matter. Most of the individual orders deal with the court’s expectations about conduct in the courtroom. But other individual standing orders cover such topics as summary judgment practices, *Daubert* hearings, voir dire practices, time limits on questioning, motions in limine, juror notetaking, electronic discovery, form and length of motion papers, continuances, tentative rulings, and so on. It can be argued that some of the individual orders encroach upon or conflict with the provisions of the national rules. Many of the orders clearly go beyond the questions of “temporary” “local” and “internal operation” issues that would seem most appropriate for standing orders.

Case Law

The case law reviewing standing orders is relatively sparse. Four basic principles can be derived:

1) Standing orders (both by the district and by an individual judge) can be an appropriate exercise of a court’s inherent authority over management of its cases and control of the courtroom. See, e.g., *United States v. Ray*, 375 F.3d 980, 993 (9th Cir. 2004) (standing order requiring U.S. Attorney to assemble information required by PROTECT Act to be submitted to the Sentencing Commission was upheld as a proper exercise of “the court’s inherent authority to regulate the practice of litigants before it.”).

2) Standing orders are invalid if they impose requirements beyond those imposed by (or in some other way conflict with) national rules. See, e.g., *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*, 271 F.3d 374, 386 (2d Cir. 2001) (standing order on Civil RICO pleading requirements invalidated because it imposed requirements “in excess of the essential elements of a RICO claim”); *United States v. Zingsheim*, 384 F.3d 867 (7th Cir. 2004) (standing order invalidated because it required the government to provide information regarding downward departure motions that was not authorized by Criminal Rule 35; also, the order was used to defer downward departure decisions, and such deferral was not authorized by Rule 35).

3) Appellate courts have expressed concern about the lack of notice and public participation in the implementation of standing orders, and have sometimes suggested that matters addressed in

standing orders would better be placed in local rules. See, e.g., *In re Fidelity/Micron Securities Litig.*, 167 F.3d 735, 737, n.1 (1st Cir. 1999) (appellants claimed that they were not aware of the district court's standing order regarding allocation of costs: "we urge the district courts to avoid incipient problems of this type by incorporating standing orders into local rules or, at least, making them readily available in the office of the Clerk of the district court."). Judge Easterbrook emphasized this critical difference between standing orders and local rules in *In re Dorner*, 343 F.3d 910, 913 (7th Cir. 2003):

Adopting local rules through the device of standing orders contravenes the Rules Enabling Act in several ways beyond the vice of inconsistency. First, rules must be reviewed by an advisory committee. Second, rules may be adopted only after public notice and opportunity for comment. Third, rules adopted by district courts must be submitted to the council of the circuit for review. Finally, all local rules must be sent to the Director of the Administrative Office, who ensures their public availability. The [court] violated all of these requirements when it used a nonpublic standing order to contradict [Bankruptcy] Rules 8006 and 8007, which like all other national rules have the force of statutes." (internal citations omitted).

4) Standing orders are subject to invalidation to the extent they set forth inflexible standards that do not accommodate the particular circumstances of a case. See, e.g., *In re Fidelity/Micron Securities Litig.*, 167 F.3d 735, 737 (1st Cir. 1999) (district court's standing order on allocation of costs "raises a core concern: it does not leave sufficient room for individualized consideration of expense requests.")

II. Delineation Between Standing Orders and Local Rules

As intimated above, there is no national rule that provides any guidance on when a matter can or should be treated with a standing order as opposed to a local rule. Standing orders, like local rules, are subject to Civil Rule 83 and Criminal Rule 57, which provide that such a rule must be consistent with, but not duplicative of, a national rule. But there is nothing to provide a ready dividing line between standing orders and local rules.

Perhaps a starting point for a proper delineation is to consider the basic difference between standing orders and local rules: *the lack of public notice and opportunity to comment*. There would appear to be a number of issues that a court might address in which there is no need or justification for public notice or comment — these are the issues that might most appropriately be covered by a standing order. What follows is a discussion of several possible categorizations, attempting to go from the heartland of permissible standing orders out to the frontier and beyond.

1. Rules of Internal Administration

The strongest case for standing orders is matters of internal administration. It would appear that for such matters notice and public comment is not necessary and in some cases not justified. Examples of standing orders covering matters of internal administration include the following:

- Court security: Southern District of Texas, Order 2001-05, In Re: Weapon Possession in Court Facilities (limits individuals who can possess a firearm in courthouses).
- Planning for emergencies: Northern District of Oklahoma, General Order 01-05 (adopting Occupant Emergency Plan for occupants of the courthouse).
- Use of non-appropriated funds: Southern District of Texas, Order 1995-13, In the Matter of Operations Without Appropriations for Fiscal Year 1996.
- Court registry funds: Southern District of Texas, Order 1992-10, Authorizing Withdrawal of Excess Securities.
- Directives to court personnel: Southern District of Texas, Order 1992-22, Order for Docketing Priority (directive to court personnel re importance of prompt docketing).
- Division of workload: Southern District of Texas, Order 2006-1, In the Matter of the Division of Work Calendar Year 2006.
- Referral to magistrate judges: Northern District of Florida, order dated 5/31/2000, Referral of Civil Cases to Full-time Magistrate Judges (ordering that all new social security cases be randomly assigned, on a rotating basis, to the division's full-time magistrate judges).
- Use of resources: Northern District of Florida, Order dated 10/2/2006, Authorization for In-District Travel for Clerk of Court and Chief Probation Officer (also authorizing agency-financed travel to FJC or AO training sessions).
- Juror wheels: Southern District of Texas, Order 2005-09, In Re: Refilling the Master Jury Wheels
- Setting dates for naturalization hearings: Southern District of Texas, Order 1990-44. Order Setting Naturalization Hearing Date
- Court implementation of judicial resources for initial appearances: Southern District of Texas Order 1991-26, In the Matter of Guidelines for Coordination of Criminal Procedures (guidelines for coordinating criminal procedures in Houston Division to

ensure that an apprehended defendant is brought before a magistrate judge as quickly as possible)

- Scheduling of motions: (Individual order of Judge Anderson, providing that civil motions are heard on Mondays at 1:30 p.m.; if Monday is a holiday, the next motion day is the following Monday).
- Appointments: Northern District of Florida, Order dated 12/14/2006, Criminal Justice Act Panel (appointing a new member).
- PACER fee exemptions: Northern District of Florida, Order dated 4/7/2006, Exemption from Fees to PACER (authorizing fee exemption for academic researcher).
- Closing of court: Northern District of Oklahoma, General Order 06-19 (announcing closing of court on Friday, November 24, 2006).

2. Temporary Problems:

A second possibly permissible use for standing orders is to handle some temporary problem, that might end up being resolved before notice and comment could be achieved. An example is the previously-referenced order in the Northern District of Oklahoma, General Order 04-07 (announcing that the court was considering a moratorium on sentencing proceedings until the impact of *Blakely* could be analyzed, and directing the U.S. Attorney to identify any case in which a delay might violate the Speedy Trial Act).

3. Emergencies:

A third possibly permissible use for a general order as opposed to a local rule is to handle what amounts to an emergency. For example, some district courts entered a standing order adopting the Interim Rules to implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Other courts have used standing orders to deal with unanticipated issues arising from particular cases, such as cases involving charges of terrorism. It could be argued that any “emergency” should be handled by an interim local rule rather than a standing order. See 28 U.S.C. § 2071(e) (“If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment”). But so long as there is ultimately a local (or national) rule that is promptly implemented to deal with the problem on a permanent basis, there is no real distinction between a standing order and an interim local rule.

The difference between an interim local rule and a standing order for an “emergency” would

arise if the standing order were allowed to operate for the long-term. An argument can be made that courts in these situations should issue interim local rules as opposed to standing orders, as a reminder of the need to adopt a permanent local rule.

4. Constant changes:

A fourth possibly permissible use for a standing order — somewhat analogous to emergencies — arises where the subject matter arguably develops and changes too quickly to be handled by a local rule. The major example cited by the courts is electronic filing, and the argument is that technology develops so quickly that by the time a local rule can be implemented, it is outmoded and a new local rule is needed. It could be argued, however, that the possibility of technological development does not justify the placement of all electronic filing rules in standing orders. The basic model local rule developed by the Judicial Conference is written flexibly enough to accommodate technological change. It is notable that a number of districts have *mandated* electronic filing by standing order rather than local rule — a standing order on such an important (and unchanging) matter seems hard to justify as necessary to accommodate constant changes in electronic filing. It is true, however, that the details of implementation of electronic filing may need fairly constant updating, and to that extent might be the subject of a standing order or a user's manual.

5. Courtroom Rules:

After the four categories set forth above, the proper line between standing orders and local rules becomes more murky and the use of standing orders becomes more controversial. There are, for example, a large number of standing orders that concern conduct in the courtroom. Most of these are standing orders of individual judges. Subjects include procedures for transcription of audio recordings entered as evidence; limitations on questions during voir dire; time limits on opening statements; preparation of exhibit notebooks; eating and drinking in the courtroom; timeliness; use of juror notebooks, and the like. It could be argued that these rules are properly placed as standing orders because each judge has the inherent power to control his or her courtroom, and requiring local rules would eliminate the differentiation that is a necessary consequence of the inherent authority of each judge. On the other hand, it could be argued that where these rules vary significantly from judge to judge, the difficulty of finding and complying with individual rules can become burdensome and a trap for the unwary. More importantly, public comment might be useful and indeed necessary on these courtroom-related subjects, as the particular rules have a direct impact on the participants, especially counsel.

Yet even if the arguments against using standing orders as courtroom rules were dispositive, it is unlikely to make much difference as a practical matter. It can be anticipated that judges will be unpersuaded that their individual rules of courtroom management should be standardized in local rules.

Some inroads on standing orders might be possible, however, if a particular order is so inflexible that it is subject to being struck by a reviewing court. See, e.g., *In re Contempt Order of Peterson*, 441 F.3d 1266 (10th Cir. 2006), where the magistrate judge entered an order of criminal contempt against a government lawyer who was five minutes late to a pretrial detention hearing. The lawyer had violated the judge’s “standing policy” that any lateness would be sanctioned in the amount of \$50, payable to the court — no excuses permitted. The court of appeals vacated the order, reasoning that it failed to take account of the circumstances of a particular case. It noted that the lawyer was in time to argue the motion, and that the judge made no effort to inquire into the reasons for the lawyer’s tardiness. Moreover, the court was concerned that the lawyer had no notice of the “standing policy.”

6. *Rules on Filing, Pretrial Practice and Motion Practice:* There are many standing orders — both general and individual — that control such matters as redaction of personal identifiers; electronic filing; special pleading requirements (especially in Civil RICO cases); sealing criteria and procedures; electronic discovery protocols; summary judgment practice; pretrial conferences; and memoranda of law. Many of these rules differ in substance or approach from the local or national rules, and an argument can be made that some of them are in tension with or even contradict those rules. More broadly, a strong argument can be made that issues attendant to filing, pretrial practice and motion practice are so important to the practicing bar that notice and public comment is essential. Thus, these rules are certainly at the frontier of proper subject matter for standing orders, and probably beyond. Though again the reality is that courts are unlikely to be receptive to calls to abrogate these rules across the board.

7. *Other proceedings:* Some districts have standing orders that essentially provide a complete set of rules for governing such proceedings as arbitration, ADR, mediation, sentencing (especially standards for probation and supervised release), and attorney disciplinary proceedings. Most districts have implemented such procedures in local rules, so it would appear that standing orders are not necessary for these kinds of proceedings. It seems difficult to justify the placement of an entire set of procedural rules in standing orders. Certainly the litigants participating in these proceedings must have some legitimate interest in commenting on at least some of the rules.

8. *Standing orders that duplicate a local or national rule:* Under the terms of Civil Rule 83 and Criminal Rule 57, standing orders are not supposed to be duplicative of a national rule. Duplication must be distinguished from an order that simply *refers to* a national rule. But if a standing order actually duplicates a national rule, then it is of course improper.²

There is no similar prohibition on a standing order duplicating a local rule. It could be argued

² Whether it would be useful for the Standing Committee to target duplicative Standing Orders is a different question, discussed in the next section.

that such duplication is problematic, because of the possibility that the local rule might change and the standing order might not. On the other hand, there is probably little harm and perhaps some good to be found in duplicating some of the local rules, as it might provide a fail-safe for lawyers. And the basic problem of standing orders — that they are issued without notice and comment — is diminished if the standing order simply duplicates the local rule. On the other hand, if the standing order does a bad job at “duplication”, i.e., by poor paraphrasing or selective duplication, the standing order will probably do more harm than good.

9. Standing orders that explicitly abrogate or modify a local rule: There are a number of instances in which a district court has either abrogated or modified a local rule by issuing a standing order, and not by any justification of an emergency. This use of standing orders is problematic, because it requires the practitioner to master both the local rule and the standing order, and then to determine how they interact. The transaction costs would appear to outweigh whatever benefit might be argued to exist from changing a local rule by way of standing order.

III. The Possible Role of the Standing Committee in Regulating Standing Orders

The Standing Committee has no direct authority to regulate the implementation of standing orders. As discussed above, review over standing orders lies with the Judicial Council in each of the circuits. Yet the lack of direct authority does not necessarily prevent the Standing Committee from providing assistance to the courts on the subject of standing orders. There are at least three ways in which the Standing Committee might assist the courts in regulating the use of standing orders, should the Committee decide that assistance is warranted. They are discussed in turn in this section.

1. Local Rules-type project: informing the district courts of problematic standing orders:

The last local rules project conducted by the Standing Committee provides some insight on the possible role of the Standing Committee with respect to standing orders. The Standing Committee reviewed all of the local rules in the United States. It found a relatively small number of rules that were either 1) in direct conflict with a national rule, or 2) superseded or invalidated by statutory enactments. The Chair of the Standing Committee then sent a report to the Chief Judge of each of the districts. If there were no rules in the district that fit one of the above targeted criteria, then the Chief Judge was so informed. If the district did have a rule that was invalid under one of the above criteria, the report cited the rule and gave an explanation for the Standing Committee’s determination of invalidity. A follow-up a year after the letters were sent indicated that all of the offending local rules that were cited to the district courts had been removed.

If the local rules project protocol is followed with respect to standing orders, the Standing Committee could focus in the first instance on the following types of standing orders, with the goal of providing a list and an explanation to the district courts:

- Orders that directly conflict with a national rule.
- Orders that directly conflict with a local rule.
- Orders that purport to abrogate or modify a local rule.

Of course standing orders might be considered to be problematic for a number of reasons other than the three just set forth. Among other problems are

- 1) duplication of (as opposed to conflict with) local or national rules;
- 2) coverage of matters on which the public has an interest in notice and comment; and
- 3) inflexible rules that do not accommodate specific fact situations.

The question is whether a local rules-type project should focus on these problems as well, and inform the district courts of the standing orders that trigger one of these other concerns.

This writer's experience with the last local rules project cautions against addressing anything more than the bulleted problems above. The reason is that the other problems are more complex, and much more subject to debate, than the bulleted problems. Presumably all can agree that orders directly conflicting with a national or local rule, and orders that specifically abrogate or modify a local rule, are substantially problematic. The same cannot be said for orders that 1) are duplicative; 2) cover matters of direct interest to litigants; or 3) are inflexible. These grounds for abrogation are more contentious, making any attempt to abrogate much more controversial and less likely to be successful.

For example, one can argue that there is indeed a virtue in duplication in that there is an extra source for the practitioner with which to locate the applicable rule. Moreover, the Standing Committee itself has authorized duplicative rules — rules that duplicate the language of particular statutes. So any critique of a duplicative standing order is subject to the response that the Committee itself permits duplication.

Flagging standing orders that cover matters on which the public has an interest in notice and comment is also controversial. As discussed above, there is no rule that *prohibits* the use of standing orders on such matters. The question of implementation is one of policy, and reasonable minds can differ, especially in grey areas such as courtroom rules governing jury practice, shackling, filing, sealing, the use of electronic devices, and so on. Certainly it would be controversial to flag every

standing order that covered anything more than an internal operating procedure. And flagging the standing orders of individual judges would probably be counterproductive.³

Finally, the benefit of trying to flag inflexible rules would probably be outweighed by the costs, given the time and effort that would be required to determine whether a rule is in fact inflexible. Determining whether a rule is “too inflexible” is a matter of judgment on which reasonable minds can differ — especially because “inflexibility” would have to be determined without the benefit of knowing how the rule would work in a specific fact situation.

In sum, if a standing orders project is narrowly tailored along the lines of the last local rules project, it might be useful in pruning the most problematic standing orders. It would not, however, do much to prevent a proliferation of standing orders, and it could do little to draw the line between matters properly treated by standing order and matters that should be the subject of local rules. And the cost of such a project, in terms of time and effort, is likely to be high.

2. *Best practices report issued by the Standing Committee:* The AO survey indicated that there is some interest in some of the districts for a report that would provide guidance on “best practices” in the implementation of standing orders — though there were also some negative comments about the usefulness of a “best practices” report. A best practices report might try to provide some guidelines for delineating the proper subject matter for standing orders. These guidelines could define categories of topics, emphasizing that matters of policy and procedure bearing on litigants should be in the local rules, and that standing orders should pertain mostly if not exclusively to internal administrative matters. As so conceived, a best practices report might help the districts to draw the line that (even though grey) has been crossed by many a standing order. And it would not require a district-by-district review and compilation of standing orders, so it is likely to be less expensive in terms of time and effort than a local rules-type report.

A best practices report would probably have the advantage of not being extremely controversial or provocative, as the report would not be holding a particular rule of a particular court up to criticism. The arguable downside is that a best practices report would not operate directly to eradicate the most problematic standing orders.

A best practices report must be distinguished from the issuance of “model standing orders”. A “model standing orders” project seems infeasible, as it would be virtually impossible to write a complete set of standing orders for all of the subjects that might be regulated permissibly by standing order. Moreover, a model rule on a particular subject matter could be taken as an indication that a matter covered by the model *should* be placed in a standing order, as opposed to a local rule.

³ In fact a good argument can be made that if a local rules-type project is undertaken, it should not treat individual standing orders at all, but should focus only on general orders of the district. Any attempt to flag an individual judge’s standing orders will understandably be ill-received.

The goal for any project on standing orders would have to be to provide information on what subject matter should be beyond the purview of a standing order. That cannot be done by writing model rules.

3. *Website best practices*: As stated above, one of the major problems with standing orders is that there is no uniform way to find them; and even more problematically, some orders of individual judges are not posted at all. It may be useful for either the Standing Committee, the AO, or another Judicial Conference Committee (e.g., CACM or CAT) to assist the districts in establishing a uniform way in which standing orders can be most easily accessed on each district's website, and posted to the website if that is not already being done. The best practices should also include some guidance on how to make the standing orders more easily searchable than is the case on some websites today.

But beyond some directive, or report, or statement of "website best practices", there is the issue of money. The AO report indicates that a number of the districts do not have the money to fund a full-time web person. These districts might appreciate a "website best practices" report, but it appears that they would appreciate the money to implement the best practices even more.



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Rules Committee Support Office

May 15, 2007

MEMORANDUM TO STANDING RULES COMMITTEE

SUBJECT: SEALING CASES

The Judicial Conference's Executive Committee tasked the rules committees, in consultation with any appropriate Conference committee, to address the request of the Court of Appeals for the Seventh Circuit that standards be developed regulating and limiting the sealing of "entire" cases.

The court's initial June 2006 request was construed to address only problems arising from inaccurate responses generated by CM/ECF systems to public inquiries about sealed cases. The inaccurate responses led to a spate of media articles, claiming that secret proceedings were being held in federal court. At its March 2007 session, the Conference approved the recommendation of the Committee on Court Administration and Case Management, urging courts "to ensure that, in response to queries about sealed cases, the CM/ECF message received reads 'case under seal' rather than 'case does not exist.'"

The court subsequently clarified its original request, asking that the propriety of sealing "entire" cases be considered (see attached request from Judge Frank Easterbrook, chief judge of the Seventh Circuit Court of Appeals). The request has been directed to the rules committee for action.

About ten years ago, the Advisory Committee on Civil Rules considered proposed rule amendments addressing standards governing the sealing of individual papers filed in a court. But no action was taken. The extant case law provided a judge with considerable discretion to determine when to seal papers, based on the facts in each case. Other than a general provision recognizing the court's discretion, little more could be accomplished under the limited rulemaking powers and any rule provision would offer little guidance.

Sealing entire cases is rare and when it occurs, it is usually ordered in criminal cases. But civil and bankruptcy cases may also be sealed and appellate cases theoretically may be sealed as well. The court's request implicates the interests of each of the advisory

Sealing Cases
Page Two

rules committees, and it may require legislation. Judge Levi has decided to appoint a subcommittee with representatives from each advisory committee. Professor Dan Coquillette will serve as the head reporter for the subcommittee, assisted by the reporters from the advisory committees. In addition, CACM will be asked to designate one of its members to serve on the subcommittee. Judge Harris Hartz will chair the subcommittee.

Judge Levi requests that the respective advisory committee chairs please advise him of the member designated to serve on the subcommittee.

John K. Rabiej

Attachment

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

FRANK H. EASTERBROOK
CHIEF JUDGE

February 23, 2007

James C. Duff
Director
Administrative Office of the United States Courts
Thurgood Marshall Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Jim:

I request that recommendation 4.b submitted by the Committee on Court Administration and Case Management be placed on the discussion calendar for the Judicial Conference's upcoming meeting.

CACM does not discuss the genesis of this proposal, and I wonder whether it might be related to a letter that Joel Flaum, my predecessor as chief judge, sent to the Standing Committee on June 13, 2006. Collins Fitzpatrick, our circuit executive, told me that this request had been rerouted to CACM.

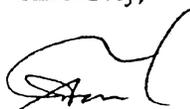
Judge Flaum's letter reflected a consensus of the Judicial Council of the Seventh Circuit that too many cases are being litigated under seal. (The concern is not the sealing of particular documents but the sealing of the whole case.) Our Council thought that the only justification for sealing an entire piece of litigation is a statute requiring that step (as, for example, the False Claims Act does for the initial stages of *qui tam* litigation). If there is any other justification for concealing from the public that litigation is ongoing, I'm unaware of it.

What has emerged from CACM is a proposal, not to define (and limit) the circumstances under which the federal courts hide the existence of litigation, but simply to put a more accurate label ("case under seal" rather than "case does not exist") on litigation that is being conducted in secret. This does not address the concern that led to Judge Flaum's letter on behalf of the Judicial Council.

Now perhaps the Advisory Committees on Civil and Criminal Rules are considering this subject concurrently. If so, then the Judicial Conference will hear from them in due course and my concern about the limits of CACM's recommendation is abated. But if CACM's proposal is the only one on this topic now under consideration by any committee of the Conference, then the Conference as a whole needs to discuss whether more is to be done.

* * *

Sincerely,



Frank H. Easterbrook

cc: Collins T. Fitzpatrick

**Judicial Conference Committee Chairs
Long-Range Planning Meeting**

March 12, 2007

Report

**Administrative Office of the United States Courts
Office of Management, Planning and Assessment**

SUMMARY REPORT

MARCH 2007 LONG-RANGE PLANNING MEETING

The March 12, 2007 long-range planning meeting was held in Washington, D.C. It was facilitated by Judge Charles R. Breyer, planning coordinator for the Judicial Conference's Executive Committee. The meeting was attended by the Executive Committee and chairs or representatives of 15 Judicial Conference committees. Administrative Office (AO) participants included Director James C. Duff, Deputy Director Jill C. Sayenga, and Deputy Associate Director Cathy A. McCarthy, who provides principal staff support for the long-range planning process. A list of participants is included as Appendix A.

Comments from the Executive Committee Chair and AO Director

Chief Judge Thomas F. Hogan, chair of the Executive Committee, spoke about the Executive Committee's desire to pursue more regular discussion about matters of general interest between Executive Committee members and the chairs of the other committees. Having a separate meeting to discuss topics of immediate interest to multiple committees will enable the planning meeting to focus more on strategic crosscutting issues. A meeting will be scheduled during the September 2007 Judicial Conference.

Administrative Office Director James C. Duff provided an update on the progress of three high-priority initiatives: seeking adequate judicial compensation, rent-reduction efforts and accomplishments with GSA, and internal AO cost-containment actions.

Update on Crosscutting Issues

Several committee chairs gave updates on issues discussed during the September 2006 planning meeting.

Two-Branch Conference: Enhancing inter-branch communication is a key strategic issue for the judiciary. Judge D. Brock Hornby, chair of the Committee on the Judicial Branch, discussed a planned conference to promote an ongoing dialogue between the judiciary and Congress. Initially, the conference was going to take place in Washington early in the 110th Congress, but it was postponed until fall 2007 in order to have the broadest possible agenda and avoid an undue focus on judicial compensation. If successful, it could be followed in 2009 with a three-branch conference.

Courtroom Usage Study:¹ Accurately measuring the full range of courtroom uses will help the judiciary to address the key strategic issue of providing sufficient space for effective operations. Judge John R. Tunheim, Committee on Court Administration and Case Management (CACM) chair, reported that the Federal Judicial Center (FJC) has been performing exceptional work on this study. There are 26 courts participating in providing courtroom scheduling and usage data. The first group of courts will be completing courtroom usage data collection shortly. The second group of courts will be collecting data from April through July. Judge Tunheim anticipates that preliminary data will be available from the FJC in September and a report produced by December. CACM would then make recommendations to the Conference in March 2008. The results of the study will also be provided to the relevant committees in Congress.

Analysis of Local Standing and General Orders: Judiciary rule-making seeks to balance the need for uniformity of practice and procedure with the need to account for local circumstances and support innovation. Judge Lee H. Rosenthal, chair of the Advisory Committee on Civil Rules, described an analysis of the use of standing and general orders in district courts. In some courts, standing and general orders are adopted through a process that is less formal than the local rule-making mechanism. Using a sample of eleven courts, the Committee on Rules of Practice and Procedure identified variations in the following areas: the accessibility and searchability of standing and general orders posted on court web sites, the extent to which courts solicit comments on proposed rules, and the use of orders in lieu of local rules or as an interim rule-making process prior to publication of local rules. The Committee will examine the current systems and consider whether improvements are needed to ensure consistency.

Compensation Study: A key objective of the judiciary's cost-containment strategy is to explore fair and reasonable opportunities to limit future compensation costs. Judge W. Royal Furgeson, chair of the Committee on Judicial Resources, provided an update on the compensation study. Market surveys were conducted to compare court jobs and pay in various locations with comparable jobs in public organizations and the private sector. Preliminary results suggest that in some locations, judiciary employees are paid above, and in others below, market rates. The Court Compensation Study Working Group is carefully analyzing this and other data, identifying issues and alternatives, and assessing

¹The study was requested by the House Committee on Transportation and Infrastructure's Subcommittee on Economic Development, Public Buildings and Emergency Management. The Executive Committee referred the matter to the Committee on Court Administration and Case Management (CACM). The CACM Committee asked the Federal Judicial Center (FJC) to conduct a comprehensive, unbiased, and methodologically sound study on how courtrooms are used in the federal judiciary.

the costs and benefits of each alternative. A draft report on compensation issues and alternatives will be made widely available in the judiciary for comment before recommendations are presented by the Judicial Resources Committee to the Judicial Conference in September 2007.

Judges Julia Smith Gibbons and Robert C. Broomfield spoke of the necessity of taking action to control the growth in compensation costs. Judge Gibbons noted that compensation costs constitute the largest portion of the judiciary's budget. They are a function of both the size of the workforce and pay levels. Judge Broomfield pointed out that the judiciary's personnel costs have been growing too fast to be sustained in the current budget climate.

Judge Furgeson said that some of the issues to be discussed will be controversial and there may not be a consensus on how to address them. In particular, he has heard concerns expressed from many judges regarding law clerks. He emphasized the importance of examining all aspects of these issues before reaching conclusions. Judge Gibbons also expressed support for a thorough assessment of the issues before reaching conclusions.

Judge Breyer commented on the importance of documenting not just the costs, but giving serious consideration to the benefits of different staffing strategies. For example, in exploring questions about whether it is more advantageous to hire term or career law clerks, beyond the cost differences, he noted the importance to the judiciary of term law clerks who leave their positions. Former law clerks assume leadership roles throughout the legal field and are often among the strongest supporters of the judiciary.

Space and Facilities: Planning for sufficient space while containing rent costs is a critical issue for the judiciary. Judge Joseph F. Bataillon, chair of the Committee on Space and Facilities, briefly discussed the Five-Year Courthouse Project Plan for FYs 2008 to 2012.² The plan includes fewer construction projects than in prior years, due to cost containment. The plan follows the Conference policy of limiting the average annual growth in rent for the judiciary to 4.9 percent. The total funding requested from Congress for projects will range between \$350-400 million per year; prior to cost containment, the average request was approximately \$500 million per year.

² The Judicial Conference endorsed the plan on the day after the long-range planning meeting.

In furtherance of the objective to limit rent growth, a working group is helping to develop a methodology and rules to implement the rent budget caps. During its June 2007 meeting, the Space and Facilities Committee will consider an overall rent budget allotment for each circuit and business rules to govern the allotment. Each circuit will receive a decentralized allotment that will allow for the circuit's current rent, projects that have received Judicial Conference approval and are anticipated to come on-line during that year, and a discretionary component to cover such things as tenant improvements.

Judge Bataillon also reported on the rent validation effort. The examination of appraisals and rental rates thus far has resulted in credit and cost avoidance savings for the judiciary totaling \$52.5 million. In addition, savings of \$3 to \$5 million are anticipated from the comparison of assignment drawings to space occupied in federal buildings.

Information Technology: Improving service while containing costs is a strategic priority for the judiciary's information technology program. Judge Thomas I. Vanaskie, chair of the Committee on Information Technology, reported on the consolidation of servers, that is, the transfer of national information technology applications to a smaller, centrally-maintained set of dedicated servers. Consolidation projects include the Probation and Pretrial Services Case Tracking System (PACTS), the Jury Management System (JMS), and the backup servers for Lotus Notes (email). Planned consolidations that will begin shortly include FAS₄T and remote log-in servers.

Judge Vanaskie reported that network management tools are currently under review and that a new system could be implemented soon. He reported on improvements to IT training for judges and the local initiative grant program.

Update on the Cost-Containment Strategy³

Judge Gibbons, chair of the Committee on the Budget, provided a brief update on the two-pronged approach of outreach to Congress and containing the growth in the judiciary's costs. The Budget Committee's congressional outreach subcommittee has been successful in carrying the message to appropriators that the judiciary's budget requests are credible and essential. For the past few years, enacted appropriations have

³In September 2004, the Judicial Conference of the United States approved an integrated strategy for controlling the future growth of judiciary costs. The *Cost-Containment Strategy for the Federal Judiciary: 2005 and Beyond* was developed by the Conference's Executive Committee after seeking ideas from Judicial Conference committees and other judiciary leaders.

been below the requested level, but they have exceeded the rate of budget increases for much of the executive branch. Judge Gibbons noted that controlling the growth in the judiciary's rent has helped to preserve court support staff. In the judiciary's financial plan for 2007, rent savings were used to increase court allotments by approximately 7 percent over 2006 obligations.

Judge Gibbons also spoke about the Budget Committee's development of caps on future budget increases. A 4.9 percent average annual growth rate for rent was approved by the Judicial Conference in September 2006. The Budget Committee was proposing to the Conference a cap on the Salaries and Expenses account at an average annual increase of 8.2 percent over prior year appropriations for 2009 to 2017.⁴ Proposed budget caps for Defender Services and Court Security have been developed and are under consideration. Both Judges Gibbons and Broomfield recognized the hard work done by the committees to make cost-containment a reality.

At its January 2007 meeting, the Budget Committee asked the Administrative Office to prepare an update report on the impact and implementation of the Cost-Containment Strategy. Deputy Associate Director Cathy A. McCarthy provided highlights of the forthcoming report (see Appendix B).

In the three years since the development of the strategy, the financial outlook has improved significantly. In April 2004, the judiciary faced a shortfall of \$848 million between forecasted resource requirements and projected funding by 2009. Today, the estimated shortfall for 2009 has been reduced to \$123 million. Cost-containment and budget control efforts have reduced budget requirements. Over the past three years, the judiciary has benefitted from larger-than-anticipated appropriations increases.

Space and Facilities: Ms. McCarthy noted that the Executive Committee had emphasized the need to address growing rent costs through a "fundamental reconsideration" of the space and facilities program and the need for additional space. The cost-containment strategy called for a comprehensive review of policies, design standards, planning assumptions, space entitlements and decision-making mechanisms. These efforts have resulted in long-term savings, short-term refunds, and a reduction of the anticipated growth in rent costs from \$1.2 billion in 2009 to \$1.09 billion. The judiciary has changed policies and practices to address the three major factors that drive the acquisition and cost of new space:

⁴The cap was approved by the Judicial Conference on the day after the long-range planning meeting.

- the long-range facilities planning process, which identifies future facilities requirements;
- the *U.S. Courts Design Guide*, which defines space standards and finishes; and
- budgetary controls in the space and facilities planning and acquisition processes.

The rate of growth in rental payments has slowed in comparison to pre-cost-containment projections. In 2004, the annual growth rate was projected to be 6 to 8 percent per year, depending on the number of new facilities occupied. In future years, it will average 4.9 percent growth per year.

Workforce: Ms. McCarthy described how cost-containment initiatives to enhance productivity and limit compensation growth have started to take effect, and a few key initiatives are still under development. The future impact is not yet clear. Court support staffing has declined by 900 (FTEs) due to budgetary constraints and cost-containment efforts at the national and local levels since 2004, but staffing requirements are currently projected to rise in future years in all programs except bankruptcy.

Judge Boudin asked why district court staffing is anticipated to grow while filings projections are relatively flat. Also, Judge Lawrence Piersol of the Executive Committee asked about the impact of CM/ECF on district court staffing requirements. Judge Vanaskie responded that many courts were using the automated case management part of CM/ECF when the staffing formula was developed, but not all of them were accepting electronic filing. Judge Furgeson explained that the district clerks' formula measured uncompensated overtime and work not accomplished, and the next district court staffing formula will reflect the impact of CM/ECF more fully.

Bankruptcy Filings and Staffing

Judge Marjorie O. Rendell, chair of the Committee on the Administration of the Bankruptcy System, noted that filings have decreased since the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), but workload remains high. Glen Palman, chief of the AO's Bankruptcy Court Administration Division, provided more detail about the changing work of bankruptcy clerks' offices following passage of BAPCPA (see Appendix C).

The uncertainty in filing levels has created difficulties for clerks' office workforce planning. Most bankruptcy experts initially predicted that filings would rebound more quickly, but the upward trend in filings has been slower than expected. Identifying appropriate staffing levels is further complicated by the additional work per case required

under BAPCPA. The AO has been working with a group of bankruptcy judges, clerks, and a circuit executive to propose staffing strategies and downsizing tools if filings remain flat or if they start to increase. These strategies and tools will be presented to appropriate Judicial Conference committees at their summer meeting cycles.

Long Range Planning Report

The Long-Range Planning Office is working on a strategic overview document that will synthesize and summarize existing plans and serve as an umbrella for planning efforts. A brief description of the overview document was distributed at the meeting and is included as Appendix D. An updated list of committee strategic goals and issues was also distributed and is included as Appendix E.

Appendix A: Participants in the September 2006 Long-Range Planning Meeting

Committee Representatives

Planning Coordinator, Executive Committee

Hon. Charles R. Breyer

Executive Committee

Hon. Thomas F. Hogan, Chair

Hon. Michael Boudin

Hon. Paul R. Michel

Hon. Lawrence L. Piersol

Hon. Deanell Reece Tacha

Hon. Anthony J. Scirica

James C. Duff, Director of the
Administrative Office

Committee on the Administrative Office

Hon. Roger L. Gregory, Chair

Committee on the Administration of the Bankruptcy System

Hon. Marjorie O. Rendell, Chair

Committee on the Budget

Hon. Julia Smith Gibbons, Chair

Hon. Robert C. Broomfield

Committee on Court Administration and Case Management

Hon. John R. Tunheim, Chair

Committee on Criminal Law

Hon. Paul G. Cassell, Chair

Administrative Office Staff

Cathy A. McCarthy

Brian Lynch

Carolyn Peake

Jill C. Sayenga

Jeffrey A. Hennemuth

Wendy Jennis

Helen G. Bornstein

Cathy A. McCarthy

Francis F. Szczebak

Ralph E. Avery

Kevin R. Gallagher

George H. Schafer

Marguerite R. Moccia

James R. Baugher

Michael V. (Mickey) Bork

Penny Fleming

Noel J. Augustyn

Mark S. Miskovsky

John Hughes

James C. Oleson

Committee on Defender Services Hon. John Gleeson, Chair	Theodore A. Lidz Richard A. Wolff
Committee on Federal-State Jurisdiction Hon. Howard D. McKibben, Chair	
Committee on Information Technology Hon. Thomas I. Vanaskie, Chair	Melvin J. Bryson Terry A. Cain
Committee on Intercircuit Assignments Hon. Royce C. Lamberth, Chair	Margaret A. (Peggy) Irving Patrick J. Walker
Committee on the Judicial Branch Hon. D. Brock Hornby, Chair	Steven M. Tevlowitz
Committee on Judicial Resources Hon. W. Royal Furgeson, Jr., Chair	Allen Brown
Committee on Judicial Security Hon. David Bryan Sentelle, Chair	Ross Eisenman Melanie F. Gilbert Linda S. Holz
Committee on the Administration of the Magistrate Judges System Hon. Dennis M. Cavanaugh, Chair	Thomas C. Hnatowski Charles E. Six Kathryn Marrone
Committee on Rules of Practice and Procedure Hon. Lee H. Rosenthal	Peter G. McCabe John K. Rabiej
Committee on Space and Facilities Hon. Joseph F. Bataillon, Chair	Ross Eisenman Melanie F. Gilbert Linda S. Holz

Other Invitees:

Hon. A. Thomas Small, Chief Judge

U.S. Bankruptcy Court for the Eastern District of North Carolina

Hon. John M. Roper, Magistrate Judge

U.S. District Court for the Southern District of Mississippi

Other Administrative Office staff in attendance:

Evelyn Eligan

Robert Lowney

Abel Mattos

Mary Louise Mitterhoff

Glen K. Palman

Antonia B. Silvera-Ricks

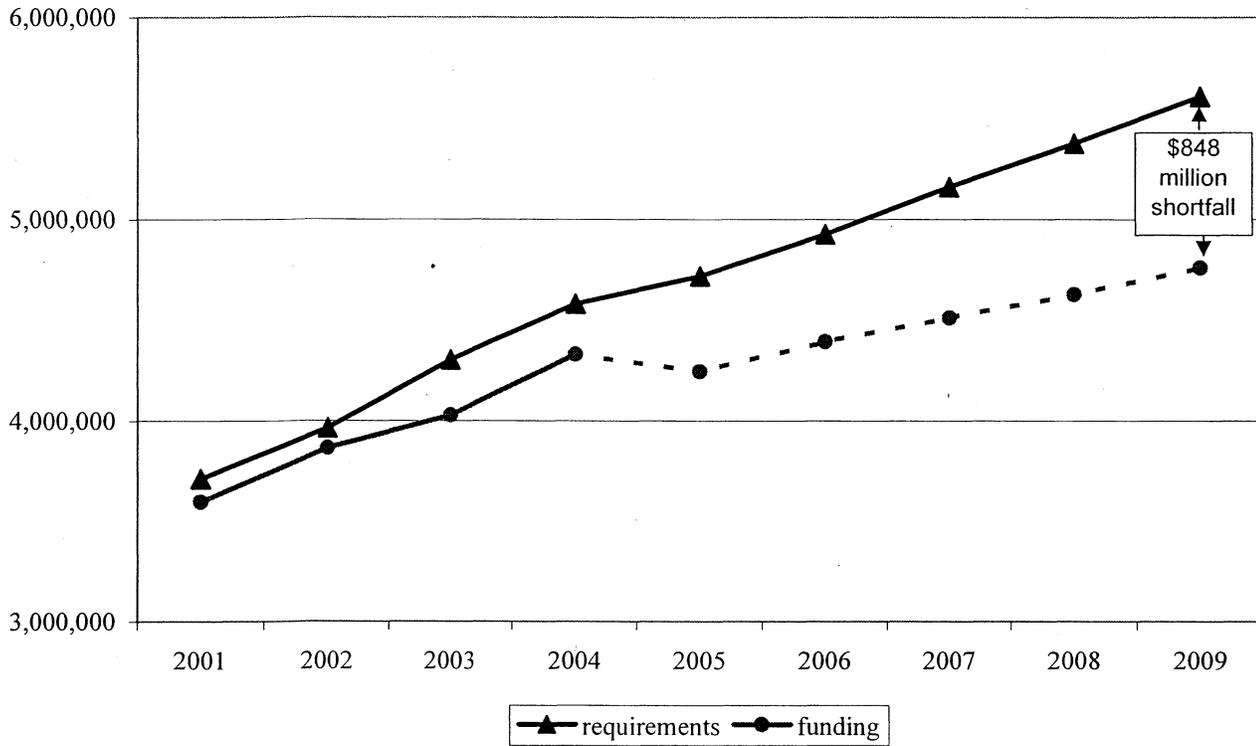
Mary Stickney

Leeann R. Yufanyi

Appendix B: Cost-Containment Strategy Update

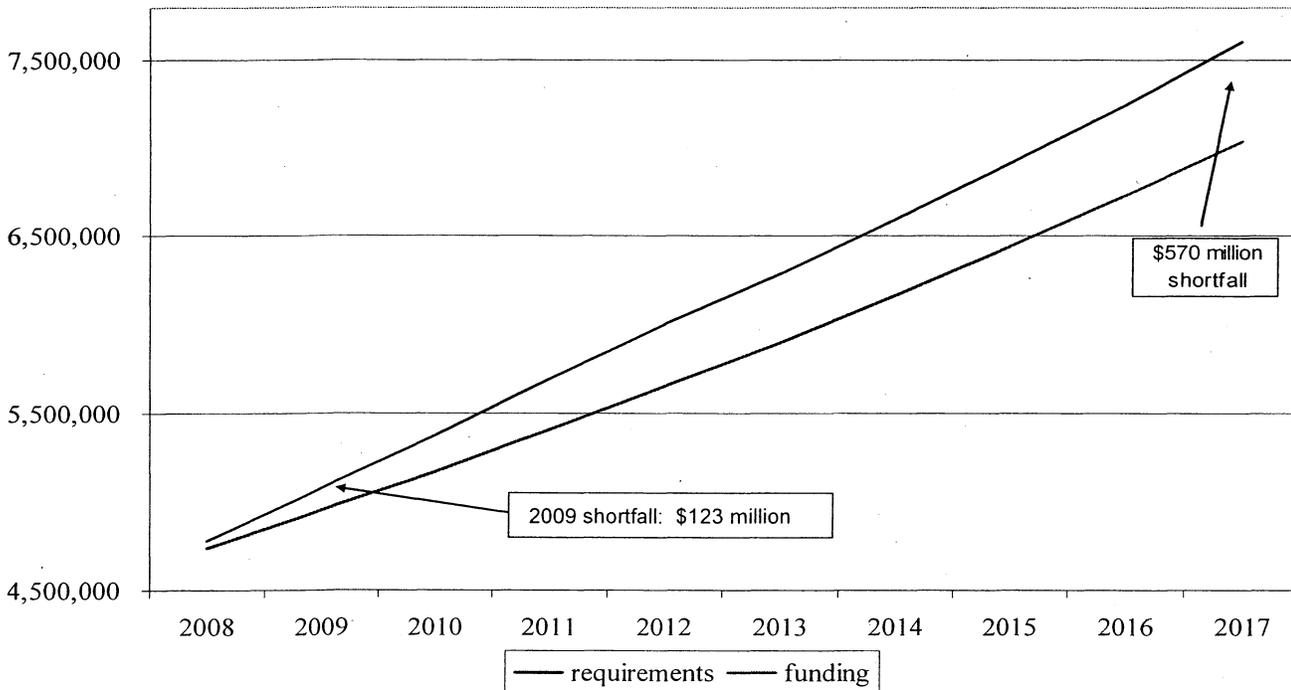
Cost-Containment Strategy Estimate (2004)

Salaries and Expenses Requirements and Estimated Funding
2001-2009



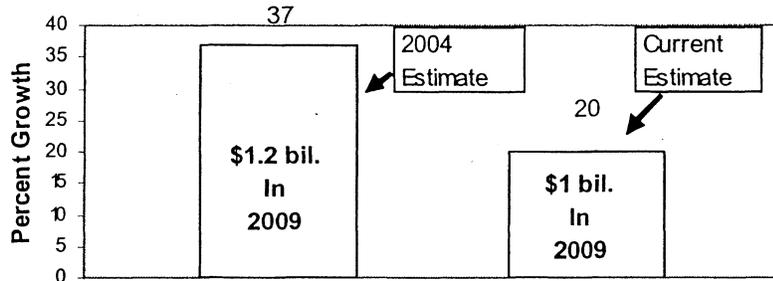
Current Estimates (January 2007)

Salaries and Expenses Requirements and Estimated Funding
2008-2017



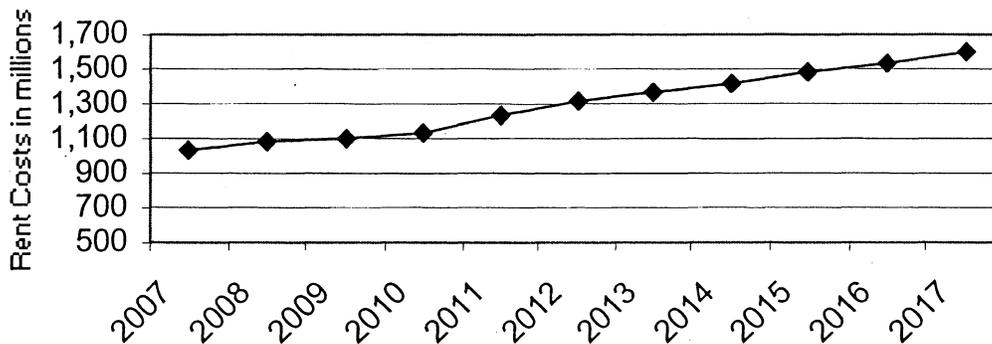
Space and Facilities Cost Containment

Estimates of Rent Costs Show Short-Term Cost Containment Impact



Future Rent Costs Lowered by Cost Containment

- Space rental costs are projected to increase by approximately \$500 million between fiscal year 2008 and fiscal year 2017. The average annual rate of growth will be 4.9 percent compared to 6 to 8 percent per year before cost-containment.

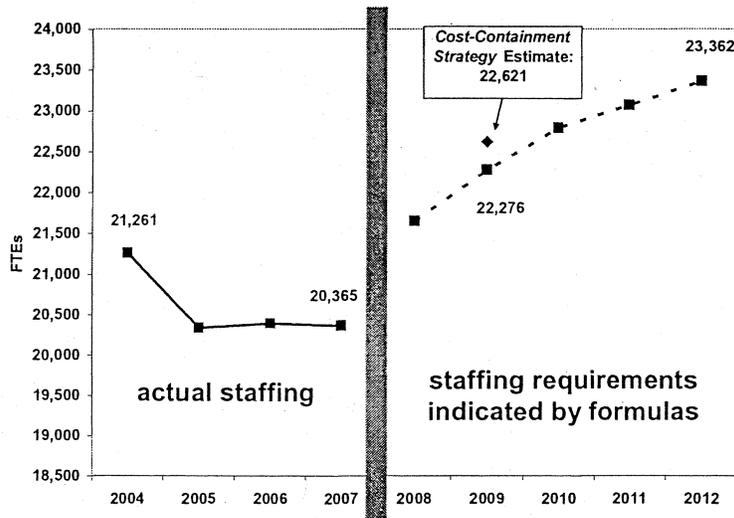


Key Factors:

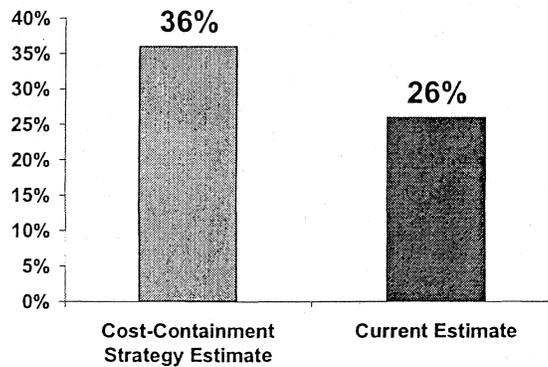
- moratoria delayed construction and renovation projects for 24 months
- rent budget caps will be implemented
- rent credits and future rent reductions
- Asset Management Planning
- *U.S. Courts Design Guide* revision
- release of underutilized space

Workforce Efficiency and Compensation

Actual Staffing Declined, Estimate of 2009 Staffing Requirements Shows Little Change



Estimated 2004-2009 Growth in Compensation Costs



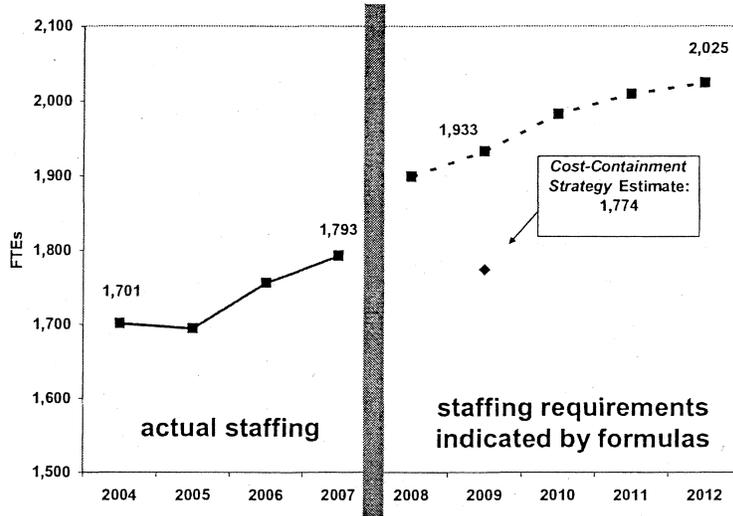
- prior to cost containment, personnel spending for the courts was projected to increase by 36 percent by 2009
- actual court support staffing has declined by approximately 900 FTE
- the current estimate is for personnel spending to increase by 26 percent by 2009
- from 2007 to 2012, personnel spending is estimated to increase 31 percent

Key Factors

- probation and pretrial services work reductions
- staffing formulas implemented in 2004 and 2006
- productivity adjustments
- changes in actual and forecasted workload
- new staffing formulas for some circuit units, bankruptcy courts, and probation and pretrial services
- compensation study

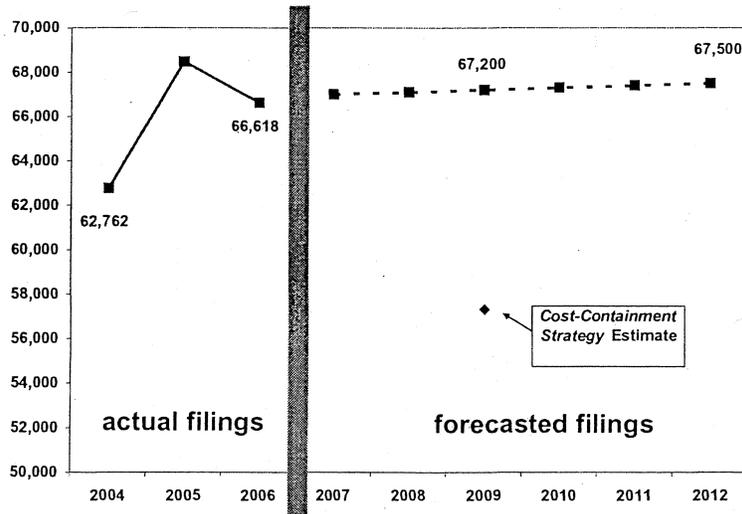
Circuits and Courts of Appeal

2009 Circuit and Appellate Staffing Requirements Higher Than Estimated in 2004



Key Factors

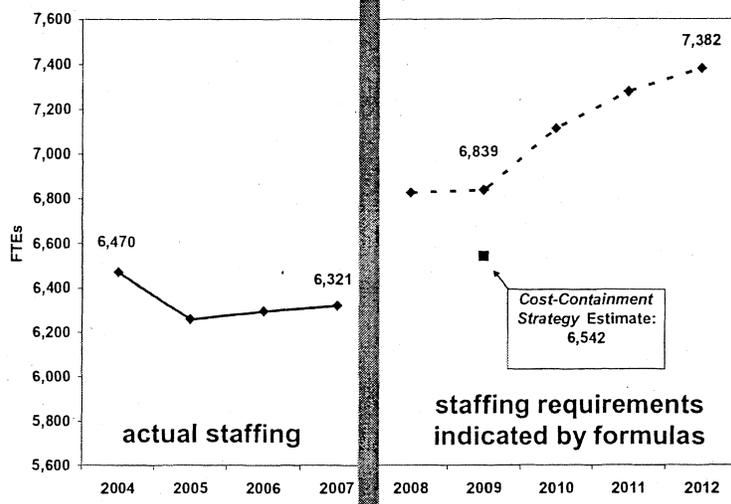
- the forecast for appellate filings in 2009 has increased 17 percent from the 2004 forecast



- annual productivity adjustments through 2009 have been incorporated
- new staffing formulas for circuit executives offices, conference/pre-argument attorneys, and circuit librarians are under development
- clerks offices and staff attorneys staffing formulas to follow CM/ECF implementation

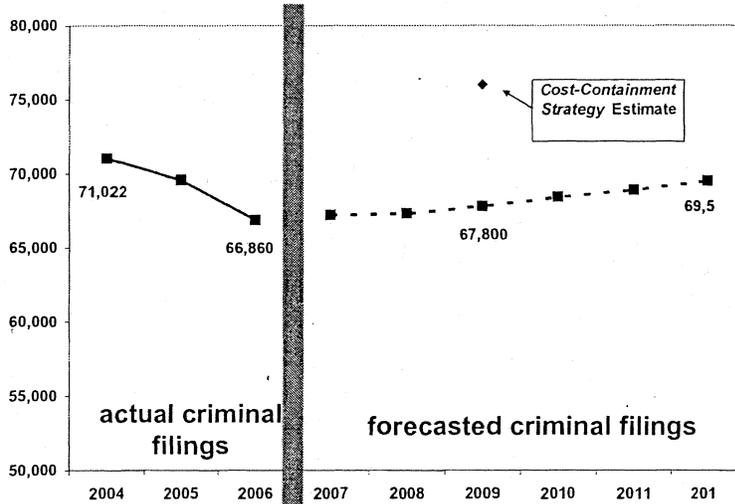
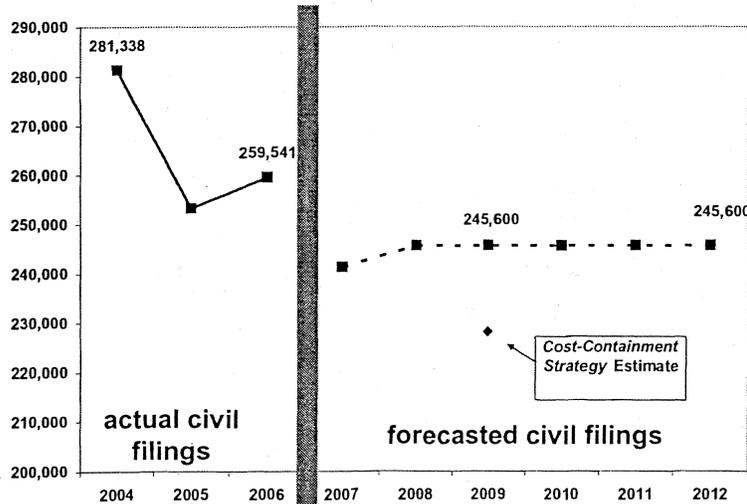
District Clerks Offices

2009 District Clerk Staffing Requirements Higher Than Estimated in 2004



Key Factors

- the forecast for civil filings increased 8 percent
- the forecast for criminal filings in 2009 has decreased by 11 percent

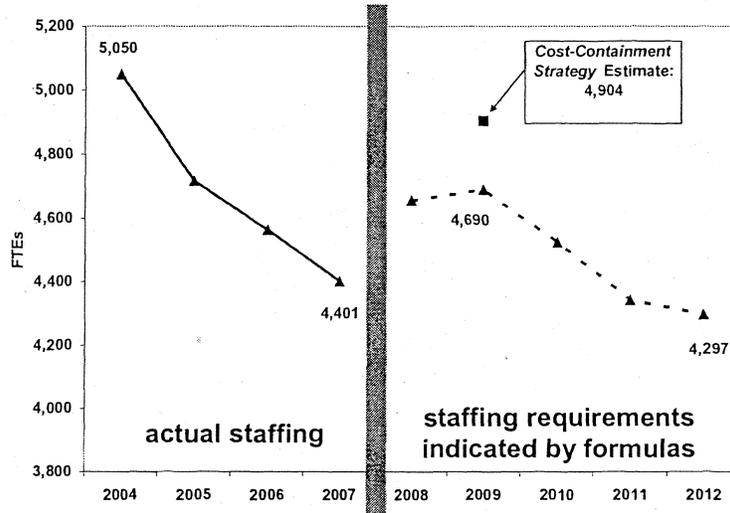


- new staffing formula in 2006 increased staffing requirements 6.7 percent compared to the old formula
- increase partially offset by productivity adjustments of 2.5 percent applied to 2008 requirements, and 4.5 percent applied to 2009 - 2012 requirements

Bankruptcy Clerks Offices

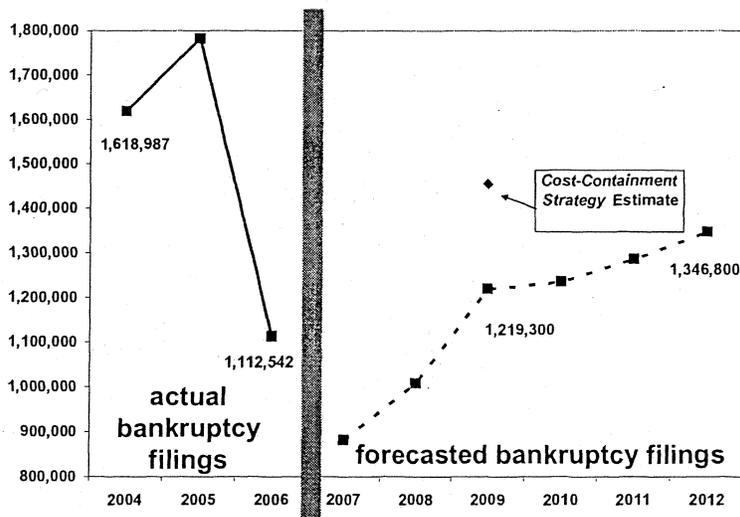
2009 Bankruptcy Clerk Staffing Requirements Lower Than Estimated in 2004

- staffing has declined 13 percent since the end of FY 2004



Key Factors

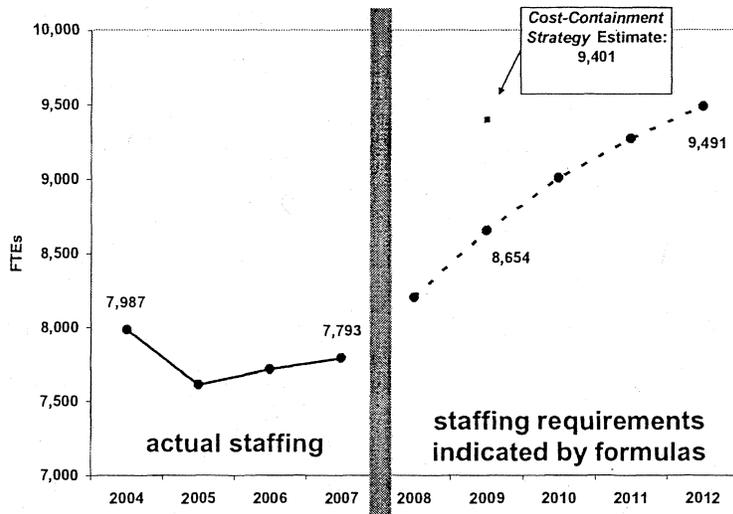
- bankruptcy filings dropped 31 percent from 2004-2006
- the forecast for bankruptcy filings in 2009 decreased 16 percent from the 2004 forecast



- continued difficulty in forecasting future filings
- new staffing formula in 2006 decreased staffing requirements 4.7 percent compared to the old formula
- additional productivity adjustments of 2.5 percent applied to 2008 requirements, and 4.5 percent applied to 2009 - 2012 requirements
- staffing formula reflecting BAPCPA requirements scheduled to be ready for 2009

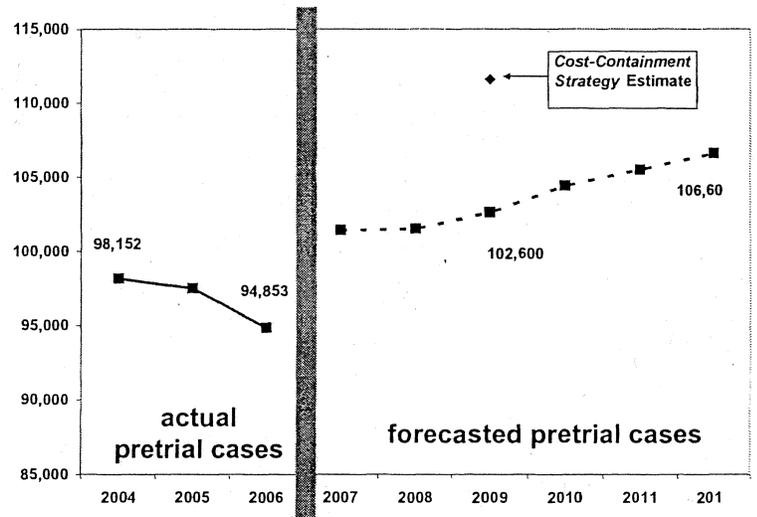
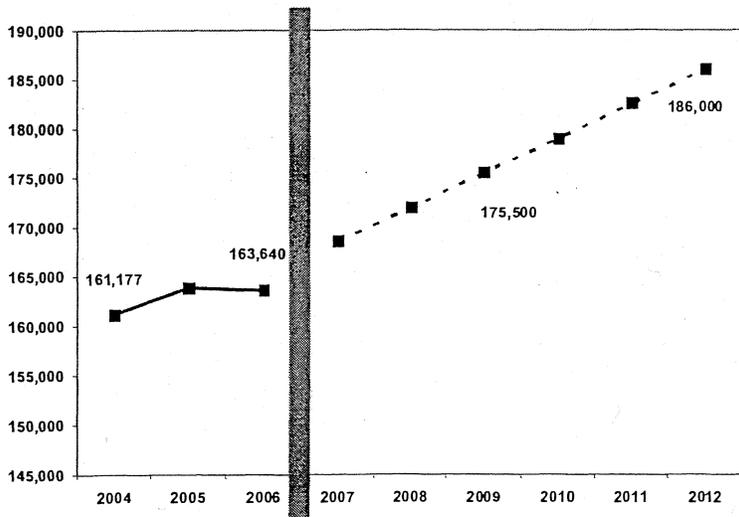
Probation and Pretrial Services

2009 Probation and Pretrial Services Staffing Requirements Lower Than Estimated in 2004



Key Factors

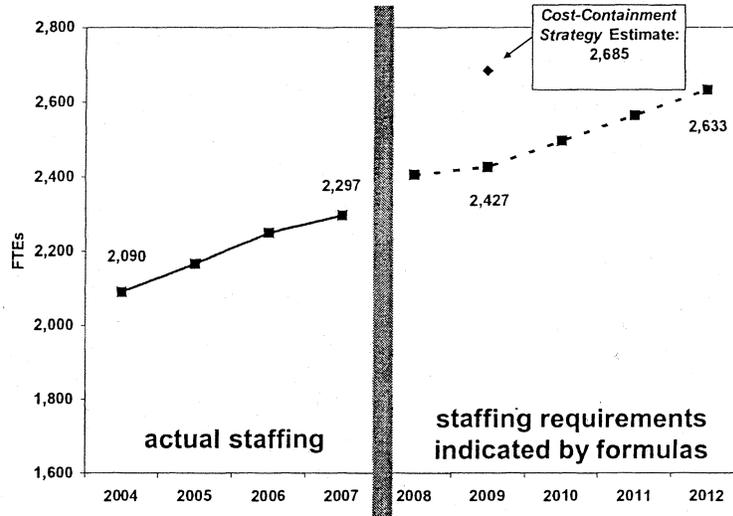
- supervision cases forecasted to rise at 2 percent per year
- the forecast for pretrial cases activated in 2009 has decreased by 8 percent



- the number of persons under supervision is estimated to grow more slowly than the 2004 forecast
- staffing allotments for probation and pretrial services offices were adjusted to eliminate credits for certain types of work
- for 2008 the workload reductions reduced staffing requirements by 7 percent
- new staffing formulas are under development

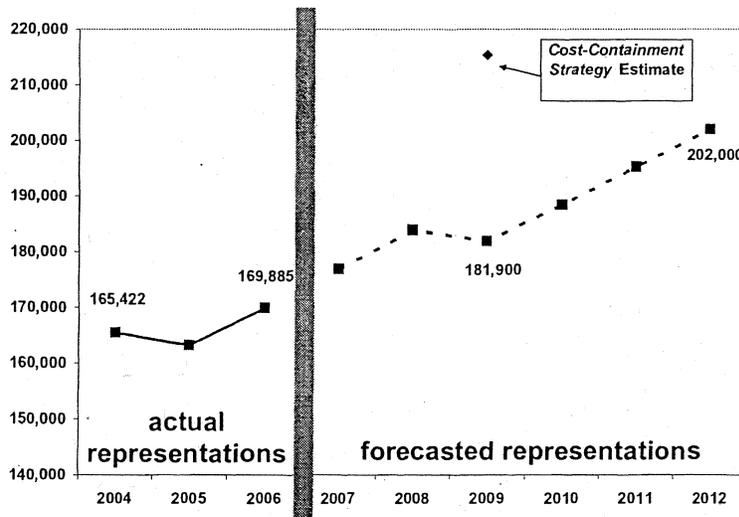
Defender Services

2009 Federal Defender Office Staffing Requirements Lower Than Estimated in 2004



Key Factors

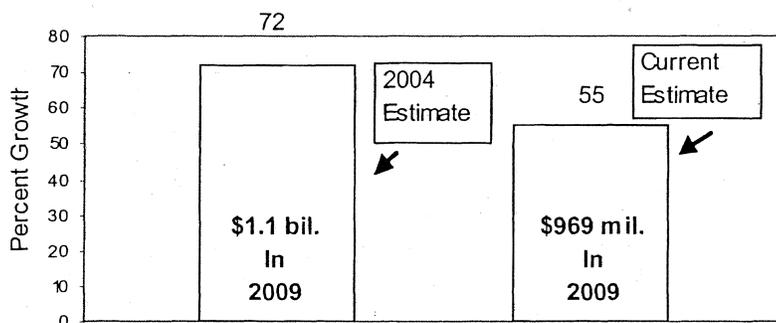
- the forecast for CJA representations in 2009 is 16 percent lower than estimated in 2004



- the Defender Services Committee will consider a case weighting system at its December 2008 meeting
- compensation study
- additional federal defender organizations

Defender Services Cost Containment

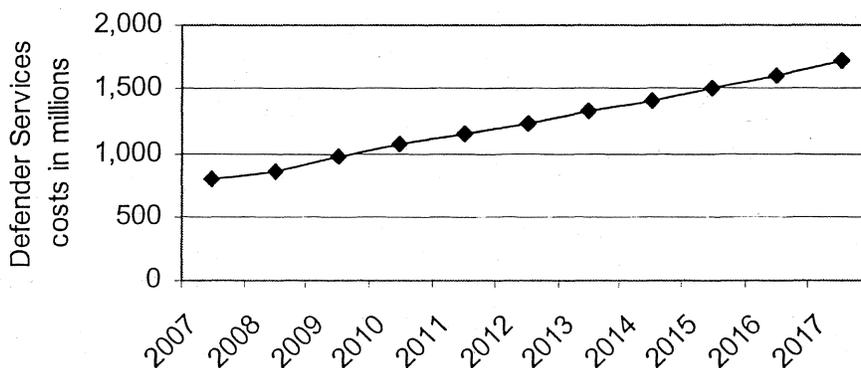
Estimates for Defender Services Show Slower Growth in Costs



- projected 2009 representations are 16 percent lower than the *Cost-Containment Strategy* estimate

Future Defender Services Costs Continue to Rise

- Defender Services costs are projected to reach \$1.7 billion by fiscal year 2017, an average annual growth rate of 8.2 percent (versus 7 percent per year cited in *Cost-Containment Strategy*).



Key Factors:

- workload projections show steady increases
- case budgeting pilot still underway
- case weights
- compensation study

Appendix C: Bankruptcy Staffing Strategies

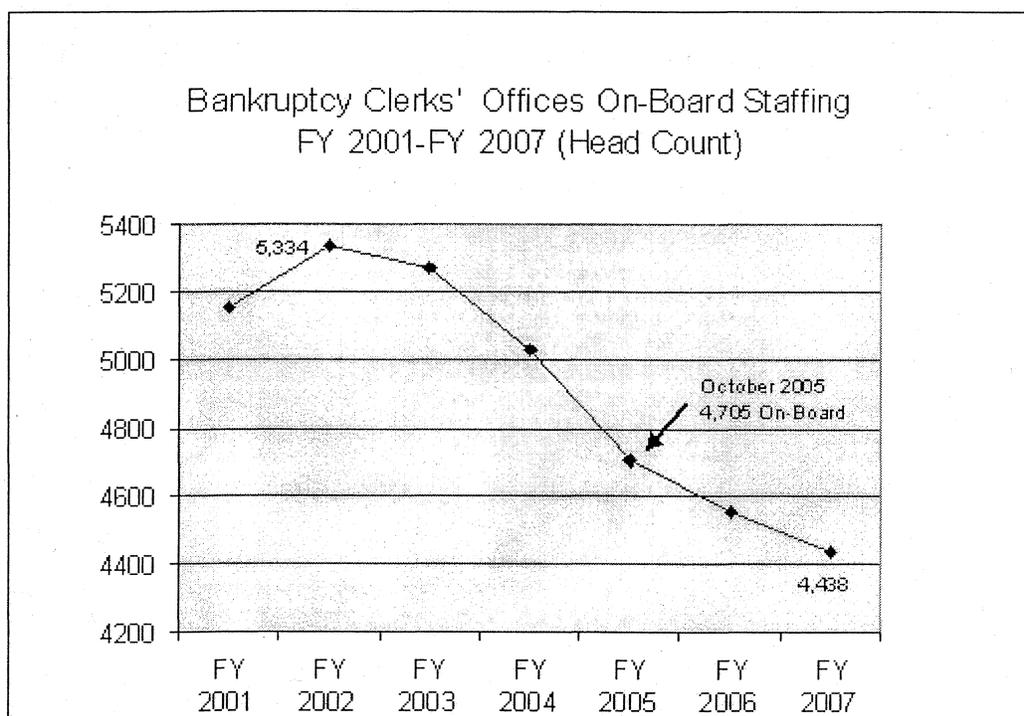
Filings Down By 50% – New Law Creating More Activity Per Case

Docket Entries (Non-Automated)	Motions Filed	Relief From Stay Motions Filed	Orders Entered	BNC Notices
+58%	+59%	+73%	+35%	+41%

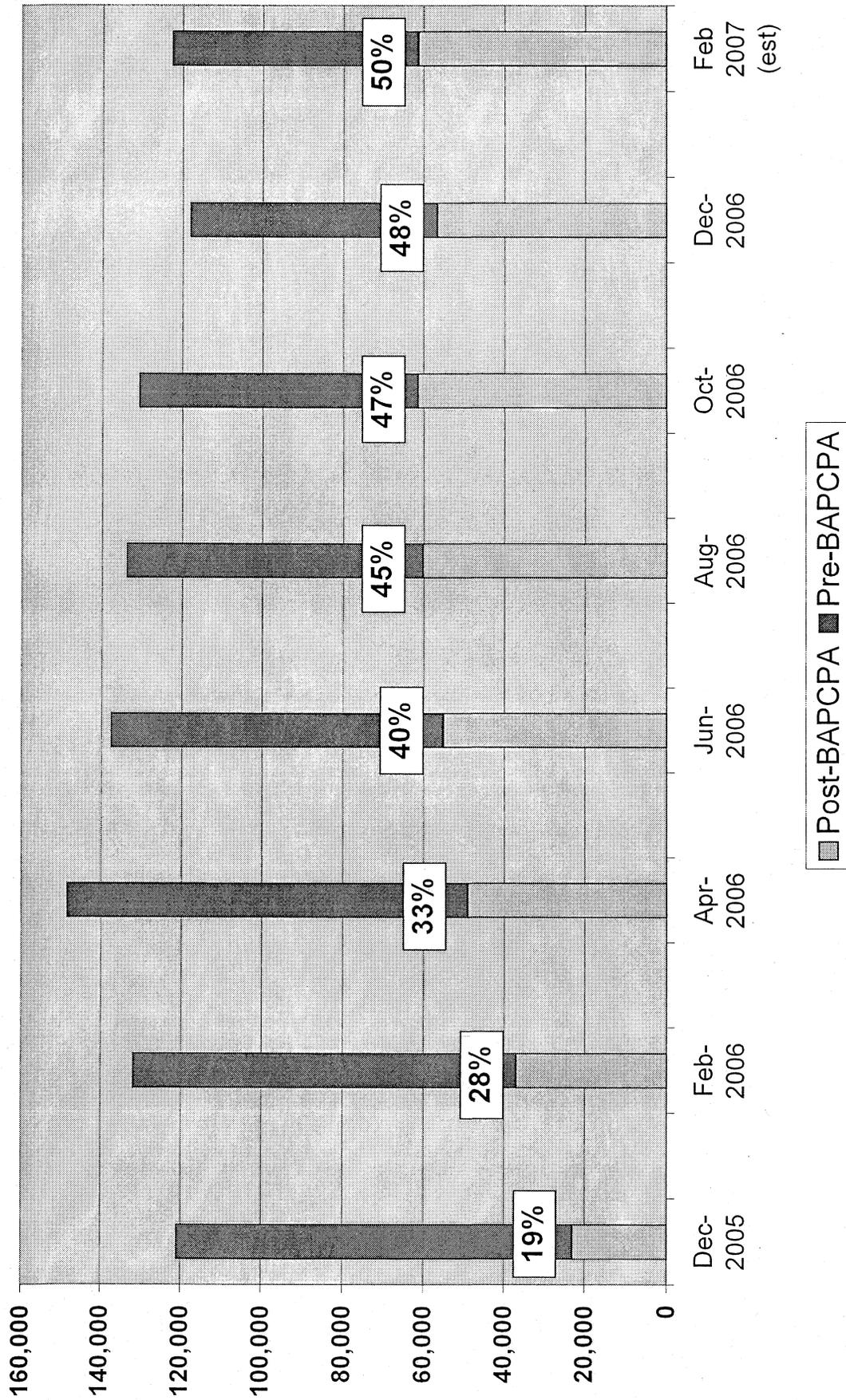
Figures reflect survey data from 10 courts represented on the Bankruptcy Staffing Working Group. The data compare pre-BAPCPA (October-December 2004) to post-BAPCPA (October-December 2006) case administration activity per case. These findings provide preliminary indicators of change; more comprehensive data collection efforts are required.

Bankruptcy Court Resizing Already In Progress

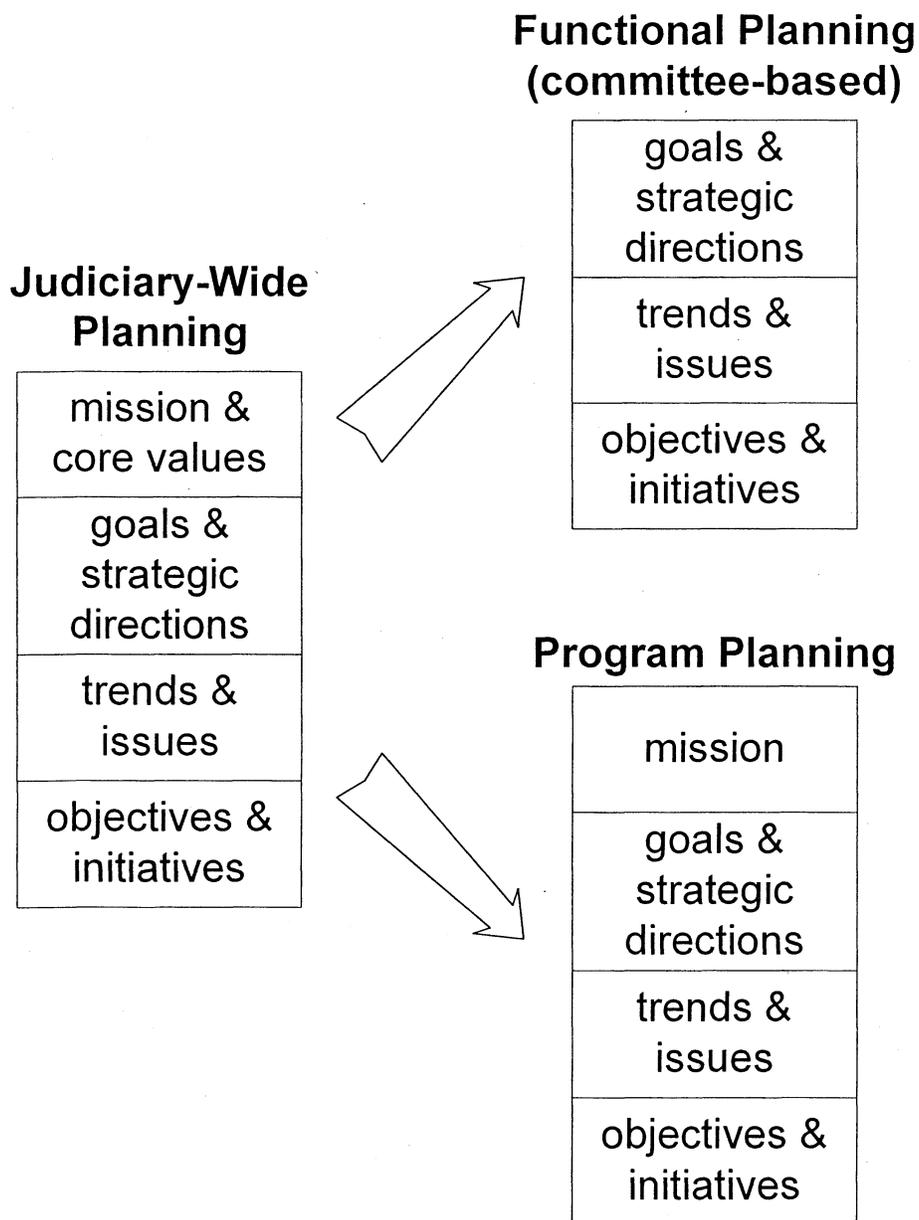
After reaching a peak in FY 2002 of 5,334 on-board employees, employment in FY 2007 is about 4,438, a reduction of almost 900 staff (-17 percent).



Bankruptcy Filings Reach 50 Percent of Pre-BAPCPA Levels



Strategic Planning Overview Will Reflect Three Levels of Planning



Judiciary Mission:

Equal Justice Under Law

- provide just and timely resolutions of the disputes that the Constitution and Congress have assigned
- preserve and protect individual rights and liberties guaranteed by the Constitution
- interpret and enforce treaties, federal statutes, and regulations, through fair and impartial judgments

Judiciary Core Values:

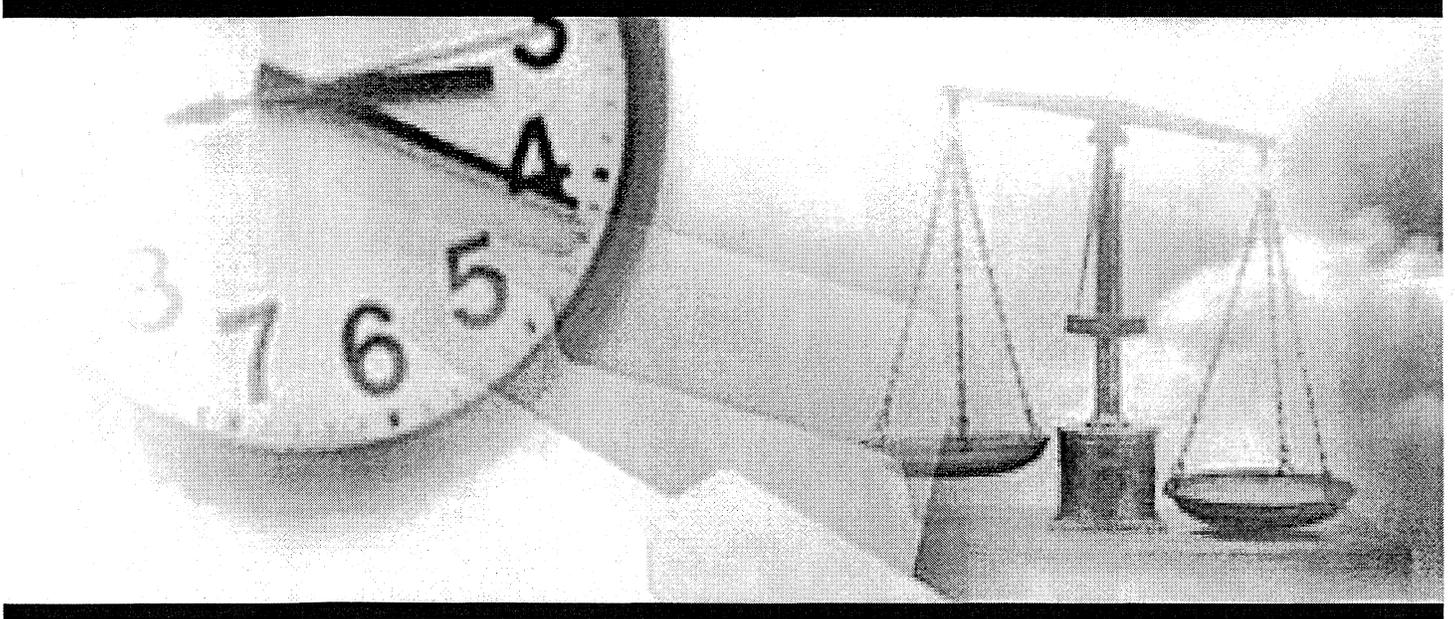
- the rule of law
- equal justice
- judicial independence
- federalism
- excellence
- accountability

Sample Goal: Security

Protect judges and their families, personnel, court facilities and proceedings.

Trend or issue examples:

- Because of their judicial functions, judges and their families are particularly vulnerable to threats and attacks outside the courthouse.
- Persons seeking to harass or intimidate judges have filed false liens against the judges' real or personal property.
- Information from financial disclosure reports can compromise the security of judges and members of their families.



Strategic Planning Goals and Issues:

Committees of the Judicial Conference of the United States

March 2007

Administrative Office of the U.S. Courts
Long-Range Planning Office

Key Crosscutting Strategic Goals and Issues

- Preserving the quality of justice
- Preserving judicial independence
- Maintaining appropriate federal jurisdiction
- Ensuring judicial security
- Enhancing relations with Congress
- Maintaining high standards of ethics and conduct
- Maintaining effective judicial governance, internal controls and oversight systems
- Obtaining needed resources from Congress
- Controlling costs while assuring operational effectiveness and quality
- Coping with changing work
- Attracting and retaining a highly competent and diverse workforce
- Providing fair and reasonable compensation for judges and staff
- Enhancing productivity and service through innovation and investment in information technology
- Sustaining public trust through open access to the courts and to case information

Committee Strategic Goals and Issues

Committee on the Administrative Office

- Enhancing internal controls and oversight systems to maintain congressional and public confidence in the judiciary
- Supporting AO efforts to identify and analyze critical long-range trends, issues and developments impacting the judiciary and its programs
- Ensuring the AO is appropriately organized and prepared to address the current and future needs of the courts and the Judicial Conference

Committee on the Administration of the Bankruptcy System

- Ensuring the continuity of operations in the event of a disaster
- Enhancing the security of bankruptcy proceedings (including such activities as meetings of creditors that take place away from the courthouse) and the effect of increased security on the operation of the courts
- Mitigating the impact on the quality of justice in the event that the judiciary's budget is not increased, or is actually decreased, in the future
- Providing flexibility in the deployment of judge resources in light of the volatility of bankruptcy case filings
- Considering the impact of the Bankruptcy Act of 2005, including such matters as staffing, fee income, and expectations concerning the eventual steady-state caseload
- Identifying and obtaining the appropriate number of bankruptcy judgeships
- Meeting the need for more statistical information on the bankruptcy system
- Managing changes in bankruptcy judges' work due to the advent of electronic case files in the bankruptcy courts
- Focusing automation applications, training and practices on the needs of judges

Committee on the Budget

- Addressing long-term funding challenges posed by the fiscal environment by obtaining needed resources from Congress and by containing growth in judiciary costs
- Assessing security concerns and their impact on future budgets, especially in view of terrorism

Committee on Court Administration and Case Management

The Committee's subcommittee on long-range planning has been asked to identify strategic issues and report to the full Committee.

2003 strategic issues:

- Providing court information in languages other than English and addressing cultural and language differences to ensure accurate translations and meaningful access to the federal courts for all citizens
- Determining the impact of an aging society on the federal court system
- Determining if and whether the court system can alter its structure to address the projected population shift to western and southern states
- Preserving respect for an independent judiciary and its importance in a democratic government
- Preparing for a more stringent budget environment and developing a plan to operate with reduced funds
- Explaining to Congress and others the budgetary needs of the courts and developing ways to stem the growth of the federal judiciary's budget (i.e., shared administrative services)
- Preserving the human face of the judiciary while also using technology in the most efficient and effective means in all areas of court operations

Committee on Criminal Law

- Containing costs while effectively investigating defendants and supervising offenders
- Making the probation and pretrial services system more results-based through the implementation of an outcome-based case tracking system and the use of evidence-based practice
- Assessing the potential for the electronic transmission of sentencing documentation
- Centralizing the delivery of the Probation and Pretrial Services Automated Case Tracking System (PACTS) to control costs and improve continuity of operations capabilities

- Enhancing continuity of operations planning for probation and pretrial services offices
- Considering the impact of the increasing federalization of criminal law
- Supporting the workload of the district courts along the southwest border
- Supporting the Article III judges who will be taking senior status over the next several years

Committee on Defender Services

Mission: *To ensure that the right to counsel guaranteed by the Sixth Amendment, the Criminal Justice Act, and other congressional mandates is enforced on behalf of those who cannot afford to retain counsel and other necessary defense services.*

Goals

- Providing assigned counsel services to all eligible persons in a timely manner
- Providing appointed counsel services that are consistent with the best practices of the legal profession
- Providing cost-effective services
- Protecting the independence of the defense function performed by assigned counsel so that the rights of individual defendants are safeguarded and enforced

Strategic Issues

- Ensuring the availability and quality of Criminal Justice Act services
- Considering the impact of technology on Criminal Justice Act services
- Developing and sustaining a diverse workforce for the future
- Maintaining the independence of the defense function
- Supporting death penalty representation under the Criminal Justice Act and related statutes

Committee on Federal-State Jurisdiction

- Guarding against expansion of federal jurisdiction that would be inconsistent with principles of judicial federalism
- Identifying problem areas in federal jurisdiction that could be addressed through legislation
- Fostering communication between state and federal judiciaries

Committee on Information Technology

- Meeting the needs of judges and chambers
- Improving service while containing costs
- Preparing for the future to take advantage of technical innovations
- Leveraging the existing base of talent to improve the information technology tools used within the judiciary
- Meeting the demands of increased data communications
- Ensuring security and privacy

Committee on the Judicial Branch

- Increasing judicial compensation to continue to ensure quality of justice
- Advocating other matters for the well-being of judges, including enhanced benefits
- Ensuring that the judiciary has a strong public image
- Maintaining good relations with Congress
- Maintaining judicial independence

Committee on Judicial Resources

- Attracting and maintaining a well-qualified, diverse workforce
- Managing long-term personnel costs
- Addressing workforce succession planning, including assessing retirement trends, attrition and training needs
- Investing wisely in information technology to enhance productivity and service
- Measuring accurately requirements for judgeships and staff

Committee on Judicial Security

The Committee's strategic and long-range planning subcommittee, which began its work in May 2006, is in the process of identifying strategic issues for consideration by the full Committee. Also, it is hoped that committee participation in the US Marshals Service's Institute on Judicial Security, a newly formed "think tank" on judicial security, will be helpful in the Committee's long-range planning efforts.

2003 strategic issues of the former Committee on Security and Facilities relating to judicial security:

- Planning for security resources effectively
- Assessing the impact of technology on the security and facilities programs

Committee on the Administration of the Magistrate Judges System

- Ensuring that the number of magistrate judge positions continues to be a function of need
- Ensuring that the judiciary has the benefit of magistrate judge participation in district court, regional, and judiciary-wide governance institutions
- Meeting the need for legal staff support for magistrate judges
- Enhancing awareness of magistrate judges' contributions of to the quality of justice
- Evaluating the effectiveness of magistrate judge utilization
- Helping courts obtain the greatest benefit from their magistrate judges

Committee on Rules of Practice and Procedure

- Restyling rules for consistency and readability
- Assessing the impact of technology on rules
- Analyzing local rules of court for consistency with national rules
- Upholding the integrity of the rules process
- Seeking greater participation in the rulemaking process by bench, bar, and public

Committee on Space and Facilities

Core Values: *To carry out its role in government, the judiciary must operate from facilities that provide (a) a safe and secure environment for the court, court personnel, the litigants, and the public; and (b) sufficient and adequate space with which to perform its functions. To accomplish this, each of the following factors shall guide planning for federal court facilities. To accomplish this, each of the following factors shall guide planning for federal court facilities:*

- Courthouses must be available to, and functional for, litigants and the public.
- The delivery of justice requires adequate courtrooms and chambers.
- Costs, especially the cost of rent, must be considered when determining the judiciary's space requirements.
- Court space must be configured to provide a structurally secure environment.
- Space must be sufficient for employees to perform effectively their jobs and shall address court operational concerns.

Strategic Issues:

- Planning for sufficient funding to continue new courthouse construction
- Planning for independence in space and facilities administration

Calendar for January 2008 (United States)

Sun	Mon	Tue	Wed	Thu	Fri	Sat
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		
Holidays and observances: 1: New Year's Day, 21: Martin Luther King Day						

Calendar generated on www.timeanddate.com/calendar

Supplemental Agenda Materials
Standing Committee Meeting
June 11-12, 2007

Evidence Rules Committee

- A. Proposed Evidence Rule 502 and Committee Note Showing Suggested Revisions by Style Subcommittee and Department of Justice
- B. Draft Letter to Congress re Rule 502
- C. Letter from California State Bar Business Law Section re Selective Waiver
- D. Comments Supporting Rule 502 from Lawyers for Civil Justice, Defense Research Institute, Federation of Defense & Corporate Counsel, International Association of Defense Counsel, U.S. Chamber Institute for Legal Reform, and Association of Corporate Counsel
- E. Restyled Evidence Rules 103, 404, 612

Appellate Rules Committee

- F. Committee Note for Time-Computation Rule - Civil Rule 6(a)
- G. Comments from Chamber of Commerce of the United States and its affiliate, National Chamber Litigation Center, and National Association of Manufacturers on Proposed Amendment to Supreme Court Rule 37.6 Requiring Amicus Curiae to Make Certain Disclosures

- H. Comments from Mayer Brown Rowe & Maw LLP on, among other things, Proposed Amendment to Supreme Court Rule 37.6 Requiring Amicus Curiae to Make Certain Disclosures

Criminal Rules Committee

- I. Letter from Federal Public and Community Defenders re Proposed Amendment to Criminal Rule 16
- J. Letter from Department of Justice re Criminal Rule 16
- K. Letter and Attachments from Chief Judge Mark Wolf re Criminal Rule 16
- L. 2007 Report from Federal Judicial Center re *Brady* Local Rules
- M. Supplemental Advisory Committee Report re Proposed Technical Amendment to Criminal Rule 45(c)
- N. Letter from Federal Public and Community Defenders re Proposed Amendments Implementing Crime Victims' Rights Act
- O. Memorandum from Federal Public and Community Defenders re Proposed Amendments Implementing Crime Victims' Rights Act
- P. Proposed Amendment to Criminal Rule 29 and Committee Note

**Advisory Committee on Evidence Rules
Proposed Amendment: New Rule 502**

PROPOSED CHANGES BY STYLE SUBCOMMITTEE AND DOJ (Blacklined)

1 **Rule 502. Attorney-Client Privilege and Work Product;**
2 **Limitations on Waiver**

3
4 The following provisions apply, in the circumstances set out,
5 to disclosure of a communication or information covered by the
6 attorney-client privilege or work-product protection.

7 **(a) Disclosure made in a federal proceeding or to a federal**
8 **office or agency; scope of a waiver.** — When the disclosure is made
9 in a federal proceeding ~~or to a federal office or agency~~ and waives the
10 attorney-client privilege or work-product protection, the waiver
11 extends to an undisclosed communication or information in a federal
12 or state proceeding only if:

- 13 (1) the waiver is intentional;
- 14 (2) the disclosed and undisclosed communications or
15 information concern the same subject matter; and
- 16 (3) they ought in fairness to be considered together.

17 **(b) Inadvertent disclosure.** — When made in a federal
18 proceeding or to a federal office or agency, the disclosure does not
19 operate as a waiver in a federal or state proceeding if:

- 20 (1) the disclosure is inadvertent;
- 21 (2) the holder of the privilege or protection took
22 reasonable steps to prevent disclosure; and

23 (3) the holder promptly took reasonable steps to
24 rectify the error, including (if applicable) following
25 Fed. R. Civ. P. 26(b)(5)(B).

26 **(c) Disclosure made in a state proceeding.** — When the
27 disclosure is made in a state proceeding and is not the subject of a
28 state-court order concerning waiver, the disclosure does not operate
29 as a waiver in a federal proceeding if the disclosure:

30 (1) would not be a waiver under this rule if it had
31 been made in a federal proceeding; or

32 (2) is not a waiver under the law of the state where
33 the disclosure occurred.

34 **(d) Controlling effect of a court order.** — A federal court
35 may order that the privilege or protection is not waived by disclosure
36 connected with the litigation pending before the court – in which
37 event the disclosure is also not a waiver in any other federal or state
38 proceeding.

39 **(e) Controlling effect of a party agreement.** — An
40 agreement on the effect of disclosure in a federal proceeding is
41 binding only on the parties to the agreement. ~~But it does not~~
42 ~~otherwise prevent a finding of waiver in any other federal or state~~
43 ~~proceeding,~~ unless it is incorporated into a court order.

44

45 **(f) Controlling effect of this rule.**— Notwithstanding Rules

46 101 and 1101, this rule applies to state proceedings, and to federal
47 court-annexed and federal court-mandated arbitration proceedings,
48 in the circumstances set out in the rule. And notwithstanding Rule
49 501, this rule applies even if state law provides the rule of decision.

50 **(g) Definitions.** — In this rule:

51 1) “attorney-client privilege” means the protection
52 that applicable law provides for confidential attorney-client
53 communications; and

54 2) “work-product protection” means the protection
55 that applicable law provides for tangible material (or its
56 intangible equivalent) prepared in anticipation of litigation or
57 for trial.

58

59 **Committee Note**

60

61 This new rule has two major purposes:

62

63 1) It resolves some longstanding disputes in the courts about
64 the effect of certain disclosures of communications or information
65 protected by the attorney-client privilege or as work product —
66 specifically those disputes involving inadvertent disclosure and
67 subject matter waiver.

68

69 2) It responds to the widespread complaint that litigation costs
70 necessary to protect against waiver of attorney-client privilege or
71 work product have become prohibitive due to the concern that any
72 disclosure (however innocent or minimal) will operate as a subject
73 matter waiver of all protected communications or information. This
74 concern is especially troubling in cases involving electronic
75 discovery. *See, e.g., Rowe Entertainment, Inc. v. William Morris*
76 *Agency*, 205 F.R.D. 421, 425-26 (S.D.N.Y. 2002) (finding that in a

77 case involving the production of e-mail, the cost of pre-production
78 review for privileged and work product would cost one defendant
79 \$120,000 and another defendant \$247,000, and that such review
80 would take months). *See also Report to the Judicial Conference*
81 *Standing Committee on Rules of Practice and Procedure by the*
82 *Advisory Committee on the Federal Rules of Civil Procedure,*
83 *September 2005 at 27 (“The volume of information and the forms in*
84 *which it is stored make privilege determinations more difficult and*
85 *privilege review correspondingly more expensive and time-*
86 *consuming yet less likely to detect all privileged information.”);*
87 *Hopson v. City of Baltimore, 232 F.R.D. 228, 244 (D.Md. 2005)*
88 *(electronic discovery may encompass “millions of documents” and*
89 *to insist upon “record-by-record pre-production privilege review, on*
90 *pain of subject matter waiver, would impose upon parties costs of*
91 *production that bear no proportionality to what is at stake in the*
92 *litigation”).*

93
94 The rule seeks to provide a predictable, uniform set of
95 standards under which parties can determine the consequences of a
96 disclosure of a communication or information covered by the
97 attorney-client privilege or work product protection. Parties to
98 litigation need to know, for example, that if they exchange privileged
99 information pursuant to a confidentiality order, the court’s order will
100 be enforceable. Moreover, if a federal court’s confidentiality order is
101 not enforceable in a state court then the burdensome costs of
102 privilege review and retention are unlikely to be reduced.

103
104 The Committee is well aware that a privilege rule proposed
105 through the rulemaking process cannot bind state courts, and indeed
106 that a rule of privilege cannot take effect through the ordinary
107 rulemaking process. See 28 U.S.C § 2074(b). It is therefore
108 anticipated that Congress must enact this rule directly, through its
109 authority under the Commerce Clause. Cf. Class Action Fairness Act
110 of 2005, 119 Stat. 4, PL 109-2 (relying on Commerce Clause power
111 to regulate state class actions).

112
113 The rule makes no attempt to alter federal or state law on
114 whether a communication or information is protected under the
115 attorney-client privilege or work product immunity as an initial
116 matter. Moreover, while establishing some exceptions to waiver, the
117 rule does not purport to supplant applicable waiver doctrine
118 generally.

119
120 The rule governs only certain waivers by disclosure. Other
121 common-law waiver doctrines may result in a finding of waiver even
122 where there is no disclosure of privileged information or work

123 product. *See, e.g., Nguyen v. Excel Corp.*, 197 F.3d 200 (5th Cir.
124 1999) (reliance on an advice of counsel defense waives the privilege
125 with respect to attorney-client communications pertinent to that
126 defense); *Ryers v. Burlison*, 100 F.R.D. 436 (D.D.C. 1983)
127 (allegation of lawyer malpractice constituted a waiver of confidential
128 communications under the circumstances). The rule is not intended
129 to displace or modify federal common law concerning waiver of
130 privilege or work product where no disclosure has been made.

131
132 **Subdivision (a).** The rule provides that a voluntary disclosure
133 in a federal proceeding or to a federal office or agency, if a waiver,
134 generally results in a waiver only of the communication or
135 information disclosed; a subject matter waiver (of either privilege or
136 work product) is reserved for those unusual situations in which
137 fairness requires a further disclosure of related, protected
138 information, in order to prevent a selective and misleading
139 presentation of evidence to the disadvantage of the adversary. *See,*
140 *e.g., In re von Bulow*, 828 F.2d 94 (2d Cir. 1987) (disclosure of
141 privileged information in a book did not result in unfairness to the
142 adversary in a litigation, therefore a subject matter waiver was not
143 warranted); *In re United Mine Workers of America Employee Benefit*
144 *Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994)(waiver of work
145 product limited to materials actually disclosed, because the party did
146 not deliberately disclose documents in an attempt to gain a tactical
147 advantage). Thus, subject matter waiver is limited to situations in
148 which a party intentionally puts protected information into the
149 litigation in a selective, misleading and unfair manner. It follows that
150 an inadvertent disclosure of protected information can never result in
151 a subject matter waiver. *See* Rule 502(b).The rule rejects the result
152 in *In re Sealed Case*, 877 F.2d 976 (D.C.Cir. 1989), which held that
153 inadvertent disclosure of documents during discovery automatically
154 constituted a subject matter waiver.

155
156 The language concerning subject matter waiver — “ought in
157 fairness” — is taken from Rule 106, because the animating principle
158 is the same. A party that makes a selective, misleading presentation
159 that is unfair to the adversary opens itself to a more complete and
160 accurate presentation. *See, e.g., United States v. Branch*, 91 F.3d 699
161 (5th Cir. 1996) (under Rule 106, completing evidence was not
162 admissible where the party’s presentation, while selective, was not
163 misleading or unfair).

164
165 To assure protection and predictability, the rule provides that
166 if a disclosure is made at the federal level, the federal rule on subject
167 matter waiver governs subsequent state court determinations on the
168 scope of the waiver by that disclosure.

169 **Subdivision (b).** Courts are in conflict over whether an
170 inadvertent disclosure of a communication or information protected
171 as privileged or work product constitutes a waiver. A few courts find
172 that a disclosure must be intentional to be a waiver. Most courts find
173 a waiver only if the disclosing party acted carelessly in disclosing the
174 communication or information and failed to request its return in a
175 timely manner. And a few courts hold that any inadvertent disclosure
176 of a communication or information protected under the attorney-
177 client privilege or as work product constitutes a waiver without
178 regard to the protections taken to avoid such a disclosure. *See*
179 *generally Hopson v. City of Baltimore*, 232 F.R.D. 228 (D.Md.
180 2005), for a discussion of this case law.

181
182 The rule opts for the middle ground: inadvertent disclosure
183 of protected communications or information in connection with a
184 federal proceeding ~~or to a federal office or agency~~ does not
185 constitute a waiver if the holder took reasonable steps to prevent
186 disclosure and also promptly took reasonable steps to rectify the
187 error. This position is in accord with the majority view on whether
188 inadvertent disclosure is a waiver. *See, e.g., Zapata v. IBP, Inc.*, 175
189 F.R.D. 574, 576-77 (D. Kan. 1997) (work product); *Hydraflow, Inc.*
190 *v. Enidine, Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (attorney-
191 client privilege); *Edwards v. Whitaker*, 868 F.Supp. 226, 229 (M.D.
192 Tenn. 1994) (attorney-client privilege). The rule establishes a
193 compromise between two competing premises. On the one hand, a
194 communication or information covered by the attorney-client
195 privilege or work product protection should not be treated lightly. On
196 the other hand, a rule imposing strict liability for an inadvertent
197 disclosure threatens to impose prohibitive costs for privilege review
198 and retention, especially in cases involving electronic discovery.

199
200 ~~The rule applies to inadvertent disclosures made to a federal~~
201 ~~office or agency, including but not limited to an office or agency that~~
202 ~~is acting in the course of its regulatory, investigative or enforcement~~
203 ~~authority. The consequences of waiver, and the concomitant costs of~~
204 ~~pre-production privilege review, can be as great with respect to~~
205 ~~disclosures to offices and agencies as they are in litigation.~~

206
207 Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss &*
208 *Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins.*
209 *Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal. 1985), set out a multi-
210 factor test for determining whether inadvertent disclosure is a waiver.
211 The stated factors (none of which are dispositive) are the
212 reasonableness of precautions taken, the time taken to rectify the
213 error, the scope of discovery, the extent of disclosure and the
214 overriding issue of fairness. The rule does not explicitly codify that

215 test, because it is really a set of non-determinative guidelines that
216 vary from case to case. The rule is flexible enough to accommodate
217 any of those listed factors. Other considerations bearing on the
218 reasonableness of a producing party's efforts include the number of
219 documents to be reviewed and the time constraints for production.
220 Depending on the circumstances, a party that uses advanced
221 analytical software applications and linguistic tools in screening for
222 privilege and work product may be found to have taken "reasonable
223 steps" to prevent inadvertent disclosure. The implementation of an
224 efficient system of records management before litigation may also be
225 relevant.

226
227 The rule does not require the producing party to engage in a
228 post-production review to determine whether any protected
229 communication or information has been produced by mistake. But the
230 rule does require the producing party to follow up on any obvious
231 indications that a protected communication or information has been
232 produced inadvertently.

233
234 The rule refers to "inadvertent" disclosure, as opposed to
235 using any other term, because the word "inadvertent" is widely used
236 by courts and commentators to cover mistaken or unintentional
237 disclosures of communications or information covered by the
238 attorney-client privilege or the work product protection. *See, e.g.,*
239 *Manual for Complex Litigation Fourth* § 11.44 (Federal Judicial
240 Center 2004) (referring to the "consequences of inadvertent waiver");
241 *Allread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993)
242 ("There is no consensus, however, as to the effect of inadvertent
243 disclosure of confidential communications.").

244
245 **Subdivision (c).** Difficult questions can arise when 1) a
246 disclosure of a communication or information protected by the
247 attorney-client privilege or as work product is made in a state
248 proceeding, 2) the communication or information is offered in a
249 subsequent federal proceeding on the ground that the disclosure
250 waived the privilege or protection, and 3) the state and federal laws
251 are in conflict on the question of waiver. The Committee determined
252 that the proper solution for the federal court is to apply the law that
253 is most protective of privilege and work product. If the state law is
254 more protective (such as where the state law is that an inadvertent
255 disclosure can never be a waiver), the holder of the privilege or
256 protection may well have relied on that law when making the
257 disclosure in the state proceeding. Moreover, applying a more
258 restrictive federal law of waiver could impair the state objective of
259 preserving the privilege or work-product protection for disclosures
260 made in state proceedings. On the other hand, if the federal law is

261 more protective, applying the state law of waiver to determine
262 admissibility in federal court is likely to undermine the federal
263 objective of limiting the costs of production.

264
265 The rule does not address the enforceability of a state court
266 confidentiality order in a federal proceeding, as that question is
267 covered both by statutory law and principles of federalism and
268 comity. *See* 28 U.S.C. § 1738 (providing that state judicial
269 proceedings “shall have the same full faith and credit in every court
270 within the United States . . . as they have by law or usage in the
271 courts of such State . . . from which they are taken.”). *See also* 6
272 MOORE’S FEDERAL PRACTICE § 26.106[1] n.5.2 (3d ed. 2006), citing
273 *Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 499 (D.Md.
274 2000) (noting that a federal court considering the enforceability of a
275 state confidentiality order is “constrained by principles of comity,
276 courtesy, and . . . federalism”). Thus, a state court order finding no
277 waiver in connection with a disclosure made in a state court
278 proceeding is enforceable under existing law in subsequent federal
279 proceedings.

280
281 **Subdivision (d).** Confidentiality orders are becoming
282 increasingly important in limiting the costs of privilege review and
283 retention, especially in cases involving electronic discovery. *See*
284 *Manual for Complex Litigation Fourth* § 11.446 (Federal Judicial
285 Center 2004) (noting that fear of the consequences of waiver “may
286 add cost and delay to the discovery process for all sides” and that
287 courts have responded by encouraging counsel “to stipulate at the
288 outset of discovery to a ‘nonwaiver’ agreement, which they can adopt
289 as a case-management order.”). But the utility of a confidentiality
290 order in reducing discovery costs is substantially diminished if it
291 provides no protection outside the particular litigation in which the
292 order is entered. Parties are unlikely to be able to reduce the costs of
293 pre-production review for privilege and work product if the
294 consequence of disclosure is that the communications or information
295 could be used by non-parties to the litigation.

296
297 There is some dispute on whether a confidentiality order
298 entered in one case is enforceable in other proceedings. *See*
299 *generally Hopson v. City of Baltimore*, 232 F.R.D. 228 (D.Md.
300 2005), for a discussion of this case law. The rule provides that when
301 a confidentiality order governing the consequences of disclosure in
302 that case is entered in a federal proceeding, its terms are enforceable
303 against non-parties in any federal or state proceeding. For example,
304 the court order may provide for return of documents without waiver
305 irrespective of the care taken by the disclosing party; the rule
306 contemplates enforcement of “claw-back” and “quick peek”

307 arrangements as a way to avoid the excessive costs of pre-production
308 review for privilege and work product. As such, the rule provides a
309 party with a predictable protection — predictability that is needed to
310 allow the party to plan in advance to limit the prohibitive costs of
311 privilege and work product review and retention.

312

313 Under the rule, a confidentiality order is enforceable whether
314 or not it memorializes an agreement among the parties to the
315 litigation. Party agreement should not be a condition of enforceability
316 of a federal court’s order.

317

318 **Subdivision (e).** Subdivision (e) codifies the well-established
319 proposition that parties can enter an agreement to limit the effect of
320 waiver by disclosure between or among them. *See, e.g., Dowd v.*
321 *Calabrese*, 101 F.R.D. 427, 439 (D.D.C. 1984) (no waiver where the
322 parties stipulated in advance that certain testimony at a deposition
323 “would not be deemed to constitute a waiver of the attorney-client or
324 work product privileges”); *Zubulake v. UBS Warburg LLC*, 216
325 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into
326 “so-called ‘claw-back’ agreements that allow the parties to forego
327 privilege review altogether in favor of an agreement to return
328 inadvertently produced privilege documents”). Of course such an
329 agreement can bind only the parties to the agreement. The rule makes
330 clear that if parties want protection ~~in a separate litigation~~ against
331 non-parties from a finding of waiver by disclosure, the agreement
332 must be made part of a court order.

333

334 **Subdivision (f).** The protections against waiver provided by
335 Rule 502 must be applicable when protected communications or
336 information disclosed in federal proceedings are subsequently offered
337 in state proceedings. Otherwise the holders of protected
338 communications and information, and their lawyers, could not rely on
339 the protections provided by the Rule, and the goal of limiting costs
340 in discovery would be substantially undermined. Rule 502(g) is
341 intended to resolve any potential tension between the provisions of
342 Rule 502 that apply to state proceedings and the possible limitations
343 on the applicability of the Federal Rules of Evidence otherwise
344 provided by Rules 101 and 1101.

345

346 The rule is intended to apply in all federal court proceedings,
347 including court-annexed and court-ordered arbitrations, without
348 regard to any possible limitations of Rules 101 and 1101. This
349 provision is not intended to raise an inference about the applicability
350 of any other rule of evidence in arbitration proceedings more
351 generally.

352

353 The costs of discovery can be equally high for state and
354 federal causes of action, and the rule seeks to limit those costs in all
355 federal proceedings, regardless of whether the claim arises under
356 state or federal law. Accordingly, the rule applies to state law causes
357 of action brought in federal court.

358
359 **Subdivision (g).** The rule’s coverage is limited to attorney-
360 client privilege and work product. The operation of waiver by
361 disclosure, as applied to other evidentiary privileges, remains a
362 question of federal common law. Nor does the rule purport to apply
363 to the Fifth Amendment privilege against compelled self-
364 incrimination.

365
366 The definition of work product “materials” is intended to
367 include both tangible and intangible information. *See In re Cendant*
368 *Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) (“It is clear from
369 *Hickman* that work product protection extends to both tangible and
370 intangible work product”).

Draft of Cover Letter to Congress on Proposed Rule 502.

The Judicial Conference respectfully submits to the United States Congress a proposed addition to the Federal Rules of Evidence. The Conference recommends that Congress consider adopting this proposed rule as Federal Rule of Evidence 502.

The Rule provides for protections against waiver of the attorney-client privilege or work product immunity. The Conference submits this proposal directly to Congress because of the limitations on the rulemaking function of the federal courts in matters dealing with evidentiary privilege. Under 28 U.S.C. § 2074(b), rules governing evidentiary privilege must be approved by an Act of Congress rather than adopted through the process prescribed by the Rules Enabling Act, 28 U.S.C. § 2072.

Description of the Process Leading to the Proposed Rule

The Judicial Conference Rules Committees have long been concerned about the rising costs of litigation, much of which has been caused by the review, required under current law, of every document produced in discovery, in order to determine whether the document contains privileged information. In 2006, the House Judiciary Committee Chair suggested the proposal of a rule dealing with waiver of attorney-client privilege and work product, in order to limit these rising costs. The Judicial Conference was urged to proceed with rulemaking that would

- protect against the forfeiture of privilege when a disclosure in discovery is the result of an innocent mistake;
- permit parties, and courts, to protect against the consequences of waiver by permitting disclosures of privileged information between the parties to a litigation.

The task of drafting a proposed rule was referred to the Advisory Committee on Evidence Rules (the “Advisory Committee”). The Advisory Committee prepared a draft Rule 502 and invited a select group of judges, lawyers, and academics to testify before the Committee about the need for the rule, and to suggest any improvements. The Advisory Committee considered all the testimony presented by these experts and redrafted the rule accordingly. At its Spring 2006 meeting, the Advisory Committee approved for release for public comment a proposed Rule 502 that would provide certain exceptions to the federal common law on waiver of privileges and work product. That rule was approved for release for public comment by the Committee on Rules of Practice and Procedure (“the Standing Committee”). The public comment period began in August 2006 and ended February 15, 2007. The Advisory Committee received more than 70 public comments, and also heard the testimony of more than 20 witnesses at two public hearings. The rule released for public comment was also carefully reviewed by the Standing Committee’s Subcommittee on Style. In April 2007, the Evidence Rules Committee issued a revised proposed Rule 502 taking into account the public comment, the views of the Subcommittee on Style, and its own judgment. The revised rule was approved by the Standing Committee and the Judicial Conference and is attached to this letter.

In order to inform Congress of the legal issues involved in this rule, the proposed Rule 502

also includes a proposed Committee Note of the kind that accompanies all rules adopted through the Rules Enabling Act. This Committee Note may be incorporated as all or part of the legislative history of the rule if it is adopted by Congress. *See, e.g.*, House Conference Report 103-711 (stating that the “Conferees intend that the Advisory Committee Note on [Evidence] Rule 412, as transmitted by the Judicial Conference of the United States to the Supreme Court on October 25, 1993, applies to Rule 412 as enacted by this section” of the Violent Crime Control and Law Enforcement Act of 1994).

Problems Addressed by the Proposed Rule

In drafting the proposed Rule, the Advisory Committee concluded that the current law on waiver of privilege and work product is responsible in large part for the rising costs of discovery, especially discovery of electronic information. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege and work product. The reason is that if a protected document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well. Moreover, an enormous amount of expense is put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver. Advisory Committee members also expressed the view that the fear of waiver leads to extravagant claims of privilege. Members concluded that if there were a way to produce documents in discovery without risking subject matter waiver, the discovery process could be made much less expensive. The Advisory Committee noted that the existing law on the effect of inadvertent disclosures and on the scope of waiver is far from consistent or certain. It also noted that agreements between parties with regard to the effect of disclosure on privilege are common, but are unlikely to decrease the costs of discovery due to the ineffectiveness of such agreements as to persons not party to them.

The Proposed Rule 502 does not attempt to deal comprehensively with either attorney-client privilege or work product protection. It also does not purport to cover all issues concerning waiver or forfeiture of either the attorney-client privilege or work product protection. Rather, it deals primarily with issues involved in the disclosure of protected information in federal court proceedings or to a federal public office or agency. The rule binds state courts only with regard to disclosures made in federal proceedings. It deals with disclosures made in state proceedings only to the extent that the effect of those disclosures becomes an issue in federal litigation. The Rule covers issues of scope of waiver, inadvertent disclosure, and the controlling effect of court orders and agreements.

Rule 502 provides the following protections against waiver of privilege or work product:

- *Limitations on Scope of Waiver:* Subdivision (a) provides that if a waiver is found, it applies only to the information disclosed, unless a broader waiver is made necessary by the holder’s intentional and misleading use of privileged or protected communications or information.

- *Protections Against Inadvertent Disclosure:* Subdivision (b) provides that an inadvertent

disclosure of privileged or protected communications or information, when made at the federal level, does not operate as a waiver if the holder took reasonable steps to prevent such a disclosure and employed reasonably prompt measures to retrieve the mistakenly disclosed communications or information.

- *Effect on State Proceedings and Disclosures Made in State Courts:* Subdivision (c) provides that 1) if there is a disclosure of privileged or protected communications or information at the federal level, then state courts must honor Rule 502 in subsequent state proceedings; and 2) if there is a disclosure of privileged or protected communications or information in a state proceeding, then admissibility in a subsequent federal proceeding is determined by the law that is most protective against waiver.

- *Orders Protecting Privileged Communications Binding on Non-Parties:* Subdivision (d) provides that if a federal court enters an order providing that a disclosure of privileged or protected communications or information does not constitute a waiver, that order is enforceable against all persons and entities in any federal or state proceeding. This provision allows parties in an action in which such an order is entered to limit their costs of pre-production privilege review.

- *Agreements Protecting Privileged Communications Binding on Parties:* Subdivision (e) provides that parties in a federal proceeding can enter into a confidentiality agreement providing for mutual protection against waiver in that proceeding. While those agreements bind the signatory parties, they are not binding on non-parties unless incorporated into a court order.

Drafting Choices Made by the Advisory Committee

The Advisory Committee made a number of important drafting choices in Rule 502. This section explains those choices.

1) The effect in state proceedings of disclosures initially made in state proceedings. Rule 502 does not apply to a disclosure made in a state proceeding when the disclosed communication or information is subsequently offered in another state proceeding. The first draft of Rule 502 provided for uniform waiver rules in federal and state proceedings, regardless of where the initial disclosure was made. This draft raised the objections of the Conference of State Chief Justices. State judges argued that the Rule as drafted offended principles of federalism and comity, by superseding state law of privilege waiver, even for disclosures that are made initially in state proceedings — and even when the disclosed material is then offered in a state proceeding (the so-called “state to state” problem). In response to these objections, the Advisory Committee voted unanimously to scale back the Rule, so that it would not cover the “state-to-state” problem. Under the current proposal state courts are bound by the Federal Rule only when a disclosure is made at the federal level and the disclosed communication or information is later offered in a state proceeding (the so-called “federal to state” problem). The Conference of Chief Justices withdrew its objection to Rule 502 after the rule was scaled back to regulate only the “federal to state” problem.

During the public comment period on the scaled-back rule, the Advisory Committee received many requests from lawyers and lawyer groups to return to the original draft and provide a uniform rule of privilege waiver that would bind both state and federal courts, for disclosures made in either state or federal proceedings. These comments expressed the concern that if states were not bound by a uniform federal rule on privilege waiver, the protections afforded by Rule 502 would be undermined; parties and their lawyers might not be able to rely on the protections of the Rule, for fear that a state law would find a waiver even though the Federal Rule would not.

The Advisory Committee determined that these comments raised a legitimate concern, but decided not to extend Rule 502 to govern a state court's determination of waiver with respect to disclosures made in state proceedings. The Committee relied on the following considerations:

- Rule 502 is located in the Federal Rules of Evidence, a body of rules determining the admissibility of evidence in federal proceedings. Parties in a state proceeding determining the effect of a disclosure made in that proceeding or in other state courts would be unlikely to look to the Federal Rules of Evidence for the answer.
- In the Committee's view, Rule 502, as proposed herein, does fulfill its primary goal of reducing the costs of discovery in *federal* proceedings. Rule 502 by its terms governs state courts with regard to the effect of disclosures initially made in federal proceedings or to federal offices or agencies. Parties and their lawyers in federal proceedings can therefore predict the consequences of disclosure by referring to Rule 502; there is no possibility that a state court could find a waiver when Rule 502 would not, when the disclosure is initially made at the federal level.

In light of the public comment, however, Congress may wish to consider separate legislation to cover the problem of waiver of privilege and work product when the disclosure is made at the state level and the consequence is to be determined in a state court. The Conference takes no position on the merits of such separate legislation.

2) Other applications of Rule 502 to state court proceedings. Although disclosures made in state court proceedings and later offered in state proceedings would not be covered, Rule 502 would have an effect on state court proceedings where the disclosure is initially made in a federal proceeding or to a federal office or agency. Most importantly, state courts in such circumstances would be bound by federal protection orders. The other protections against waiver in Rule 502 — against mistaken disclosure and subject matter waiver — would also bind state courts as to disclosures initially made at the federal level. The Rule, as submitted, specifically provides that it applies to state proceedings under the circumstances set out in the Rule. This protection is needed, otherwise parties could not rely on Rule 502 even as to federal disclosures, for fear that a state court would find waiver even when a federal court would not.

3) Disclosures made in state proceedings and offered in a subsequent federal proceeding. Earlier drafts of Proposed Rule 502 did not determine the question of what rule would apply when a disclosure is made in state court and the waiver determination is to be made in a

subsequent federal proceeding. Proposed Rule 502 as submitted herein provides that all of the provisions of Rule 502 apply unless the state law of privilege is more protective (less likely to find waiver) than the federal law. The Advisory Committee determined that this solution best preserved federal interests in protecting against waiver, and also provided appropriate respect for state attempts to give greater protection to communications and information covered by the attorney-client privilege or work product doctrine.

4) Selective waiver. At the suggestion of the House Judiciary Committee Chair, the Advisory Committee considered a rule that would allow persons and entities to cooperate with government agencies without waiving all privileges as to other parties in subsequent litigation. Such a rule is known as a “selective waiver” rule, meaning that disclosure of protected communications or information to the government waives the protection only selectively — to the government — and not to any other person or entity.

The selective waiver provision proved to be very controversial. The Advisory Committee determined that it would not propose adoption of a selective waiver provision; but in light of the request from the House Judiciary Committee, the Advisory Committee did prepare language for a selective waiver provision should Congress decide to proceed. The draft language for a selective waiver provision is set forth in a separate report.

Conclusion

Proposed Rule 502 is respectfully submitted for consideration by Congress as a rule that will effectively limit the skyrocketing costs of discovery. Members of the Standing Committee, the Advisory Committee on Federal Rules, as well as their reporters and consultants, are ready to assist Congress in any way its sees fit.

Respectfully submitted,



BUSINESS LAW SECTION

THE STATE BAR OF CALIFORNIA

May 7, 2007

via Email: Rules_Comments@ao.uscourts.gov

Mr. Peter G. McCabe
Secretary
The Standing Committee on Rules of Practice and Procedure
The Judicial Conference of the United States
Administrative Office of United States Courts
Washington, D.C. 20544

re Advisory Committee on Evidence Rules
Text on Selective Waiver Segregated from
Proposed Rule 502, Federal Rules of Evidence
(the "Selective Waiver Text")

Dear Mr. McCabe:

The Executive Committee (the "Executive Committee") of the Business Law Section (the "Section") of the State Bar of California (the "State Bar") is writing to urge the Standing Committee on Rules of Practice and Procedure (the "Standing Committee") not to forward the Selective Waiver Text to the Judicial Conference of the United States (the "Judicial Conference") or otherwise approve submission of it to the Congress. The Executive Committee respectfully requests that this letter be included in the materials distributed to members of the Standing Committee in advance of its meeting scheduled for June 11-12, 2007.

The Corporations Committee, a standing committee of the Section (the "Corporations Committee"), joins the Executive Committee in submitting this letter. Both the Executive Committee and the Corporations Committee (collectively, the "committees") have previously participated in the public comment process on proposed Rule 502 of the Federal Rules of Evidence ("FRE 502").

We understand that the Standing Committee will be considering at its meeting, among others, a recommendation forwarded to it by the Advisory Committee on Evidence Rules (the "Advisory Committee") regarding FRE 502. Please note that the committees are not commenting with this letter on FRE 502 itself, although both of them have previously communicated their support for the activities of the Advisory Committee in connection with the provisions remaining in FRE 502 that would provide clarity in terms of subject matter waiver, inadvertent waiver, *etc.*

This letter (1) provides the committees' analysis of why they believe it is improper to forward the Selective Waiver Text to the Judicial Conference or otherwise approve submission of it to the Congress, and (2) suggests several alternatives that could be taken by the Standing Committee consistent with that analysis and with the Procedures for the Conduct of Business by

the Judicial Conference Committees on Rules of Practice and Procedure (the “Standing Committee Procedures”) and the provisions of 28 U.S.C. §§ 2071-2077 (the “Rules Enabling Act”).

Action by the Advisory Committee

The committees understand that the members of the Advisory Committee voted on a motion to send the Selective Waiver Text up to the Standing Committee (and potentially to the Congress) but to make it clear that it was merely sharing the results of the “scrivener” role it had played over many months and that the Advisory Committee was not making *any* recommendation on it whatsoever.¹ The committees will not, however, have an opportunity to review the written reports and recommendations by the Advisory Committee before submitting this letter, as the delay required to do so could foreclose the possibility that this letter would be included in the materials for the Standing Committee meetings.

Why the Selective Waiver Text Should not Be Sent Up

The committees believe that the Selective Waiver Text should not be sent up to the Judicial Conference or otherwise on to the Congress for several reasons.

First, the mandate of the Advisory Committee on Evidence Rules is to review and develop proposals for revisions to the Federal Rules of Evidence.² It does not cover preparation of separate legislation, even in the context as a “scrivener.” The Advisory Committee has unanimously voted *not* to include the Selective Waiver Text in the proposal which it is sending to the Standing Committee for amendment to the Federal Rules of Evidence. One reason articulated in the memorandum of the Reporter of the Advisory Committee for excising what used to be FRE 502(c) is that selective waiver is by its nature essentially a political issue. Reaching that conclusion cannot be consistent with forwarding the Selective Waiver Text to Congress for political action. We submit that doing so invites the Standing Committee to undertake an action that we submit is not consistent with its own role or the role of the Judicial Conference.³

1 The description is provided by Steven K. Hazen, an officer of the Executive Committee who testified on its behalf at the public hearing of the Advisory Committee on January 12, 2007 and attended the meeting of the Advisory Committee on April 12-13, 2007 as an observer for the Executive Committee. Mr. Hazen reports that he kept contemporaneous notes of the discussion but acknowledges that those fall well short of a transcript (or even minutes) in terms of accuracy and completeness. Neither the Executive Committee nor the Corporations Committee offers the description of actions taken by the Advisory Committee for the accuracy of it but as a reference for the basis of the committees’ submission of this letter.

2 Standing Committee Procedures, Part I, Sections 3.c., 4.b., 4.c., 5.b.

3 Standing Committee Procedures, Part II, Sections 8.c. and 8.d.

Second, members of the Advisory Committee are identified and appointed for their particular knowledge and experience in rules of evidence, how they are applied, and the impact of them in our system of justice. The Standing Committee should be able to expect that proposals sent to it by the Advisory Committee would be accompanied by clear articulation of the analysis and views of the members of the Advisory Committee as to the substantive issues addressed by such proposals. That should include a recommendation on those issues, not just on the process for addressing those proposals. All that the Advisory Committee has done is to recommend that the Selective Waiver Text be forwarded on to Congress for its consideration.

Third, Justice Douglas aptly noted in his dissent to the Order of the Supreme Court adopting the originally-proposed Federal Rules of Evidence that submission by the Court would result in them being seen as having the imprimatur of it even though the Justices and the Court had played no role in their development.⁴ The same will be true with respect to the Selective Waiver Text: if it is sent to Congress by any instrumentality of the Judicial Conference, it will be seen as the work product of it even if no recommendation is given. Describing the role of the Advisory Committee as that of a “scrivener” will reduce the risk of it being perceived as much more than that.

Fourth, the Rules Enabling Act specifically provides that rules adopted pursuant to it “shall not abridge, enlarge or modify any substantive right.”⁵ The attempt to create a regimen of privilege in direct conflict with literally centuries of judicial rulings has, at the very least, a strong appearance of doing just that. It would be an extraordinary anomaly of reason that the Judicial Conference and instrumentalities of it should be permitted to do, outside of the arena of authority designated to them, those things that are specifically proscribed to matters within that authorized arena.

Finally, the process is in conflict with the careful balance of Separation of Powers issues reflected in the Rules Enabling Act. The only justification given by the Advisory Committee for submitting the Selective Waiver Text is politically based: responsiveness to a letter sent by the then-Chair of the House Judiciary Committee, treating it not as a request for rulemaking procedure but as an instruction as to the outcome of it. While various instrumentalities of the Judicial Conference have representatives outside of the Judicial Branch, the Judicial Conference itself is exclusively composed of members of the Judicial Branch who hold their position in that capacity.⁶ It would be equally improper for the Legislative Branch to arrogate authority over Judicial Branch instrumentalities (such as the Judicial Conference) as it would be for the Judicial

4 56 F.R.D. 184, 185 (1972). The dissent was included with the original Order issued November 20, 1972, pursuant to which the Court “prescribed” the Rules and authorized the Chief Justice to transmit them to the Congress. Those Rules were, of course, revised substantially by Act of Congress (P.L. 93-595). *See also* Reporter’s Note at 409 U.S. 1132 recording that the Rules as previously prescribed by the Court were “to have no force or effect except to the extent, and with such amendments, as may be expressly approved by Act of Congress.”

5 28 U.S.C. § 2072(b). This was one of the points made by Justice Douglas regarding evidence rules generally in his dissent to the original Order of the Supreme Court regarding what ultimately became the Federal Rules of Evidence (*see* note 4 *supra*), a position subsequently validated by Act of Congress (P.L. 93-12).

6 28 U.S.C. § 331.

Conference or any instrumentalities of it to allow itself to be treated as an adjunct to the Legislative Branch for crafting legislation outside of the careful balance of responsibilities set forth in the Rules Enabling Act.

Alternative Actions by the Standing Committee

The committees believe that the Standing Committee has a number of options available to it vis-à-vis the Selective Waiver Text:

1. **Reject**. The committees respectfully urge the Standing Committee to reject the proposal outright. Submissions by the committees in opposition to the concepts set forth in the Selective Waiver Text fully support that action and are but a few of the many comment letters submitted to the Advisory Committee reaching the same conclusion.⁷ The Standing Committee has full authority to do so pursuant to Standing Committee Procedures, Part II, Section 8.c. Rejection would preserve the function of the Judicial Conference and the Supreme Court in “prescrib[ing] general rules of practice and procedure and rules of evidence for cases in the United States district courts ... and courts of appeals”⁸ by avoiding the appearance of participating in the legislative process on other matters.
2. **Recommit**. If the Standing Committee believes that submission of the Selective Waiver Text would in theory be consistent with the Standing Committee Procedures and the Rules Enabling Act, the committees respectfully urge the Standing Committee to return that proposal to the Advisory Committee with a request for its specific advice and recommendation on the substance of the Selective Waiver Text, not just the procedure for submission of it. If the Standing Committee is uncertain whether submission of the Selective Waiver Text would be consistent with the Standing Committee Procedures and/or the Rules Enabling Act, the committees respectfully urge the Standing Committee to return that proposal to the Advisory Committee with a request for its specific advice and recommendation as to the authority to submit the Selective Waiver Text in the manner proposed by the Advisory Committee.
3. **Report with Recommendation of Non-Adoption**. If the Standing Committee believes that submission of the Selective Waiver Text would in theory be consistent with the Standing Committee Procedures and Rules Enabling Act and believes that it does not need further input from the Advisory Committee on that proposal, the committees respectfully urge the Standing Committee to reach a specific recommendation on it consistent with deliberations of the Advisory Committee and with the overwhelming majority of comments submitted to the Advisory Committee on FRE 502(c) and the analysis provided in them: that it **NOT** be enacted.

7 The overwhelming majority of all written comments submitted on FRE 502(c) were in opposition to it.

8 Rules Enabling Act, § 2072.

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Thank you for your consideration of these matters. Please note that positions set forth in this letter are only those of the Section, specifically including the Executive Committee and the Corporations Committee. As such, they have not been adopted by the State Bar's Board of Governors, its overall membership, or the overall membership of the Section, and are not to be construed as representing the position of the State Bar. Membership in the Section is voluntary and funding for activities of it, including all legislative activities such as this, is obtained entirely from voluntary sources and not from mandatory dues of the State Bar.

If you have any questions, please feel free to contact Mr. Keith Paul Bishop who is the Vice Chair Legislation of the Executive Committee or Mr. Steven K. Hazen who is the Secretary of the Executive Committee and appeared on its behalf at the January 12, 2007, public hearing of the Advisory Committee. One of them will attend the meeting of the Standing Committee as an authorized representative of the Executive Committee and of the Corporations Committee. Contact information for each is set forth below.

Very truly yours,

/s/
Neil J Wertlieb
Chair
Executive Committee

/s/
Bruce R. Deming
Co-Chair
Corporations Committee

/s/
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cc: The Honorable David F. Levi
Chair
Standing Committee on Rules of Practice and Procedure

The Honorable Jerry E. Smith
Chair
Advisory Committee on Evidence Rules



Lawyers for Civil Justice
Defense Research Institute
Federation of Defense & Corporate Counsel
International Association of Defense Counsel
U.S. Chamber Institute for Legal Reform
Association of Corporate Counsel

**Comments to the Committee on Rules of Practice and
Procedure of the
Judicial Conference of the United States**

IN SUPPORT OF PROPOSED FEDERAL EVIDENCE RULE 502

June 7, 2007

COMMENTS BY
LAWYERS FOR CIVIL JUSTICE
DEFENSE RESEARCH INSTITUTE
FEDERATION OF DEFENSE & CORPORATE COUNSEL
INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL
U.S. CHAMBER INSTITUTE FOR LEGAL REFORM
ASSOCIATION OF CORPORATE COUNSEL
TO THE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES
IN SUPPORT OF PROPOSED FEDERAL EVIDENCE RULE 502

JUNE 7, 2007

The Lawyers for Civil Justice, Defense Research Institute, Federation of Defense & Corporate Counsel, International Association of Defense Counsel, U.S. Chamber Institute for Legal Reform, and Association of Corporate Counsel¹ respectfully submit these brief comments to express strong support for the work of the Advisory Committee on Evidence Rules, to urge the

¹ Lawyers for Civil Justice (“LCJ”) is a national coalition of corporate counsel and civil defense trial lawyers supporting improvements in the civil justice system. The Defense Research Institute (“DRI”) is a national organization of defense trial lawyers and corporate counsel. The Federation of Defense & Corporate Counsel (“FDCC”) is an organization composed of attorneys and others who are actively engaged in the administration of civil defense litigation throughout the world. The International Association of Defense Counsel (“IADC”) is an organization dedicated to enhancing skills, professionalism, and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, and society. The U.S. Chamber Institute for Legal Reform (“ILR”) is a national campaign, representing the nation’s business community, with the critical mission of making America’s legal system simpler, fairer, and faster for everyone. The Association of Corporate Counsel (“ACC”) is the in-house counsel bar association, serving the professional needs of over 21,000 attorneys who practice in the legal departments of corporations and other private sector organizations world wide.

Committee on Rules of Practice and Procedure (the “Standing Committee”) to approve proposed Rule 502, and to forward Rule 502 to the Judicial Conference for approval and transmission to Congress.

1. The Need for Proposed Rule 502.

The testimony before the Advisory Committee confirmed the serious and growing threats to the attorney-client privilege and work product protections posed by the increasing complexity of multi-forum litigation and modern information technology. Indeed, because of the overwhelming amount of information now involved in discovery, increased costs literally threaten to overwhelm the litigation system in the United States. Proposed Rule 502 does much to secure and preserve the fundamental protections of the attorney client privilege and work product doctrine. By establishing clear and uniform federal rules, it also will provide critical assistance in making discovery more efficient and predictable and help to save our justice system from unnecessary and crushing expense. We believe strongly in the need for reason, uniformity and predictability in the areas covered by this Proposed Rule. That need, however, applies throughout our national economy and legal system, regardless of whether a controversy first erupts in a state or federal forum.

The associations submitting this comment strongly support the Advisory Committee’s treatment of subject matter waiver and inadvertent disclosure. Its formulation of the rules and appropriate standards will eliminate confusion and the threat of conflicting results in federal proceedings and investigations. It will allow courts and practitioners to determine a party’s discovery responsibilities more clearly, and equally important, what the consequences of an inadvertent disclosure might be. Likewise, the Advisory Committee’s proposals with respect

to the binding effects of court orders and agreements give courts and litigants important tools to manage complex and expensive discovery issues proactively.

We also strongly endorse the nine changes made to Rule 502 after publication and comment, referenced in the Advisory Committee's transmittal memorandum. All of these refinements of the Proposed Rule are useful, appropriate, and consistent with the public comments. In particular, we believe that application of these rules to federal offices and agencies, as well as federal proceedings, is necessary to achieve the goals of this Rule, because, as determined by the Advisory Committee and demonstrated in public comments, productions to federal offices and agencies can involve the same extraordinary costs of privilege review as in litigation.

2. The Protections of Rule 502 Should Apply in All Federal and State Proceedings.

We respectfully offer one suggestion to improve the efficacy of the Proposed Rule. Our members commend and support the statement in the *Draft of Cover Letter to Congress on Proposed Rule 502* at 4 that: "In light of the public comment, Congress may wish to consider separate legislation to cover the problem of waiver of privilege and work product when the disclosure is made at the state level and the consequence is to be determined in a state court." However, we urge the Standing Committee to go further and adopt language to provide that Rule 502 applies to state as well as federal proceedings.

Alternatively, we urge the Standing Committee to recommend affirmatively that Congress adopt such a broader application via separate legislation. The original draft of the Rule provided for a uniform rule of privilege waiver that would bind both state and federal courts. In part, the Advisory Committee opted for a more restrictive rule based upon concern about the

scope of its role in drafting federal rules of evidence. Nonetheless, the Advisory Committee recognized merit in the many comments it received from lawyers and lawyer groups urging the adoption of privilege protections that applied across the board in state and federal court. *See Draft of Cover Letter to Congress on Proposed Rule 502*, at. 4.

Application of proposed Rule 502 in both federal and state court is necessary to achieve the goals identified by Congress in its original charge to the Standing Committee — protect against forfeiture of the privilege and help stem the rising costs of litigation. Without application in state proceedings, parties will still be subject to inconsistent standards and the threat of broad subject matter waiver, even when disclosure is inadvertent. In turn, “... clients and attorneys would be back where they started — expending substantial resources to guard against waiver and unnecessarily increasing the cost of litigation...”² This Rule requires congressional approval in any event. While the Advisory Committee’s deference on the federal/state issue is understandable, Congress has the authority to ensure that the protections of Rule 502 apply to all state and federal proceedings.³

3. Selective Waiver Was Properly Deleted from the Rule.

Finally, we applaud the Advisory Committee’s decision to remove the selective waiver provision from proposed Rule 502. The testimony before the Advisory Committee was overwhelmingly against the proposal. Adoption of a selective waiver rule would undermine the attorney-client privilege and work product doctrine. The arguments in favor of adopting such a rule are separate and apart from Congress’s stated goals of protecting the privilege and reducing

² *See*, Memorandum from Dan Capra, Reporter, and Ken Broun, Consultant, to the Advisory Committee on Evidence Rules, March 22, 2006, at 37.

³ We respectfully refer the Standing Committee to the discussion of this authority contained in LCJ’s Comments to the Advisory Committee on Evidence Rules Re: Proposed Revisions to Rule 502, January 5, 2007, at 6-11. *See, also*, Timothy P. Glynn, *Federalizing Privilege*, 52 Am.U.L.Rev. 59 (2002); Memorandum from Dan Capra, Reporter, and Ken Broun, Consultant to the Advisory Committee on Evidence Rules, March 22, 2006 at 19-23.

litigation costs. We believe this issue is more appropriately dealt with separately and note that there is already legislation pending in Congress, S. 186, addressing this very issue.

4. Conclusion.

Each of the signatories to this Comment respectfully requests that the Standing Committee adopt and approve Proposed Evidence Rule 502 and recommend that Congress extend the laudable and important protections of this proposed Rule to state as well as federal proceedings.

Respectfully submitted,

LAWYERS FOR CIVIL JUSTICE

DEFENSE RESEARCH INSTITUTE

FEDERATION OF DEFENSE & CORPORATE COUNSEL

INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL

U.S. CHAMBER INSTITUTE FOR LEGAL REFORM

ASSOCIATION OF CORPORATE COUNSEL

June 7, 2007

Rule 103. Rulings on Evidence	Rule 103 — Rulings on Evidence
<p>(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and</p> <p>(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or</p> <p>(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.</p>	<p>(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects the party’s substantial right and:</p> <p>(1) if the ruling admitted evidence, the party, on the record:</p> <p style="padding-left: 40px;">(A) timely objected or moved to strike; and</p> <p style="padding-left: 40px;">(B) stated the specific ground, unless it was apparent from the context; or</p> <p>(2) if the ruling excluded evidence, the party informed the court of its substance by an offer of proof, unless the substance was apparent from the context of the questions.</p>
<p>Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.</p>	<p>(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error.</p>
<p>(b) Record of Offer and Ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.</p>	<p>(c) Court’s Statements About the Ruling; Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may also direct that an offer of proof be made in question-and-answer form.</p>
<p>(c) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.</p>	<p>(d) Preventing the Jury from Hearing Inadmissible Evidence. In a jury trial, the court must, to the extent practicable, conduct the proceedings so that inadmissible evidence is not suggested to the jury by any means [, including statements, offers of proof, questions, or arguments? I’d omit].</p>

(d) Plain Error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

(e) Taking Notice of Plain Error. An appellate court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

<p>Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes</p>	<p>Rule 404 — Character Evidence; Evidence of Crimes or Other Acts</p>
<p>(a) Character Evidence Generally. Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:</p>	<p>(a) Character Evidence.</p> <p>(1) In General. Evidence of a person’s character trait is not admissible to prove that the person acted in accordance with the trait on a particular occasion.</p>
<p>(1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;</p>	<p>(2) Exceptions. The following exceptions apply:</p> <p>(A) a criminal defendant may offer evidence of the defendant’s pertinent [relevant?] trait, and the prosecutor may offer evidence to rebut it;</p>
<p>(2) Character of Alleged Victim. Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;</p> <p>(3) Character of Witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.</p>	<p>(B) a criminal defendant may offer evidence of an alleged crime victim’s pertinent [relevant?] trait, and if the evidence is admitted, the prosecutor may:</p> <p>(i) offer evidence to rebut it; and</p> <p>(ii) offer evidence of the defendant’s same trait;</p> <p>(C) in a homicide case, the prosecutor may offer evidence of the alleged victim’s trait of peacefulness to rebut evidence that the victim was the first aggressor; and</p> <p>(D) evidence of a witness’s trait may be admitted under Rules 607, 608, and 609.</p>

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

(b) Crimes or Other Acts.

(1) *In General.* Evidence of a crime or other act is not admissible to prove a character trait that led the person to act in accordance with the trait on a particular occasion.

(2) *Exceptions; Notice.* Evidence of a crime or other act is admissible for other purposes, such as proving motive, opportunity, intent, plan, preparation, knowledge, identity, absence of mistake, or lack of accident. On request by a criminal defendant, the prosecutor must:

(A) provide reasonable notice of the general nature of that evidence if the prosecutor intends to use it at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

<p>Rule 612. Writing Used To Refresh Memory</p>	<p>Rule 612 — Writing Used to Refresh a Witness’s Memory.</p>
<p>Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either—</p> <p>(1) while testifying, or</p> <p>(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,</p> <p>an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.</p>	<p>(a) General Application. This rule gives an adverse [opposing?] party certain rights when a witness uses a writing — including an electronic one — to refresh memory:</p> <p>(1) while testifying; or</p> <p>(2) before testifying, if the court decides that the party should have those rights.</p> <p>(b) Adverse Party’s Rights; Deleting Unrelated Matter. Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, the adverse [opposing?] party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness’s testimony. If the producing party claims that the writing includes an unrelated matter, the court must examine it in camera [in chambers?], delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over [either party’s?] objection must be preserved for the record.</p> <p>(c) Failure to Produce or Deliver. If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness’s testimony or [may?] declare a mistrial.</p>

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in these rules, or in any local rule, or court order, or in any statute that does not specify a method of computing time. In accordance with Rule 83(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) “does not apply to situations where the court has established a specific calendar day as a deadline”), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). If, for example, the date for filing is “no later than November 1, 2007,” subdivision (a) does not govern. But if a filing is required to be made “within 10 days” or “within 72 hours,” subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g.*, 2 U.S.C. § 394 (specifying method for computing time periods prescribed by certain statutory provisions relating to contested elections to the House of Representatives).

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. *See, e.g.*, Rule 60(b). Subdivision (a)(1)(B)’s directive to “count every day” is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and the 10-day period not infrequently ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int’l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays,

Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk’s office is inaccessible.

Where subdivision (a) formerly referred to the “act, event, or default” that triggers the deadline, new subdivision (a) refers simply to the “event” that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. *See, e.g.*, Rule 14(a)(1).

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were generally retained without change.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be “rounded up” to the next whole hour. Subdivision (a)(3) addresses situations when the clerk’s office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start

and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk’s office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk’s office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday, or day when the clerk’s office is inaccessible.

Subdivision (a)(3)’s extensions apply “[u]nless the court orders otherwise.” In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to “weather or other conditions” as the reason for the inaccessibility of the clerk’s office. The reference to “weather” was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk’s office. The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g.*, William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition, many local provisions address inaccessibility for purposes of electronic filing, *see, e.g.*, D. Kan. Rule 5.4.11 (“A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.”).

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may provide, for example, that papers filed in a drop box after the normal hours of the clerk’s office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that “[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders.” A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g., Casaldue v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is

designed to deal with filings in the ordinary course without regard to Section 452.

Subdivision (a)(5). New subdivision (a)(5) defines the “next” day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e.g.*, Rule 59(b) (motion for new trial “shall be filed no later than 30 days after entry of the judgment”). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 26(f) (parties must hold Rule 26(f) conference “as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)”). In determining what is the “next” day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 30 days *after* an event, and the thirtieth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 21 days *before* an event, and the twenty-first day falls on Saturday, September 1, then the filing is due on Friday, August 31.

Subdivision (a)(6). New subdivision (a)(6) defines “legal holiday” for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivision (a).



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June 4, 2007

Clerk of the Court
Att: Rules Committee
Supreme Court of the United States
Washington, D.C. 20543

Ladies and Gentlemen:

On May 14, 2007 the Court invited public comment on proposed revisions to its rules of procedure. The proposed revisions include an amendment to Rule 37.6 which, as we understand it, would require an *amicus curiae* to indicate, in addition to the current required disclosures, (i) whether a party (or its counsel) is a member of the *amicus curiae* (e.g., whether a party is a member of a trade association submitting an *amicus* brief), and if so, (ii) whether the party (or its counsel) made a monetary contribution to the preparation or submission of the brief. This represents a significant change from the current rule, which does not require *amicus curiae* to make either of these disclosures.

The Chamber of Commerce of the United States of America and its affiliate, the National Chamber Litigation Center, and the National Association of Manufacturers are jointly submitting these comments to discuss why we believe that the proposed amendment to Rule 37.6 not only is unnecessary, but also would be detrimental to organizations that frequently submit *amicus* briefs to the Court. We are deeply concerned that if adopted, the proposed amendment to Rule 37.6 would have a serious chilling effect on our organizations' ability both to attract and retain members and to prepare high quality *amicus* briefs that benefit the Court in its consideration of cases that are important to the American business community.

Our associations raised a similar concern in April 1996 when the Court was in the process of considering adoption of Rule 37.6. The Court considered our comments, and the current rule does not require *amicus curiae* to reveal whether a party to the appeal is a member of the association, much less whether a party that is a member made a financial contribution to the brief. Despite the passage of more than a decade, the Court now apparently believes that both such disclosures are needed to deter parties from exercising control or undue influence over the content of *amicus*

briefs. We can assure the Court, however, that based on our own extensive experience in preparing *amicus* briefs, including routinely interacting with parties and their counsel, there is no “control” or “undue influence” problem. Indeed, the current rule, which requires *amicus curiae* to indicate whether a party or its counsel authored the *amicus* brief in whole or part, has served as a strong and effective deterrent. Accordingly, we urge the Court to retain Rule 37.6 in its current form.

INTEREST OF THE COMMENTERS

The *Chamber of Commerce of the United States of America* (“Chamber”) is the world’s largest federation of business organizations. It represents more than three million businesses of every size, in every business sector, and from every geographic region of the country. One of the Chamber’s primary missions is to represent the collective interests of its members by filing *amicus curiae* briefs in cases involving issues of national importance to American business. The *National Chamber Litigation Center* (“NCLC”) is the separately incorporated and separately funded legal affiliate of the Chamber. NCLC, which has its own membership, acts as a public policy law firm, by filing *amicus* briefs on behalf of the Chamber in the Supreme Court and in the lower courts. Because NCLC receives no fees for its services, it depends solely upon voluntary contributions from its supporters to fund its activities, including preparation and submission of *amicus* briefs.

The *National Association of Manufacturers* (“NAM”) is the nation’s largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. The NAM’s mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America’s economic future and living standards.

REASONS WHY RULE 37.6 SHOULD NOT BE AMENDED

The Chamber and the NAM are united in our belief that the proposed amendment to Rule 37.6 not only is unnecessary, but also would be highly detrimental to the very purpose of *amicus* practice in the Supreme Court—to be of “considerable help to the Court” by “bring[ing] to the attention of the Court relevant matter not already brought to its attention by the parties.” R. 37.1.

1. The Proposed Amendment Is Unnecessary

The Clerk's comment on the proposed amendment to Rule 37.6 is that "the change would require the disclosure that a party made a monetary contribution to the preparation or submission of an *amicus curiae* brief in the capacity of a member of the entity filing as *amicus curiae*." Although no further explanation is provided, we infer the Court's concern is that a party may be presumed to have exerted undue influence over the content of an *amicus* brief if it is a member of the organization that submitted the brief and made a monetary contribution to preparation of the brief. We respectfully submit, however, that there is no basis for any such presumption, and therefore, no need for additional disclosure requirements.

First, the current Rule 37.6 already requires an *amicus curiae* to "indicate whether counsel for a party authored the brief in whole or in part." This current disclosure requirement applies regardless of whether the party or its counsel is a member of the *amicus curiae* or made a monetary contribution to preparation of the brief. It functions as a powerful deterrent against a party or its counsel exercising a heavy hand in the preparation of an *amicus* brief. See Robert L. Stern et al., *Supreme Court Practice* 661-62 (8th ed. 2002) ("The Rule 37.6 disclosure requirements will discourage party counsel from taking over the preparation and submission of supporting *amici* briefs. And those counsel intent on continuing such practices should expect the Court to accord their *amicus* briefs a lesser degree of credibility.").

Second, each of our organizations exercises great care in selecting cases, both at the petition and merits stages, for submission of *amicus* briefs. Equally important, after deciding to submit an *amicus* brief, we exercise our own judgment in determining which issues to address and what arguments to present on behalf of our respective memberships. For example, before NCLC selects a case for submission of an *amicus* brief on behalf of the Chamber, a memorandum is prepared discussing the case background, issues on appeal, parties' positions, and importance of the case and issues to the Chamber's membership and the business community. This memorandum, which sometimes conveys a party's request for *amicus* support, is carefully reviewed and discussed by one of NCLC's case selection committees (e.g., Constitutional & Administrative Law Advisory Committee; Environmental and Energy Law Advisory Committee; Labor & Employment Law Advisory Committee; Securities Litigation Advisory Committee; California Litigation Advisory Committee). If the appropriate NCLC advisory committee recommends that an *amicus* brief be filed, that recommendation must be reviewed and approved by NCLC's senior management. Then, if preparation of an *amicus* brief is approved and sufficient funding is available, NCLC engages its own *amicus* counsel, who generally are highly skilled Supreme Court

practitioners, to draft the brief after consulting with NCLC's legal staff regarding what arguments to present on behalf of the Chamber.

To help ensure that the *amicus* brief will be beneficial to the Court and not duplicative, the supported parties' counsel often are afforded an opportunity to review and comment on a final draft of the brief. See Stern et al., *supra* at 662 ("Often some form of consultation and communication is both appropriate and essential if the *amicus* brief is to be confined, as it should be under Rule 37.1, to 'relevant matter not already brought to [the Court's] attention by the parties.'"). This is the extent of "control" or "influence" that the party and its counsel exerts. NCLC never has submitted—and never would submit—an *amicus* brief which has been controlled or directed, much less authored, by a party's counsel.

The NAM follows similar procedures in preparing *amicus* briefs. While there are no formal case selection committees at the NAM, there is a review and approval process that is designed to ensure that cases are selected not merely because of the parties that are involved but because the legal issues are ones that affect a wide range of manufacturers other than the parties. Since briefs are expensive, voluntary contributions are limited, and there are many more cases considered than can be selected, the NAM must necessarily focus on the cases that will have the greatest impact on manufacturers in general. It would be a poor use of member contributions to file in cases with issues that only affect one company.

In view of our organizations' discriminating procedures for selection and preparation of *amicus* briefs, and the well established *de facto* prohibition in current Rule 37.6 against a party's counsel authoring an *amicus* brief, there simply is no basis for assuming that a party's membership in and/or financial support of an *amicus* association enables it to utilize the association as a surrogate for the filing of a "second" brief.

2. The Proposed Amendment Would Undermine the Fundamental Purpose of Associations and Deprive the Court of Beneficial *Amicus* Briefs

In view of the increasing number of references to private party *amicus* briefs in the Court's opinions, see generally Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743 (2000) (presenting statistics), we are confident that the Court finds high quality *amicus* briefs to be valuable both in determining whether to grant certiorari, and where review is

granted, in deciding the merits.¹ To prepare *amicus* briefs that are suitable for submission to the Supreme Court, our organizations endeavor to engage the best possible appellate counsel who have the requisite substantive knowledge, analytical and legal writing skills, and experience. The cost in terms of legal fees is very substantial, especially for associations, like ours, that are frequent *amici curiae*. We largely rely upon our members' financial contributions to fund such *amicus* activity. As a result, we become very concerned when a proposed Supreme Court rule would discourage either membership or financial contributions.

The current version of Rule 37.6 deters parties and their counsel from attempting to control or direct the content of *amicus* briefs while satisfactorily addressing the concerns that we expressed regarding the Court's original, broadly worded proposed rule, which the Court released for public comment in March 1996. The *current* proposed revisions are even more onerous than the Court's original, 1996 proposed rule because they would explicitly require disclosure of information that is sacrosanct among the vast majority of associations—whether a particular corporation, individual, or group is a member of the association. Coupled with the additional proposed requirement to disclose whether a supported party not only is an association member, but also made a “monetary contribution” toward preparation of an *amicus* brief, the proposed amendment to Rule 37.6 would severely impair our ability to prepare and submit the very type of high quality *amicus* briefs that the Court has come to expect from us.

The whole idea behind an *amicus* brief prepared and submitted by an association is to advocate the *collective* views of its members on important legal issues that affect the members' interests. “The First Amendment does not mention the ‘right of association’ in so many words, but the [S]upreme [C]ourt has long interpolated the right to associate with other individuals as being a necessary corollary of the rights that are mentioned in the text.” George D. Webster, *The Law of Associations*, § 1.01 (Oct. 2006 ed.). “It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.” *NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449, 460 (1958). Indeed, “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.” *Ibid.*

¹ See, e.g., *Pennsylvania State Police v. Suders*, 542 U.S. 129, 148 n.9 (2004) (citing Chamber *amicus* brief); *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 537 (1999) (same); *Varity Corp. v. Howe*, 516 U.S. 489, 514 (1996) (same).

The Court repeatedly has recognized that “compelled disclosure” of an association’s membership would “affect adversely” the “members’ ability ‘to pursue their collective effort to foster beliefs which they admittedly have the right to advocate.” *McCormell v Fed. Election Comm’n*, 540 U.S. 93, 198 n.82 (2003) (quoting *NAA CP v Alabama*, 357 U.S. at 463-63). “It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association.” *NAA CP*, 357 U.S. at 462; *see also Eastland v U.S. Servicemen’s Fund*, 421 U.S. 491, 498 (1975) (“The right of voluntary associations . . . to be free from having either state or federal officials expose their affiliation and membership absent a compelling state or federal purpose has been made clear a number of times.”) (citing *NAA CP* and other cases); *Bates v Little Rock*, 361 U.S. 516, 524 (1960) (holding that there must be a “cogent” and “compelling” interest “to justify the substantial abridgement of associational freedom which such disclosures [of membership lists] will effect”).

The proposed amendment to Rule 37.6 would compel an *amicus curiae* association to disclose whether the supported party is a member. Yet, as discussed above, there is no compelling, or even cogent, reason to do so. The effect of this proposed infringement of associational freedom and membership privacy would not be to discourage a party or its counsel from asserting control or undue influence over the content of an *amicus* brief. Instead, the effect would be to discourage corporations, especially those frequently involved in litigation, from joining or continuing as members of associations and/or to deter associations from filing *amicus* briefs in cases where members are parties. This adverse impact would be greatly magnified in large associations such as the Chamber, which has *numerous* members that find themselves involved in litigation that potentially could reach the Court. For this reason the proposed association membership disclosure requirement not only raises First Amendment concerns, but also would erode abruptly one of the principal benefits provided by associations such as ours, namely *amicus* advocacy in Supreme Court proceedings.

Disclosure of membership affects more than simple participation in *amicus* briefs. Our associations engage in advocacy activities on many fronts, including substantial work before Congress and in Executive Branch regulatory proceedings, on controversial and often emotional national policy issues. Our members are free to engage in such activities on their own, but they rely on us in many cases to carry forward their message so that they will not be directly and publicly identified as supporting a particular view. Companies may be subjected to threats of boycotts, strikes, adverse publicity, or other acts that would make it more difficult for them to carry on their businesses, even though their acts of issue advocacy are fully protected by the First Amendment. This Court’s proposed rule would incrementally expose the

membership of our organizations to public scrutiny, raising the specter of adverse consequences and discouraging participation in all of our association activities.

Equally important, the proposed requirement that an *amicus* association disclose whether a supported party that is a member of the association made a “monetary contribution” to preparation or submission of an *amicus* brief would hinder our organizations’ ability to raise the funds necessary to engage in *amicus* activity. This is because many associations finance their *amicus* programs through special fundraising mechanisms. While some fundraising efforts raise general funds for *amicus* activity, others focus upon specific issues or cases and are directed to the most interested or affected industry sectors. This would include, of course, any members that are parties, or *potential* parties, in Supreme Court appeals. We are concerned that the proposed monetary contribution disclosure requirement would discourage financial contributions, especially because, as discussed below, the requirement is broad and vague, and could affect members that make financial contributions even before they become parties to appeals. Indeed, although an individual corporation’s monetary contribution to one of our organizations does not entitle or enable it to control or exert undue influence over an *amicus* brief, adoption of the disclosure requirement would imply, contrary to reality, that a party’s financial support means that they somehow are “buying” the right to file a second brief.

Moreover, it does not make sense for companies or associations to have to give up First Amendment rights in order to exercise their right to appeal to the Supreme Court of the United States. While this Court may want to be abundantly cautious to prevent undue influence on *amici* by the parties, the current rule accomplishes that goal. Imposing this new additional disclosure is largely irrelevant to the question of influence, and runs counter to the practice of most other federal appellate courts.

3. The Proposed Amendment’s Disclosure Requirements Are Vague and Overly Broad

The proposed amendment’s broad language raises interpretative questions in a trade association context and only exacerbates the new disclosure requirements’ potential adverse impacts.

For example, the proposed new language would require an *amicus* association to indicate whether a party or its counsel “is a *member* of the *amicus curiae*” (emphasis added). That seemingly simple question actually may be difficult to answer given the complex and varying structures of many national (or international) trade associations, business federations, and other non-profit organizations and advocacy groups. In the case of the Chamber, it has its own membership (consisting of companies, individuals,

and other chambers and associations) which is separate from, and in some instances overlaps with, the memberships of its affiliates, such as NCLC. If the *amicus curiae* is the Chamber, would a brief submitted on behalf of the Chamber by NCLC have to indicate that a party is a “member” if it belongs to NCLC but not to the Chamber? Further, many organizations have different categories of membership, and some, such as professional societies, are comprised primarily of individuals. Under the proposed amendment, would an *amicus* brief submitted by a professional society have to indicate that a corporate party is a member if some of its personnel are members, but their dues are paid or reimbursed by their employers?

Moreover, given many associations’ complex structures and multiple fundraising mechanisms, the meaning of “*monetary contribution* to the preparation or submission of the brief” (emphasis added) is unclear in an association context. For example, if a party is a general dues-paying member of an *amicus* association, but has not made a cash contribution earmarked for a particular *amicus* brief, does the payment of dues represent a “monetary contribution” to the brief? Such payments might be viewed as contributing to the brief in that staff time is spent preparing or submitting the brief. Thus, any member of our large associations would be disclosed in any brief we filed in support of their position. Or if the association seeks financial support from companies in a specific industry sector to help fund *amicus* briefs in appeals involving issues important to that sector, does that represent a monetary contribution to a particular Supreme Court brief under the proposed amendment? What if the party made the monetary contribution before the case in which it is involved was even filed in the Supreme Court? There are no time limitations proposed in the rule, nor are there *de minimis* thresholds. If a party makes a contribution to our *amicus* program on January 1, would disclosure be required in any *amicus* brief subsequently filed, for years into the future, as long as the association’s *amicus* program has not spent all of its contributions? How close in time would a contribution be related to a brief?

These examples of interpretive questions are just the tip of the iceberg. Every association is structured and funded differently. Responsible associations would err on the side of disclosure, and that would only heighten the unintended, but nevertheless deleterious, effects of these unnecessary disclosure requirements.

CONCLUSION

Our organizations, which are among the Supreme Court’s most ethical, experienced and active *amici curiae*, urge the Court to retain Rule 37.6 in its current form.

Respectfully submitted,

A handwritten signature in black ink that reads "Robin S. Conrad". The signature is written in a cursive style with a large, stylized 'R' and 'C'.

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Re: Proposed revisions to the rules of the Court

Dear General Suter:

I write in response to the Court's invitation for comments on the recently proposed revisions to the rules of the Supreme Court. These comments have been circulated to a variety of active members of the Court's Bar, and a number of other bar members have asked to join them; a list of these signatories is included as an addendum to this letter.

These comments are organized in the order of the rules to which the proposed amendments apply, though in a number of instances specific comments relate to other rules as well.

1. Revised Rule 15.3: Requirement to file *in forma pauperis* briefs in opposition.

The revision to Rule 15.3—the addition of the word “shall” in the sentence “If the petitioner is proceeding *in forma pauperis*, the respondent shall file an original and 10 copies of a brief in opposition prepared as required by Rule 33.2.”—may be ambiguous. According to the Clerk's Comment, this revision is designed to make “an 8½- by 11-inch paper response to an *in forma pauperis* petition mandatory.” But arguably this revision mandates the *submission* of a brief in opposition, instead of merely requiring that such a brief, *if filed*, comply with Rule 33.2 rather than Rule 33.1. To be sure, Rule 15.1 specifies that briefs in opposition are not mandatory except in capital cases or when ordered by the Court; nonetheless, we would suggest modifying this revision to eliminate this ambiguity. One proposed revision would be:

“If the petitioner is proceeding *in forma pauperis*, the respondent shall prepare its brief in opposition, if any, as required by Rule 33.2, and shall file an original and 10 copies of that brief.”

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2. Revised Rules 25.2 and 25.3: Time periods for the preparation of merits briefs.

The amendments to Rule 25.2 and 25.3 change the time period for the respondent or appellee to prepare its brief on the merits – from 35 days to 30 days – and the time period for the petitioner or appellant to prepare its reply brief – from 35 days to 25 days. The clerk’s comment explains that this alteration is being proposed because “the time period between the granting of a petition for a writ of certiorari and the date of oral argument has decreased in recent years,” and because “technological improvements have decreased the amount of time needed to prepare booklet-format briefs.”

We question the need for or desirability of this change. As the clerk’s comment explains, in a number of instances a somewhat-shortened briefing schedule is necessary to accommodate the time period between a grant of certiorari and the date of oral argument. But the Court has successfully addressed this issue in the recent past by issuing accelerated briefing schedules in instances in which the normal briefing schedule would cause the Court problems in scheduling cases on the argument calendar – a relatively small percentage of cases, we believe. The effect of this rule would be to mandate accelerated briefing in all cases. We acknowledge that under the proposed rules litigants may seek extensions of the briefing time periods (from the Clerk or an individual Justice, depending on the type of brief), but we nonetheless believe that there is little reason to change the default rule governing the timing of briefs. Given the time it takes to prepare top-notch briefs, and the press of other business that counsel frequently must juggle, we would respectfully suggest that the Court reconsider these changes. Alternatively, the Court could modify the amendment to Rule 25.3 to allow the petitioner 30 days to prepare its reply brief.

3. Revised Rule 25.8 and Rule 26.1: Electronic submission of Joint Appendices.

Proposed rule 25.8 would mandate that the parties submit electronic versions of briefs on the merits to the Clerk of Court (and to opposing counsel). We have no objection to this revision, which has been reflected in the Court’s *“Guide for counsel in cases to be argued before the Supreme Court of the United States”* for some time. In fact, we respectfully suggest that the Court also modify rule 26.1 to mandate that the parties submit an electronic version of the joint appendix to the Clerk. Joint appendices could thereafter be posted on the ABA’s web site and elsewhere, thus increasing the public’s access to relevant information about pending cases.

A possible method to effectuate this change would be to add, at the end of Rule 26.1, the following sentence:

An electronic version of the joint appendix shall be transmitted to the Clerk of Court and to opposing counsel of record at the time the appendix is filed in accordance with guidelines established by the Clerk. The elec-

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tronic transmission requirement is in addition to the requirement that booklet-format copies of the appendix be timely filed and served.

4. Revised Rule 33.1(b): New Century Schoolbook font.

The revision to Rule 33.1(b) changes the font required for booklet-format documents. The prior rule mandated that briefs be typeset in “Roman 11-point or larger type,” with footnotes in “9-point or larger” type. The revised rule specifies that booklet-format documents be typeset in “New Century Schoolbook 12-point type,” with footnotes in “New Century Schoolbook 10-point type.”

Some members of the bar question this proposed revision. Few dispute that a somewhat-larger typeface might be wise, and we understand that many believe that Roman—and in particular Times New Roman—is a problematic font for brief-length documents. See the Seventh Circuit’s *Requirements And Suggestions For Typography In Briefs And Other Papers*. But some question whether it is wise for the Court to specify as the required font a font that comes neither with Windows nor with the Macintosh operating system. Although New Century Schoolbook is available online for around \$100 (one must purchase the plain font, italicized font, bolded font, and bold-italicized font separately, each for around \$25), we worry that many litigants—and in particular litigants who appear less frequently in the Court—may be confused by this requirement and may unintentionally violate it. Furthermore, although \$100 is not much money in comparison to the cost of producing a booklet-format brief, a large law firm might need to purchase this font for 100 or more individuals, and thereafter keep track of which individuals were licensed to use the font.

Thus, we respectfully suggest that the Court consider modifying this revision. Three options would be (1) to encourage counsel strongly to use this specific font, but to allow other, similarly sized, fonts also to be used; (2) to specify two alternative fonts in addition to this font—one native to Windows and one native on Macintosh computers—that would also be acceptable; or (3) to include, either in the clerk’s comments or on the Court’s web site, more specific information about how to obtain and install this specific font.

5. Revised Rules 33.1(d) & (g): Word Limits.

The proposed revision to Rule 33.1(d) and (g) would replace the Court’s current page limits for booklet-format briefs with word count limits. There is some concern that the specific word-counts proposed in Rule 33.1(g)—which seem to be based on a conversion factor of 300 words under the new rule per page under the old rule—will mandate slightly shorter briefs than before. Several members of the Court’s bar have checked the lengths of briefs that comply with the current rule, and have found that the word counts for those briefs are often somewhat higher than 300 words per page—320-

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330 words per page seems common, and compliant briefs can at times reach 350 words per page.

Nonetheless, members of the bar vary as to what, if anything, they would submit as a comment in response to this proposed alteration. Given that the briefs for all parties will be held to the same length limits, many believe this proposed alteration is unproblematic. Others would suggest that the Court expand these word-count limitations slightly. Thus, we are merely alerting the Court that these word-count limitations may result in slightly shorter briefs.

6. Revised Rule 33.1(g)(vii): Word-count limitation for reply briefs on the merits.

Rule 33.1(g)(vii) alters the maximum length for merits reply briefs from 20 pages to 6000 words, using the same 300-words-per-page formula that the Court used to determine the new word-count limits for all briefs.

Many members of the Bar believe that the length limitation for reply briefs under the current rules is too short, and thus that the revised rule will continue to require reply briefs to be overly short. Given the number of *amicus* briefs that petitioner's counsel frequently must address on reply, and given how critical many believe merits reply briefs are to the eventual outcome of a case, we would suggest that the Court consider expanding this length limitation. One proposal would be to allow merits reply briefs to be 50% of the length of opening briefs on the merits—that is, 7,500 words if the Court implements the remainder of its proposed alteration to Rule 33.1(g)'s length limitations. This modest expansion, which parallels the ratio of word limits for opening briefs and reply briefs in the Federal Rules of Appellate Procedure, would make it somewhat easier for counsel to respond to the arguments made by respondents and their amici.

7. Rule 33.1: Transition issues.

We are concerned that there may be some unfairness caused if revised Rule 33.1 is simply implemented on August 1, 2007, regardless of the stage of briefing at which a case may be. In particular, because briefs submitted in accordance with the revised rule 33.1 may need to be somewhat shorter than briefs submitted in accordance with the current version of Rule 33.1, respondents may be allotted fewer words than petitioners for briefs in opposition or bottom-side briefs on the merits. Accordingly, we suggest that the Court alter the effective date of these proposed rules as follows:

In any case in which the petition for certiorari has been filed before the effective date of these rules but in which the respondent has not filed its brief in opposition prior to that date, all remaining briefs submitted in that case prior to the Court's decision whether to grant certiorari may comply with the May 2, 2005 version of the *Rules of the Supreme Court of the United States* rather than with these revised rules. Similarly, in any case in which

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the petitioner has filed its brief on the merits prior to the effective date of these rules, all remaining briefs in that case may comply with the May 2, 2005 version of the Rules of the Supreme Court of the United States rather than with these revised rules.

8. Revised Rule 37.2(a) : Notification to parties of intent to file an *amicus* brief.

The proposed modification to this rule would mandate that *amicus* briefs in support of a petition for a writ of certiorari be filed within 30 days of the date the petition is filed (without possibility of extension), and that “[a]n *amicus curiae* shall ensure that the counsel of record for all parties receive notice of its intention to file an *amicus curiae* brief at least 10 days prior to the due date for the *amicus curiae* brief.” There is some disagreement among the signatories to this letter as to the provision precluding extensions of time for the filing of *amicus* briefs in support of a petition for a writ of certiorari; thus, we do not address that provision in these comments. One concern that is shared, however, is that the rule does not account for instances in which more than one *amicus* joins the same *amicus* brief—a situation that occurs with some frequency but that often is not arranged until late in the day, when additional *amici* review and agree to join an *amicus* brief that another *amicus* has largely prepared. The respondent in this instance would not be burdened by such additional *amici* joining an *amicus* brief that respondent already knew was going to be filed. Thus, we suggest adding the following to the proposed revision:

An *amicus curiae* shall ensure that the counsel of record for all parties receive notice of its intention to file an *amicus curiae* brief at least 10 days prior to the due date for the *amicus curiae* brief, unless the *amicus curiae* brief is filed earlier than 10 days before the due date. Only one signatory to any *amicus curiae* brief filed jointly by more than one *amicus curiae* must timely notify the parties of its intent to file that brief.

9. Revised Rule 37.2(a) and Rule 15.5: Timing issues with respect to the filing of cert-stage *amicus* briefs.

The revision to Rule 37.2(a) addresses one of the cert-stage timing problems that exists under the current rule—the inability of respondents to respond to *amicus* briefs. However, this revision does nothing to address another timing problem that many have experienced: instances in which an *amicus* intends to submit an *amicus* brief in support of a petition for certiorari but in which the respondent either files its brief in opposition long before its due date or waives its right to file a brief in opposition. Although the parties are, of course, the primary participants before the Court, we believe that cert-stage *amicus* briefs are frequently beneficial to the Court. Thus, we would propose modifying Rule 15.5 as follows:

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If the Court receives an express waiver of the right to file a brief in opposition, the Clerk will distribute the petition to the Court for its consideration no less than 5 days thereafter, unless within that 5-day period one or more entities submits written notification to the Clerk of its intent to file an *amicus curiae* brief, at which point the Clerk will distribute the petition to the Court for its consideration upon the expiration of the time allowed for filing such *amicus curiae* briefs. If a brief in opposition is timely filed, the Clerk will distribute the petition, brief in opposition, and any reply brief to the Court for its consideration no less than 10 days after the brief in opposition is filed, except that if the brief in opposition is filed before the due date for *amicus curiae* briefs in support of the petition, and one or more entities submits written notification to the Clerk of its intent to file an *amicus curiae* brief within five days after the filing of the brief in opposition, the Clerk will distribute the petition, brief in opposition, and any reply brief to the Court for its consideration no less than 10 days after the due date for the filing of such *amicus curiae* briefs. If no waiver or brief in opposition is filed, the Clerk will distribute the petition to the Court upon the expiration of the time allowed for filing a brief in opposition.

10. Revised Rule 37.6: Disclosure requirements for *amicus* briefs.

The proposed revision to Rule 37.6—the addition of the requirement that *amicus* briefs disclose “whether [counsel for a party] or a party is a member of the *amicus curiae*, or made a monetary contribution to the preparation or submission of the [*amicus*] brief” —strikes us as highly problematic. For example, under this rule a potential *amicus* would be required to check its membership logs to determine whether any of the parties, or counsel for any of the parties, is a member—no easy task in many cases. (How many John Smiths belong to the ACLU?) Further, that information might have no bearing on a case, and might be highly personal; we can easily envision instances in which counsel for one party in a case might be a member of an *amicus* that filed on the other side of that same case. The proposal could easily discourage counsel, concerned about potential embarrassment to their clients, from joining or maintaining membership in organizations—to the detriment both of the counsel’s associational interests and of the work of associations. Furthermore, many organizations consider their membership records to be highly confidential.

A separate and more discrete problem we see under the proposed revision is that there is a latent ambiguity in the requirement that an *amicus* disclose whether a party (or counsel for a party) “made a monetary contribution to the preparation or submission of the brief”; although we doubt this is the intent of the proposed revision, argua-

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bly a party's general membership dues in an organization that submitted an *amicus* brief helps fund the preparation or submission of the brief.

Thus, we would propose reworking this revised rule as follows:

Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part **and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief**, and shall identify every person other than the *amicus curiae*, its members, or its counsel, who made **such** a monetary contribution. The disclosure shall be made in the first footnote on the first page of text.

We would also suggest that the Clerk's Comment be amended to add at the end the following sentence:

Such disclosure is limited to monetary contributions that are intended to fund the preparation or submission of the brief; general membership dues in an organization need not be disclosed.

In conclusion, we again thank the Court for its consideration of these comments.

Sincerely,



David M. Gossett

Signatories

The following people have asked to join these comments. Affiliations are included solely for identification purposes.

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May 14, 2007

Peter G. McCabe
Secretary, Committee Rules of Practice and Procedure
Administrative Office of the United States Courts
1 Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Amendment to Rule 16, Federal Rules of Criminal Procedure

Dear Mr. McCabe:

I write on behalf of Federal Public and Community Defenders to support the proposal to amend Rule 16, Fed. R. Crim. P. The proposal is modest and simply requires the government, upon request, to make available to the defense evidence that is exculpatory or impeaching. As the Committee Notes indicate, the proposal is founded on the principle of fundamental fairness and does little more than supplement what is ethically required of prosecutors. Because the proposal seemed uncontroversial, we did not comment when it was first published. The Advisory Committee for the Criminal Rules of Procedure recommended it be adopted. We understand that the Department of Justice (DOJ) hopes to persuade the Standing Committee to reject that recommendation. We believe the Standing Committee should support the proposed amendment.

We understand DOJ believes it is in the best position to monitor its *Brady* obligations and to that end has modified its manual to emphasize the importance of its obligation. This is not enough! The significance of a prosecutor's obligation to disclose exculpatory or impeaching information has been signaled by courts and commentators for decades. Nonetheless, Federal Reporters are pocked with examples of *Brady* violations, law review articles have been devoted to the problem and full chapters in treatises on prosecutorial misconduct detail the regularity and variety of *Brady* miscues. There is no reason to believe an amendment to DOJ's manual will heighten compliance with *Brady* obligations given the government's history of relentless non-compliance.

The frequency of *Brady* violations suggests that the problem is a product, in part, of prosecutorial indifference and even inability to grasp what exculpatory or impeaching evidence is. Judge Jon Newman's famous observations made before the Second Circuit Judicial Conference in 1967 illustrate this point. At the time he was a United States Attorney and he told the Conference:

I recently had occasion to discuss [*Brady*] at a PLI Conference in New York City before a large group of State prosecutors. . . . I put to them this case: you are prosecuting a bank robbery. You have talked to two or three of the tellers and one or two of the customers at the time of the robbery. They have all taken a look at your defendant in a lineup, and they have said, "This is the man." In the course of your investigation you also have found another customer who was in the bank that day, who viewed the suspect, and came back and said, "This is *not* the man."

The question I put to these prosecutors was, do you believe you should disclose to the defense the name of the witness who, when he viewed the suspect, said "That is not the man"? In a room of prosecutors not quite as large as this group but almost as large, only two hands went up. There were only two prosecutors in that group who felt that they should disclose or would disclose that information. Yet I was putting to them what I thought was the easiest case – the clearest case for disclosure of exculpatory information!¹

Judge Newman's observations were manifest in my district several years ago when the district court questioned a federal prosecutor's failure to provide to the defense the statement of a witness who said the defendant was not the perpetrator of the crime. The prosecutor explained that he did not believe the witness was telling the truth and if it wasn't the truth, then it wasn't exculpatory. This is how advocates think and why the court, not the government, should be in charge of monitoring and enforcing *Brady* obligations.

We have provided the Advisory Committee's Reporter with a number of examples of *Brady* violations that have resulted in sanctions. It is important to emphasize **and recognize** that sanctions occur infrequently but *Brady* violations occur often. Critics of *Brady* jurisprudence argue this disparity results from the judiciary's retrospective approach

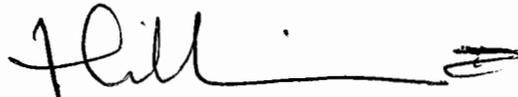
¹J. Newman, *A Panel Discussion Before the Judicial Conference of the Second Circuit* (September 8, 1967), reprinted in *Discovery in Criminal Cases*, 44 F.R.D. 481, 500-501 (1968); quoted in *United States v. Bagley*, 473 U.S. 667, 697 (1985) (Justice Marshall dissenting).

to deciding the materiality of nondisclosures.² Significantly, the proposed amendment to Rule 16 does not require that the exculpatory or impeaching information be “material.” The Committee Notes emphasize this point and its salutary purpose: prosecutors will be less likely to “play the odds” by withholding information felt to be of marginal value to the defense.³ The clearer the rule the more likely compliance.⁴

This proposal will not cure problems associated with *Brady* evidence. Anachronistic limitations on discovery in federal criminal cases have spawned a culture of non-disclosure. See, e.g., *United States v. Oxman*, 740 F.2d 1298, 1310 (3d Cir. 1984) (“[W]e are left with the nagging concern that material favorable to the defense may never emerge from secret government files.”), *vacated sub nom. United States v. Pflaumer*, 473 U.S. 922 (1985) (mem.). But the proposal can only assist in ameliorating the harm that is part and parcel of our controversial and archaic system of criminal discovery.

The proposal has no down side. It embraces the rule of law and the principle of fairness. Despite the government’s belief that it is in the best position to monitor compliance with *Brady*, the evidence overwhelmingly demonstrates otherwise. For these reasons, we urge the Standing Committee to accept the proposed amendment to Rule 16.

Very truly yours,



Thomas W. Hillier, II
Federal Public Defender

TWH/mp

²Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. Tex. L. Rev. 685, 690 (2006).

³*United States v. Bagley*, *supra* at 701 (Justice Marshall dissenting).

⁴Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, Wis. L. Rev. 399, 428-430 (2006).



Office of the Deputy Attorney General
Washington, D.C. 20530

June 5, 2007

The Honorable David F. Levi
Chair, Committee on Rules of
Practice and Procedure
United States District Court
for the Eastern District of California
United States Courthouse
501 I Street, 14th Floor
Sacramento, CA 95814

Dear Chief Judge Levi:

This letter sets out the Department's deep concerns with the Rule 16 proposal that will be considered by the Standing Committee next week. While the proposal suffers from a number of practical defects that this letter will address in significant detail, it is worth emphasizing certain broad points at the outset. The objective of the criminal justice system is to produce just results. This includes ensuring that the process we use does not result in the conviction of the innocent, and likewise ensuring that the guilty do not unjustifiably go free. It also includes an interest in ensuring that other participants in the process – i.e., victims, law enforcement officers, and other witnesses – are not unnecessarily subjected to physical harm, harassment, public embarrassment or other prejudice. Over the past several decades, a careful reconciliation of these interests, as they relate to disclosure of exculpatory and impeachment information, has been achieved through the interweaving of constitutional doctrine (i.e., Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972); Kyles v. Whitley, 514 U.S. 419, 439 (1995)), statutory directive (i.e., Jencks Act and Crime Victims' Rights Act), and Rules (i.e., Rule 16). The Advisory Committee on Criminal Rules, Practice and Procedure ("Advisory Committee") now proposes a dramatic reworking of that balancing, one the Committee itself recognizes will extend far-beyond current Brady and Rule 16 obligations and would be a significant change in the current adversary system. Given the breadth of this proposal, it would be reasonable to expect there to be a well-documented case that this proposal is necessary to solve a fundamental problem of regular false conviction of the innocent. That is not the case. Instead, what the Advisory Committee offers is reference to a relatively small number of Brady cases (which needs to be put in the context of the more than 70,000 federal defendants convicted each year) and the general supposition of "highly respected practitioners" that change is needed.

In the same way that there is an absence of a compelling justification for such a significant change, the Committee's report also ignores the very substantial costs additional

disclosure will impose – costs to the reputational and privacy interests of witnesses, costs in additional litigation, and, if witnesses become less willing to step forward, costs to society from the loss of the just conviction of the guilty. These are real costs and ones that both the Supreme Court and Congress have taken pains to avoid. The Committee offers the proposed rule and its rejection of a materiality requirement for the disclosure of exculpatory information despite the fact that the Supreme Court has observed that failure to limit the scope of Brady to material evidence “would entirely alter the character and balance of our present systems of criminal justice.” United States v. Bagley, 473 U.S. 667, 675 n.7 (1985) (quotation omitted). Similarly, the Bagley Court declared that a rule eliminating materiality “would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments.” Id. Fundamental changes of this magnitude, which contemplate a departure from over forty years of Supreme Court precedent as well as established statutes and procedural rules, should not be entered into without significant pause and a corresponding and well-documented need. Because no such need has been demonstrated, the proposal should not move forward.

It is not simply the lack of an empirical case for change which should give pause, but also the fact that the Department’s new modifications to the United States Attorney’s Manual, (“USAM”) which address many of the Advisory Committee’s concerns regarding the disclosure of exculpatory and impeachment information, have not yet been given an opportunity to take full effect. The Department released this new USAM provision only after giving extensive and serious consideration to the rule amendments circulating in the Committee. In fact, the provision represents an unprecedented effort on the part of the Department to collaborate with Rule 16 subcommittee members to address their concerns while still preserving the balanced discovery system sought by Congress.¹ The new USAM provision did not merely codify a prosecutor’s constitutional disclosure obligations under the pre-existing Supreme Court precedent but went further – by expanding the disclosure obligations both in substance and process.² This new

¹ As stated in the Committee’s report, the Committee “applauded” the Department’s efforts to create a new USAM policy that required broad disclosure. In fact, during the drafting process, the Department obtained the approval of Committee members with respect to the USAM’s coverage of exculpatory information. Although sections of the Committee’s report focus almost exclusively on exculpatory information (see “The need to address the issue in Rule 16” discussion in Committee report), it is the Department’s understanding that the Committee moved forward with the proposed amendment in large part because it disagreed with the USAM’s coverage of impeachment information.

² It deserves mention that violating the USAM has serious repercussions: an attorney can be investigated by the Office of Professional Responsibility (“OPR”), disciplined or dismissed from the Department, and reported to his or her licensing Bar. A review of OPR investigations closed on or after January 1, 2002, through the present revealed that seventy investigations led to a finding of misconduct and the Department taking disciplinary action based on the misconduct. In addition, there are an additional twenty-one investigations pending before the Department in

provision is still in its infancy – having only taken effect on October 19, 2006 – and has not yet been given an opportunity to prove its effectiveness.

These factors are not the sole reasons to counsel against approving the proposal. Indeed, there are numerous problems with the Advisory Committee’s proposed modification to Rule 16. They include:

- As noted above, the proposed amendment is inconsistent with forty years of Supreme Court precedent as it seeks to obliterate any materiality requirement for both the disclosure of exculpatory and impeachment material. As the Court stated in United States v. Agurs, 427 U.S. 97, 112 n. 20 (1976), any effort to focus the impact of government disclosures on “the defendant’s ability to prepare for trial” deviates from the holding of Brady, which addresses the Court’s “overriding concern” with the justice and accuracy of the finding of guilt. Id. at 112. In reaching these decisions, the Court has recognized that eliminating the materiality requirement would “impose an impossible burden on the prosecutor and undermine the interest in the finality of judgements.” Bagley, 473 U.S. at 675 n. 7.
- The proposed amendment clashes with other provisions of the Rules of Criminal Procedure, including other portions of *Rule 16 itself*. For example, the government’s disclosure obligations under both Rule 16(a)(1)(E) and 16(a)(1)(F) are triggered by items that are “material to preparing the defense.” Fed. R. Crim. P. 16(a)(1)(E)-(F). Likewise, Rules 16(a)(2) and 16(a)(3) leave the timing of the disclosure of non-expert witness statements to the provisions of the Jencks Act, as does Rule 26.2. The proposed amendment, however, does not even discuss how it should be reconciled with these provisions, passed by the Advisory Committee’s predecessors and codified by years of federal practice.
- The proposed amendment disregards the statutory requirements of the Jencks Act, 18 U.S.C. § 3500, which governs the disclosure of witness statements. This statute, which has been law for decades, represents the congressional balancing of the competing interests of witness security and privacy with the defendant’s interest in disclosure, and was intended to prevent defendants from rummaging through government files for helpful information. United States v. Palermo, 360 U.S. 353, 354 (1958). The proposed rule, however, utterly disregards that balance and consigns the statute, and the concomitant congressional balancing of interests contained in the Act, to a distant memory.
- The proposed amendment is inconsistent with discovery procedures which are

which OPR found misconduct and recommended disciplinary action.

applied every day in most of the federal courts in the United States where the materiality provisions of the Brady line of cases are applied routinely and effectively. Moreover, the Advisory Committee overstates the effect of local rules and practices in district courts across the country, a subject that augurs at a minimum for further study before enacting such a sweeping modification.

- There is no demonstrated need for such a significant change. The Advisory Committee relies principally on anecdotal evidence and the premise that, given the nature of the problem, the full scope of disclosure will never be known – an assertion that is virtually impossible for the government to refute. In contrast to the Advisory Committee’s position, our assessment of the Brady cases raised in the materials presented by the Committee³ suggests that on average there are less than two reported federal cases each year that find a Brady violation. This is hardly evidence of a substantial problem warranting such a fundamental change to existing practice.
- The proposal would sow confusion through the federal legal system by creating confusion in application, remedy and review. The rule contains little or no guidance on how it should be applied. For example, the Advisory Committee makes no effort to define “impeaching,” thus subjecting courts and practitioners to contend with multiple interpretations and leading to virtually unlimited disclosure obligations on the government to turn over innuendo, hearsay, and rumor, no matter how remote or speculative. Moreover, the proposal would create further confusion as to how courts should view violations that are disclosed before trial, after conviction, on appeal and on collateral review. For instance, the simple question of what is the proper remedy if a trial judge discovers before trial that a disclosure is incomplete remains unanswered. What if that discovery is made after the witness has testified? What if it occurs after a verdict? Should that verdict be set aside, or does a harmless error analysis apply? If so, what does that mean for the intended aim to dispense with a materiality requirement? What standard should be applied on appeal to allegations of a failure to comply with Rule 16? Does that change if the case is on collateral review? These questions – and many more – are left unanswered.
- The proposal risks treading on the current policy balance between disclosure and privacy interests and witness protection, while it also clashes with statutes, such as the Crime Victims’ Rights Act (“CVRA”) and federal and state rape shield laws, that are intended to safeguard the rights of crime victims. Congress enacted the CVRA, for example, to make crime victims full participants in the criminal justice

³ Our evaluation is based on the cases summarized in an excerpt from the Habeas Assistance Training Project.

system by providing them a procedural mechanism to enforce a number of rights and protections, including the right to have their privacy protected. Similarly, Congress has also made it a federal priority to help states combat child abuse and to promote the reporting and prosecution of rape and sexual assault through the enactment of rape shield laws and statutes protecting the confidentiality of child abuse investigative records. These statutes serve the compelling interest of protecting victims by making it easier for them to report such heinous crimes. The proposed rule, however, would require disclosure of such information regardless of its relevance, admissibility or materiality. Likewise, the new rule conflicts with state statutes, such those in California, that govern the disclosure of the personnel files of state and local law enforcement officials, as well as federal practices regarding the release of such information.

- The proposal disregards the legitimate interests of the federal government in protecting the safety and integrity of witnesses, many of whom are private citizens. The prospect of testifying in a federal criminal trial – regardless of the type of crime involved – can be frightening and intimidating, and it is difficult and challenging to secure the cooperation of the victims and witnesses of crime. It is a sad reality that many witnesses are threatened, harassed or, in some instances, assaulted or killed by those against whom they are asked to testify. The proposed rule, however, further threatens these witnesses by requiring the government to turn over all potential impeaching information, without limits to its admissibility, materiality or relevance, and then puts the burden upon the government to prove that witness safety is at risk – a burden that can be difficult to discharge before any harassment actually takes place. Thus, the proposed rule would ask victims and witnesses to shoulder an even heavier burden and would detract from effective law enforcement, all in the absence of a demonstrated need for such a radical change.

The Department of Justice strongly urges the Standing Committee to reject the Advisory Committee's proposal in its entirety as there is no justification for such a fundamental change to existing law. Should the Standing Committee decline to reject this proposal outright, the Department requests that it send the matter back to the Advisory Committee and direct it to study this issue further over several years. If, after a careful and studied review of the USAM's impact on the practice of discovery, the Advisory Committee determines that the USAM provision is not working, empirical evidence supports the need for a fundamental change, and a rule is required for achieving the desired results, then, and only then, the Standing Committee should ask the Advisory Committee to draft a new proposal – one that is consistent with existing law and Supreme Court precedent, properly balances the policy interests at stake, uses definitive and

precise language, answers the unanswered questions and addresses the concerns raised in this letter.⁴

I. The Proposal Upsets the Purpose, Operation, and Balance of the Current Law

A. The Proposal Is Inconsistent with Supreme Court Precedent

The rule announced in Brady is a constitutional right. Its purpose is to guarantee defendants the right to a fair trial and sentencing. It ensures that the factfinder can be made aware of any evidence that is exculpatory or impeaching and material to the factfinder's decision. Like many other constitutional guarantees under the Fourth, Fifth, and Sixth Amendments, it has never been codified. Like other constitutional protections, Brady provides no remedy unless the defendant shows that the Constitution has been violated. Unlike Rule 16, Brady's purpose is not to provide discovery – either for trial preparation or plea negotiations. Rule 16 serves that purpose and does so in a manner that is parallel and reciprocal for both parties. This distinction between Brady and Rule 16 discovery – reaffirmed in forty years of case law – is fundamental to the purpose and operation of the rules.

It is axiomatic that “[t]here is no general constitutional right to discovery in a criminal case.” Weatherford v. Bursey, 429 U.S. 545, 559 (1977). Nevertheless, the Supreme Court has held that the disclosure of certain information is necessary to protect a defendant's right to a fair trial under the Due Process Clause of the Fifth Amendment.

In Brady, the Court granted a criminal defendant a new sentencing hearing because the prosecutor had withheld evidence of a co-defendant's confession. The Court held that “suppression by the prosecution of evidence favorable to an accused upon request violates due

⁴ The procedural history begins in October 2003, when the American College of Trial Lawyers (“ACTL”) first submitted a proposal to the Judicial Conference's Advisory Committee on the Rules of Criminal Procedure (“Advisory Committee”) to codify and dramatically expand the Government's disclosure obligations as set forth in Brady and Giglio. The Advisory Committee formed an initial subcommittee to consider the proposal. After its May 2004 meeting, the Advisory Committee agreed to continue its study of the proposal and formed a second subcommittee. The Department of Justice expressed its opposition to the ACTL proposal in written and oral submissions to both subcommittees. Despite numerous conference calls, a series of opposition memoranda, and the government-initiated creation of a policy in the United States Attorneys' Manual (“USAM”) requiring disclosure beyond the constitutionally required minimum, the subcommittee, over the Department's objection, voted to submit a draft amendment of Rule 16 to the Advisory Committee which greatly expanded the Government's disclosure obligations. After a series of revisions, the Advisory Committee, in turn, now presents new draft amendment language along the same lines to the Standing Committee and requests that it be published for public comment.

process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” Brady, 373 U.S. at 87. The principle supporting that holding, the Court explained, is “avoidance of an unfair trial to the accused.” Id.

In Giglio, the Court extended Brady to impeachment evidence, holding that the prosecution violated due process when it failed to disclose that it had promised its key witness that he would not be prosecuted if he testified at the defendant’s trial. The Court reasoned that “[w]hen the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [the Brady] rule.” Giglio, 405 U.S. at 154 (citation and internal quotation marks omitted).

In subsequent cases, the Court has consistently limited Brady to the nondisclosure of exculpatory and impeachment information that results in the denial of a fair trial by undermining confidence in the reliability of the jury’s finding of guilt or of the resulting sentence. In United States v. Agurs, 427 U.S. 97 (1976), for instance, the Court emphasized as “a critical point” that “the prosecutor will not have violated his constitutional duty of disclosure [under Brady] unless his omission is of sufficient significance to result in the denial of the defendant’s right to a fair trial.” Id. at 108. The Court further explained that, because “[t]he proper standard of materiality must reflect *our overriding concern with the justice of the finding of guilt*,” a prosecutor’s failure to disclose exculpatory evidence violates the Constitution only “if the omitted evidence creates a reasonable doubt that did not otherwise exist.” Id. at 112 (emphasis added). Notably, the Court rejected as inconsistent with Brady a standard that would instead “focus on the impact of the undisclosed evidence on the defendant’s ability to prepare for trial.” Id. at 112 n.20.

Similarly, in Bagley, the Court considered and rejected the expansion of Brady to reach nonmaterial, inadmissible information. The Court explained that the purpose of the Brady rule “is not to displace the adversary system . . . but to ensure that a miscarriage of justice does not occur.” Bagley, 473 U.S. at 675. For that reason, “the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.” Id. (footnote omitted). The Court explained that failure to limit the scope of Brady to evidence that is material “would entirely alter the character and balance of our present system of criminal justice.” Id. at 675 n.7 (quotation omitted). Such a rule “would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments.” Id. The Court then reiterated that “[c]onsistent with our overriding concern with the justice of the finding of guilt, a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.” Id. at 678 (citation and internal quotation marks omitted).

Subsequently, in Kyles, the Court explained that “the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense.” 514 U.S. at 436-37 (citing Bagley, 473 U.S. at 675 n.7). A constitutional violation

occurs only “when the government’s evidentiary suppression undermines confidence in the outcome of the trial.” *Id.* at 434 (citation and internal quotation marks omitted). And in *Strickler v. Greene*, 527 U.S. 263, 281 (1999), the Court observed that, while the phrase “‘Brady violation’ is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence . . . there is never a real ‘Brady violation’ unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.” *Id.* (footnote omitted).

In contrast with this established precedent, the Committee’s proposal requires disclosure of “all information . . . that is either exculpatory or impeaching,” without regard to whether its suppression would deprive the defendant of the benefit of a fair trial. The proposal intentionally eviscerates Brady’s “materiality” requirement and transforms Brady – which is intended to protect the fairness of trial and to guard against the risk that an innocent person might be found guilty because the government withheld evidence – into a trial preparation right by providing the defense with what inevitably will be, under the proposed rule, open file discovery. The Supreme Court has rejected earlier calls for expanding Brady in this manner, *see Agurs*, 427 U.S. at 112 n. 20; *Weatherford*, 429 U.S. at 557, and so should the Standing Committee.

As the case law uniformly recognizes, the purpose of the Supreme Court’s Brady line of cases is to protect the fairness of criminal trials, not to provide defendants with an additional discovery tool for assisting in trial preparation. Rule 16 – *which already overlaps with Brady in areas other than witness statements* – serves this latter purpose. As the Court explained, any broader right – such as the one currently proposed – would fundamentally alter the character and balance of our present systems of criminal justice. *Bagley*, 473 U.S. at 675 n.7 (quotation omitted).

B. The Proposal Is Inconsistent with Rule 16

The concept of materiality is a fundamental part of Rule 16 which governs discovery and inspection of evidence in federal criminal cases. The Notes of the Advisory Committee to the 1974 Amendments expressly state that in revising Rule 16 “to give greater discovery to both the prosecution and the defense,” the Committee had “decided not to codify the Brady Rule.” Fed. R. Crim. P. 16 advisory committee’s note. The Committee noted, however, that “the requirement that the government disclose documents and tangible objects ‘*material* to the preparation of his defense’ underscores the importance of disclosure of evidence favorable to the defendant.” *Id.*

The elimination of the materiality requirement is contrary to the Committee’s existing discovery policy, the tenants of the other provisions of Rule 16, and the discovery practice occurring every day in courts throughout the country. For example, current Rule 16(a)(1)(E) requires disclosure of books, papers, documents, data, etc. if “the item is *material* to preparing the defense.” Fed. R. Crim. P. 16(a)(1)(E)(I) (emphasis added). Similarly, Rule 16(a)(1)(F) requires disclosure of reports of scientific tests or experiments if “the item is *material* to

preparing the defense” Fed. R. Crim. P. 16(a)(1)(F)(iii) (emphasis added). The proposed rule ignores the fact that Rule 16 already provides for significant discovery. It ignores the fact that Rule 16 already overlaps with Brady by requiring the Government to disclose documents, objects, and reports that are “material to preparing the defense.” Fed. R. Crim. P. 16(a)(1)(E)(I). It ignores the fact that the Committee recognized this overlap and intentionally decided not to go further. Fed. R. Crim. P. 16 advisory committee’s notes. It ignores the fact that Rule 16 explicitly *excludes* non-expert witness statements from its scope – a protection granted to both parties – and, instead, recognizes that their disclosure and the timing of their disclosure is entrusted to the Jencks Act. See Fed. R. Crim. P. 16(a)(2)-(3) (reaffirming that the Jencks Act is the exclusive means for compelling the disclosure of statements of government witnesses for impeachment purposes). It ignores the policy underlying these rules – the unfortunate but real world fact that the premature disclosure of witness statements increases the risk of witness intimidation and creates opportunity for the opposing party to script the testimony of their witnesses in response – all of which taints the integrity of the trial itself.

The notion, suggested in Committee meetings and materials and by the ACTL in its original submission to the Committee, that the materiality requirement of Brady and Giglio is appropriate only in the context of appellate review or “cannot realistically be applied by a trial court facing a pre-trial discovery request” is simply false. The plain language of Rule 16, coupled with existing policy and practice demonstrates that not only is it possible to assess materiality accurately before trial but it is in fact done on a daily basis and has been codified in the current rules. The Committee’s report also incorrectly suggests that the decision not to require disclosure of exculpatory evidence within Rule 16 creates an “anomaly” within the Rules of Criminal Procedure. It is the proposal that would create an anomaly within the rules because it threatens to change Rule 16’s status as a limited rule requiring disclosure of material evidence and aims to drastically alter the provisions so that the government is effectively turned into an investigative agent for the defense.

C. The Proposal Is Inconsistent with the Jencks Act and Rule 26.2

The Jencks Act and Federal Rule of Criminal Procedure 26.2⁵ control the disclosure of non-expert witness statements and reports. The Jencks Act provides:

After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United

⁵ Rule 26.2 was drafted to include the substance of the Jencks Act within the Criminal Rules. This Rule applies equally to the prosecution and defense as it allows either party to move for the production of any statement of a witness, other than the defendant, who has testified, that is in the possession of the non-moving party and that relates to the subject matter of the witness’s testimony. Fed. R. Crim. P. 26.2.

States which relates to the subject matter as to which the witness has testified.

18 U.S.C. § 3500(b). The Jencks Act balances the importance of disclosure in contributing to accurate determinations regarding guilt and punishment against the costs of offering open access to defendants of the government's investigative files. Compare Goldberg v. United States, 425 U.S. 94, 104 (1976) (noting that “[t]he House committee expressed its goal as that of preventing defendants from ‘rummag[ing] through confidential information containing matters of public interest, safety, welfare, and national security.’”) (quoting H.R. Rep. No. 700, at 4), with id. at 107 (describing the Jencks Act as “‘designed to further the fair and just administration of criminal justice’” by requiring disclosure of certain witness statements) (quoting Campbell v. United States, 365 U.S. 85, 92 (1961)). The Act and the procedural rule designed to implement it achieve this balance by requiring the disclosure of only those witness statements that fall within their relatively narrow definition and only after the witness testifies.

In a Supreme Court case decided shortly after the enactment of the Jencks Act, the Court stated: “The Act’s major concern is with *limiting and regulating defense access to government papers*, and it is designed to deny such access to those statements which do not satisfy [the definition of statement], or do not relate to the subject matter of the witness’ testimony.” Palermo v. United States, 360 U.S. 343, 354 (1959) (emphasis added). In keeping with these concerns, the Palermo Court described how certain materials if disclosed as impeachment information would defeat the purpose of the Act:

One of the most important motive forces behind the enactment of this legislation was the fear that an expansive reading of Jencks would compel the indiscriminating production of agent’s summaries or interviews . . . [It would be] grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness’ own rather than the product of the investigator’s selections, interpretations, and interpolations.

Id. at 350.

The Committee’s proposal is inconsistent with the stated purpose of the Jencks Act – limiting and regulating defense access to government papers – in that its enactment essentially mandates disclosure akin to open file discovery. Requiring disclosure of all impeachment information, without regard to its evidentiary value or significance, is so sweeping that prosecutors will have little choice but to provide open file discovery. See infra pp. 15-16 (discussion of breadth of rule). The proposal also threatens to disrupt the delicate balance of interests achieved in the Act – the defendant’s right to disclosure versus the government’s interest in protecting against unfettered access to government files. In addition, the proposal contradicts the Court’s reasoning in Palermo – to protect witnesses from improper impeachment. Moreover, the Committee’s proposal contains no mention of Rule 26.2, which contains the current procedures for witness statement disclosures. Thus, the proposal creates yet another

inconsistency within the Rules without any attempt to reconcile these provisions.

Moreover, Congress recognized the risks and difficulties involved in testifying against a criminal defendant when it adopted the policy embodied in the Jencks Act that as a matter of law protects government witnesses, their identities, and their statements until they testify. This protection against premature disclosure of identifying information exists without the government carrying any additional burden of proving that the safety of a witness is endangered. The Committee's proposal would reverse that policy and expand the government's obligation to disclose information to a defendant to such a degree that the identity of government witnesses would have to be disclosed weeks before trial is scheduled to begin and potentially months before the witness testifies unless a court concludes that the prosecutor has met her burden to show that safety concerns exist. This would, without question, put witnesses and their families at greater risk – in direct contravention of the stated policy objective of the Jencks Act.

D. The Proposal Is Inconsistent with Criminal Discovery Practices in Most Federal Courts

In July 2004, the Advisory Committee requested that the Federal Judicial Center (“FJC”) study and report on the local rules of the U.S. district courts, state laws, and state court rules that address the disclosure principles contained in Brady. What the FJC report⁶ revealed was that most federal districts did not codify any aspect of Brady in local rules, orders, or even in customary procedures before the court. Nevertheless, the Advisory Committee points to the existence of some local rules, orders, and procedures to augment its argument for an amendment to Rule 16. According to the Committee, the local rules that govern Brady disclosures vary widely from one district to another; thus, the Committee argues, the proposed changes to Rule 16 will create consistent prosecutorial obligations throughout the federal system.

What the Committee fails to recognize is that while some⁷ district courts have adopted local rules or some other prevailing standard to address Brady disclosures, none of those local

⁶ This report is titled, “Treatment of Brady v. Maryland Material in United States District and State Courts Rules, Orders and Policies.” Although the Advisory Committee notes that FJC will release an updated report in 2007, at the time of writing this letter we had available to us only the 2004 FJC report and 2005 supplement data.

⁷ The FJC Report notes that thirty, or approximately one-third, of the ninety-four district courts have some form of a local rule, order or procedure addressing the disclosure of Brady material. In a memorandum from John K. Rabiej to the Brady subcommittee containing supplemental data to the FJC Report, the District of the Northern Mariana Islands is cited as another example of a district court with a local rule addressing Brady obligations. Memorandum from the Rules Comm. Support Office of the Admin. Office of the U.S. Courts to the Brady Subcomm. 1 (Mar. 2, 2005).

rules accomplish this task with the breadth that the proposed revisions to Rule 16 seek to implement. The three orders⁸ that require disclosure, “without regard to materiality,” of all evidence “within the scope of Brady” have separate provisions for disclosure of Giglio information⁹ that do not expressly waive the materiality requirement. None of the other local rules come even remotely close to the proposed amendment’s breadth. Thus, with respect to exculpatory evidence, the proposed rule, which does away with the materiality requirement, is broader than local rules or orders in 97% (91 out of 94) of federal districts; and with respect to impeachment evidence, the proposed rule is broader than any of the local rules or orders in all 94 federal districts.

In addition, the Committee appears to overstate the impact of the local rules, orders, and procedures that currently are in effect. First, the report examined any rule or order addressing the disclosure of favorable evidence. Many of these orders appear to apply only to the practice before a particular magistrate or judge, and thus, do not have the force and effect of a local rule applying to all of the criminal cases in a district.¹⁰ Second, many of the orders refer to disclosure of “Brady” information, which necessarily includes a materiality requirement unless it states otherwise.¹¹ Others contain express language indicating that the evidence must be material.¹²

⁸ These orders include: M.D. Ala., S.D. Ala., and N.D. Fla.

⁹ For instance, the local rules for the Southern District of Alabama provide for the disclosure of Giglio material defined as “[t]he existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective witnesses, within the scope of United States v. Giglio.” S.D. Ala. R. 16.13(b)(1)(c). The Middle District of Alabama has a standing order on criminal discovery with identical language, which can be found at: <http://www.almd.uscourts.gov/Web%20Orders%20&%20Info/Criminal%20Discovery%20General%20Order.htm> (last visited Feb. 23, 2007). The Northern District of Florida employs the same language in its Rule 26.3(D)(2). N.D. Fla. R. 26.3(D)(2) (West 2004).

¹⁰ For example, the report lists: D. Idaho, Magistrate Procedural Order; E.D. Tenn., Magistrate Criminal Scheduling Order; W.D. Mo., Magistrate Judge Procedural Order; N.D. Ga., Magistrate Judge Order; M.D. Ga., Standard Pretrial Order; W.D. Ky., Magistrate Arraignment Order; D. Nev., Joint Discovery Statement; S.D. W. Va., Arraignment Order and Standard Discovery Request. The District of Nevada’s Joint Discovery Statement is only customary, however, and not required of the parties.

¹¹ These orders include: D. Neb., W.D. Mo., E.D. Tenn., W.D. Tex., M.D. Ga., N.D. Ga., S.D. Fla., D. Conn., D. Vt., N.D. W. Va., M.D. Tenn., D. N.M., N.D. N.Y., and W.D. Okla.

¹² D. Nev., Joint Discovery Statement (“suppression by the prosecution of evidence favorable to an accused, . . . violates due process where the evidence is *material* either to guilt or punishment.”); D. Idaho Procedural Order (“[d]isclose all *material* evidence within the scope of

While there may be a legitimate reason to regularize the practice of how the government handles disclosures of impeaching and exculpatory information, the proposed revisions to Rule 16 do not offer a workable solution. In essence, the Committee wants a prosecutor to disclose any impeachment material regardless of materiality – a standard vastly different from each district that has addressed the Brady disclosure requirements within its local rules.

Moreover, while the FJC studied and reported on which federal district and state courts adopted formal rules or standards for guiding prosecutors' disclosure obligations under Brady, the FJC report did not assess local compliance with or the success of these rules or the consequences for violating them. Before the Standing Committee publishes for public comment a rule that is broader than any of the local rules and threatens to disrupt the adversarial balance in the federal criminal justice system, it should ask the Advisory Committee to conduct thorough research on the effectiveness of these local rules in practice.

E. The Proposal Is Unnecessary

The proposed amendment would not only be a fundamental deviation from current law, precedent and practice, but it is also entirely unnecessary. The Supreme Court has issued a series of rulings over the four decades since Brady was decided that clearly define the scope of the Brady rule. Accordingly, no further clarification or codification of those responsibilities is warranted.

Moreover, contrary to the Committee's position, there is no demonstrated need to change the rules. The Committee cites anecdotal evidence from the ACTL and the College's Federal Criminal Procedure Committee to suggest that the lack of guidance to prosecutors in the form of a rule results in the improper restriction of or outright refusal to disclose exculpatory information. In addition, the Committee points to cases summarized in its materials where Brady evidence was not disclosed as evidence of a significant problem. The Committee cites this small number of federal cases as proof that a substantial problem exists and then, presumably recognizing the weakness of the empirical support for its argument, suggests that "a true measure of the scope of the problem" cannot be known because "[t]he defense is, by definition, unaware of exculpatory information that has not been provided by the government." (See "The need to address the issue in Rule 16" discussion in Committee's report).

In essence, the Committee's position is that there is no possible way to measure the scope of the problem and thus there is no possible way to know whether anything other than its proposed rule is sufficient to remedy the problem. This puts the Government in the impossible position of trying to argue against an irrefutable point because if there is no possible way to know

Brady . . .); W.D. Wash. ("provide . . . evidence favorable to the defendant and *material* to the defendant's guilt or punishment."); and D. N.H. ("[t]he government shall disclose any evidence *material* to issues of guilt or punishment . . .").

whether sufficient cause exists for the dramatic remedy suggested by the Committee's proposed rule amendment, then there is equally no way to argue against the Committee's declaration.

Fortunately, there is hard data, and it does not mesh with the Committee's account of Brady violations in the federal criminal justice system. The government has studied and evaluated the list of cases set forth in the Habeas Assistance Training Project's "Successful Cases Under *Brady v. Maryland*" (circulated by the Advisory Committee) and determined that it does not demonstrate a need to change the federal rules. The majority of these cases are based upon state prosecutions.¹³ Specifically, 58 of the 106 cases listed under the Court of Appeals section are based upon state prosecutions that do not provide a basis for a change to the federal rules. The remaining 48 cases are federal prosecutions which span 40 years – an average of less than two cases per year. Even recognizing that this list is not comprehensive, it is hardly overwhelming. If there were a systemic Brady problem in the federal system, one would expect the list to include many more cases.

Further the majority of the cases listed involve impeachment Brady evidence, rather than exculpatory Brady evidence. Most impeachment information is covered by the Jencks Act. As with all witness statements, the proposal requiring the disclosure of this information "[no] earlier than 14 days before trial" directly conflicts with the Jencks Act. And it does so without any reason to believe that it would solve the "problem" it claims to address.

There is also no reason to believe that the proposal will be a more effective rule than the combined force of Brady and the Jencks Act – which already requires material impeachment and exculpatory evidence to be disclosed, just later. The errors described in the cases are regretful, however it is not at all clear that they would have been less likely to occur under the proposal. In short, the best way to address Brady error is to reverse any conviction tainted by it and to grant a new trial. The Constitution already provides this remedy and proposed amendment to Rule 16 cannot improve upon it.

II. The Proposed Rule Would Create Confusion

A. Widely Broad and Undefined Language Creates Confusion for Application and Will Lead to Open File Discovery

The proposed rule states that: "Upon a defendant's request, the government must make

¹³ Considering that this proposed rule of federal procedure would only have effect in the federal system, the extent of a problem with state prosecutors' failure to disclose exculpatory information is irrelevant. Moreover, as the Committee notes in its report, while most states have statutes and rules governing disclosure, the states nonetheless appear to shoulder the vast majority of violations.

available *all information*¹⁴ that is known to the attorney for the government . . . that is either exculpatory or *impeaching*” (emphasis added). The proposed committee notes make clear that disclosure is not limited to “material” information, but rather prosecutors must disclose “*all* exculpatory or impeaching information.” The sweeping language contained in the proposed rule is designed to eliminate any prosecutorial decision-making in the disclosure of evidence. It is the Departments’s firm belief that some prosecutorial filtering is not only necessary in the pursuit of justice, but also consistent with volumes of history and precedent supporting the proposition that prosecutors are in the proper position to make these evaluations of materiality. See Fed. R. Crim. P. 16(a)(1)(E)-(F) (entrusting prosecutors to disclose certain documents, papers, books, scientific reports or tests when the item is “material to preparing the defense”); Kyles, 514 U.S. at 439 (noting that the prosecutor at “some point [has] to determine when [he/she] must act” by making “judgment calls about what would count as favorable evidence” in light of the “existing or potential evidentiary record”); United States v. Causey, 356 F. Supp. 2d 681, 689-90 (S.D. Tex. 2005) (“[P]rosecutor is duty bound to become informed about available information and to evaluate the cumulative effect of all the evidence withheld from the defendants.”); see also Strickler 527 U.S. at 283 n.23 (noting that the defense counsel may “reasonably rely” on the prosecutor’s representation that disclosure included all relevant exculpatory materials); United States v. Evanchik, 413 F.2d 950, 953 (2d Cir. 1969) (“[T]he assurance by the government that it has in its possession no undisclosed evidence that would tend to exculpate defendant justifies denial of a motion for inspection that does not make some particularized showing of materiality and usefulness.”).

Also notably absent from the proposed rule and committee notes is any attempt to define the term “impeaching.”¹⁵ The problem with the expansive language chosen by the Committee is that it is subject to multiple interpretations and is broad enough to encompass virtually any information that might be used to challenge a witness’ testimony. Without substantial guidance on what information is considered “impeaching,” a prosecutor’s disclosure obligations will have no bounds.

A review of how federal courts have defined impeachment makes clear that in the absence of a precise or narrowed definition, the proposed language will generate confusion, inconsistency, and limitless disclosure. In federal courts, impeachment has been defined as that which contradicts, see Klonski v. Mahlab, 156 F.3d 255, 270 (1st Cir. 1998), attacks a witness’

¹⁴ The Rules Committee voted 7-4 in favor of stating the rule in terms of “information” rather than “evidence.” The Department of Justice and some members of the subcommittee continue to favor the term “evidence” in the rule and the committee note.

¹⁵ The Committee report expressly states that it has made no attempt in the rule or committee notes to define the term “impeachment.” (See “Scope of required disclosure” discussion in Committee Report).

credibility, see United States v. Conroy, 424 F.3d 833, 837 (8th Cir. 2005), reveals the bias or interest of a witness, see Berry v. Oswald, 143 F.3d 1127, 1132 (8th Cir. 1998), and provides a reason to disbelieve all or some of a witness' testimony, see United States v. Leary, 378 F. Supp. 2d 482, 491 (D. Del. 2005). Black's Law Dictionary defines "impeachment of [a] witness" as the calling into "question the veracity of a witness . . . or the adducing of proof that a witness is unworthy of belief." See Black's Law Dictionary 753 (6th ed. 1990). In the absence of additional guidance, prosecutors considering these varied definitions of impeachment will feel compelled to disclose anything that casts any doubt on anything that any witness has to say.¹⁶ Essentially, the rule requires limitless, open-file disclosure, including a prosecutor's own thoughts about a witness as explained in a prosecution memo or email.

The rule would require the government to disclose not only evidence but all hearsay, innuendo, and rumor no matter how remote or speculative. As the proposed committee note indicates, "[t]he rule contains no requirement that the information be 'material' to guilt . . . [but rather] requires prosecutors to disclose to the defense all exculpatory or impeaching information . . . without further speculation as to whether this information will ultimately be material to guilt." While the Supreme Court has held that information that would not be admissible at trial is not covered by the requirements of Brady and need not be disclosed unless it would lead to the discovery of admissible evidence, Wood v. Bartholomew, 516 U.S. 1, 5-6 (1995) (per curiam) (noting that the state was not required by Giglio to disclose to defendant inadmissible polygraph evidence concerning a key prosecution witness), the proposed rule eliminates this consideration.

Without a well-defined materiality requirement limiting the required disclosure, prosecutors will be compelled to provide the defense with their entire investigative file for fear that a conviction would be reversed if immaterial impeachment information goes undisclosed. Instead of assuming this risk, prosecutors will operate as they almost always do – erring on the side of disclosure – and will quickly learn that the only way to ensure compliance with the proposed rule is to turn everything over. The proposed rule, therefore, essentially codifies the fishing expedition that courts consistently have warned against. See generally Bowman Dairy Co. v. United States, 341 U.S. 214, 221 (1951) (invalidating a "catch-all provision" in defendant's Rule 17 subpoena on the basis that it was "not intended to produce evidentiary materials" but instead was "merely a fishing expedition"); United States v. Cuthbertson, 630 F.2d 139, 144 (3d Cir. 1980) (citation omitted) (stating that under Rule 17 "[t]he test for enforcement is whether the [Rule 17] subpoena constitutes a good faith effort to obtain identified evidence rather than a general 'fishing expedition' that attempts to use the rule as a discovery device") (citations omitted); United States v. White, 450 F.2d 264, 268 (5th Cir. 1971) (noting

¹⁶ For instance, under the current Giglio rubric, prosecutors need not turn over impeachment information for unimportant government witnesses when their "reliability . . . [is not] determinative of guilt or innocence." 405 U.S. at 154. Under the proposed rule, this all changes as prosecutors will now need to disclose *any* impeaching information regardless of its insignificance. A failure to do so may result in a new trial.

that while Rule 16 does not require the defendant to designate the materials sought, “it would seem that the defendant should not be allowed to conduct a fishing expedition”); United States v. Sermon, 218 F. Supp. 871, 872-73 (D. Mo. 1963) (stating that although fishing expeditions are the standard in a civil action, they are not allowed in criminal actions where only limited discovery is permissible).

The breadth of the proposed rule will also raise national security and foreign policy concerns in some cases. This can be demonstrated by considering a prosecution of an alleged terrorist suspect. The government may have cooperating witnesses that apply to the particular prosecution and also to ongoing intelligence gathering. Moreover, multiple foreign law enforcement agencies may be involved in the investigation of the case. Under the proposed rule, the government may have to disclose the identities of all the cooperating witnesses and foreign witnesses interviewed by foreign law enforcement agencies, even if the government ultimately makes the decision not to use the testimony at trial for national security, foreign relations, or other reasons. Under the proposed rule, the government may have to disclose information on these witnesses from any foreign law enforcement source regardless of whether the information is material to preparing the defense. It is evident from this one example that the government’s attempt to meet this increased burden would implicate serious national security and foreign policy concerns, a topic about which the Committee’s proposal says virtually nothing.

B. Disparity and Confusion for Review and Remedy

The proposed rule creates confusion for both trial and appellate courts in determining the proper standard on review and the appropriate remedy for violations. This confusion occurs regardless of when, in the course of the proceedings, a prosecutor’s failure to disclose impeachment material manifests itself. The questions raised by the proposal encompass every stage of the judicial proceedings. For instance, if in the middle of trial, the trial judge determines that impeachment material was withheld for a witness that already testified, what is the proper remedy? Should the trial judge recall the witness to afford the defendant an opportunity to use the impeachment material? Or should the trial judge assess whether the withholding of the impeachment material was harmless error? If so, how is the harmless error analysis different than a review for materiality? What if the withheld impeachment material was discovered after a jury reached a guilty verdict but before sentencing? Should the unanimous verdict of twelve jurors be overturned even when the impeachment information was not material? What if the rules violation is first discovered when the case is on direct appeal or on a petition for habeas review – what is the proper standard to apply then?

Under the proposal, additional questions surface when evaluating the importance of the withheld information with respect to the proper remedy. Would a new trial be required when the testimony of a witness, who would have been impeached but for the prosecutor’s failure to disclose impeaching information, was corroborated by additional testimony? What if the

suppressed impeachment evidence merely furnished an additional basis on which to impeach a witness whose credibility was already greatly diminished on cross examination? In the case of a rules violation, when, if ever, is the materiality of the undisclosed information relevant?

1. Harmless Error Under Rule 52 Versus Review for Materiality¹⁷ on Direct Appeal

The proposed rule creates confusion (not to mention, disparity) in the way government suppression of impeachment information will be reviewed on direct appeal. The standard of review for appeals raising Brady violations – materiality review – is not the same as the standard contained in Rule 52 applicable to rules violations, which is harmless error review.

Different standards of appellate review apply to Brady claims and claims under Rule 16. Courts of appeals generally review Brady claims de novo. See, e.g., United States v. Blanco, 392 F.3d 382, 387 (9th Cir. 2004); United States v. Wooten, 377 F.3d 1134, 1141-42 (10th Cir. 2004); United States v. Tarwater, 308 F.3d 494, 515 (6th Cir. 2002); United States v. Kates, 174 F.3d 580, 583 (5th Cir. 1999) (per curiam).¹⁸ However, courts of appeals review Rule 16 decisions for abuse of discretion. United States v. Lanoue, 71 F.3d 966, 973 (1st Cir. 1995) (noting that under Rule 16, defendant must show that the trial court abused its discretion), abrogated on other grounds by United States v. Watts, 519 U.S. 148 (1997); accord, e.g., United States v. Duvall, 272 F.3d 825, 828 (7th Cir. 2001); United States v. Clark, 957 F.2d 248, 251 (6th Cir. 1992).

Under Brady, due process is violated if the *defendant* can meet his burden to show that the government suppressed “material” favorable evidence. “[T]he materiality standard for Brady claims is met when ‘the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.’” Banks v. Dretke, 540 U.S. 668, 698 (2004) (citation omitted). That is, the defendant must demonstrate a reasonable probability that had the information been properly disclosed, the result of the proceeding would have been different. Kyles, 514 U.S. at 433-34; see also United States v. Payne, 63 F.3d 1200, 1209 (2d Cir. 1995) (“[T]he defendant is required to show more than just that the error was not harmless

¹⁷ The Committee prepared and presented research on the different standards of review used to assess Brady violations and rules violations on direct appeal.

¹⁸ Some circuits review motions for new trial, including those raising Brady claims, for an abuse of discretion. See, e.g., United States v. Garcia-Torres, 341 F.3d 61, 70 (1st Cir. 2003); United States v. Chorin, 322 F.3d 274, 277, 282 (3d Cir. 2003); United States v. Gary, 341 F.3d 829, 832 (8th Cir. 2003); United States v. Gil, 297 F.3d 93, 101 (2d Cir. 2002); United States v. Bender, 290 F.3d 1279, 1284 (11th Cir. 2002); United States v. Ross, 245 F.3d 577, 584 (6th Cir. 2001); United States v. Wilson, 237 F.3d 827, 831-32 (7th Cir. 2001).

beyond a reasonable doubt.”). Once the defendant meets his burden of showing that a due process violation has occurred, reversal is appropriate and there is no further harmless error analysis. Kyles, 514 U.S. at 435 (“[O]nce a reviewing court * * * has found constitutional error [under the materiality standard] there is no need for further harmless-error review.”).

In contrast to the well-established standard of review for Brady claims, Federal Rule of Criminal Procedure 52(a) provides for harmless error review for a properly preserved claim of a rules violation and plain error review for those that are not.¹⁹ Fed. R. Crim. P. 52(a). For properly preserved claims, after the defendant establishes that a rules violation occurred, the *government* bears the burden of proving that the error was harmless – that is, that any error did not affect the defendant’s substantial rights.²⁰ See United States v. Vonn, 535 U.S. 55, 62 (2002). Reversal is not required where the Government meets this burden. United States v. Phillip, 948 F.2d 241, 250 (6th Cir. 1991). Moreover, because Rule 16 error is non-constitutional, the government only has to prove that a Rule 16 violation is harmless by a preponderance of the evidence. United States v. Hicks, 103 F.3d 837, 842 (9th Cir. 1996).²¹

¹⁹ Claims of rules violations that are not properly preserved in the trial court are reviewed on appeal for plain error. Fed. R. Crim. P. 52(b). When rules violations are reviewed for plain error, the *defendant* carries the burden of establishing that the error affected his substantial rights. United States v. Vonn, 535 U.S. 55, 62-63 (2002) (citations omitted) (“[T]he defendant who sat silent at his trial has the burden to show that his ‘substantial rights’ were affected.”); United States v. Olano, 507 U.S. 725, 733 (1993). Moreover, because relief on plain error review is discretionary, the defendant bears the additional burden of convincing the court that the error “seriously affected the fairness, integrity or public reputation of judicial proceedings.” Vonn, 535 U.S. at 63 (quotation marks, brackets, and citations omitted).

²⁰ With respect to whether the proposed rule would alter the standard of review, the Committee admitted in its report that there is “sufficient variation in law at the circuit level that the picture is not entirely clear.” In fact, the report continues stating that “[m]any circuit decisions . . . hold that the defendant seeking relief on appeal from a discovery violation must always show prejudice.” (See “Effect on appellate review and collateral attack” discussion in Committee report). Thus, for the defendants in those circuits, a prosecutor’s violation of the proposed rule requiring disclosure will require the defendant to meet the same burden of proof as a Brady violation.

²¹ If the defendant failed to object in the district court to the suppression of evidence, the analysis on appeal will be the same under Brady and Rule 16. In this instance, the defendant must prove that there was plain error under Federal Rule of Criminal Procedure 52(b). Rule 52(b) requires defendants to show that the error was plain, that it “affected the defendant’s substantial rights,” and that it “seriously affected the fairness, integrity or public reputation of [judicial proceedings].” Compare United States v. Quiroz, 374 F.3d 682, 684 (8th Cir. 2004) (Brady claim); United States v. Crayton, 357 F.3d 560, 569 (6th Cir. 2004) (same); and United

Assuming, then, that the government suppressed impeachment information and that the defendant properly raised the issue before the district court, the question raised by the proposal is whether a failure to disclose impeachment information would be reviewed on appeal for harmless error under Rule 52 or whether it would be reviewed for materiality using a Brady analysis. Take for instance, the government's failure to disclose portions of a prosecution memorandum that contain initial skepticism about a key government witness' credibility – how should an appellate court evaluate a properly preserved claim that the prosecutor failed to disclose this impeachment information? Should the burden rest with the defendant to show that the information regarding the witness' credibility was material or should it rest with government to show that any resulting prejudice was more probably than not harmless? Notwithstanding the different language used in these different standards, it is hard to fathom an occasion where failure to disclose nonmaterial impeaching information would be grounds for reversal under the harmless error standard. What if the withheld impeachment information was that a key prosecution witness in a domestic violence case received anger-management counseling ten years earlier? Would an appellate court ever have the occasion to reverse a case such as this where the information withheld was not material? When, if ever, would the withholding of nonmaterial impeaching information affect a defendant's substantial rights? The rule fails to address these questions and raises the specter of a risk of creating substantial confusion in district and appellate courts.

2. Questions for Collateral Review

The harmless error standard used for determining whether a petitioner is entitled to habeas corpus relief is whether the trial error “had substantial and injurious effect or influence in determining the jury’s verdict.” Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (quotation omitted). The Supreme Court has defined trial errors as constitutional violations that “occur[] during presentation of the case to the jury” and are amenable to harmless error analysis because they “may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial.]” Arizona v. Fulminante, 499 U.S. 279, 307-08 (1991).

As an initial matter, rule violations generally cannot be the basis for habeas relief because they are not constitutional violations.²² While this is generally the case, the Committee fails to

States v. Vinyard, 266 F.3d 320, 331 (4th Cir. 2001) (same), with United States v. Navarro, 90 F.3d 1245, 1259 (7th Cir. 1996) (Rule 16).

²² The Committee initially argued that changes to Rule 16 will not create confusion for collateral review because a violation of the proposed Rule 16 amendment is not constitutional and therefore cannot be the basis for habeas relief. The Committee's most recent report, however, states that nonconstitutional claims, such as a Rule 16 violation, can be raised if “the error is a ‘fundamental defect which inherently results in a complete miscarriage of justice [or]

contemplate the quasi-constitutional position that the proposed Rule 16 amendment occupies. At the very least, defense attorneys will craft arguments that the Rule 16 amendment is grounded in a defendant's constitutional right to a fair trial – after all, the initial ACTL proposal sought to codify the constitutional rule of Brady – and, thus, habeas review would be proper when a prosecutor fails to deliver impeaching information.

As is evident from the above series of unanswered questions, the proposal raises substantial questions that have the potential to cause a great impact on cases in all phases of adjudication and review. Before a proposal of this magnitude should be published, these questions, at the very least, should be raised and considered, with definitive answers provided so that the public can understand the precise implications of the proposal being offered.

III. The Proposal Destabilizes the Current Policy Balance in Relation to Privacy Interests and Witness Protection

A. Legitimate Privacy Concerns

Proponents of the proposal have not adequately considered how the proposal will interact with the underlying policies of other laws and established rules in the federal system. Specifically, they have failed to reconcile the proposal with policies that have at their core the protection of individuals' privacy interests. The broad and far-reaching language contained in the proposal ensures an unmanageable divide between the competing policy interests of privacy rights and a defendant's right to a fair trial. This section will cover four such policies: (1) the Crime Victims' Rights Act; (2) child protection laws; (3) rape shield laws; and (4) police officer protection laws. These listed items are not intended to be exhaustive of all the privacy interests potentially compromised by the proposal, but rather are mere examples of the important conflicts that will arise if the proposal were enacted in its current form.

1. Protection of Victims' Rights

The Crime Victims' Rights Act ("CVRA"), codified at 18 U.S.C. § 3771, provides that a crime victim has "[t]he right to be treated with fairness and with respect for the victim's dignity and *privacy*." 18 U.S.C. § 3771(a)(8). The objective behind the eight victims' rights delineated in the CVRA is to balance the rights provided to the accused and make crime victims independent participants in the criminal justice system. H.R. Rep. No. 108-711, at 3-4, reprinted in 2004

an omission inconsistent with the rudimentary demands of fair procedure.'" (See "Effect of appellate review and collateral attack" discussion in Committee report (quoting Hill v. United States, 368 U.S. 424, 428 (1962)). The Committee report then summarily states that these standards *should be "similar" to the principles the Court articulated in the Brady line of cases (emphasis added)*. Based on this assumption, the Committee report concludes that the adoption of the amendment would have no effect on collateral proceedings. (See "Effect of appellate review and collateral attack" discussion in Committee report). There is confusion already.

U.S.C.C.A.N. 2274, 2276-77; 150 Cong. Rec. S4260-01 (daily ed. Apr. 22, 2004) at S4265 (statement of Sen. Kyl) (“We are not trying to take one single right away from any defendant. That would be wrong under our system. But we do think it is time to balance the scales of justice.”); see also Kenna v. U.S. Dist. Court for the Cent. Dist. of Cal., 435 F.3d 1011, 1016 (9th Cir. 2006) (noting that “[t]he statute was enacted to make crime victims full participants in the criminal justice system”). The CVRA provides victims with a new set of statutory rights²³ that are enforceable in court by either the government or the victim, see 18 U.S.C. § 3771(d) (permitting victims to petition the court of appeals for a writ of mandamus when the district court denies the relief sought), and also imposes on the judiciary an affirmative obligation to “ensure” that those rights are “afforded.” Id. § 3771(b).

While the text of the statute and the legislative history are silent as to what specifically Congress intended to require or prohibit with the inclusion of this right, the Senate sponsors made clear that they expected a liberal reading of the statute to result in interpretations that promote victims’ interests in fairness, respect, dignity, and privacy. See 150 Cong. Rec. S4260-01 (daily ed. Apr. 22, 2004) at S4269 (statement of Sen. Kyl); see also United States v. Turner, 367 F. Supp. 2d 319, 335 (E.D.N.Y. 2005) (noting that “[t]he provision’s broad language will undoubtedly lead to litigation over the extent to which courts must police the way victims are treated inside and outside the courtroom”).

The Committee’s proposal – advocating for the disclosure of all impeachment information – fails to take into account the victim-privacy protection policy contained in the CVRA. Under the proposal, all information (not merely admissible evidence) that might be used to impeach a victim-witness must be provided to the defense, regardless of materiality. This means that any information that might possibly be used to disparage, discredit, or dispute a victim’s testimony will be disclosed to the defense, without any regard to whether such information would increase confidence in the outcome of the trial or even be admissible at trial.

For example, under the proposed rule, prosecutors would be required to disclose the existence of any mental health treatment undertaken by a victim regardless of how minor, any financial issues no matter how tangential, and familial interactions with law enforcement no matter how insignificant. Moreover, because the proposed rule makes no effort to balance a victims’ interests with any limit to the required disclosure, courts can expect victims to readily exercise their new right to petition courts for writs of mandamus each time the district court permits disclosure of nonmaterial evidence that treads on their privacy interests. The result will be increased litigation which will likely burden the courts. The broad nature of this proposed disclosure requirement will, without question, directly conflict with a liberal reading of the

²³ Many of the rights contained in the CVRA already existed in Title 42, however, there was no independent enforcement mechanism. The right we are concerned with – the right to be treated with fairness and respect for the victim’s dignity and privacy – was part of the original statutory language. See 42 U.S.C. § 10606 (repealed Oct. 30, 2004).

CVRA's policy to protect a victim's privacy and with its stated purpose of affording victims' rights comparable to those afforded to the defendant.

2. Child Protection Laws

Since the mid-1970's, Congress has made it a federal priority to help states combat the problem of child abuse. See S. Rep. No. 108-12, at 5 (2003) ("The first Federal programs specifically designed to address concerns regarding child abuse and neglect in this country were authorized under the Child Abuse Prevention and Treatment Act of 1974."). To that end, Congress has made funds available to states for creating, enacting, and supporting child abuse and neglect prevention and treatment programs. See 42 U.S.C. § 5106a. In order to be eligible for this funding, Congress requires states to have a law or a program that includes "methods to preserve the confidentiality of all records in order to protect the rights of the child and of the child's parents or guardians." Id. § 5106a(b)(2)(A)(viii). Nonetheless, there are exceptions for disclosure to "a grand jury or court, upon a finding that information in the record is *necessary* for the determination of an issue before the court or grand jury" and to federal, state, or local government entities "that ha[ve] a *need* for such information in order to carry out [their] responsibilities under law to protect children from abuse and neglect." Id. § 5106a(b)(2)(A)(viii)(V) & (b)(2)(A)(ix) (emphasis added). All fifty states and the District of Columbia have enacted state statutes that protect the confidentiality of state child abuse investigative records. See Pennsylvania v. Ritchie, 480 U.S. 39, 61 n.17 (1987) (citing Brief for State of California ex rel. John K. Van de Kamp, et al. as Amici Supporting Petitioner, Pennsylvania v. Ritchie, 480 U.S. 39 (1987) (No. 85-1347)).

Confidentiality protects the privacy rights of the victim, encourages reports of abuse, enhances the reliability of investigations, and assists families in seeking treatment. In a case deciding whether a defendant accused of child abuse had a due process right to review the state's child abuse investigative file concerning the child-victim, the Supreme Court recognized the strong public interest in protecting such sensitive information:

Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim. A child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent. It therefore is essential that the child have a state-designated person to whom he may turn, and to do so with the assurance of confidentiality. Relatives and neighbors who suspect abuse also will be more willing to come forward if they know that their identities will be protected. Recognizing this, the Commonwealth – like all other States – has made a commendable effort to assure victims and witnesses that they may speak to [Child Protection Services] counselors without fear of general disclosure.

Ritchie, 480 U.S. at 60-61 (footnote omitted). Notwithstanding the state's compelling interest in

confidentiality, the Court affirmed the Pennsylvania Supreme Court decision to remand the case for an *in camera* review of the confidential child protective services records. The Court stated that if the lower court's review revealed information that "probably would have changed the outcome of [the defendant's] trial" – i.e., information that is *material* – then the grant of a new trial would be the appropriate remedy. *Id.* at 58. Notably, the Court did not accept the defendant's argument that he was entitled to view the entire file so that he might uncover statements inconsistent with the victim's trial testimony or tending to show her improper motive. *Id.* at 52-53 (stating, in the context of a Confrontation Clause challenge, that "[t]he ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony"). The Court noted that a broad reading, such as that articulated by the defendant, would "transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery." *Id.* at 52.

Under the proposal advanced by the Committee, however, this substantial privacy interest is threatened. In a case involving criminal charges against a defendant for child abuse, it is hardly likely that *immaterial* impeachment information on the child-victim would be *necessary* for the determination of an issue before the court. See generally, 42 U.S.C. § 5106a (b)(2)(A)(viii)(V). Nonetheless, under the proposal, immaterial impeachment information would need to be disclosed without regard to the substantial policy interests in keeping this information confidential and private. For example, a child advocate's impressions of the credibility of the abused child during his initial interview would need to be disclosed as impeachment material. This disclosure of immaterial impeachment evidence is required even if evidence against the defendant included his own confession and videotapes of the defendant committing the abuse. Because the child advocate's initial impressions could be used to discredit, disparage, or dispute the victim's testimony, the Rule 16 proposal anticipates its disclosure. The Committee has not adequately considered the consequences of such a broad rule of disclosure or squared the proposal with the dictates of the Supreme Court.

3. Rape Shield Laws

The proposal does not adequately consider how it will interact with other established rules in the federal system and state laws enacted to protect sexual assault victims. Rule 412 of the Federal Rules of Evidence provides that "[e]vidence offered to prove that any alleged victim engaged in other sexual behavior" or "to prove any alleged victim's sexual predisposition" is not generally admissible in a criminal case.²⁴ Detailing the purpose of the rule, the Advisory Committee notes state that:

²⁴ Exceptions exist for evidence of "specific instances of sexual behavior . . . offered to prove that a person other than the accused was the source of the semen, injury or other physical evidence;" "evidence of specific instances of sexual behavior . . . offered . . . to prove consent;" and evidence that if excluded would violate the defendant's constitutional rights. Fed. R. Evid. 412(b).

The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.

Fed. R. Evid. 412, advisory committee’s notes.

“Rape shield laws are evidentiary measures that aim to protect rape complainants’ privacy and dignity by preventing the disclosure of damaging and irrelevant information about their sexual history at trial.” Richard I. Haddad, Shield or Sieve? People v. Bryant and the Rape Shield Law in High Profile Cases, 39 Colum. J.L. & Soc. Probs. 185, 187 (2005). As a result of the dogged defending of these “privacy interests,” advancements are made in the reporting and successful prosecution of these cases. Forty-nine states, the District of Columbia, and the federal government have enacted rape shield statutes (or the equivalent) that prohibit the disclosure of identifying information on victims of sex crimes. See generally, Michelle J. Anderson, From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law, 70 Geo. Wash. L. Rev. 51, 81 (2002) (noting that Arizona is the only state without a rape shield law).

The Committee’s proposal requires disclosure of “all *information* that is . . . impeaching,” without regard to materiality or whether it would be admissible as evidence. Under a reasonable interpretation of the rule, information about a sex-crime victim’s sexual history, partners, and sexual predisposition would need to be disclosed to the defense even though it may not be admissible as evidence at trial.²⁵ But irrespective of whether the potential impeachment evidence is properly excluded at trial, it would be too late to remedy the problem because the damage to the witness’s privacy rights that the legislature sought to protect against happens upon disclosure of the information. Thus, a subsequent motion *in limine* decision to bar use of the disclosed information at trial does little to protect privacy rights and chills victims from reporting these serious crimes. Disclosure of this type of impeachment information cuts against the very policy aims of rape shield laws – protection of a rape victim’s privacy and dignity.

4. Police Officer Protection Laws

Under current Department policy,²⁶ law enforcement agents used as witnesses for the

²⁵ While Rule 412 provides for only specific exceptions, the defense might attempt to use the existence of the amended Rule 16 (an expanded codification of the constitutional obligation of Brady and its progeny) to advocate for the position that failure to allow this evidence for impeachment purposes would deny the defendant his due process right to a fair trial.

²⁶ This provision is titled “Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses (Giglio Policy).”

prosecution are protected from open file disclosure of their personnel file. The policy's purpose, contained in USAM 9-5.100, makes clear that the provision aims to protect the "legitimate privacy rights of Government employees" while also ensuring that prosecutors meet their obligations under Giglio so that defendants receive fair trials. USAM 9-5.100.²⁷ While the policy specifically notes that "[t]he exact parameters of potential impeachment are not easily determined," it goes on to state that potential impeachment information is generally defined as that "which is material to the defense," "information that either casts a substantial doubt upon the accuracy of any evidence . . . the prosecutor intends to rely on to prove an element of any crime charged" or that which "might have a significant bearing on the admissibility of prosecution evidence." Id. Bearing in mind these definitions of impeachment information, the Department's policy makes clear that law enforcement agencies must provide a requesting prosecutor with "any finding of misconduct that reflects upon the truthfulness or possible bias" of the law enforcement agency witness, "any past or pending criminal charge" brought against the witness, and "any credible allegation of misconduct that reflects upon the truthfulness or possible bias of the [witness] that is the subject of the pending investigation." Id.

It is common knowledge that law enforcement agents are in regular contact with the criminals in their communities – be it through surveillance, investigation, or arrest. It is this close contact that causes law enforcement agents to be the target of numerous fabricated allegations of misconduct. These allegations range from serious misconduct, such as the use of excessive force, to less-than-serious misconduct, such as exhibiting rude behavior. After a complaint is filed, the allegations typically are investigated by a police department's Internal Affairs Section (or the equivalent) and ultimately resolved. In most instances, the investigation determines that the allegation is unfounded and paperwork to that effect is submitted to the law enforcement agent's file.

While the USAM provision requires disclosure of material impeachment information,²⁸ it goes on to exclude from disclosure those allegations which are unsubstantiated, not credible or have resulted in exoneration of the witness.²⁹ This Department policy makes practical sense because the damage is done to the police officer's privacy interests when the information is turned over – privacy interests are compromised once the nonmaterial information leaves the officer's

²⁷ With the enactment of USAM 9-5.001, USAM 9-5.100 was amended to be consistent with the policy of more expansive disclosure.

²⁸ The policy reads: "potential impeachment information, however, has been generally defined as impeaching information which is *material* to the defense." USAM 9-5.100 (emphasis added).

²⁹ Under certain specific circumstances where allegations which are unsubstantiated, not credible, or result in exoneration of the witness contain information which reflects upon the truthfulness or bias of the witness, they can also be disclosed upon request.

file and enters the public realm. Moreover, without this protection of their privacy interests, case agents testifying for the prosecution will be subject to the embarrassment and harassment implicit in any disclosure of ill-founded allegations as well as the additional risk of public exposure of matters with no relevance to their credibility, bias or the testimony at hand. This can occur even when a court refuses to allow defense counsel to extensively develop a line of cross examination as for example, in the instance where the government is required to file pre-trial motions *in limine* to preclude more extensive use at trial. Under the broad view of impeachment information advocated by the proposed rule, a prosecutor would be required to turn over anything that casts any doubt on anything that any witness has to say. For instance, under the proposed rule's sweeping treatment of impeachment information, the government would be required to disclose an allegation in the testifying officer's file that he planted a handgun on a habitual drug-offender even when the subsequent investigation revealed that this allegation was completely unfounded. This remains true even if the investigation of the allegation has revealed the "planted" handgun was registered to the drug-offender, had the offender's fingerprints, and eyewitnesses state that the testifying officers retrieved it from the offender's waistband.

Moreover, protective policies for law enforcement agency witnesses are not limited to the federal government. States also embody these principles of privacy in their state laws regarding disclosure. Because it is not uncommon for state law enforcement to team up with federal law enforcement in forming joint task forces to combat issues impacting both state and federal laws, the existence of state policies prohibiting certain disclosures needs to be considered before moving forward with the rule. Take, for instance, section 832.7 of the California Penal Code, which provides that peace officers' and custodial officers' personnel files³⁰ "are confidential and shall not be disclosed in any criminal . . . proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code." Cal. Penal Code § 832.7(a) (West 2007). These discovery provisions authorize disclosure upon written motion which must contain "[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the *materiality* thereof to the subject matter involved in the pending litigation" Cal. Evid. Code § 1043(3) (West 2007). The conflict between the proposal's requirement for "all [impeachment] information" and California's law requiring a showing of "materiality" in order to obtain the protected material highlights one of the problems that will ensue if the proposal, in its current form, were to become law. When a state law enforcement officer is called as a witness in a federal case, it is unclear whether state protection laws automatically would be trumped by the proposed federal policy of complete disclosure. In all likelihood, this federal/state policy conflict will become an area of contention and will generate extensive litigation over the conflict of law, and, at the very least, create disparities amongst the district courts faced with the question of elevating federal policy over state policy. See generally, In re Grand Jury, John Doe No. G.J. 2005-2, 478 F.3d 581 (4th

³⁰ Citizen complaints against officers can be maintained in the officer's general personnel file or in a separate file designated by the agency. However, citizen complaints that are determined to be unfounded, frivolous, or that result in the exoneration of the officer cannot be maintained in the officer's general personnel file but must be maintained in other separate files.

Cir. 2007) (upholding a district court’s order quashing a federal subpoena for state police officer statements from an internal investigation based on the state’s interest in maintaining confidentiality in internal investigations).

Under the theory of the proposed rule and the overly broad and undefined “impeachment information” language contained therein, federal prosecutors would be required to obtain the testifying agent’s personnel file and turn it over in its entirety to the defense – including every unsubstantiated, unfounded and even ridiculous allegation previously made against the testifying officer. This is so because any allegation of misconduct, even one unsubstantiated by a single shred of evidence, will be considered impeachment material and thus discoverable – even if the material is inadmissible or the material’s impeachment value is a mere fraction of a percent. This complication highlights the problem of language that is overly broad to achieve its purpose. The Advisory Committee should be required to find an alternative that at least attempts to preserve the interest in the privacy rights of law enforcement agents before releasing any rule for public comment.

B. Legitimate Government Witness Protection Concerns

The proposed rule will impose a substantial cost on the criminal justice system in that it provides for the disclosure of witness information weeks prior to trial and therefore, in some cases, prior to a final decision even to call a witness and perhaps, in a long trial, months prior to a witness’s actual testimony. This is a dramatic departure from current law, which mandates no such disclosure prior to trial. Apart from discovery orders, prosecutors often do not disclose impeachment information until just before trial³¹ because doing so would reveal the identities of

³¹ The Department of Justice recognizes and acknowledges that in many cases, the identities of witnesses can be and in fact are disclosed well in advance of trial without putting them at risk. Prosecutors routinely disclose the identities of law enforcement and expert witnesses – witnesses who are paid to testify either as part of their job or are specifically hired to testify in the case – prior to trial to expedite trial proceedings. Yet current law recognizes that the United States is under no obligation to disclose any witness before trial. The law requires disclosure of impeachment material only after the witness testifies. See 18 U.S.C. § 3500; Fed. R. Crim. P. 26.2. If a defendant requires additional time to review and make use of the impeachment material – in other words, if the timing of the disclosure is insufficient to satisfy the defendant’s right to due process of law – the remedy is a continuance. This remedy is rarely necessary, however, precisely because the government regularly turns over more than what is required to satisfy due process and does so earlier than mandated. Moreover, if, as the Committee’s report suggests, defendants regularly find themselves presented with information that requires time to investigate (see “Timing” discussion in Committee report) – a claim that has no empirical support – the answer is to address the law of continuance.

cooperating witnesses, undercover investigators, or other prospective witnesses.³² That practice is based on the well-grounded fear that such information could disrupt ongoing investigations and expose prospective witnesses to harassment, intimidation, injury, or even death. United States v. Ruiz, 536 U.S. 622, 632 (2002) (noting that the “careful tailoring that characterizes most legal Government witness disclosure requirements suggests recognition by both Congress and the Federal Rules Committees that such concerns are valid”) (citing 18 U.S.C. §§ 3422 & 3500; Fed. R. Crim. P. 16(a)(2)).

Testifying against an accused in a federal criminal trial is difficult and intimidating, even for the most worldly and experienced person. When the defendant is the chief executive officer of the witness’s company or a member of an international terrorist organization, testifying against the defendant as a witness for the United States becomes an act of genuine courage. In terrorism cases, the United States often needs to shield the identities of witnesses until trial either because there are risks to them and their families (especially if the witness is from a country where the terrorist organization is based), or because their cooperation is particularly sensitive and may have an impact on our relationship with another country or, even more importantly, our ability to gather intelligence and protect national security interests. Under the proposed amendment, the government is expected to carry a burden of proving that witness safety is put at risk by the disclosure in order to delay disclosure until the witness testifies. The problem with requiring this proof of a safety risk is that, in most cases, it is simply unattainable in advance of any intimidation and harassment. Obtaining proof of intent to intimidate, before any intimidation occurs, would require undercover surveillance or informant cooperation, neither of which can be pursued on a regular basis. Moreover, the proposed amendment makes it difficult for the government to offer the necessary assurances to obtain the testimony of witnesses or the continuing cooperation of other countries, thereby seriously undermining our ability to investigate terrorists, and other criminals, and bring them to justice. The fact that a court might, in its discretion, enter an order of protection *if* the prosecution makes a sufficient showing will be of no comfort to a witness and, consequently, will discourage them from coming forward. As a result, if the proposal to amend Rule 16 is approved and becomes law, there will be more witness intimidation, more witness harassment, and, over time, less witness cooperation in the reporting, investigation and prosecution of crime.

The Committee has offered no compelling reason to hasten and expand impeachment information disclosure and thereby expose cooperating witnesses, jeopardize ongoing investigations, or subject victims or witnesses to an increased risk of harassment, intimidation, retaliation or coercion.

³² It deserves mention that 97% of all criminal cases are resolved without trial. The proposal’s broad approach to impeachment information, however, appears to be aimed more at issues arising in the small percentage of cases that go to trial, and it neglects to square the competing interests of witness security, victims’ interest and privacy rights in a plea environment.

IV. The United States Attorneys' Manual Policy on Disclosure Is a Workable Solution

As discussed in its report, the Advisory Committee had concerns that a prosecutor's constitutional disclosure obligations under the Brady line of cases and the remedy of a new trial for violations were not enough to ensure that the necessary information would be disclosed and the defendant would receive a fair trial. While not conceding that current practice produced any fundamental unfairness, the Department nevertheless responded by creating a new provision in the USAM which obligates a prosecutor well-beyond the disclosure requirements in existing law. This amendment to the USAM – entitled “Policy Regarding Disclosure of Exculpatory and Impeachment Information” – was precipitated by the Advisory Committee's interest in there being a clear pronouncement to all prosecutors about their obligations on disclosure. In fact, the Department worked assiduously with members of the subcommittee to formulate a USAM amendment that would address the concerns raised by the Committee³³ while still preserving the system of discovery contemplated by existing case law and the Federal Rules of Criminal Procedure.

A. The USAM Provision – Designed To Expand a Prosecutor's Disclosure Obligations

In a memorandum sent to all holders of Title 9 of the United States Attorneys' Manual, the amendment's stated purpose reads as follows:

The purposes of this amendment to the U.S. Attorneys' Manual are to ensure that all federal prosecutors are fully aware of their constitutional obligation to disclose exculpatory and impeachment evidence, and to further develop the Department's guidance to federal prosecutors in relation to disclosure of information favorable to a defendant.

See Memorandum from the Deputy Attorney General of the U.S. Dep't of Justice to the Holders of the U.S. Attorneys' Manual, Title 9 (Oct. 19, 2006). The memorandum goes on to state that the policy “requires prosecutors to *go beyond* the minimum obligations required by the Constitution and establishes broader standards for the disclosure of exculpatory and impeachment information,” while also recognizing “the need to safeguard witnesses from harassment, assault, and intimidation and to make disclosure at a time and in a manner consistent with the needs of national security.” Id. (emphasis added).

³³ The consensus from the Committee was that while the USAM provision requires disclosure of exculpatory information that is inconsistent with any element of the crime (thereby severely limiting any independent prosecutorial analysis), the impeachment disclosure language contained in the new USAM policy continues to permit prosecutors to evaluate the information's materiality prior to disclosure.

The USAM amendment restates a prosecutor's constitutional obligations under the Brady line of cases to disclose "material exculpatory and impeachment evidence." USAM 9-5.001(B). "Recognizing that it is sometimes difficult to assess the materiality of evidence before trial," the amendment affirmatively encourages prosecutors to "take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence." USAM 9-5.001(B)(1). Moreover, the policy encourages prosecutors to err on the side of caution by disclosing exculpatory or impeaching information that may not be admissible in court if its admissibility is a "close question." Id.

The amendment then goes further by requiring "disclosure by prosecutors of information beyond that which is 'material' to guilt as articulated in Kyles and Strickler." USAM 9-5.001(C) (citations omitted). The amendment stresses that this requirement is grounded in the fact that a fair trial often includes "examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, . . . make the difference between guilt and innocence." Id. At the same time, the amendment warns that information "which is irrelevant or not significantly probative of the issues before the court" is not subject to disclosure. Id. The policy specifically references the expansion of disclosure, stating that a prosecutor must now disclose: (1) exculpatory information that is inconsistent with any element of the crime or that establishes a recognized affirmative defense; (2) impeachment information that either casts a substantial doubt upon the accuracy of any evidence the prosecutor intends to rely on to prove an element of the offense or that might have a significant bearing on the admissibility of certain prosecution evidence; and (3) exculpatory or impeachment information meeting this definition regardless of whether the information would itself constitute admissible evidence. USAM 9-5.001(C)(1)-(3). Finally, the policy reminds prosecutors to look at the information cumulatively to determine if it meets the expanded standards of disclosure. USAM 9-5.001(C)(4).

The policy also covers the timing of disclosure for both exculpatory and impeachment information. The policy provides that exculpatory information must be disclosed "reasonably promptly after it is discovered." USAM 9-5.001(D)(1). This standard accelerates the timing of disclosure from the due process standard of in sufficient time to permit the defendant to make effective use of that information at trial. See, e.g., Weatherford, 429 U.S. at 559. The policy's timing of impeachment disclosure is more flexible because it recognizes that a prosecutor might have to balance the goals of early disclosure against significant interests such as witness and national security. Thus, impeachment information "will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently." USAM 9-5.001(D)(2).

B. The USAM Provision Strikes a Proper Balance of Interests

This newly-enacted USAM provision strikes a better balance than that proposed by the Rule 16 amendment. The USAM provision properly accounts for the myriad interests affected by criminal discovery policy. While the USAM provision requires prosecutors to make broader

disclosures than that which are constitutionally mandated under Brady and its progeny, it expressly balances the scope of exculpatory and impeachment disclosures against other interests such as national security and witness protection to name a few. USAM 9-5.001 (A). Moreover, even though the provision requires more liberal disclosure, it does not encourage (or require) limitless disclosure. In its statement that disclosure under the USAM is not limited to information that is “material” to guilt, the provision reminds prosecutors that broader disclosure does not include “irrelevant” information, information that is “not significantly probative of the issues before the court,” or information involving “spurious issues” which improperly divert the court’s attention. USAM 9-5.001(C). These pronouncements, alone, make significant headway in addressing the legitimate privacy and witness safety concerns raised by breadth of the proposed amendment.

In an effort to promote regularity and consistency in disclosure practices, the provision contains clear statements on what additional exculpatory or impeachment information must be disclosed. Instead of employing vague and undefined language designed to eliminate any prosecutorial discretion, the USAM embraces the reality (and desirability) of prosecutorial discretion while providing eminently clear guidance on what must be disclosed. For exculpatory information, a prosecutor “must disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense.” USAM 9-5.001(C)(1). For impeachment information, a prosecutor “must disclose information that either casts a substantial doubt upon the accuracy of any evidence . . . the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence.” USAM 9-5.001(C)(2).

Moreover, the USAM provision does not generate additional confusion on review because the policy, unlike the proposed amendment to Rule 16, does not “provide defendants with any additional rights or remedies.” USAM 9-5.001(E). Defendants could, of course, still challenge disclosure violations under the Brady line of cases, but a prosecutor’s failure to disclose the additional information required in the USAM would not be grounds for review.³⁴

Finally, the USAM provision remains loyal to the standards developed in forty years of Brady case law, Rule 16, and the Jencks Act. At the outset, USAM 9-5.001’s stated purpose reminds prosecutors of their role to “seek a just result in every case.” USAM 9-5.001(A); cf. Agurs, 427 U.S. at 112 (footnote omitted) (noting that “[t]he proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt”). Although the policy expands required disclosures, the provision does not create additional defense discovery rights.

³⁴ However, the lack of any rights or remedies for a defendant should not lead to the conclusion that the USAM provision lacks enforcement teeth. As stated above, a prosecutor who violates the USAM could be investigated by the Office of Professional Responsibility, disciplined or dismissed from the Department, and reported to their licensing Bar.

See generally Bagley, 473 U.S. at 675 n.7 (quotation omitted) (noting that any broader right of discovery “would entirely alter the character and balance of our present systems of criminal justice”). Likewise, the provision does not create internal inconsistencies in Rule 16’s “materiality” requirements nor does it disrupt Rule 16’s parallel and reciprocal discovery objective. The USAM provision also gives proper deference to the policies underlying the Jencks Act by: (1) expressly excluding from disclosure “irrelevant” information and information that is “not significantly probative of the issues before the court,” or that which involves “spurious issues;” and (2) allowing flexibility in the timing of impeachment disclosures. USAM 9-5.001(C) & (D)(2).

V. Conclusion

The proposed amendment to Rule 16 is completely unwarranted and entirely inconsistent with existing law. A fundamental change of this nature should only be considered where corresponding and compelling justifications exist. The Committee has not made a case for the need to expand so drastically a discovery process that has been working effectively over the past forty years. If the Standing Committee wishes to study this issue further, the government requests that the Standing Committee eliminate the existing proposed rule from consideration and assess the USAM’s productivity over the next several years. Although the new USAM policy requires prosecutors to make broader disclosures than that which are constitutionally mandated, it also preserves the balanced discovery system sought by Congress and adheres to the congressionally-stated policy interests of protecting victim and witness privacy interests and ensuring witness safety. The proposal’s language is clear, concise, and consistent with the language and standards developed in existing case law, Rule 16, and the Jencks Act. While the provision requires more liberal disclosure, it does not encourage (or require) limitless disclosure. Instead, it remains loyal to the clearly defined purpose and scope of the Brady rule, and, yet expands upon its reach to ensure consistency and reliability in what is (and is not) discoverable. Moreover, the USAM proposal does not create confusion for courts reviewing and assessing remedies for impeachment or exculpatory information disclosure violations.

Based on the foregoing, the Department respectfully requests that the Standing Committee reject the proposed amendment to Rule 16.

Sincerely,



Paul J. McNulty
Deputy Attorney General

United States District Court

Boston, Massachusetts 02210

MARK L. WOLF
CHIEF JUDGE

June 8, 2007

BY EMAIL

Honorable David F. Levi
Chair, Committee on Rules of
Practice and Procedure
United States District Court
14-200 Robert T. Matsui
United States Courthouse
501 I Street
Sacramento, CA 95814-7300

Dear David:

Late yesterday afternoon, I received Deputy Attorney General Paul McNulty's 33-page letter to the Committee on Rules of Practice and Procedure (the "Standing Committee") reiterating the Department of Justice's opposition to the revision of Federal Rule of Criminal Procedure 16 that has been proposed for publication by the Advisory Committee on Criminal Rules (the "Advisory Committee") on which I serve. I am writing, necessarily quickly in view of the Standing Committee's meeting next week, to urge that the proposed revision be published.

As you know, the Department of Justice, including Mr. McNulty, made repeated presentations on this issue to the Advisory Committee, which considered the Department's views carefully. The proposed revision of Federal Rule of Criminal Procedure 29 that was advocated by the Department, based exclusively on anecdotal information rather than empirical study, was published and prompted many comments that proved very helpful to the Advisory Committee and, I expect, to the Standing Committee. Publication of proposed new Rule 16 would do the same.

The Department contends that the proposed revision does not address an important issue, in part because it believes that there are on average less than two reported cases each year that find a violation of the government's obligation to disclose material exculpatory information under Brady v. Maryland and its progeny. My 22 years of experience as a district judge make me skeptical of

this statistic and, in any event, make me confident that the reported cases understate the magnitude of the problem.

In 1998, the United States District Court for the District of Massachusetts revised its Local Rules to provide that material exculpatory information must ordinarily be disclosed within 28 days of arraignment and material impeaching evidence must ordinarily be disclosed 21 days before trial; protective orders, which are easily obtainable in appropriate cases, are the means used to protect the identity of witnesses and address other legitimate concerns created by the circumstances of a particular case. Our Local Rules were adopted because the District Court found that cases "too often get to trial without legally required discovery being provided. Such problems present judges with challenging issues to be resolved promptly, and threaten both the fairness of the trial and the finality of any conviction. See, e.g., United States v. Walsh, 75 F.3d 1 (1st Cir. 1996); United States v. Osorio, 929 F.2d 753 1 (1st Cir. 1991); United States v. Devin, 918 F.2d 280 (1st Cir. 1990); United States v. Mannarino, 850 F.Supp. 57 (D. Mass. 1994)." Report of the Judicial Members of the Committee Established to Review and Recommend Revisions of the Local Rules of the United States District Court for the District of Massachusetts Concerning Criminal Cases (Oct. 28, 1998) at 8.¹

Our Local Rules have been helpful and have been deemed a valuable model.² They have not, however, ended the problem of prosecutors failing to produce material exculpatory information. The degree of this persistent problem in my cases is not fully reflected in my published decisions. While I occasionally publish a decision when I have found a Brady violation, I often do not, at times to spare prosecutors the embarrassment of having their violations of constitutional rights publicized and memorialized.³

¹Except for most published cases, the materials referenced in this letter are attached.

²The Illinois Governor's Commission on Capital Punishment used the District of Massachusetts' Local Rule defining exculpatory information as the model for one of its recommended reforms to reduce wrongful convictions in criminal cases. Report of the Governor's Commission on Capital Punishment, Chapter 8: Pretrial Proceedings, pp. 119-20 (2002).

³See, e.g., United States v. Diabate, 90 F. Supp. 2d 140, 148-51 (D. Mass. 2000) (dismissing case without prejudice for Brady violation and describing a series of then recent, unreported cases in which the government violated its discovery obligations); April 19, 2002, The Boston Globe, "Judge Drops Charge Due to Misconduct" (newspaper article concerning United

At least some of my colleagues also do not publish decisions in all cases involving Brady problems. Therefore, I believe that the reported cases do not reliably reflect the need for reform.

The Department also asserts that the fact that in October, 2006 it included in the United States Attorneys Manual (the "USAM"), for the first time, a section on federal prosecutors' Brady obligations eliminates any need for the proposed revision of Rule 16 because violating the USAM has serious repercussions, including investigation by the Department's Office of Professional Responsibility ("OPR") and serious sanctions, including dismissal. My recent experience makes me acutely aware that this is not true.

In United States v. Ferrara, 384 F. Supp. 2d 384 (D. Mass. 2005), I found that Assistant United States Attorney Jeffrey Auerhahn intentionally engaged in professional misconduct which required the release from prison of a Capo in the Patriarca Family of La Cosa Nostra. I also found that Mr. Auerhahn's testimony in 2003 may have been perjurious. Id. at 397 n.10. The Ferrara decision formalized and amplified findings that I made on October 3, 2003 in the companion case of United States v. Barone, which led to Mr. Barone, an Associate of the Patriarca Family, being released later that month from a life sentence, with the agreement of the government. The First Circuit affirmed my decision in Ferrara, characterizing Mr. Auerhahn's actions as "egregious," "outrageous," "feckless," and as "paint[ing] a grim picture of blatant misconduct." United States v. Ferrara, 456 F.3d 278, 291, 293 (1st Cir. 2006). OPR conducted an investigation and found Mr. Auerhahn had engaged in professional misconduct by violating his Brady obligations in Ferrara and Barone. The sanction for Mr. Auerhahn's misconduct was a written reprimand from the United States Attorney, who continues to employ him. See December 11, 2006, February 1, 2007, and May 29, 2007 Orders in Ferrara and Barone.

I recognize that, if adopted, revised Rule 16 would not prevent the type of intentional misconduct committed by Mr. Auerhahn. However, the removal of the materiality requirement would, among other things, provide valuable guidance and protection

States v. Castillo being dismissed with prejudice after a prejudicial Brady violation was found at a retrial following a mistrial declared for an earlier Brady violation - no published decision); December 22, 2006, The Boston Globe, "Prosecutors Mistakes Leads to Dismissal in Diaz Cases" (newspaper article concerning United States v. Diaz et al., a case against two Latin Kings which the government asked be dismissed with prejudice after a mistrial for a Brady violation and then another Brady violation - no published decision).

to prosecutors acting in good faith, but without the knowledge or experience to assess reliably whether exculpatory information is material to the defense. See, e.g., United States v. Savafian, 233 F.R.D. 12, 15-17 (D.D.C. 2005); United States v. Naegele,⁴ 468 F. Supp. 2d 150, 152-53 (D.D.C. 2007; Daughtry v. Dennehy, 946 F. Supp. 1053, 1059 n.2 (D. Mass. 1996).

If I had more time to devote to this I could respond now to some of the other arguments made again by the Department. There are other issues raised by the Department that I would like to consider carefully after receiving public comments. However, I feel strongly that the public interest will be served by publication of the proposed revision of Rule 16.

As you know, I was, from 1975 to 1977, a Special Assistant to Attorney General Edward Levi.⁵ Each day, I saw etched in the rotunda of his office an inscription to the effect that, "The government wins when justice is done its citizens in the court." The proposed revision of Rule 16 would, in my view, give integrity to that principle. Like a majority of the members of the Advisory Committee, I believe that it deserves a full and fair hearing, which can only occur if it is now published for public comment.

I would appreciate it if you would share this letter with your colleagues and thank you all for your consideration of it.

With best wishes,

Sincerely yours,



Mark L. Wolf

cc: Members of the Advisory Committee on Criminal Rules

⁴Savafian and Naegele are decisions of Judge Paul Friedman, who is, as you know, a former Assistant United States Attorney, a former Assistant Solicitor General, and a former member of the Advisory Committee.

⁵I was also a Special Assistant to Deputy Attorney General Laurence Silberman (1974), Deputy United States Attorney for the District of Massachusetts (1981-1985), and the recipient of the Department of Justice's Distinguished Service Award for my work prosecuting corrupt public officials (1984).

Brady v. Maryland Material
in the United States District Courts:
Rules, Orders, and Policies

*Report to the
Advisory Committee on Criminal Rules
of the Judicial Conference of the United States*

Federal Judicial Center
May 31, 2007

Brady v. Maryland Material
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*Report to the
Advisory Committee on Criminal Rules
of the Judicial Conference of the United States*

Laural Hooper and Shelia Thorpe
Federal Judicial Center
May 31, 2007

This report was undertaken in furtherance of the Federal Judicial 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

In April 2007, the Judicial Conference Advisory Committee on Criminal Rules asked the Federal Judicial Center to update its 2004 report on local rules of the U.S. district courts, state laws, and state court rules that address the disclosure principles contained in *Brady v. Maryland*.¹ *Brady* requires that prosecutors fully disclose to the accused all exculpatory evidence in the prosecutors' possession. Subsequent Supreme Court decisions have elaborated the *Brady* obligations to include the duty to disclose (1) impeachment evidence,² (2) favorable evidence in the absence of a request by the accused,³ and (3) "favorable evidence known to the others acting on the government's behalf in the case including the police."⁴

When it requested the 2004 report, the committee's interest was in learning whether federal district courts and state courts have adopted any formal rules or standards that provide prosecutors with specific guidance on discharging their *Brady* obligations. Specifically, the committee wanted to know whether the U.S. district and state courts' relevant authorities (1) codify the *Brady* rule, (2) set specific deadlines for when *Brady* material must be disclosed, or (3) require *Brady* material to be disclosed automatically or only on request. In addition, the Center sought information regarding policies in two areas: (1) due diligence obligations of the government to locate and disclose *Brady* material favorable to the defendant, and (2) sanctions for the government's failure to comply specifically with *Brady* disclosure obligations. That research resulted in a report titled *Treatment of Brady v. Maryland Material in United States District and State Courts' Rules, Orders, and Policies*.

This 2007 report has two sections and five appendices. Section I presents a general introduction to the report, along with a summary of our findings. Section II describes the federal district court local rules, orders, and policies that address *Brady* material. Appendix A contains the committee's proposed amendment to Rule 16. Appendix B is a compendium of federal material that served as the basis for this report. Appendix C provides examples of individual judge orders addressing *Brady* disclosures. Appendix D contains the *U.S. Attorney's Manual*, section 9-5.000, *Issues Related to Trials and Other Court Proceedings*, which covers the Department of Justice's policy regarding disclosure of exculpatory and im-

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1. 373 U.S. 83 (1963).
 2. *Giglio v. United States*, 405 U.S. 150, 153-54 (1972).
 3. *United States v. Agurs*, 427 U.S. 97, 107 (1976).
 4. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

peachment information. Appendix E includes the state court portion of the 2004 *Brady* report. It has not been updated.

A. Background: *Brady*, Rule 16, and Rule 11

I. Brady v. Maryland

In *Brady v. Maryland*, the Supreme Court held “that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.”⁵ Subsequent Supreme Court decisions have held that the government has a constitutionally mandated, affirmative duty to disclose exculpatory evidence to the defendant to help ensure the defendant’s right to a fair trial under the Fifth and Fourteenth Amendments’ Due Process Clauses.⁶ The Court cited as justification for the disclosure obligation of prosecutors “the special role played by the American prosecutor in the search for truth in criminal trials.”⁷ The prosecutor serves as “the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.”⁸

The *Brady* decision did not define what types of evidence are considered “material” to guilt or punishment, but other decisions have attempted to do so. For example, the standard of “materiality” for undisclosed evidence that would constitute a *Brady* violation has evolved over time from “if the omitted evidence creates a reasonable doubt that did not otherwise exist,”⁹ to “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,”¹⁰ to “whether in [the undisclosed evidence’s] absence [the defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence,”¹¹ to the current standard: “when prejudice to the accused ensues . . . [and where] the nondisclosure [is] so serious that there

5. *Brady*, 373 U.S. at 87.

6. See *United States v. Bagley*, 473 U.S. 667, 675 (1985) (“The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur.”).

7. *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

8. *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

9. *United States v. Agurs*, 427 U.S. 97, 112 (1976).

10. *Bagley*, 473 U.S. at 682.

11. *Kyles*, 514 U.S. at 434.

is a reasonable probability that the suppressed evidence would have produced a different verdict.”¹²

Over the last few years, a number of articles have been written regarding prosecutorial obligations and discretion pursuant to *Brady*.¹³ Those articles highlight some of the issues that continue to be raised and debated in the legal community. (Please note that the articles cited are not intended to serve as a comprehensive review of the literature on this issue.)

One author investigated the “dissonance between *Brady*’s grand expectation to civilize U.S. criminal justice and the grim reality of its largely unfilled promise.”¹⁴ Further, the author proffers that the lack of specific local court rules imposing obligations on prosecutors impedes compliance.¹⁵ Others argue that current disciplinary mechanisms provide little remedy.¹⁶

12. *Strickler*, 527 U.S. at 281–82.

13. Stephanos Bibas, *The Story of Brady v. Maryland: From Adversarial Gameship Toward the Search for Innocence?*, U. Pa. L. Sch., Working Paper No. 81 (2005) (<http://lsr.nellco.org/upenn/wps/papers/81>); Elizabeth Napier Dewar, *A Fair Trial Remedy for Brady Violations*, 115 Yale L.J. 1450 (2006); Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. Tex. L. Rev. 685 (2005–2006); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 Wis. L. Rev. 399 (2006); John B. Mitchell, *Evaluating Brady Error Using Narrative Theory: A Proposal for Reform*, 53 Drake L. Rev. 599 (2005); Mark D. Villaverde, *Structuring the Prosecutor’s Duty to Search the Intelligence Community for Brady Material*, 88 Cornell L. Rev. 1471 (2003).

14. Gershman, *supra* note 13, at 686. *See also* Scott E. Sundby, *Superheroes and Constitutional Mirages: The Take of Brady v. Maryland*, 33 McGeorge L. Rev. 643, 658 (2002) (positing that “*Brady*’s doctrinal limitations as a pre-trial discovery mechanism are magnified by the realities of criminal practice”).

15. Gershman, *supra* note 13, at 726 (citing *United States v. Mannarino*, 850 F. Supp. 57, 59, 71 (D. Mass. 1994) (finding that prosecutors had consistently, for many years, shown an “obdurate indifference to . . . disclosure responsibilities,” prompting the district to adopt an extensive discovery rule)).

16. Peter Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, Wis. L. Rev. 399, 400 (2006) (suggesting “prosecutorial misconduct is largely the result of three institutional conditions: vague ethics rules that provide ambiguous guidance to prosecutors; vast discretionary authority with little or no transparency; and inadequate remedies for prosecutorial misconduct, which create perverse incentives for prosecutors to engage in, rather than refrain from, prosecutorial misconduct”); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 Okla. City U. L. Rev. 833, 898 (1997) (concluding that most disciplinary processes are almost completely ineffective against prosecutors); Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 D.C. L. Rev. 275, 289–91 (2004) (exploring the efficacy of prosecutors’ manuals, the Office of Professional Responsibility, and bar disciplinary committees).

Lastly, one author has proposed an innovative remedy for criminal defendants when the government fails to fulfill its constitutional obligation to disclose favorable evidence.¹⁷

2. Federal Rule of Criminal Procedure 16

Federal Rule of Criminal Procedure 16 governs discovery and inspection of evidence in federal criminal cases. The Notes of the Advisory Committee to the 1974 Amendments expressly said that in revising Rule 16 “to give greater discovery to both the prosecution and the defense,” the committee had “decided not to codify the *Brady* Rule.”¹⁸ However, the committee explained, “the requirement that the government disclose documents and tangible objects ‘material to the preparation of his defense’ underscores the importance of disclosure of evidence favorable to the defendant.”¹⁹

Rule 16 entitles the defendant to receive, upon request, the following information:

- statements made by the defendant;
- the defendant’s prior criminal record;
- documents and tangible objects within the government’s possession that “are material to the preparation of the defendant’s defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant”;
- reports of examinations and tests that are material to the preparation of the defense; and
- written summaries of expert testimony that the government intends to use during its case-in-chief at trial.²⁰

Rule 16 also imposes on the government a continuing duty to disclose additional evidence or material subject to discovery under the rule, if the government discovers such information prior to or during the trial.²¹ Finally, Rule 16 grants the court discretion to issue sanctions or other orders “as are just” in the event the government fails to comply with a discovery request made under the rule.²²

17. Napier Dewar, *supra* note 13 (proposing that when evidence that should have been disclosed earlier emerges during or shortly before trial, the court should consider instructing the jury on the duty to disclose and allowing the defendant to argue that failure to disclose raises a reasonable doubt about the defendant’s guilt).

18. Fed. R. Crim. P. 16 Advisory Committee’s Note (italics added).

19. *Id.*

20. Fed. R. Crim. P. 16(a)(1)(A)–(G).

21. Fed. R. Crim. P. 16(c).

22. Fed. R. Crim. P. 16(d)(2).

3. Federal Rule of Criminal Procedure 11

Federal Rule of Criminal Procedure 11 governs prosecutor and defendant practices during plea negotiations. The Supreme Court has not said whether disclosure of exculpatory evidence is required in the context of plea negotiations; however, in *United States v. Ruiz*, the Court held that the government is not constitutionally required to disclose *impeachment* evidence to a defendant prior to entering a plea agreement.²³ The Court noted that “impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary* (‘knowing,’ ‘intelligent,’ and ‘sufficiently aware’).”²⁴ The Court stated that “[t]he degree of help that impeachment information can provide will depend upon the defendant’s own independent knowledge of the prosecution’s potential case—a matter that the Constitution does not require prosecutors to disclose.”²⁵ Finally, the Court stated that “a constitutional obligation to provide impeachment information during plea bargaining, prior to entry of a guilty plea, could seriously interfere with the Government’s interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice.”²⁶

Since *Ruiz*, several courts have reviewed cases regarding impeachment evidence and *Brady* obligations.²⁷ Specifically, one court held that in circumstances where the government has failed to disclose impeachment evidence that is also exculpatory to the defense to prepare for trial in the hopes of executing a plea agreement, the withholding of *Brady* materials is “impermissible conduct by the government depriving [the defendant] of his ability to decide intelligently whether to plead guilty.”²⁸

23. 536 U.S. 622, 633 (2002).

24. *Id.* at 629 (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)).

25. *Id.* at 630.

26. *Id.* at 631.

27. *See McCann v. Mangialardi*, 337 F.3d 782, 788 (7th Cir. 2003) (stating it is likely to be violative of due process if prosecutors or relevant government actors are aware of the criminal defendant’s factual innocence but fail to disclose such information to a defendant before he enters a guilty plea); *United States v. Ohiri*, 133 Fed. Appx. 555, 562 (10th Cir. 2005) (unpublished decision) (the court distinguished *Ruiz* holding that the government may not avoid the consequence of a *Brady* violation if the defendant accepts an eleventh-hour plea agreement without knowledge of withheld exculpatory evidence in the government’s possession); *Ferrara v. United States*, 384 F. Supp. 2d 384, 414–15 (D. Mass. 2005) (asserting that where the intelligent character of a guilty plea is undermined by material misrepresentations or other prejudicial misconduct by the government, the plea may be vacated in a habeas corpus proceeding).

28. *Ferrara*, 384 F. Supp. 2d at 389.

4. American College of Trial Lawyers' proposal

In October 2003, the American College of Trial Lawyers (ACTL) proposed amending Federal Rules of Criminal Procedure 11 and 16 in order to “codify the rule of law first propounded in *Brady v. Maryland*, clarify both the nature and scope of favorable information, require the attorney for the government to exercise due diligence in locating information and establish deadlines by which the United States must disclose favorable information.”²⁹

5. Department of Justice's response to the ACTL's proposal

The Department of Justice (DOJ) opposed the ACTL's proposal to amend Federal Rules of Criminal Procedure 11 and 16. DOJ contended that the government's *Brady* obligations are “clearly defined by existing law that is the product of more than four decades of experience with the *Brady* rule,” and therefore no codification of the *Brady* rule was warranted.³⁰

6. Summary of Advisory Committee's and Department of Justice's work on amending Rule 16

In 2003, prompted by the American College of Trial Lawyers' proposal, the committee commenced discussions regarding whether an amendment was needed to Rule 16. Specifically, the committee explored whether Rule 16 should codify and expand the government's disclosure obligations regarding exculpatory and impeachment evidence favorable to the defense. Since that time, DOJ has continually opposed any proposed amendment to Rule 16, believing it to be unnecessary and expressing *inter alia* concern about pretrial disclosure of the identity of prosecution witnesses. Notwithstanding that position, DOJ has worked with the committee in drafting language for a proposed amendment while simultaneously undertaking efforts to revise the *U.S. Attorneys' Manual (Manual)* regarding the government's disclosure obligations that might serve as an alternative to an amendment to Rule 16.

On September 5, 2006, the committee met in special session by teleconference to discuss DOJ's proposed revision to the *Manual* and to decide whether, given the proposal, the committee should still forward the draft Rule 16 amendment to the Standing Committee for publication.

29. Memorandum from American College of Trial Lawyers to the Judicial Conference Advisory Committee on Federal Rules of Criminal Procedure (October 2003), at 2.

30. Memorandum from U.S. Department of Justice (Criminal Division) to Hon. Susan C. Bucklew, Chair, Judicial Conference Subcommittee on Rules 11 and 16 (April 26, 2004), at 2.

Committee minutes revealed that some committee members believed the revised language to the *Manual* was a substantial improvement, but in the end concluded that DOJ's internal policy could not serve as a substitute for the proposed amendment to Rule 16. Specifically, some members had concerns about the subjective language limiting the obligation to disclose impeachment materials to information the prosecutor sees as "significant" or "substantial." Additionally, one member commented that, even if the proposed provisions were identical, the fundamental question was whether the policy on disclosure of exculpatory and impeaching information should be solely an internal "Department" matter or should also be included in a rule. Further, there was concern that the policy was limited to prosecutors and did not alter or supersede the narrower *Giglio* policy applicable to investigators and other government agencies. Lastly, another member noted that the internal policy was not judicially enforceable and thus probably would not alter current practices. That member further added, "only the rule would provide an effective remedy for violation and actually reduce the number of problems in this area."

Several members favored an incremental approach and recommended that the committee defer consideration of a Rule 16 amendment until the impact of DOJ's proposed revision to the *Manual* could be assessed.

At the conclusion of the special session, the committee voted 8–4 to forward the proposed Rule 16 amendment to the Standing Committee for publication.³¹ The proposed amendment creates a new subdivision and is based on the principle that fundamental fairness is enhanced when the defense has access before trial to any exculpatory and impeaching information known to the prosecution.

On October 19, 2006, DOJ posted a new *Manual* provision requiring greater disclosure of material and exculpatory evidence.³²

B. Summary of Findings

- Thirty-seven of the ninety-four districts reported having a relevant local rule, order, or procedure specifically governing disclosure of *Brady* material. References to *Brady* material are usually in the courts' local rules but are also in courts' standard pretrial orders and scheduling orders. The remaining districts have not adopted any formal standards or rules that provide guidance to prosecutors on

31. See Appendix A.

32. See Appendix D. Contained within the *Manual* are general policies and procedures applicable to U.S. attorneys. The *Manual*'s primary function is to provide internal Department of Justice guidance.

discharging *Brady* obligations. These districts routinely follow Federal Rule of Criminal Procedure 16 or a local rule that mirrors Rule 16.

- Nineteen of the thirty-seven districts that explicitly reference *Brady* material use the term “favorable to the defendant” in describing evidence subject to the disclosure obligation. Nine districts refer to it by case name (“*Brady* material”). The remaining nine districts refer to *Brady* material as evidence that is “exculpatory” in nature.
- Twenty-eight of the thirty-seven districts mandate automatic disclosure; nine dictate that the government provide such material only upon request of the defense. One district requires parties to address *Brady* material in a requested pretrial conference, and two districts presume that the defendant has requested disclosure unless the presumption is overcome.
- The thirty-seven districts that reference *Brady* material vary significantly in their timetables for disclosure of the material. The most common time frame is “within fourteen days of the arraignment,” followed by “within seven days of the arraignment,” and “within ten days of the arraignment.” Some districts have no specified time requirements for disclosure, using terms such as “as soon as reasonably possible” or “before the trial.”
- In thirty-one of the thirty-seven districts with *Brady*-related provisions, the disclosure obligation is a continuing one, such that if additional evidence is discovered during the trial or after initial disclosure, the defendant must be notified and provided with the new evidence. The most common time frame for which this newly additional material must be turned over is “immediately” followed by “promptly.”
- Of the thirty-seven districts with policies governing *Brady* material, thirteen have due diligence requirements for prosecutors. Two districts have a certificate of compliance requirement.
- None of the districts specifies specific sanctions for nondisclosure by prosecutors, leaving any sanction determination and remedy to the discretion of the court.
- Nine of the thirty-seven districts that reference *Brady* have declination procedures for disclosure of specific types of information. These procedures vary by districts, but most require a writing describing the specific matters in question and the reasons for declining to make the necessary disclosures required by the local rule or order.

II. U.S. District Court Rules and Policies Addressing *Brady* Material

This section describes federal district courts' local rules, orders, and procedures that codify the *Brady* rule, define *Brady* material, and set the timing and conditions for disclosure of *Brady* material. In addition, we discuss provisions containing due diligence obligations of the government and specific sanctions, if any, for the government's failure to comply with disclosure procedures.

This report does not address the degree to which the court's rules and other policies describe what actually occurs in the district. Nor does it address the government's compliance with *Brady*. Providing that type of information would necessitate a different type of research study.

A. Research Methods

Like the 2004 Center report, the information presented in this updated report is derived from a number of sources, including district courts' local rules, orders, and policies, and other relevant material. The majority of this information came from the courts' individual websites. We also searched the Westlaw and Lexis-Nexis federal court rules and orders databases for relevant information.

For twenty-eight districts, the review of the court's website and the database searches yielded specific local rules and orders that relate to the *Brady* decision or that set forth guidance to the government regarding disclosure of *Brady* material. For nine districts for which our searches did not yield a relevant local rule or order, we contacted the clerks of court to request their assistance in locating any local rules or materials relating to the application of the *Brady* decision. Through those efforts we identified thirty-seven districts that clearly refer to *Brady* material in their local rules, orders, or procedures. The remaining courts without a specific local rule either follow Federal Rule of Criminal Procedure 16 or a local rule that mirrors Rule 16.

During our research, we found instances in which individual judges have incorporated *Brady* obligations into their pretrial orders. A sample of those orders can be found in Appendix C.³³ They are not included in the analysis of this report since our objective was not to look at individual judge practices but rather court-wide policies and procedures.

33. See, e.g., D.D.C. (Judge Walton's order); M.D. Fla. (Judge Bucklew's and Judge Corrigan's orders); N.D. Iowa (Judge Bennett's order); and D.P.R. (Judge Cerezo's order).

Three districts did not respond to our requests for information.³⁴

The thirty-seven districts that have local rules, orders, and procedures specifically addressing *Brady* material served as the basis of our analysis. We reviewed and analyzed each of the thirty-seven districts' materials to determine

- the types of information defined as *Brady* material;
- whether the material is disclosed automatically or only upon request;
- the timing of disclosure;
- whether the parties had a continuing duty to disclose;
- whether the parties had a due diligence requirement; and
- whether there are specific provisions authorizing sanctions for failure to disclose *Brady* material.

We also noted whether the districts had declination procedures.

B. Governing Rules, Orders, and Procedures

We found references to *Brady* material in various documents, including local rules, orders (including standing orders and standard discovery, arraignment, scheduling, and pretrial orders), and supplementary materials such as joint statements of discovery and checklists (including disclosure agreement checklists).

Provisions for obligations to disclose *Brady* material are contained in the documents listed in Table 1. We were unable to find information on each of the variables discussed here for all districts. Consequently, we provide information only where available.

C. Definition of *Brady* Material

Most disclosure rules, orders, and procedures in the thirty-seven districts that address the *Brady* decision define *Brady* material in a number of ways: as “evidence favorable to the defendant” (19 districts),³⁵ by case

34. District of Guam, Eastern District of Missouri, and District of Oregon.

35. M.D. Ala. Standing Order on Criminal Discovery § (1)(B); S.D. Ala. R. 16.13 § (b)(1)(B); D. Conn. Cr. R. Appx. § (A)(11); N.D. Fla. R. 26.3(D)(1); S.D. Fla. R. 88.10(D); N.D. Ga. Standard Pretrial Order § IV(B); S.D. Ga. Cr. R. 16.1(f); W.D. La. Criminal Scheduling Order § II(c)(1); W.D. Mich. Standing Order Regarding Discovery in Criminal Cases § D; W.D. Mo. Scheduling and Trial Order § VI(A); N.D.N.Y. R. Cr. P. 14.1 § (b)(2); D. N. Mar. I. Cr. R. 17.1.1(c); W.D. Okla. Joint Statement of Discovery Conference § 5; W.D. Pa. Cr. R. 16.1(F); E.D. Tenn. Discovery and Scheduling Order ¶ 15; M.D. Tenn. R. 16.01(d); D. Vt. R. 16.1(a)(2); W.D. Wash. Cr. R. 16(a)(1)(K); S.D. W. Va. Arraignment Order & Discovery Requests III(1)(H).

name, e.g., “*Brady* material” (9 districts);³⁶ and as “exculpatory evidence” (9 districts).³⁷

Table 1. District Court Documents that Reference *Brady* Material³⁸

Document	Number of Districts	Districts
Local rules	17	S.D. Ala., N.D. Cal., D. Conn., N.D. Fla., S.D. Fla., S.D. Ga., D. Haw., D. Mass., D.N.H., N.D.N.Y., E.D. N.C., D. N. Mar. I., W.D. Pa., M.D. Tenn., W.D. Wash., N.D. W. Va., E.D. Wis.
Standard pretrial order	6	E.D. Ark., M.D. Ga., N.D. Ga., W.D. La., D.N.D., D. Vt.
Standing order	4	M.D. Ala., E.D. Mich., W.D. Mich., D.N.J.
Discovery and scheduling order	2	E.D. Tenn., D. Kan.
Scheduling order	2	W.D. Ky., W.D. Mo.
Arraignment order and standard discovery request	1	S.D. W. Va.
Criminal progression order	1	D. Neb.
Disclosure agreement checklist	1	W.D. Tex.
Joint discovery statement	1	W.D. Okla.
Procedural order	1	D. Idaho
Standard order	1	D.N.M.

36. E.D. Ark. Pretrial Order; M.D. Ga. Standard Pretrial Order ¶ 4; D. Haw. Crim. R. 16.1(a)(7); D. Idaho Procedural Order § I(5)(A); D. Kan. General Order of Discovery and Scheduling ¶ 10; W.D. Ky. Scheduling Order § 2(B)(2); D. Neb. Order for the Progression of a Criminal Case § 3; D.N.H. R. 16.1(c); D.N.M. Standard Discovery Order § 6.

37. N.D. Cal. Crim. R. 17.1-1 § (b)(3); D. Mass. R. 116.2; E.D. Mich. Standing Order for Discovery and Inspection and Fixing Motion Cut-Off Date in Criminal Cases § 1(b); D.N.J. Order for Discovery and Inspection § 1(f); E.D.N.C. Crim. R. 16.1(b)(6); D.N.D. Criminal Pretrial Order § II(d); W.D. Tex. Parties’ Disclosure Agreement Checklist; N.D. W. Va. R. Cr. P. 16.05; E.D. Wis. Crim. R. 16.1(b).

38. A number of districts cover *Brady* obligations in more than one document. We chose the document with the most comprehensive information.

1. Evidence favorable to the defendant

The most common definition of “evidence favorable to the defendant,” found in nineteen of the thirty-seven districts that use the term, defines *Brady* material as any material or information that may be favorable to the defendant on the issues of guilt or punishment and that is within the scope (or meaning) of *Brady*.³⁹ Five of the nineteen districts add the qualifier “without regard to materiality.”⁴⁰

2. Exculpatory evidence or exculpatory material

Nine districts refer to *Brady* material as exculpatory in nature.⁴¹ Of these nine districts, Massachusetts has the most detailed and expansive rule dealing with *Brady* material and exculpatory evidence. It defines exculpatory evidence as follows:

- Information that would tend directly to negate the defendant’s guilt concerning any count in the indictment or information.
- Information that would cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief and that could be subject to a motion to suppress or exclude, which would, if allowed, be appealable under 18 U.S.C. § 3731.
- A statement whether any promise, reward, or inducement has been given to any witness whom the government anticipates calling in its case-in-chief, identifying by name each such witness and each promise, reward, or inducement, and a copy of any promise, reward, or inducement reduced to writing.
- A copy of any criminal record of any witness identified by name whom the government anticipates calling in its case-in-chief.

39. M.D. Ala. Standing Order on Criminal Discovery § (1)(B); S.D. Ala. R. 16.13 § (b)(1)(B); D. Conn. Cr. R. Appx. § (A)(11); N.D. Fla. R. 26.3(D)(1); S.D. Fla. R. 88.10(D); N.D. Ga. Standard Pretrial Order § IV(B); S.D. Ga. Cr. R. 16.1(f); W.D. La. Criminal Scheduling Order § II(c)(1); W.D. Mich. Standing Order Regarding Discovery in Criminal Cases § D; W.D. Mo. Scheduling and Trial Order § VI(A); N.D.N.Y. R. Cr. P. 14.1 § (b)(2); D. N. Mar. I. Cr. R. 17.1.1(c); W.D. Okla. Joint Statement of Discovery Conference § 5; W.D. Pa. Cr. R. 16.1(F); E.D. Tenn. Discovery and Scheduling Order ¶ 15; M.D. Tenn. R. 16.01(d); D. Vt. R. 16.1(a)(2); W.D. Wash. Cr. R. 16(a)(1)(K); S.D. W. Va. Arraignment Order & Discovery Requests III(1)(H).

40. M.D. Ala. Standing Order on Criminal Discovery § (1)(B); S.D. Ala. R. 16.13 § (b)(1)(B); D. Conn. Cr. R. Appx. § (A)(11); N.D. Fla. R. 26.3(D)(1); D. Vt. R. 16.1(a)(2).

41. N.D. Cal. Crim. R. 17.1-1 § (b)(3); D. Mass. R. 116.2; E.D. Mich. Standing Order for Discovery and Inspection and Fixing Motion Cut-Off Date in Criminal Cases § 1(b); D.N.J. Order for Discovery and Inspection § 1(f); E.D.N.C. Crim. R. 16.1(b)(6); D.N.D. Criminal Pretrial Order § II(d); W.D. Tex. Parties’ Disclosure Agreement Checklist; N.D. W. Va. R. Crim. P. 16.05; E.D. Wis. Crim. R. 16.1(b) & (c).

- A written description of any criminal cases pending against any witness identified by name whom the government anticipates calling in its case-in-chief.
- A written description of the failure of any percipient witness identified by name to make a positive identification of a defendant, if any identification procedure has been held with such a witness with respect to the crime at issue.
- Any information that tends to cast doubt on the credibility or accuracy of any witness whom or evidence that the government anticipates calling or offering in its case-in-chief.
- Any inconsistent statement, or a description of such a statement, made orally or in writing by any witness whom the government anticipates calling in its case-in-chief, regarding the alleged criminal conduct of the defendant.
- Any statement, or a description of such a statement, made orally or in writing by any person, that is inconsistent with any statement made orally or in writing by any witness the government anticipates calling in its case-in-chief, regarding the alleged criminal conduct of the defendant.
- Information reflecting bias or prejudice against the defendant by any witness whom the government anticipates calling in its case-in-chief.
- A written description of any prosecutable federal offense known by the government to have been committed by any witness whom the government anticipates calling in its case-in-chief.
- A written description of any conduct that may be admissible under Fed. R. Evid. 608(b) known by the government to have been committed by a witness whom the government anticipates calling in its case-in-chief.
- Information known to the government of any mental or physical impairment of any witness whom the government anticipates calling in its case-in-chief, that may cast doubt on the ability of that witness to testify accurately or truthfully at trial as to any relevant event.
- Exculpatory information regarding any witness or evidence that the government intends to offer in rebuttal.
- A written summary of any information in the government's possession that tends to diminish the degree of the defendant's culpability or the defendant's Offense Level under the United States Sentencing Guidelines.⁴²

42. D. Mass. R. 116.2(B).

3. *Brady* material generally

Nine districts cite only to *Brady v. Maryland* or to *Brady* and some other case authority when addressing the prosecutor's obligation to turn over exculpatory material.⁴³

D. Disclosure Requirements

Twenty-eight districts mandate automatic disclosure of *Brady* material.⁴⁴ One district, the Middle District of Georgia, has a caveat—the government need not furnish the defendant with *Brady* information that the defendant has obtained or, with reasonable diligence, could obtain himself or herself.⁴⁵ Another district, the Western District of Kentucky, requires that “[i]f the United States has knowledge of *Brady* rule evidence and is unsure as to the nature of the evidence and the proper time for disclosure, it may request an *in camera* hearing for the purpose of resolving this issue.”⁴⁶

Nine districts dictate that the government provide *Brady* material upon request of the defendant.⁴⁷ The Northern District of California adds qualifying language that requires that the parties address the issue “if pertinent

43. E.D. Ark. Pretrial Order; M.D. Ga. Standard Pretrial Order ¶ 4; D. Haw. Crim. R. 16.1(a)(7); D. Idaho Procedural Order § I(5)(A); D. Kan. General Order of Discovery and Scheduling ¶ 10; W.D. Ky. Scheduling Order § 2(B)(2); D. Neb. Order for the Progression of a Criminal Case § 3; D.N.H. R. 16.1(c); D.N.M. Standard Discovery Order § 6.

44. M.D. Ala. Standing Order on Criminal Discovery § (1)(B); S.D. Ala. R. 16.13 § (b)(1)(B); E.D. Ark. Pretrial Order; D. Conn. Cr. R. Appx. § (A)(11); N.D. Fla. R. 26.3(D)(1); S.D. Fla. R. 88.10(D); D. Haw. Crim. R. 16.1(a)(7); D. Kan. General Order of Discovery and Scheduling ¶ 10; W.D. Ky. Scheduling Order § 2(B)(2); D. Mass. R. 116.2; E.D. Mich. Standing Order for Discovery and Inspection and Fixing Motion Cut-Off Date in Criminal Cases § 1(b); W.D. Mich. Standing Order Regarding Discovery in Criminal Cases § D; W.D. Mo. Scheduling and Trial Order § VI(A); D. Neb. Order for the Progression of a Criminal Case § 3; D.N.H. R. 16.1(c); D.N.J. Order for Discovery and Inspection § 1(f); D.N.M. Standard Discovery Order § 6; N.D.N.Y. R. Cr. P. 14.1 § (b)(2); D.N.D. Criminal Pretrial Order § II(d); D. N. Mar. I. Cr. R. 17.1.1(c); W.D. Okla. Joint Statement of Discovery Conference § 5; W.D. Pa. Cr. R. 16.1(F); E.D. Tenn. Discovery and Scheduling Order ¶ 15; M.D. Tenn. R. 16.01(d); W.D. Tex. Parties' Disclosure Agreement Checklist; D. Vt. R. 16.1(a)(2); N.D. W. Va. R. Cr. P. 16.05; E.D. Wis. Crim. R. 16.1(b).

45. M.D. Ga. Standard Pretrial Order ¶ 5 (citing *United States v. Slocum*, 708 F.2d 587, 599 (11th Cir. 1983)).

46. W.D. Ky. Scheduling Order § 4.

47. N.D. Cal. Crim. R. 17.1-1 § (b)(3); M.D. Ga. Standard Pretrial Order ¶ 5; N.D. Ga. Standard Magistrate Judge's Pretrial Order § IV(B); S.D. Ga. Crim. R. 16.1(f); D. Idaho Procedural Order § I(5); W.D. La. Criminal Scheduling Order § II(c); E.D.N.C. Crim. R. 16.1(b)(6); W.D. Wash. Crim. R. 16(a)(1)(K); S.D. W. Va. Arraignment Order and Standard Discovery Request § III(1)(H).

to the case” and in their pretrial conference statement “if a conference is held.”⁴⁸

Only one district, the Middle District of Tennessee, specifically addresses the disposition of the information or evidence once the case has been resolved. That district requires that the information or evidence be returned to the “government or destroyed following the completion of the trial, sentencing of the defendant, or completion of the direct appellate process, whichever occurs last.”⁴⁹ A party who destroys materials must certify the destruction by letter to the government.

1. Time requirements for disclosure⁵⁰

The thirty-seven districts vary significantly in their disclosure timetables. Some districts specify a time by which the prosecution must disclose *Brady* material, while other districts rely on nonspecific terms such as “in time for effective use at trial” or “as soon as reasonably possible.”

a. Specific time requirement

Thirty-three districts have mandated time limits (or specific events, such as arraignments or pretrial conferences) for prosecutorial disclosure of *Brady* material (see Table 2).

48. N.D. Cal. Crim. R. 17.1-1(b).

49. M.D. Tenn. Crim. R. 16.02.

50. It is well settled that the district court may order when *Brady* material is to be disclosed. *See* *United States v. Starusko*, 729 F.2d 256 (3d Cir. 1984). Some decisions have held that the Jencks Act controls and that *Brady* material relating to a certain witness need not be disclosed until that witness has testified on direct examination at trial. *United States v. Bencs*, 28 F.3d 555 (6th Cir. 1994); *United States v. Jones*, 612 F.2d 453 (9th Cir. 1979); *United States v. Scott*, 524 F.2d 465 (5th Cir. 1975). Others have held that *Brady* material might be disclosed prior to trial, in order to afford the defendant the opportunity to make effective use of the material during trial. *See* *United States v. Perez*, 870 F.2d 1222 (7th Cir. 1989); *United States v. Campagnuolo*, 592 F.2d 852 (5th Cir. 1979); *United States v. Pollack*, 534 F.2d 964 (D.C. Cir. 1976).

Table 2. Districts with Time Requirements for Prosecutorial Disclosure of *Brady* Material

Time Requirement	Number of Districts	Districts
Within 14 days of arraignment	5	N.D.N.Y., ⁵¹ S.D. Fla., ⁵² M.D. Tenn., W.D. Tex., ⁵³ D. Vt. ⁵⁴
Within 7 days of arraignment	4	D. Hawaii, ⁵⁵ D. Idaho, W.D. Mich., N.D. W. Va.
Within 10 days of arraignment	4	D. Conn., E.D. Mich., ⁵⁶ W.D. Mo., D. Neb. ⁵⁷
At arraignment	3	M.D. Ala., S.D. Ala., E.D. Wis.
Within 5 days of arraignment	3	N.D. Fla., S.D. Ga., W.D. Pa.
At pretrial conference	2	E.D.N.C., ⁵⁸ D. N. Mar. I. ⁵⁹
Within a reasonable time after arraignment	1	D. Kan.
Within 28 days of arraignment	1	D. Mass.
At discovery conference	1	W.D. Wash.
10 days after not guilty plea	1	W.D. Okla.
10–20 days after not guilty plea	1	N.D. Cal.
10 days after defendant’s request	1	S.D. W. Va.
7 days after court’s order	1	W.D. Ky. ⁶⁰
8 days after court’s order	1	D.N.M.
10 days after court’s order	1	D.N.J.

51. Or on the date the court otherwise sets for good cause.

52. Or as ordered by the court.

53. If defendant waives the arraignment within fourteen days after latest arraignment date.

54. Or date otherwise set by court.

55. Government must file and serve notice of compliance with discovery.

56. Or other date set by judge.

57. Upon request for additional discovery or disputed *Brady* materials “as soon as practicable upon request.”

58. May exchange by mail. “Rule adds to government disclosure obligations under Rule 16, and requires the scheduling of a pretrial conference at which Rule 16 materials should be given to a defendant.” *United States v. King*, 121 F.R.D. 277 (E.D.N.C. 1988).

59. Conference upon request or *sua sponte*.

60. If not prior to order then *Brady* disclosure must be in time for effective use at trial.

Time Requirement	Number of Districts	Districts
14 days after court's order	1	E.D. Tenn. ⁶¹
20 days before trial	1	D.N.H. ⁶²
Not less than 7 days before trial	1	W.D. La. ⁶³

b. No specific time requirement

Four districts have nonspecific time requirements for disclosure, set out in local rules or in various court orders. The terms used for these time requirements include the following descriptions:

- “in time for effective use at trial”;⁶⁴
- “as soon as reasonably possible”;⁶⁵
- “sufficiently in advance of trial to allow a defendant to use it effectively”;⁶⁶ and
- “discovery shall be accomplished without the necessity of court intervention.”⁶⁷

2. Duration of disclosure requirements

Thirty-one of the thirty-seven districts make the prosecutor's disclosure obligation a continuing one, such that if additional evidence is discovered during the trial or after initial disclosure, the defendant must be notified and shown the new evidence.⁶⁸ Many of the districts use adjectives or

61. In the Eastern District of Tennessee, timing of disclosure is governed by *United States v. Presser*, 844 F.2d 1275 (6th Cir. 1988), which addressed material that was arguably exempt from pretrial disclosure by the Jencks Act, yet also arguably exculpatory under the *Brady* rule. There, the material needed only to be disclosed to defendants “in time for use at trial.”

62. For good cause shown the government may seek approval to disclose said material at a later time.

63. Parties must meet in person.

64. E.D. Ark. Pretrial Order for Criminal Cases.

65. M.D. Ga. Standard Pretrial Order ¶ 5.

66. N.D. Ga. Standard Criminal Pretrial Order IV.B.

67. D.N.D. Criminal Pretrial Order § II(a).

68. M.D. Ala. Standing Order on Criminal Discovery § Supplementation; S.D. Ala. R. 16.13 § (c); E.D. Ark. Pretrial Order; D. Conn. Cr. R. Appx. § (D); N.D. Fla. R. 26.3(G)(2); S.D. Fla. R. 88.10(Q)(3); N.D. Ga. Standard Pretrial Order § IV(A); S.D. Ga. Cr. R. 16.1(g); D. Haw. Crim. R. 16.1(c); D. Idaho Procedural Order § I(5); D. Kan. General Order of Discovery and Scheduling; W.D. Ky. Scheduling Order § 2(B)(2); W.D. La. Criminal Scheduling Order § II(c)(8); D. Mass. R. 116.7; E.D. Mich. Standing Order for Discovery and Inspection and Fixing Motion Cut-Off Date in Criminal Cases § (3); W.D. Mich. Standing Order Regarding Discovery in Criminal Cases § M; M.D. Neb. Order for the Progression of a Criminal Case § 2; D.N.H. R. 16.2; D.N.J. Order for Dis-

modifiers to more clearly define how soon after discovery of new material the government must disclose it.⁶⁹ Nine of the thirty-one districts provide no timing information.⁷⁰

E. Due Diligence Requirements

Thirteen districts have “due diligence” requirements for prosecutors regarding discovery.⁷¹ One district⁷² requires the government to sign and file a “certificate of compliance” (with *Brady* obligations) with discovery. Another district obliges the parties to “collaborate in preparation of a written statement to be signed by counsel for each side, generally describing all discovery material exchanged, and setting forth all stipulations entered into at the conference.”⁷³

While other districts do not use the term “due diligence” in their local rules, orders, or procedures, some make it clear that the government has the responsibility to identify and produce discoverable evidence and information. For example, the Western District of Missouri’s rule regarding

covery and Inspection § 5; D.N.M. Standard Discovery Order § 4; N.D.N.Y. R. Cr. P. 14.1 § (f); E.D.N.C. Crim. R. 16.1(e); D.N.D. Criminal Pretrial Order § II; W.D. Okla. Joint Statement of Discovery Conference § 5; E.D. Tenn. Discovery and Scheduling Order ¶ 16; M.D. Tenn. R. 16.01(n); W.D. Tex. R. CR-16(b)(4); D. Vt. R. 16.1(e); W.D. Wash. Cr. R. 16(a)(2)(E)(d); N.D. W. Va. R. Cr. P. 16.12; S.D. W. Va. R. Cr. P. 16.1(f).

69. *E.g.*, “immediately” (D. Conn. Crim. R. App. Standing Order on Discovery § D; S.D. Fla. Gen. R. 88.10; D. Kan. General Order of Discovery and Scheduling; W.D. La. Criminal Scheduling Order § II(c)(8); W.D. Mich. Standing Order Regarding Discovery in Criminal Cases § M; E.D. Tenn. Discovery and Scheduling Order ¶ 16; M.D. Tenn. R. 16.01(n); N.D. W. Va. R. Crim. P. 16.05); “promptly” (E.D. Ark. Pretrial Order; D. Haw. Crim. R. 16.1(c); D. Mass. R. 116.7; D.N.M. Standard Discovery Order § 4; W.D. Tex. R. CR-16(b)(4); D. Vt. R. 16.1(e); W.D. Wash. Cr. R. 16(a)(2)(E)(d)); “expeditiously” (M.D. Ala. Standing Order on Criminal Discovery; S.D. Ala. R. 16.13(c); N.D.N.Y. R. Crim. P. 14.1(f)); “as soon as it is received” (S.D. W. Va. R. Cr. P. 16.1(f)); “as soon as practicable” (D. Idaho Procedural Order § I(5)); “by the speediest means available” (N.D. Fla. Crim. R. 26.3(G)); and “when information is discovered” (D.N.H. R. 16.2).

70. E.D. Ark. Pretrial Order; N.D. Ga. Standard Pretrial Order § IV(A); S.D. Ga. Cr. R. 16.1; W.D. Ky. Arraignment Order Reciprocal Order of Discovery (Louisville Division) 3(c); E.D. Mich. Standing Order for Discovery and Inspection and Fixing Motion Cut-Off Date in Criminal Cases § 3(f); D. Neb. Order for the Progression of a Criminal Case; D.N.J. Order for Discovery and Inspection § 3; E.D.N.C. Crim. R. 16.1(e); W.D. Okla. Joint Statement of Discovery Conference.

71. D. Conn. Crim. R. App. Standing Order on Discovery § A; S.D. Fla. R. 88.10(A); D. Haw. Crim. R. 16.1; D. Mass. R. 116.2(A)(1); W.D. Mich. Standing Order Regarding Discovery in Criminal Cases §§ A & B; W.D. Mo. Scheduling and Trial Order § I; D.N.H. Crim. R. 16.2; D.N.M. Standard Discovery Order § 2; E.D.N.C. Crim. R. 16.1(b)(1); E.D. Tenn. Discovery and Scheduling Order § A; M.D. Tenn. R. 16.01(a)(2); W.D. Wash. Crim. R. 16(a); N.D. W. Va. R. Cr. P. 16.01(a).

72. W.D. Mo. Scheduling and Trial Order § IX.

73. W.D. Mich. Standing Order Regarding Discovery in Criminal Cases § L.

the government's responsibility for reviewing the case file for *Brady* (and *Giglio*) material provides:

The government is advised that if any portion of the government's investigative file or that of any investigating agency is not made available to the defense for inspection, the Court will expect that trial counsel for the government or an attorney under trial counsel's immediate supervision who is familiar with the *Brady/Giglio* doctrine will have reviewed the applicable files for the purpose of ascertaining whether evidence favorable to the defense is contained in the file.⁷⁴

In addition, the Middle and Southern Districts of Alabama include a restriction on the delegation of the responsibility:

The identification and production of all discoverable information and evidence is the personal responsibility of the Assistant U.S. Attorney assigned to the action and may not be delegated without the express permission of the Court.⁷⁵

F. Sanctions for Noncompliance with *Brady* Obligations

None of the thirty-seven districts specifies remedies for prosecutorial non-disclosure. All leave the determination of any sanctions to the discretion of the court.

However, several districts provide some guidance for judges dealing with the failure of the government to comply with *Brady/Giglio* obligations. The Uniform Procedural Order in the District of Idaho provides:

If the government has information in its possession at the time of the arraignment, but elects not to disclose this information until a later time in the proceedings, the court can consider this as one factor in determining whether the defendant can make effective use of the information at trial.⁷⁶

The Eastern District of Michigan's rule notes "the government proceeds at its peril if there is a failure to disclose information pursuant to Rule 16(a)(1) and exculpatory evidence."⁷⁷ And the Western District of Kentucky's rule states that the "[f]ailure to disclose *Brady* [material] at a time when it can be used effectively may result in a recess or continuance so that defendant may properly utilize such evidence."⁷⁸

74. W.D. Mo. Scheduling and Trial Order Note following §§ VI(A) & (B).

75. M.D. Ala. Standing Order on Criminal Discovery § 2(C); S.D. Ala. R. 16.13(b)(2)(C).

76. D. Idaho Procedural Order § I(5).

77. E.D. Mich. Standing Order for Discovery and Inspection and Fixing Motion Cut-Off Date in Criminal Cases § 1(b).

78. W.D. Ky. Scheduling Order § 2(B)(2).

Most courts allow sanctions (generally based on Rule 16's authority) for both parties for general discovery abuses. These sanctions include exclusion of evidence at trial, a finding of contempt, granting a continuance, and even dismissal of the indictment with prejudice. For example, the Northern District of West Virginia's local rule provides:

If at any time during the course of the proceedings it is brought to the attention of the Court that a party has failed to comply with L.R. Crim. P. 16 [the general discovery rule], the Court may order such party to permit the discovery or inspection, grant a continuance or prohibit the party from introducing evidence not disclosed, or the Court may enter such order as it deems just under the circumstances up to and including the dismissal of the indictment with prejudice.⁷⁹

G. Declination Procedures

Nine of the thirty-seven districts specifically refer to declination procedures in their local rules or orders.⁸⁰ Procedures vary by districts, but most require a writing describing the specific matters in question and the reasons for declining to make the necessary disclosures required by the local rule or order. For example, the Southern District of Georgia's local rule says:

In the event the U.S. Attorney declines to furnish any such information described in this rule, he shall file such declination in writing specifying the types of disclosure that are declined and the ground therefor. If defendant's attorney objects to such refusal, he shall move the Court for a hearing therein.⁸¹

The District of Massachusetts has an even more detailed rule governing the declination of disclosure and protective orders, providing for challenges, sealed filings, and ex parte motions:

(A) Declination. If in the judgment of a party it would be detrimental to the interests of justice to make any of the disclosures required by these Local Rules, such disclosures may be declined, before or at the time that disclosure is due, and the opposing party advised in writing, with a copy filed in the Clerk's Office, of the specific matters on which disclosure is declined and the reasons for declining. If the op-

79. N.D. W. Va. R. Crim. P. 16.11.

80. S.D. Ga. Crim. R. 16.1(g); W.D. Ky. Arraignment Order Reciprocal Order of Discovery (Louisville Division) 3(c); W.D. La. Criminal Scheduling Order § III(a); D. Mass. R. 116.6(A); E.D. Mich. Standing Order for Discovery and Inspection and Fixing Motion Cut-Off Date in Criminal Cases § (2); D.N.J. Order for Discovery and Inspection § 2; W.D. Pa. Cr. R. 16.1(B); W.D. Wash. Crim. R. 16(e); N.D. W. Va. R. Cr. P. 16.02.

81. S.D. Ga. Crim. R. 16.1(g).

posing party seeks to challenge the declination, that party shall file a motion to compel that states the reasons why disclosure is sought. Upon the filing of such motion, except to the extent otherwise provided by law, the burden shall be on the party declining disclosure to demonstrate, by affidavit and supporting memorandum citing legal authority, why such disclosure should not be made. The declining party may file its submissions in support of declination under seal pursuant to L.R. 7.2 for the Court's in camera consideration. Unless otherwise ordered by the Court, a redacted version of each such submission shall be served on the moving party, which may reply.

(B) Ex Parte Motions for Protective Orders. This Local Rule does not preclude any party from moving under L.R. 7.2 and ex parte (i.e., without serving the opposing party) for leave to file an ex parte motion for a protective order with respect to any discovery matter. Nor does this Local Rule limit the Court's power to accept or reject an ex parte motion or to decide such a motion in any manner it deems appropriate.⁸²

Four of the thirty-seven districts have procedures for motions to deny, modify, restrict, or defer discovery or inspection.⁸³ The moving party has the burden to show cause why discovery should be limited.

82. D. Mass. Crim. R. 116.6.

83. *See, e.g.*, D. Conn. Cr. R. Appx. § (F); W.D. Mich. Standing Order Regarding Discovery in Criminal Cases § N; E.D. Tenn. Discovery and Scheduling Order ¶ 17; M.D. Tenn. R. 16.01(n). The Middle District of Tennessee's local rule language is similar to Connecticut's; however, the Middle District of Tennessee's local rule includes the following cautionary message: "It is expected by the Court, however, that counsel for both sides shall make every good faith effort to comply with the letter and spirit of this Rule." M.D. Tenn. R. 16.01(a)(2)(n).

Appendix A

Proposed Rule 16 Amendment and Committee Note

March 15, 2006, draft

Rule 16. Discovery and Inspection

(a) GOVERNMENT'S DISCLOSURE.

(1) INFORMATION SUBJECT TO DISCLOSURE.

* * * *

(H) *Exculpatory or Impeaching Information.* Upon a defendant's request, the government must make available all information that is known to the attorney for the government or agents of law enforcement involved in the investigation of the case that is either exculpatory or impeaching. The court may not order disclosure of impeachment information earlier than 14 days before trial.

COMMITTEE NOTE

Subdivision (a)(1)(H). New subdivision (a)(1)(H) is based on the principle that fundamental fairness is enhanced when the defense has access before trial to any exculpatory or impeaching information known to the prosecution. The requirement that exculpatory and impeaching information be provided to the defense also reduces the possibility that innocent persons will be convicted in federal proceedings. *See generally* ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-3.11(a) (3d ed. 1993), and ABA MODEL RULE OF PROFESSIONAL CONDUCT 3.8(d) (2003). The amendment is intended to supplement the prosecutor's obligations to disclose material exculpatory or impeaching information under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), *Kyles v. Whitley*, 514 U.S. 419 (1995), *Strickler v. Greene*, 527 U.S. 263, 280–81 (1999), and *Banks v. Dretke*, 540 U.S. 668, 691 (2004).

The rule contains no requirement that the information be "material" to guilt in the sense that this term is used in cases such as *Kyles v. Whitley*. It requires prosecutors to disclose to the defense all exculpatory or impeaching information known to any law enforcement agency that participated in the prosecution or investigation of the case without further speculation as to whether this information will ultimately be material to guilt.

The amendment distinguishes between exculpatory and impeaching information for purposes of the timing of disclosure. Information is exculpatory under the rule if it tends to cast doubt upon the defendant's guilt as to any essential element in any count in the indictment or information.

Because the disclosure of the identity of witnesses raises special concerns, and impeachment information may disclose a witness's identity, the rule provides that the court may not order the disclosure of information that is impeaching but not exculpatory earlier than 14 days before trial. The government may apply to the court for a protective order concerning exculpatory or impeaching information under the already-existing provision of Rule 16(d)(1), so as to defer disclosure to a later time.

Appendix B

Compendium of U.S. District Court Material Addressing *Brady* Material

Middle District of Alabama

STANDARD ORDER ON CRIMINAL DISCOVERY

. . . (1) Disclosure by the Government. At arraignment, or on a date otherwise set by the court for good cause shown, the government shall tender to defendant the following:

. . . (B) *Brady* Material. All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, without regard to materiality, within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963).

Southern District of Alabama

LR16.13 CRIMINAL DISCOVERY

. . . (b) Initial Disclosures.

. . . (B) *Brady* Material. All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, without regard to materiality, within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963).

Eastern District of Arkansas

PRETRIAL ORDER FOR CRIMINAL CASES

Brady/Giglio

The government must comply with its Constitutional obligation to disclose any information known to it that is material to the guilt or punishment of the defendant whether or not the defendant requests it. *Brady* and *Giglio* information must be disclosed in time for effective use at trial.

Northern District of California

17.1-1. PRETRIAL CONFERENCE

. . . (b) Pretrial Conference Statement. Unless otherwise ordered, not less than 4 days prior to the pretrial conference, the parties shall file a pretrial conference statement addressing the matters set forth below, if pertinent to the case:

. . . (3) Disclosure of exculpatory or other evidence favorable to the defendant on the issue of guilt or punishment . . .

District of Connecticut

APPENDIX STANDING ORDER ON DISCOVERY

In all criminal cases, it is Ordered:

(A) Disclosure by the Government. Within ten (10) days from the date of arraignment, government and defense counsel shall meet, at which time the attorney for the government shall furnish copies, or allow defense counsel to inspect or listen to and record items which are impractical to copy, of the following items in the possession, custody or control of the government, the existence of which is known or by the exercise of due diligence may become known to the attorney for the government or to the agents responsible for the investigation of the case:

. . . (11) All information known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963).

Northern District of Florida

Rule 26.3. DISCOVERY – CRIMINAL

. . . (D) *Other Disclosure Obligations of the Government.*—The government’s attorney shall provide the following within five (5) days after the defendant’s arraignment, or promptly after acquiring knowledge thereof:

(1) *Brady Material.*—All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, without regard to materiality, that is within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963) and *United States v. Agurs*, 427 U.S. 97 (1976).

Southern District of Florida

Rule 88.10. CRIMINAL DISCOVERY

. . . C. The government shall reveal to the defendant and permit inspection and copying of all information and material known to the government which may be

favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Agurs*, 427 U.S. 97 (1976).

Middle District of Georgia

DISCOVERY AND INSPECTION UNDER *BRADY* AND RULE 16; DISCLOSING IMPEACHING INFORMATION AND EXCULPATORY EVIDENCE

A defendant has a right only to discovery of evidence pursuant to Rule 16 of the Federal Rules of Criminal Procedure or *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny.

Northern District of Georgia

STANDARD CRIMINAL ORDER

. . . B. *Discovery and Disclosure of Evidence Arguably Subject to Suppression and of Evidence Which Is Exculpatory and/or Impeaching*: Upon request of the defendant, the government is directed to comply with FED. R. CRIM. P. 16 and with FED. R. CRIM. P. 12 by providing notice as specified in section II.B, *supra*. The government is also directed to provide all materials and information that are arguably favorable to the defendant in compliance with its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and their progeny. Exculpatory material as defined in *Brady* and *Kyles v. Whitley*, 514 U.S. 419, 434 (1995), must be provided sufficiently in advance of trial to allow a defendant to use it effectively. Impeachment material must be provided no later than production of the *Jencks* Act statements.

Southern District of Georgia

LCrR 16.1. PRETRIAL DISCOVERY AND INSPECTION IN CRIMINAL CASES

Within five (5) days after arraignment, the United States Attorney and the defendant's attorney shall confer and, upon request, the government shall:

. . . (f) Permit defendant's attorney to inspect and copy or photograph any evidence favorable to the defendant.

District of Hawaii

CrimLR 16.1. STANDING ORDER FOR ROUTINE DISCOVERY IN CRIMINAL CASES

. . . A request for discovery set out in this paragraph and in *Fed.R.Crim.P. 16* is entered for the defendant to the government by this rule so that the defendant need not make a further request for such discovery. If the defendant does not request such discovery, he or she shall file a notice to the government that he or she does not request such discovery within five (5) days after arraignment. If such a notice is filed, the government is relieved of any discovery obligations to the defendant imposed by this paragraph or *Fed.R.Crim.P. 16*. If the defendant does not file such a notice, within seven (7) days after arraignment unless otherwise ordered by the court or promptly upon subsequent discovery, the government shall permit the defendant to inspect and copy or photograph, or, in the case of the defendant's criminal record, shall furnish a copy, and provide the information listed in the subparagraphs enumerated immediately below. Upon providing the information required in the enumerated subparagraphs below, the government shall file and serve notice of compliance with discovery mandated under this paragraph.

. . . 7. *Brady* material, as it shall be presumed that defendant has made a general *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215, 1963 U.S. LEXIS 1615 (1963) request. Specific requests shall be made in writing to the government or by motion . . .

District of Idaho

PROCEDURAL ORDER

. . . 5. The Court strongly encourages the government to produce any information currently in its possession and described in the following paragraphs within seven (7) calendar days of the date of the arraignment on the indictment, in conjunction with the material being produced under Part I, paragraph 1 of this Procedural Order. As to any materials not currently in the possession of the government, including information that may not be exculpatory in nature at the time of the arraignment but as the case proceeds towards trial may become exculpatory because of subsequent events, then the government shall, as soon as practicable and at a minimum for the defendant to make effective use of it at trial, disclose the information. If the government has information in its possession at the time of the arraignment, but elects not to disclose this information until a later time in the proceedings, the court can consider this as one factor in determining whether the defendant can make effective use of the information at trial.

A. Disclose all material evidence within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Agurs*, 427 U.S. 97 (1976), and *Kyles v. Whitley*, 514 U.S. 419 (1995), and their progeny.

District of Kansas

GENERAL ORDER OF SCHEDULING AND DISCOVERY

. . . In general, the court will order the parties to comply with Rules 12, 12.1, 12.2, 16 and 26.2 of the Federal Rules of Criminal Procedure, with *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763 (1972) and their progeny, and with Title 18, U.S.C. § 3500, as well as Rule 404(b), Federal Rules of Evidence. A request is not necessary to trigger the operation of the Rules and the absence of a request may not be asserted as a reason for noncompliance.

. . . Within a reasonable time period after arraignment, the government shall comply with Rules 12(b)(4)(B) and 16, and *Brady/Giglio*. Pursuant to Rule 16, the government shall copy for the defendant or permit the defendant to inspect and copy or photograph:

. . . Pursuant to *Brady* and *Giglio* and their progeny, the government shall produce any and all evidence in its possession, custody or control which would tend to exculpate the defendant (that is, evidence which is favorable and material to a defense), or which would constitute impeachment of government witnesses, or which would serve to mitigate punishment, if any, which may be imposed in this case. This includes and is not limited to the following:

1. Any evidence tending to show threats, promises, payments or inducements made by the government or any agent thereof which would bear upon the credibility of any government witness.

2. Any statement of any government witness which is inconsistent with a statement by the witness which led to the indictment in this case.

3. Any statement of any government witness which the attorney for the government knows or reasonably believes will be inconsistent with the witness' testimony at trial.

4. Any prior conviction of any government witness, which involved dishonesty or false statement, or for which the penalty was death or imprisonment in excess of one year under the law under which he was convicted.

5. Any pending felony charges against any government witness.

6. Any specific instances of the conduct of any government witness which would tend to show character for untruthfulness.

Western District of Kentucky

SCHEDULING ORDER

. . . (2) *Brady material*. The government shall disclose any *Brady* material of which it has knowledge in the following manner:

(a) pretrial disclosure of any *Brady* material discoverable under Rule 16(a)(1);

(b) disclosure of all other *Brady* material in time for effective use at trial.

Western District of Louisiana

CRIMINAL SCHEDULING ORDER

. . . (c) Not less than 7 days prior to trial:

(1) The government shall reveal to the defendant and permit inspection and copying of all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland*, *United States v. Agurs*, and *Kyles v. Whitley*.

District of Massachusetts

RULE 116.1 DISCOVERY IN CRIMINAL CASES

(A) Discovery Alternatives.

(1) Automatic Discovery. In all felony cases, unless a defendant waives automatic discovery, all discoverable material and information in the possession, custody, or control of the government and that defendant, the existence of which is known, or by the exercise of due diligence may become known, to the attorneys for those parties, must be disclosed to the opposing party without formal motion practice at the times and under the automatic discovery procedures specified in this Local Rule.

. . . (C) Automatic Discovery Provided By The Government.

(1) Following Arraignment. Unless a defendant has filed the Waiver, within twenty-eight (28) days of arraignment—or within fourteen (14) days of receipt by the government of a written statement by the defendant that no Waiver will be filed—the government must produce to the defendant:

. . . (2) Exculpatory Information. The timing and substance of the disclosure of exculpatory evidence is specifically provided in L.R. 116.2.

RULE 116.2 DISCLOSURE OF EXCULPATORY EVIDENCE

(A) Definition. Exculpatory information includes, but may not be limited to, all information that is material and favorable to the accused because it tends to:

(1) Cast doubt on defendant's guilt as to any essential element in any count in the indictment or information;

(2) Cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable pursuant to *18 U.S.C. § 3731*;

(3) Cast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its case-in-chief; or

(4) Diminish the degree of the defendant's culpability or the defendant's Offense Level under the United States Sentencing Guidelines.

(B) Timing of Disclosure by the Government. Unless the defendant has filed the Waiver or the government invokes the declination procedure under Rule 116.6, the government must produce to that defendant exculpatory information in accordance with the following schedule:

(1) Within the time period designated in L.R. 116.1(C)(1):

(a) Information that would tend directly to negate the defendant's guilt concerning any count in the indictment or information.

(b) Information that would cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief and that could be subject to a motion to suppress or exclude, which would, if allowed, be appealable under *18 U.S.C. § 3731*.

(c) A statement whether any promise, reward, or inducement has been given to any witness whom the government anticipates calling in its case-in-chief, identifying by name each such witness and each promise, reward, or inducement, and a copy of any promise, reward, or inducement reduced to writing.

(d) A copy of any criminal record of any witness identified by name whom the government anticipates calling in its case-in-chief.

(e) A written description of any criminal cases pending against any witness identified by name whom the government anticipates calling in its case-in-chief.

(f) A written description of the failure of any percipient witness identified by name to make a positive identification of a defendant, if any identification procedure has been held with such a witness with respect to the crime at issue.

(2) Not later than twenty-one (21) days before the trial date established by the judge who will preside:

(a) Any information that tends to cast doubt on the credibility or accuracy of any witness whom or evidence that the government anticipates calling or offering in its case-in-chief.

(b) Any inconsistent statement, or a description of such a statement, made orally or in writing by any witness whom the government anticipates calling in its case-in-chief, regarding the alleged criminal conduct of the defendant.

(c) Any statement or a description of such a statement, made orally or in writing by any person, that is inconsistent with any statement made orally or in writing by any witness the government anticipates calling in its case-in-chief, regarding the alleged criminal conduct of the defendant.

(d) Information reflecting bias or prejudice against the defendant by any witness whom the government anticipates calling in its case-in-chief.

(e) A written description of any prosecutable federal offense known by the government to have been committed by any witness whom the government anticipates calling in its case-in-chief.

(f) A written description of any conduct that may be admissible under *Fed. R. Evid. 608(b)* known by the government to have been committed by a witness whom the government anticipates calling in its case-in-chief.

(g) Information known to the government of any mental or physical impairment of any witness whom the government anticipates calling in its case-in-chief, that may cast doubt on the ability of that witness to testify accurately or truthfully at trial as to any relevant event.

(3) No later than the close of the defendant's case: Exculpatory information regarding any witness or evidence that the government intends to offer in rebuttal.

(4) Before any plea or to the submission by the defendant of any objections to the Pre-Sentence Report, whichever first occurs: A written summary of any information in the government's possession that tends to diminish the degree of the defendant's culpability or the defendant's Offense Level under the United States Sentencing Guidelines.

(5) If an item of exculpatory information can reasonably be deemed to fall into more than one of the foregoing categories, it shall be deemed for purposes of determining when it must be produced to fall into the category which requires the earliest production.

Eastern District of Michigan

STANDING ORDER FOR DISCOVERY AND INSPECTION AND FIXING MOTION CUT-OFF DATE IN CRIMINAL CASES

. . . (b) The government shall permit defense counsel to inspect, copy or photocopy any exculpatory evidence within the meaning of *Brady v. Maryland* and *U.S. v. Agurs*.

Western District of Michigan

STANDING ORDER OF DISCOVERY IN CRIMINAL CASES

. . . D. The government shall reveal to the defendant and permit inspection and copying all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland* and *U.S. v. Agurs*.

Western District of Missouri

SCHEDULING AND TRIAL ORDER

. . . VI. Evidence Favorable to the Defense

. . . A. *Brady* Evidence

The government is directed to disclose all evidence favorable to the defendant within the meaning of *Brady v. Maryland*.

District of Nebraska

ORDER FOR PROGRESSION OF A CRIMINAL CASE

Upon arraignment of Defendant this date and the entry of plea of not guilty,
IT IS ORDERED:

. . . the United States Attorney shall disclose *Brady v. Maryland* (and its progeny) material as soon as practicable.

District of New Hampshire

Rule 16.1. ROUTINE DISCOVERY

The parties shall disclose the following information without waiting for a demand from the opposing party.

. . . (c) Exculpatory and Impeachment Material.

The government shall disclose any evidence material to issues of guilt or punishment within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963), and related cases, and any impeachment material as defined in *Giglio v. United States*, 405 U.S. 150 (1972), and related cases, at least twenty (20) days before trial. For good cause shown, the government may seek approval to disclose said material at a later time.

District of New Jersey

ORDER FOR DISCOVERY AND INSPECTION

. . . 1. *CONFERENCE*. Within ten (10) days from the date hereof, the United States Attorney or one of his assistants and the defendant's attorney shall meet and confer, and the government shall:

(f) Permit defendant's attorney to inspect, copy or photograph any exculpatory evidence within the purview of *Brady v. Maryland*.

District of New Mexico

RULE 16.1 DISCOVERY OF EVIDENCE

The Parties will comply with the Standard Discovery Order. A copy of the Order is attached to these Rules.

STANDARD DISCOVERY ORDER

. . . 6. DISCLOSURE OF *BRADY*, *GIGLIO* AND JENCKS ACT MATERIALS. The government shall make available to the Defendant by the time required by applicable law all material for which discovery is mandated by *Brady v. Mary-*

land, 373 U.S. 83 (1963), by *Giglio v. United States*, 405 U.S. 150 (1972), and by the Jencks Act, 18 U.S.C. § 3500, and Rules 12(i) and 26.2.

Northern District of New York

14.1 DISCOVERY

. . . (b) Fourteen (14) days after arraignment, or on a date that the Court otherwise sets for good cause shown, the government shall make available for inspection and copying to the defendant the following:

1. *Brady* Material. All information and material that the government knows that may be favorable to the defendant on the issues of guilt or punishment, within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963).

Eastern District of North Carolina

Rule 16.1. MOTIONS RELATING TO DISCOVERY AND INSPECTION

. . . At the pre-trial conference and upon the request of counsel for the defendant, the government shall permit counsel for the defendant:

. . . (6) to inspect, copy or photograph any exculpatory evidence.

District of North Dakota

PRETRIAL ORDER (CRIMINAL)

. . . II. DISCOVERY: The following discovery rules shall apply:

. . . d) The Government shall disclose to the Defendant any exculpatory material discoverable under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny.

District of the Northern Mariana Islands

LCrR 17.1.1—PRETRIAL CONFERENCE

. . . c. Production of evidence favorable to the defendant on the issue of guilt or punishment as required by *Brady v. Maryland*, 373 U.S. 83 (1963), and related authorities . . .

Western District of Oklahoma

LCrR16.1 DISCOVERY CONFERENCE

(b) Joint Statement. Within three (3) days following completion of the required discovery conference, the parties shall file with the Court Clerk a joint statement memorializing the discovery conference.

JOINT DISCOVERY STATEMENT

. . . 5. The fact of disclosure of all materials favorable to the defendant or the absence thereof within the meaning of *Brady v. Maryland* and related cases:

Counsel for plaintiff expressly acknowledges continuing responsibility to disclose any material favorable to defendant within the meaning of *Brady* that becomes known to the Government during the course of these proceedings.

Western District of Pennsylvania

Rule 16.1. DISCOVERY AND INSPECTION

. . . F. Within five (5) days after the arraignment, the United States attorney shall permit the defendant or defendant's attorney to inspect, copy or photocopy any evidence favorable to the defendant.

Eastern District of Tennessee

DISCOVERY AND SCHEDULING ORDER

. . . The government shall reveal to the defendant and permit inspection and copying of all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Agurs*, 427 U.S. 97 (1976) (exculpatory evidence), and *United States v. Bagley*, 473 U.S. 667 (1985) (impeachment evidence). Timing of such disclosure is governed by *United States v. Presser*, 844 F.2d 1275 (6th Cir. 1988).

Middle District of Tennessee

LcrR16.01. DISCOVERY AND INSPECTION

. . . d. The government shall reveal to the defendant and permit inspection and copying of all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

Western District of Texas

Rule CR-16 DISCOVERY AND INSPECTION

(a) Discovery Conference and Agreement.

(1) The parties need not make standard discovery requests, motions, or responses if, not later than the deadline for filing pretrial motions (or as otherwise authorized by the court), they confer, attempt to agree on procedures for pretrial discovery, and sign and file a copy of the Disclosure Agreement Checklist appended to this rule.

PARTIES' DISCLOSURE AGREEMENT CHECKLIST

Disclosed	Will Disclose/Refuse to	Not	Comments
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. . . Rule 16 material:

. . . Exculpatory material . . .
(*Brady*)

District of Vermont

Rule 16.1. DISCOVERY

. . . (a) Disclosure from Government. Within 14 days of arraignment, or on a date otherwise set by the court for good cause shown, the government will make available to the defendant for inspection and copying the following:

. . . (2) *Brady* Material. All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963).

CRIMINAL PRETRIAL ORDER

. . . II. DISCOVERY:

A. Discovery from Government. Within 14 days of arraignment, or on a date otherwise set by the Court for good cause shown, the government shall make available to the defendant for inspection and copying the following:

. . . 2. *Brady* Material. All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963).

Western District of Washington

Rule 16. DISCOVERY AND INSPECTION

. . . (1) Discovery from the government. At the discovery conference the attorney for the government shall comply with the government's obligations under Rule 16 including, but not limited to, the following:

. . . (K) Advise the attorney for the defendant and provide, if requested, evidence favorable to the defendant and material to the defendant's guilt or punishment to which he is entitled pursuant to *Brady v. Maryland* and *United States v. Agurs* . . .

Northern District of West Virginia

LR Cr P 16.05. EXCULPATORY EVIDENCE

Exculpatory evidence as defined in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), as amplified by *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985), shall be disclosed at the time the disclosures described in LR Cr P 16.01 are made. Additional *Brady* material not known to the government at the time of disclosure of other discovery material, as described above, shall be disclosed immediately in writing setting forth the material in detail.

Southern District of West Virginia

ARRAIGNMENT ORDER AND STANDARD DISCOVERY REQUESTS

. . . 1. On Behalf of the Defendant, the Government Is Requested to: (defense counsel must initial all applicable sections)

. . . H. Disclose to defendant all evidence favorable to defendant, including impeachment evidence, and allow defendant to inspect, copy or photograph such evidence.

Eastern District of Wisconsin

Criminal L.R. 16.1 OPEN FILE POLICY

. . . (b) As defined by the United States Attorney's Office, "open file policy" means disclosure without defense motion of all information and materials listed in Fed.R.Crim.P. 16(a)(1)(A), (B), and (D); upon defense request, material listed in Fed.R.Crim.P. 16(a)(1)(C); material disclosable under *18 U.S.C. § 3500* other than grand jury transcripts; reports of interviews with witnesses the government intends to call in its case-in-chief relating to the subject matter of the testimony of the witness; relevant substantive investigative reports; and all exculpatory ma-

terial. The government must retain the authority to redact from open file material anything (i) that is not exculpatory and (ii) that the government reasonably believes is not relevant to the prosecution, or would jeopardize the safety of a person other than the defendant, or would jeopardize an ongoing criminal investigation. The defendant retains the right to challenge such redactions by motion to the Court.

Appendix C

Sample of Individual Judge Orders Addressing *Brady* Disclosures

District of the District of Columbia
(Judge Walton)

GENERAL ORDER GOVERNING CRIMINAL CASES

... (7) **DISCOVERY MOTIONS:**

The court requires counsel to confer and attempt to resolve all discovery disputes informally. If counsel must file a motion pertaining to a discovery matter, the motion **must** comply with **Local Criminal Rule 16.1**.

- (a) **BRADY/GIGLIO EVIDENCE:** If defense counsel believes that the defense is entitled to pretrial disclosure of *Brady/Giglio* material and the government has not complied with its obligations to produce such material, defense counsel should immediately file a motion requesting that the court order the production of such evidence. In the event a motion for the production of *Brady/Giglio* evidence is filed, the court will forthwith convene a hearing during which it will ascertain whether such evidence exists, and if so, when it must be produced. Failure to file a motion despite defense counsel's belief that the defense is in need of pretrial disclosure of *Brady/Giglio* evidence to effectively prepare and present a defendant's case, will weigh heavily against a request by a defendant for a continuance on the eve of trial based on the untimely disclosure of *Brady/Giglio* evidence by the government. In any event, the government is required to provide to the defendant *Brady/Giglio* evidence "at such a time as to allow the defense to use the favorable material effectively in the *preparation and presentation of its case . . .*" *United States v. Pollock*, 534 F.2d at 973 (emphasis added). If the government believes that such disclosure should not occur sufficiently in advance of a defendant's opening statement so as to afford defense counsel the opportunity to incorporate the *Brady/Giglio* material into the defendant's opening statement, government counsel must advise the Court of the reason(s) for the non-disclosure so the Court can determine when disclosure shall occur. The timing of the disclosure in such situations will be determined by the Court based on the individual circumstances of the particular case.

Middle District of Florida
(Judge Bucklew)

**PRETRIAL DISCOVERY ORDER AND NOTICE OF TRIAL AND
STATUS CONFERENCE**

. . . II. At an appropriate time and after considering any written requests made to the Government by defendant(s):

- A. The Government shall reveal to the defendant and permit inspection and copying of all information and material known to the Government which may be favorable to the defendant on the issue of guilt or punishment within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Agurs*, 427 U.S. 97 (1976).

Middle District of Florida
(Judge Corrigan)

**JUDGE CORRIGAN'S STANDING ORDER PERTAINING TO
DISCOVERY, MOTIONS, HEARINGS, CONFERENCES AND TRIAL**

. . . E. Not later than five (5) working days before trial, the Government shall reveal to the defendant(s) all information and material known to the Government which may be favorable to the defendant(s) on the issue of guilt or punishment within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963).

Northern District of Iowa
(Judge Bennett)

**ORDER SETTING JURY TRIAL IN CRIMINAL CASES and
STIPULATED DISCOVERY ORDER**

. . . **XVII. STIPULATED DISCOVERY ORDER:** At the time of arraignment, the following discovery obligations were agreed to by the parties, and the Court **ORDERS** compliance with the same.

- A. The United States will include in its open discovery file or otherwise make available law enforcement reports (excluding evaluative material of matters such as possible defenses and legal strategies), grand jury testimony, and evidence or existing summaries of evidence in the custody of the United States Attorney's Office, which provide the basis for the case against the defendant. The file will include Rule 16, *Brady*, and Jencks Act materials of which the United States Attorney's Office is aware and which said Office possesses. Should the defendant become aware of any *Brady* material not contained in the open discov-

ery file, the defendant will notify the United States Attorney's Office of such materials in order that the information may be obtained.

B. The United States may redact or withhold information from the open discovery file for security concerns or to protect an ongoing investigation. This does not preclude the defendant from requesting *in camera* review of such material by the court, upon proper showing, in order to determine whether or not it should be disclosed in accordance with Federal Rule of Criminal Procedure 16. Where the United States withholds information from the open discovery file, notice of the withholding along with a general description of the type of material withheld will be included in the open discovery file. The open discovery file will also not contain evidence which the United States has decided to use for impeachment of defense witnesses or rebuttal evidence. It will not include evaluative material of matters such as possible defenses and legal strategies or other attorney work product. The United States is authorized to disclose any defendant's tax information in its file to co-defendants for use consistent with this Order.

C. The information in the United States's discovery file may only be used for the limited purpose of discovery and in connection with the above-captioned federal criminal case now pending against the defendant. The information provided in discovery shall not be disclosed to or used by any person other than that defendant and his or her counsel, and may not be used or disclosed in any proceeding not part of the pending criminal case. This paragraph does not prohibit the sharing of information by co-defendants in this federal criminal case between or among counsel who are subject to this Order. No information obtained through discovery shall be shared with other defendants or their counsel who are not subject to this Order except through motion pleading, or the offer of trial and sentencing exhibits.

District of Puerto Rico
(Judge Cerezo)

SCHEDULING ORDER

. . . 1. Automatic discovery by the government of the following material and information in its possession, custody or control, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

Within the term provided above, except where otherwise provided, the government shall disclose and allow the defendant to inspect, copy and photograph:

- (F) all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Kyles v. Whitley*, 115 S.Ct. 1555 (1995).

Appendix D

U.S. Attorney's Manual, Section 9-5.000, Issues Related to Trials and Other Court Proceedings

9-5.000 ISSUES RELATED TO TRIALS AND OTHER COURT PROCEEDINGS

- | | |
|----------------|--|
| 9-5.001 | Policy Regarding Disclosure of Exculpatory and Impeachment Information |
| 9-5.100 | Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses (“Giglio Policy”) |
| 9-5.110 | Testimony of FBI Laboratory Examiners |
| 9-5.150 | Authorization to Close Judicial Proceedings to Members of the Press and Public |
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9-5.001	Policy Regarding Disclosure of Exculpatory and Impeachment Information
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- A. **Purpose.** Consistent with applicable federal statutes, rules, and case law, the policy set forth here is intended to promote regularity in disclosure practices, through the reasoned and guided exercise of prosecutorial judgment and discretion by attorneys for the government, with respect to the government’s obligation both to disclose exculpatory and impeachment information to criminal defendants and to seek a just result in every case. The policy is intended to ensure timely disclosure of an appropriate scope of exculpatory and impeachment information so as to ensure that trials are fair. The policy, however, recognizes that other interests, such as witness security and national security, are also critically important, *see* USAM § 9-21.000, and that if disclosure prior to trial might jeopardize

these interests, disclosure may be delayed or restricted (*e.g.* pursuant to the Classified Information Procedures Act). This policy is not a substitute for researching the legal issues that may arise in an individual case. Additionally, this policy does not alter or supersede the policy that requires prosecutors to disclose “substantial evidence that directly negates the guilt of a subject of the investigation” to the grand jury before seeking an indictment, *see* USAM § 9-11.233.

- B. **Constitutional obligation to ensure a fair trial and disclose material exculpatory and impeachment evidence.** Government disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972). The law requires the disclosure of exculpatory and impeachment evidence when such evidence is material to guilt or punishment. *Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 154. Because they are Constitutional obligations, *Brady* and *Giglio* evidence must be disclosed regardless of whether the defendant makes a request for exculpatory or impeachment evidence. *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995). Neither the Constitution nor this policy, however, creates a general discovery right for trial preparation or plea negotiations. *U.S. v. Ruiz*, 536 U.S. 622, 629 (2002); *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).
1. **Materiality and Admissibility.** Exculpatory and impeachment evidence is material to a finding of guilt – and thus the Constitution requires disclosure – when there is a reasonable probability that effective use of the evidence will result in an acquittal. *United States v. Bagley*, 475 U.S. 667, 676 (1985). Recognizing that it is sometimes difficult to assess the materiality of evidence before trial, prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence. *Kyles*, 514 U.S. at 439. While ordinarily, evidence that would not be admissible at trial need not be disclosed, this policy encourages prosecutors to err on the side of disclosure if admissibility is a close question.
 2. **The prosecution team.** It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all the members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant. *Kyles*, 514 U.S. at 437.

- C. **Disclosure of exculpatory and impeachment information beyond that which is constitutionally and legally required.** Department policy recognizes that a fair trial will often include examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal or, as is often colloquially expressed, make the difference between guilt and innocence. As a result, this policy requires disclosure by prosecutors of information beyond that which is “material” to guilt as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995), and *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999). The policy recognizes, however, that a trial should not involve the consideration of information which is irrelevant or not significantly probative of the issues before the court and should not involve spurious issues or arguments which serve to divert the trial process from examining the genuine issues. Information that goes only to such matters does not advance the purpose of a trial and thus is not subject to disclosure.
1. **Additional exculpatory information that must be disclosed.** A prosecutor must disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime.
 2. **Additional impeachment information that must be disclosed.** A prosecutor must disclose information that either casts a substantial doubt upon the accuracy of any evidence – including but not limited to witness testimony – the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence. This information must be disclosed regardless of whether it is likely to make the difference between conviction and acquittal of the defendant for a charged crime.
 3. **Information.** Unlike the requirements of *Brady* and its progeny, which focus on evidence, the disclosure requirement of this section applies to information regardless of whether the information subject to disclosure would itself constitute admissible evidence.
 4. **Cumulative impact of items of information.** While items of information viewed in isolation may not reasonably be seen as meeting the standards outlined in paragraphs 1 and 2 above, several items together can have such an effect. If this is the case, all such items must be disclosed.

- D. **Timing of disclosure.** Due process requires that disclosure of exculpatory and impeachment evidence material to guilt or innocence be made in sufficient time to permit the defendant to make effective use of that information at trial. *See, e.g. Weatherford v. Bursey*, 429 U.S. 545, 559 (1997); *United States v. Farley*, 2 F.3d 645, 654 (6th Cir. 1993). In most cases, the disclosures required by the Constitution and this policy will be made in advance of trial.
1. **Exculpatory information.** Exculpatory information must be disclosed reasonably promptly after it is discovered. This policy recognizes that exculpatory information that includes classified or otherwise sensitive national security material may require certain protective measures that may cause disclosure to be delayed or restricted (*e.g.* pursuant to the Classified Information Procedures Act).
 2. **Impeachment information.** Impeachment information, which depends on the prosecutor's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. In some cases, however, a prosecutor may have to balance the goals of early disclosure against other significant interests – such as witness security and national security – and may conclude that it is not appropriate to provide early disclosure. In such cases, required disclosures may be made at a time and in a manner consistent with the policy embodied in the Jencks Act, 18 U.S.C. § 3500.
 3. **Exculpatory or impeachment information casting doubt upon sentencing factors.** Exculpatory and impeachment information that casts doubt upon proof of an aggravating factor at sentencing, but that does not relate to proof of guilt, must be disclosed no later than the court's initial presentence investigation.
 4. **Supervisory approval and notice to the defendant.** A prosecutor must obtain supervisory approval not to disclose impeachment information before trial or not to disclose exculpatory information reasonably promptly because of its classified nature. Upon such approval, notice must be provided to the defendant of the time and manner by which disclosure of the exculpatory or impeachment information will be made.
- E. **Comment.** This policy establishes guidelines for the exercise of judgment and discretion by attorneys for the government in determining what information to disclose to a criminal defendant pursuant to the government's disclosure obligation as set out in *Brady v. Maryland* and *Giglio v. United States* and its obligation to seek justice in every case. As the

Supreme Court has explained, disclosure is required when evidence in the possession of the prosecutor or prosecution team is material to guilt, innocence or punishment. This policy encourages prosecutors to err on the side of disclosure in close questions of materiality and identifies standards that favor greater disclosure in advance of trial through the production of exculpatory information that is inconsistent with any element of any charged crime and impeachment information that casts a substantial doubt upon either the accuracy of any evidence the government intends to rely on to prove an element of any charged crime or that might have a significant bearing on the admissibility of prosecution evidence. Under this policy, the government's disclosure will exceed its constitutional obligations. This expanded disclosure policy, however, does not create a general right of discovery in criminal cases. Nor does it provide defendants with any additional rights or remedies. Where it is unclear whether evidence or information should be disclosed, prosecutors are encouraged to reveal such information to defendants or to the court for inspection *in camera* and, where applicable, seek a protective order from the Court. By doing so, prosecutors will ensure confidence in fair trials and verdicts. Prosecutors are also encouraged to undertake periodic training concerning the government's disclosure obligation and the emerging case law surrounding that obligation.

Appendix E

State Court Policies for the Treatment of *Brady* Material*

State Court Policies for the Treatment of *Brady* Material

This section describes state court statutes, rules, orders, and procedures that codify the *Brady* rule or incorporate specific aspects of it, define *Brady* material and/or set the timing and conditions for its disclosure, impose any due diligence obligations on the government, and specify sanctions for the government's failure to comply with such disclosure procedures.

A. Research Methods

We identified within all fifty states and the District of Columbia the relevant statewide legal authority governing prosecutorial disclosure of information favorable to the defendant. We searched relevant databases in Westlaw and LEXIS, including state statutes, criminal procedure rules, state court rules governing criminal discovery, state constitutions, state court opinions, and state rules on professional conduct. For most states, we were able to locate a relevant state rule, order, or other legal authority when we used the following search terms in various combinations:

- “exculpatory evidence”;
- “favorable evidence”;
- “*Brady* material”;
- “prosecution disclosure”; and
- “suppression of evidence.”

If we were unable to locate a rule for a state, we reviewed state court opinions to determine if case law addressed or clarified the legal obligation regarding prosecutorial disclosure of information favorable to the defendant.

Our analyses and conclusions are based on our interpretation of the relevant authorities that we identified. We looked for relevant legal authority that contained clear and unequivocal language regarding the duty of the prosecutor to disclose information to the defense. Where we could not identify authority with clear language regarding the prosecution's disclosure obligation, we erred on the side of caution and noted the absence of a clear authority regarding the duty to disclose.

* For a summary of state court policies, see page 61.

B. Governing Rules, Orders, and Procedures

All fifty states and the District of Columbia address the prosecutor’s obligation to disclose information favorable to the defendant. Table 3 shows the sources of the relevant authority.

Table 3. Sources of Authority for Prosecutor’s Obligation to Disclose Evidence Favorable to the Defendant

Authorities⁷⁰	Number of States	States
Rules of Criminal Procedure or general court rules	35	Ala., Alaska, Ariz., Ark., Colo., Del., D.C., Fla., Idaho, Ill., Ind., Iowa, Ky., Me., Md., Mass., Mich., Minn., Miss., Mo., N.H., N.J., N.M., N.D., Ohio, Pa., R.I., S.C., Tenn., Utah, Vt., Va., Wash., W. Va., Wyo.
General statutes	14	Conn., Ga., Kan., La., Mont., Neb., Nev., N.Y., N.C., Okla., Or., S.D., Tex., Wis.
Penal code	2	Cal., Haw.

Some state supreme courts have found prosecutors’ suppression of exculpatory evidence to violate the due process clauses of their constitutions. For example, in *State v. Hatfield*, the West Virginia Supreme Court held that “[a] prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of the West Virginia Constitution.”⁷¹ Another state, Nevada, explicitly notes in its criminal discovery procedure statute that “[t]he provisions of this section are not intended to affect any obligation placed upon the prosecuting attorney by the constitution of this state . . . to disclose exculpatory evidence to the defendant.”⁷²

C. Definition of *Brady* Material

In thirty-three of the fifty-one jurisdictions, we found rules or procedures that codify the *Brady* rule. There are differences in the *Brady*-related definitions of materials covered.

70. We identified several states that address the favorable evidence disclosure obligation in more than one source, e.g., in a statute as well as in a rule. We charted only the highest authority.

71. 286 S.E.2d 402, 411 (W. Va. 1982).

72. Nev. Rev. Stat. § 174.235(3) (2004).

1. Evidence favorable to the defendant

Although there is some variation in the specific language used to define *Brady* material,⁷³ twenty-three states⁷⁴ have adopted language generally resembling the following: “any material or information which tends to negate the guilt of the accused as to the offense charged or would tend to reduce the accused’s punishment therefor.”⁷⁵

2. Exculpatory evidence or material

Ten other states⁷⁶ expressly list exculpatory material as items of information that prosecutors are required to disclose. These states describe exculpatory material in two ways: as “exculpatory evidence”⁷⁷ or as “exculpatory material.”⁷⁸

The remaining states do not appear to have any express language regarding *Brady* material, but case law in several of those states discusses the *Brady* obligation. For example, in *Potts v. State*, the Georgia Supreme Court held that the “[d]efendant . . . has the burden of showing that the evidence withheld from him so impaired his defense that he was denied a fair trial within the meaning of the *Brady* Rule.”⁷⁹ The Supreme Court of Wyoming noted that although “[t]here is no general constitutional right to discovery in a criminal case. . . . [s]uppression of evidence favorable to an accused upon request violates due process where the evidence is material to guilt.”⁸⁰ Other state courts have similarly invoked the *Brady* rule in their decisions.⁸¹

No state procedure expressly refers to impeaching evidence as material subject to disclosure requirements, but three states specify that prosecutors must turn over any information required to be produced under the Due Process Clause of

73. See, e.g., Me. R. Crim. P. 16(a)(1)(C) (“any matter or information known to the attorney for the state which may not be known to the defendant and which tends to create a reasonable doubt of the defendant’s guilt as to the offense charged”).

74. Ala., Ariz., Ark., Colo., Fla., Haw., Idaho, Ill., Ky., La., Me., Md., Minn., Mo., Mont., N.J., N.M., Ohio, Okla., Pa., Tex., Utah, and Wash.

75. Idaho Crim. R. 16(a).

76. Cal., Conn., Mass., Mich., Miss., Nev., N.H., Tenn., Vt., Wis.

77. See, e.g., Nev. Rev. Stat. § 174.235(3).

78. See, e.g., Cal. Penal Code § 1054.1(e).

79. 243 S.E.2d 510, 517 (Ga. 1978) (citation omitted).

80. *Dodge v. State*, 562 P.2d 303, 307 (Wyo. 1977) (citations omitted).

81. *Bui v. State*, 717 So. 2d 6, 27 (Ala. Crim. App. 1997) (“In order to prove a *Brady* violation, a defendant must show (1) that the prosecution suppressed evidence, (2) that the evidence was of a character favorable to his defense, and (3) that the evidence was material.” (citation omitted)); *O’Neil v. State*, 691 A.2d 50, 54 (Del. 1997) (“[T]he [prosecution’s] obligation to disclose exculpatory information is triggered by the defendant’s request pursuant to Super. Ct. Crim. Rule 16 and is not limited to trial proceedings.”); *Lomax v. Commonwealth*, 319 S.E.2d 763, 766 (Va. 1984) (“[T]he Commonwealth has a duty to disclose the [*Brady*] materials in sufficient time to afford an accused an opportunity to assess and develop the evidence for trial.”).

the U.S. Constitution.⁸² Two states require disclosure pursuant to the *Brady* decision.⁸³ Despite this lack of express language, however, it appears that any state court opinion that cites the *Brady* rule would include impeachment evidence as material that state prosecutors are constitutionally obliged to produce for defendants.⁸⁴

D. Disclosure Requirements

Five states⁸⁵ use the term “favorable” in describing evidence subject to the state disclosure obligation. However, these states limit the clause “evidence favorable to the accused” with a condition that such evidence be “material and relevant to the issue of guilt or punishment.”⁸⁶

Although *Brady* used “favorable” in describing the evidence required for prosecutorial disclosure,⁸⁷ Rule 16 does not expressly refer to “favorable evidence.” The rule permits a defendant in federal criminal cases to receive, upon request, documents and tangible objects within the possession of the government that “*are material to the preparation of the defendant’s defense* or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.”⁸⁸ In describing some of the items of evidence subject to the criminal discovery right, twenty-six states use language identical or substantially similar to the italicized language above.⁸⁹

1. Types of information required to be disclosed

All of the states⁹⁰ require, at a minimum, disclosure of the types of evidence that Rule 16 permits to be disclosed before trial:

82. See, e.g., Nev. Rev. Stat. § 174.235(3); N.M. Dist. Ct. R. Cr. P. 5-501(A)(6); N.Y. Consol. Law Serv. Crim. P. Law § 240.20(1)(h).

83. See, e.g., N.H. Super. Ct. R. 98(A)(2)(iv); Tenn. Crim. P. R. 16 (Advisory Commission Comments).

84. See *United States v. Bagley*, 473 U.S. 667, 676 (“Impeachment evidence, as well as exculpatory evidence, falls within the *Brady* rule.”).

85. La., N.M., Ohio, Okla., Pa.

86. See, e.g., Pa. R. Crim. P. 573 (B)(1)(a) (“The Commonwealth shall . . . permit the defendant’s attorney to inspect and copy or photograph . . . any evidence favorable to the accused that is material either to guilt or to punishment.”); La. Code Crim. P. Ann. art. 718 (“[O]n motion of the defendant, the court shall order the district attorney to permit or authorize the defendant to inspect, copy, examine . . . [evidence] favorable to the defendant and which [is] material and relevant to the issue of guilt or punishment.”).

87. 373 U.S. at 87 (“[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment.”).

88. Fed. R. Crim. P. 16(a)(1)(C) (emphasis added).

89. Ala., Conn., Del., D.C., Haw., Idaho, Ind., Iowa, Kan., Ky., Miss., Mo., Neb., N.D., Ohio, Pa., S.C., S.D., Tenn., Tex., Utah, Vt., Va., Wash., W. Va., Wyo.

90. Indiana is unique in that it does not contain a separate rule for criminal discovery and relies on civil trial procedural rules to govern criminal trials. See Ind. Crim. R. 21 (“The Indiana rules of trial and appellate procedure shall apply to all criminal proceedings.”). Therefore, Indiana

- written or recorded statements, admissions, or confessions made by the defendant;
- books, papers, documents, or tangible objects obtained from the defendant;
- reports of experts in connection with results of any physical or mental examinations made of the defendant, and scientific tests or experiments made;
- records of the defendant's prior criminal convictions; and
- written lists of the names and addresses of persons having knowledge of relevant facts who may be called by the state as witnesses at trial.⁹¹

Some states, however, go beyond this basic list of information and specify other material for disclosure:

- any electronic surveillance of any conversations to which the defendant was a party;⁹²
- whether an investigative subpoena has been executed in the case;⁹³
- whether the case has involved an informant;⁹⁴
- whether a search warrant has been executed in connection with the case;⁹⁵
- transcripts of grand jury testimony relating to the case given by the defendant, or by a codefendant to be tried jointly;⁹⁶
- police, arrest, and crime or offense reports;⁹⁷
- felony convictions of any material witness whose credibility is likely to be critical to the outcome of the trial;⁹⁸
- all promises, rewards, or inducements made to witnesses the state intends to present at trial;⁹⁹
- DNA laboratory reports revealing a match to the defendant's DNA;¹⁰⁰
- expert witnesses whom the prosecution will call at the hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecution;¹⁰¹

does not provide a specific list of evidence subject to criminal discovery. Presumably, however, a criminal defendant in Indiana state court would be entitled to the basic items of evidence listed here.

91. *See, e.g.*, Conn. Gen. Stat. § 54-86(a) (2003); Idaho Crim. Rule 16(a).

92. Mont. Code Ann. § 415-15-322 (2)(a).

93. Mont. Code Ann. § 415-15-322 (2)(b).

94. Mont. Code Ann. § 415-15-322 (2)(c).

95. Ariz. St. RCRP R. 15.1(b)(10).

96. N.Y. Consol. Law Serv. Crim. P. Law § 240.20(1)(b).

97. Colo. Crim. P. Rule 16(a)(I).

98. Cal. Penal Code § 1054.1(d).

99. Mass. Crim. P. R. 14(1)(A)(ix) (as amended, effective Sept. 7, 2004).

100. N.C. Gen. Stat. § 15A-903(g).

101. Wash. Super. Ct. Crim. R. 4.7(a)(2)(ii).

- any information that indicates entrapment of the defendant;¹⁰² and
- “any other evidence specifically identified by the defendant, provided the defendant can additionally establish that its disclosure would be in the interests of justice.”¹⁰³

Most states provide that this “favorable” evidence *may* be disclosed to the defendant upon request or at the discretion of the court. Other states require that evidence beyond the scope of *Brady* material *must* be disclosed even without a request or court order.

2. Mandatory disclosure without request

Thirteen states¹⁰⁴ require mandatory disclosure of information “favorable” to the defense, regardless of whether the defendant made a specific discovery request for the material. We determined that this disclosure is mandatory because of the use of the phrase “prosecutor *shall* disclose,” and the lack of any conditional clause such as “upon defendant’s request,” or “at the court’s discretion.” For example, Massachusetts describes as being “mandatory discovery for the defendant” the following items of evidence:

- (i) Any written or recorded statements, and the substance of any oral statements, made by the defendant or a co-defendant.
- (ii) The grand jury minutes, and the written or recorded statements of a person who has testified before a grand jury.
- (iii) Any facts of an exculpatory nature.
- (iv) The names, addresses, and dates of birth of the Commonwealth’s prospective witnesses other than law enforcement witnesses
- (v) The names and business addresses of prospective law enforcement witnesses.
- (vi) Intended expert opinion evidence, other than evidence that pertains to the defendant’s criminal responsibility
- (vii) Material and relevant police reports, photographs, tangible objects, all intended exhibits, reports of physical examinations of any person or of scientific tests or experiments, and statements of persons the Commonwealth intends to call as witnesses.
- (viii) A summary of identification procedures, and all statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures.
- (ix) Disclosure of all promises, rewards or inducements made to witnesses the Commonwealth intends to present at trial.¹⁰⁵

102. Wash. Super. Ct. Crim. R. 4.7(a)(2)(iii).

103. Pa. R. Crim. P. 573(B)(2)(a)(iv).

104. Alaska, Ariz., Cal., Colo., Fla., Haw., Me., Md., Mass., N.H., N.M., Or., Wash.

105. Mass. Crim. P. Rule 14 (as amended, effective Sept. 7, 2004).

In contrast, Hawaii requires disclosure of evidence favorable to the defendant only if the defendant is charged with a felony.¹⁰⁶ In cases other than felonies, Hawaii permits a state court, at its discretion, to require disclosure of favorable evidence “[u]pon a showing of materiality and if the request is reasonable.”¹⁰⁷

Of the thirteen states that require disclosure of favorable evidence, three distinguish between information that is subject to mandatory disclosure and other evidence that must be specifically requested by the defendant or ordered by the court. Maine requires prosecutors to disclose the following items:

1. Statements obtained as a result of a search and seizure, statements resulting from any confession or admission made by the defendant, statements relating to a lineup or voice identification of the defendant.
2. Any written or recorded statements made by the defendant.
3. Any statement that tends to create a reasonable doubt of the defendant’s guilt as to the offense charged.¹⁰⁸

Maine requires the defendant to make a written request to compel the disclosure of books, papers, documents, tangible objects, reports of experts made in connection with the case, and names and addresses of the witnesses whom the state intends to call in any proceeding.¹⁰⁹

The other two states that distinguish between items of evidence that are subject to mandatory disclosure are Maryland¹¹⁰ and Washington.¹¹¹

3. Disclosure upon request of defendant

Thirty-eight states¹¹² require a defendant to request favorable information, sometimes in writing, before the prosecution’s obligation to disclose is triggered.

Ten states¹¹³ place an additional condition on the defense:

- the defendant must make “a showing [to the court] that the items sought may be material to the preparation of his defense and that the request is reasonable,”¹¹⁴ or
- the defendant must show “good cause” for discovery of such information.¹¹⁵

106. Haw. R. Penal P. 16(a) (“[D]iscovery under this rule may be obtained in and is limited to cases in which the defendant is charged with a felony.”).

107. Haw. R. Penal P. 16(d).

108. Me. R. Crim. P. 16(a)(1)(A)–(C).

109. Me. R. Crim. P. 16(b).

110. Md. Rule 4-263.

111. Wash. Super. Ct. Crim. R. 4.7.

112. Ala., Ark., Conn., Del., D.C., Ga., Idaho, Ill., Ind., Iowa, Kan., Ky., La., Mich., Minn., Miss., Mo., Mont., Neb., Nev., N.J., N.Y., N.C., N.D., Ohio, Okla., Pa., R.I., S.C., S.D., Tenn., Tex., Utah, Vt., Va., W. Va., Wis., Wyo.

113. Conn., Idaho, Ind., Minn., Mo., Neb., Pa., Tex., Va., Wash.

114. Conn. Gen. Stat. § 54-86(a).

115. Tex. Code Crim. Proc. art. 39.14 (2004).

It appears that these ten states permit disclosure of certain favorable evidence only at the discretion of the trial court, and only if the court finds that the defendant has met the burden of proof in making the discovery request.

4. Time requirements for disclosure

States vary considerably in their time requirements for disclosure of *Brady* material. Some specify a time by which the prosecution must disclose favorable information, while others rely upon undefined terms such as “timely disclosure” or “as soon as practicable.” Ten states¹¹⁶ have established two separate time limits—one for the period within which the defendant must file a discovery request for favorable information and another for the period within which the prosecution must disclose the information.¹¹⁷

For a small number of states,¹¹⁸ we were unable to determine a specific timetable for disclosure of *Brady* material. Nonetheless, it is probable that these states impose a “timely” disclosure requirement that would not prejudice the defendant’s right to a fair trial.

a. Specific time requirement

Twenty-eight states¹¹⁹ have mandated specific time limits for prosecutorial disclosure of evidence favorable to the defendant. Table 4 summarizes these time requirements.

Table 4. States with Specific Time Limits for Prosecutorial Disclosure of Evidence Favorable to the Defendant

State	Authority	Time Requirement
Alabama	Ala. R. Cr. P. 16.1	Within 14 days after the request has been filed in court
Arizona	Ariz. St. R. Cr. P. 15.6(c)	Not later than 7 days prior to trial
California	Cal. Penal Code § 1054.7	Not later than 30 days prior to trial
Colorado	Colo. Cr. P. R. 16(b)	Not later than 20 days after filing of charges
Connecticut	Conn. Gen. Stat. § 54-86(c)	Not later than 30 days after defendant pleads not guilty

116. D.C., Idaho, Mo., Nev., N.Y., Ohio, Okla., R.I., Va., W. Va.

117. *See, e.g.*, Nev. Rev. Stat. § 174.285 (2004) (“A request . . . may be made only within 30 days after arraignment or at such reasonable later time as the court may permit. . . . A party shall comply with a request made . . . not less than 30 days before trial or at such reasonable later time as the court may permit.”).

118. D.C., Iowa, Pa., S.D., Tenn., Tex., Wyo.

119. Ala., Ariz., Cal., Colo., Conn., Del., Fla., Ga., Haw., Idaho, Ind., Kan., Me., Md., Mass., Mich., Minn., Mo., Nev., N.H., N.J., N.M., N.Y., Ohio, Okla., R.I., S.C., Wash.

State	Authority	Time Requirement
Delaware	Del. Super. Ct. Crim. R. 16(d)(3)(B)	Within 20 days after service of discovery request
Florida	Fla. R. Cr. P. 3.220(b)(1)	Within 15 days after service of discovery request
Georgia	Ga. Code Ann. § 17-16-4(a)(1)	Not later than 10 days prior to trial
Hawaii	Haw. R. Penal P. 16(e)(1)	Within 10 calendar days after arraignment and plea of the defendant
Idaho	Idaho Cr. R. 16(e)(1)	Within 14 days after service of discovery request
Indiana	Ind. R. Trial P. 34(B)	Within 30 days after service of discovery request
Kansas	Kan. Stat. Ann. § 22-3212(f)	Within 20 days after arraignment
Maine	Me. R. Crim. P. 16(a)(3)	Within 10 days after arraignment
Maryland	Md. R. 4-263(e)	Within 25 days after appearance of counsel or first appearance of defendant before the court, whichever is earlier
Massachusetts	Mass. Crim. P. R. 14(1)(A)	At or prior to the pretrial conference
Michigan	Mich. Ct. R. 6.201(F)	Within 7 days after service of discovery request
Minnesota	Minn. R. Crim. P. 9.03; Minn. Bd. of Judicial Stand. R. 9(e)	Within 60 days after service of discovery request; by the time of the omnibus hearing
Missouri	Mo. Sup. Ct. R. 25.02	Within 10 days after service of discovery request
Nevada	Nev. Rev. Stat. § 174.285	Not later than 30 days prior to trial
New Hampshire	N.H. Sup. Ct. R. 98(A)(2)	Within 30 days after defendant pleads not guilty
New Jersey	N.J. Ct. R. 3:13-3(b)	Not later than 28 days after the indictment
New Mexico	N.M. R. Crim. P. 5-501(A)	Within 10 days after arraignment
New York	N.Y. Consol. Law Serv. Crim. P. Law § 240.80(3)	Within 15 days after service of discovery request
Ohio	Ohio R. Crim. P. 16(F)	Within 21 days after arraignment or 7 days prior to trial, whichever is earlier
Oklahoma	Okla. Stat. § 2002(D)	Not later than 10 days prior to trial
Rhode Island	R.I. Super. R. Crim. P. 16(g)(1)	Within 15 days after service of discovery request

State	Authority	Time Requirement
South Carolina	S.C. R. Crim. P. 5(a)(3)	Not later than 30 days after service of discovery request
Washington	Wash. Super. Ct. Crim. R. 4.7(a)(1)	No later than the omnibus hearing

b. Nonspecific, descriptive time frame

Eighteen states¹²⁰ provide nonspecific, descriptive time requirements for disclosure of *Brady* material. The terms used for these general time frames include the following:

- “timely disclosure”;¹²¹
- “as soon as practicable”;¹²²
- “a reasonable time in advance of trial date”;¹²³
- “within a reasonable time”;¹²⁴
- “in time for the defendants to make effective use of the evidence”;¹²⁵
- “as soon as possible”;¹²⁶
- “as soon as reasonably possible”;¹²⁷ and
- “within a reasonable time before trial.”¹²⁸

State case law may provide guidance on whether a particular disclosure has satisfied the “timely” disclosure requirement. In general, however, the state courts have interpreted “timely” or “as soon as possible” to mean that the prosecution must disclose information favorable to the defendant “within a sufficient time for its effective use” by the defendant in preparation for his or her defense.¹²⁹ State courts that have ruled on the issue of timing of disclosures have

120. Alaska, Ark., Ill., Ky., La., Me., Miss., Mont., Neb., N.C., N.D., Ohio, Or., Utah, Vt., Va., W. Va., Wis.

121. *See, e.g.*, Alaska R. Prof. Conduct 3.8(d); La. R. Prof. Conduct 3.8(d).

122. *See, e.g.*, Ark. R. Crim. P. 17.2(a); Ill. Sup. Ct. R. 412(d).

123. *See, e.g.*, Ky. R. Crim. P. 7.24(4).

124. *See, e.g.*, Me. R. Crim. P. 16(a).

125. *See, e.g.*, State v. Taylor, 472 S.E.2d 596, 607 (N.C. 1996) (“[D]ue process and *Brady* are satisfied by the disclosure of the evidence at trial, so long as disclosure is made in time for the defendants to make effective use of the evidence.” (citations omitted)).

126. *See, e.g.*, Vt. R. Crim. P. 16(b).

127. *See, e.g.*, State v. Hager, 342 S.E.2d 281, 284 (W. Va. 1986) (“[W. Va. R. Crim. P.] 16 impliedly sanctions the use of newly discovered evidence at trial, so long as the evidence is disclosed to the defense as soon as reasonably possible.”).

128. *See, e.g.*, Wis. Stat. § 971.23(1).

129. State v. Harris, 680 N.W.2d 737, 754–55 (Wis. 2004) (“We hold that in order for evidence to be disclosed ‘within a reasonable time before trial’ . . . it must be disclosed within a sufficient time for its effective use. Were it otherwise, the State could withhold all *Brady* evidence until

emphasized that any disclosure must not constitute “unfair surprise” to the defendant and must not prejudice the defendant’s right to a fair trial.¹³⁰

E. Due Diligence Obligations

By various means each state imposes a continuing duty on the prosecutor to locate and disclose additional favorable information discovered throughout the course of a trial. Delaware’s Superior Court Rule 16(c) is typical of the rules in most states with a due diligence obligation:

If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party’s attorney or the court of the existence of the additional evidence or material.¹³¹

Beyond this basic duty to supplement discovery of information, five states¹³² require prosecutors to certify, in writing, that they have exercised diligent, good faith efforts in locating all favorable information, and that what has been disclosed is accurate and complete to the best of their knowledge or belief. For example, Florida requires the following:

Every request for discovery or response . . . shall be signed by at least 1 attorney of record . . . [certifying] that . . . to the best of the signer’s knowledge, information, or belief formed after a reasonable inquiry it is consistent with these rules and warranted by existing law¹³³

Similarly, Massachusetts provides:

When a party has provided all discovery required by this rule or by court order, it shall file with the court a Certificate of Compliance. The certificate shall state that, to the best of its knowledge and after reasonable inquiry, the party has disclosed and made available all items subject to discovery other than reports of experts, and shall identify each item provided.¹³⁴

F. Sanctions for Noncompliance with *Brady* Obligations

All states provide remedies for prosecutorial nondisclosure that follow closely, if not explicitly mirror, Federal Rule of Criminal Procedure 16(d)(2), which states that a “court may order [the prosecution] to permit the discovery or inspection, grant a continuance, or prohibit [the prosecution] from introducing evidence not

the day of trial in the hope that the defendant would plead guilty under the false assumption that no such evidence existed.”).

130. *State v. Golder*, 9 P.3d 635 (Mont. 2000) (defendant argued that the timing of the state’s formal disclosure of the two witnesses and the nature of their testimony constituted unfair surprise and jeopardized his right to a fair trial as ensured under the Montana Constitution).

131. Del. Super. Ct. R. 16(c).

132. Colo., Fla., Idaho, Mass., N.M.

133. Fla. R. Crim. P. 3.220(n)(3). *See also* Idaho Crim. R. 16(e) (Certificate of Service).

134. Mass. Crim. P. R. 14(a)(1)(E)(3) (as amended, effective Sept. 7, 2004).

disclosed, or it may enter such other order as it deems just under the circumstances.”¹³⁵

In addition, eleven states¹³⁶ indicate that willful violations of a criminal discovery rule or court order requiring disclosure may subject the prosecution to other sanctions as the court deems appropriate. These sanctions “may include, but are not limited to, contempt proceedings against the attorney . . . as well as the assessment of costs incurred by the opposing party, when appropriate.”¹³⁷

At least one state, Idaho, expressly states that failure to comply with the time prescribed for disclosure “shall be grounds for the imposition of sanctions by the court.”¹³⁸ Other states probably also permit their courts to impose sanctions for failure to meet time requirements, as their rules provide remedies for failure to comply with *any* discovery rules, which can and often do include a time-limits provision.

At least three states¹³⁹ allow the court to order a dismissal as a possible sanction for particularly egregious violations of disclosure obligations. For example, Maine’s rules state the following:

If the attorney for the state fails to comply with this rule, the court on motion of the defendant or on its own motion may take appropriate action, which may include, but is not limited to, one or more of the following: requiring the attorney for the state to comply, granting the defendant additional time or a continuance . . . prohibiting the attorney for the state from introducing specified evidence and *dismissing charges with prejudice*.¹⁴⁰

However, three states¹⁴¹ regard dismissal to be too severe a sanction for non-disclosure. Louisiana’s Code of Criminal Procedure notes that for disclosure violations, their state courts may “enter such other order, *other than dismissal*, as may be appropriate.”¹⁴² Similarly, the Supreme Court of Pennsylvania found dismissal to be “too severe” a sanction for failure to disclose *Brady* material, and explained that the discretion of Pennsylvania trial courts “is not unfettered.”¹⁴³

135. Fed. R. Crim. P. 16(d)(2).

136. Ala., Ark., Fla., Haw., Ill., La., Minn., Mo., N.M., Vt., Wash.

137. Fla. R. Crim. P. 3.220(n)(2).

138. Idaho Crim. R. 16(e)(2).

139. Conn., Me., N.C.

140. Me. R. Crim. P. 16(d) (emphasis added).

141. La., Pa., Tex.

142. La. Code Crim. P. Ann. art. 729.5(A) (emphasis added).

143. *Commonwealth v. Burke*, 781 A.2d 1136, 1143 (Pa. 2001) (“[O]ur research has revealed [no judicial precedents] that approve or require a discharge as a remedy for a discovery violation. In fact, the precedents cited by the trial court and appellant support the view that the discharge ordered here was too severe . . . [W]hile it is undoubtedly true that the trial court possesses some discretion in fashioning an appropriate remedy for a *Brady* violation, that discretion is not unfettered.”).

Summary of State Court Policies for the Treatment of *Brady* Material

- All fifty states and the District of Columbia have a rule or other type of authority, including statutes, concerning the prosecutor's obligation to disclose information favorable to the defendant.
- Many of the states have enacted rules similar to Federal Rule of Criminal Procedure 16; however, some of these rules and statutes vary in their details. Some states go beyond the scope of Rule 16 and the *Brady* constitutional obligations by explicitly setting time limits on disclosure; other states have adopted Rule 16 almost verbatim, using language like "evidence material to the preparation of the defense" and "evidence favorable to the defendant."
- Most states' rules impose a continuing disclosure obligation, such that if additional evidence is discovered during the trial or after initial disclosure, the defendant must be promptly notified and shown such new evidence.
- A few states have a specific due diligence obligation that requires prosecutors to submit a "certificate of compliance" indicating that they have exercised due diligence in locating favorable evidence and that, to the best of their knowledge and belief, all such information has been disclosed to the defense.
- All of the states authorize sanctions for prosecutors' failure to comply with discovery obligations and other state-court-mandated disclosure requirements. A few states permit a trial court to dismiss charges entirely as a sanction for prosecutorial misconduct, while other states have held dismissal to be too severe a sanction.

**To: Hon. David F. Levi, Chair
Standing Committee on Rules of Practice and Procedure**

**From: Hon. Susan C. Bucklew, Chair
Advisory Committee on Federal Rules of Criminal Procedure**

Subject: Technical Amendment Correcting Cross-Reference in Criminal Rule 45

Date: June 5, 2007

The restyling of the Civil Rules has created an unanticipated problem with the cross references in Criminal Rule 45(c), which governs computing and extending time. The Supreme Court has approved and transmitted to Congress an amendment to Criminal Rule 45(c) that clarifies the method of extending time. Both current Rule 45(c) and the amendment refer to service made in the manner provided under Civil Rule 5(b)(2)(B), (C), or (D). The restyling of the Civil Rules renumbers the provisions to which the current rule and the amendment refer as 5(b)(2)(C), (D), (E), and (F).

Rule 45(c) grants the parties an additional three days for action after certain forms of service. The effect of renumbering subdivisions of the Civil Rule (whether the amendment to Rule 45 is approved or not) is to make this additional three days unavailable in two classes of cases in which it is now available: those in which service is made by electronic means, and those in which service is made by other means that have been consented to in writing. The renumbering also adds three days in a class of cases in which it was not previously available: those in which service by leaving a paper at a person's home or office. Although the Civil Rules Advisory Committee had discussed whether to eliminate the additional three days for electronic filings, where delivery is instantaneous, it decided to retain the extra time for electronic filings to avoid discouraging them. The Criminal Rules Advisory Committee has not discussed any change in the application of the three day rule.

An additional amendment to Rule 45(c) is needed to preserve the status quo regarding the availability of the additional three days after service by electronic means or other means to which there has been written consent, and to eliminate the additional three days when service is made by leaving the papers at a home or office.

FEDERAL RULES OF CRIMINAL PROCEDURE

A proposed amendment and committee note are attached. (The text assumes that the amendment submitted by the Supreme Court to Congress will go into effect.) The Criminal Rules Committee has approved the proposed technical amendment.

**PROPOSED AMENDMENT TO THE FEDERAL
RULES OF CRIMINAL PROCEDURE***

Rule 45. Computing and Extending Time

1

* * * * *

2

(c) Additional Time After Certain Kinds of Service.

3

Whenever a party must or may act within a specified

4

period after service and service is made in the manner

5

provided under Federal Rule of Civil Procedure

6

5(b)(2)~~(B)~~; (C), or (D), (E), and (F) 3 days are added

7

after the period would otherwise expire under

8

subdivision (a).

9

* * * * *

Committee Note

This amendment revises the cross references to Civil Rule 5, which have been renumbered as part of a general restyling of the Federal Rules of Civil Procedure. No substantive change is intended.

*New material is underlined; matter to be omitted is lined through.

**FEDERAL PUBLIC DEFENDER
Western District of Washington**

*Thomas W. Hillier, II
Federal Public Defender*

May 10, 2007

Peter G. McCabe
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Re: Proposed Rules Relating to Crime Victims' Rights Act

Dear Mr. McCabe:

I write on behalf of the Federal Public and Community Defenders to oppose and suggest changes to the set of rules said to implement the Crime Victims' Rights Act (CVRA) which has been approved by the Advisory Committee. The National Association of Criminal Defense Lawyers joins us in these comments.¹ The CVRA-based rule proposals are ill-conceived, poorly drafted, and exceed the limitations of the Rules Enabling Act.

The Rules Enabling Act authorizes the Supreme Court to prescribe "general rules of practice and procedure" for cases in the United States courts. 28 U.S.C. § 2072(a). That power is limited: "Such rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). *See also Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941) (federal courts may make rules "not inconsistent with the statutes or Constitution of the United States.").

It is especially important to adhere to those limits here. Congress enacted the CVRA when sponsors of a crime victims' constitutional amendment failed to secure sufficient support for its passage after years of debate.² The fundamental objection to creating constitutional rights for victims was that it would install the private prosecution model the Framers rejected, unbalance the adversary criminal justice system the Framers created, and threaten the Bill of Rights.³ The constitutional amendment failed, a statute

¹ Peter Goldberger, Co-Chair of the Committee on Federal Rules of Procedure of the National Association of Criminal Defense Lawyers, has reviewed and supports the views expressed in this letter and the attached memorandum.

² 150 Cong. Rec. at S4261 (Apr. 22, 2004) (statement of Sen. Feinstein).

³ *See S. Rep. No. 108-191 at 68-69* (minority views) (The "colonies shifted to a system of public prosecutions because they viewed the system of private prosecutions as 'inefficient, elitist, and sometimes vindictive.' . . . [T]he Framers believed victims and defendants alike were best protected by the system of public prosecutions that was then, and remains, the American standard

was passed, and our adversary criminal justice system was intended to remain intact. Since then, a small but vocal group of victim advocates has promoted aggressive interpretations of the CVRA which would create a *de facto* victim rights constitutional amendment. (One of the principal advocates of these interpretations was recently heard on National Public Radio's "All Things Considered" acknowledging that the objective is to overthrow the adversary system and replace it with a three-party system.⁴) The Advisory Committee was presented with a raft of proposals which would do just that.⁵ The Committee rejected many of the most extreme proposals, but appears to have made certain compromises. Several of the proposed rules have no basis in the CVRA, and would abridge, enlarge and modify existing rights. At the same time, "general rules of practice and procedure," which are needed, are by and large missing.

We urge the Standing Committee to disapprove the Advisory Committee proposal, and send the matter back to that committee. To the extent that the Standing Committee believes it can do so without another round of publication and comment, it may wish to adopt some of the purely procedural language suggested by the Defenders and the NACDL, such as our proposed substitute Rule 60(b). The following is a summary of the problems in the proposed rules, which are set forth in more detail in the attached Memorandum to the Subcommittee on the Crime Victims' Rights Act dated April 11, 2007 (hereinafter "Memorandum").

Rule 1(b)(11), which would define "victim" for all rules of criminal procedure as a "crime victim" as defined in 18 U.S.C. § 3771(e), should be revised to specify that the definition applies only to the rules that implement the Crime Victims' Rights Act, and to state that the offense by which the victim allegedly was harmed is one with which a defendant has been charged and is being prosecuted or has been convicted and which is the subject of a pending criminal proceeding in a federal district court. The rule as written suggests a definition that is inconsistent with Rule 1(a) and 18 U.S.C. § 3771

for achieving justice."); *id.* at 70 ("[W]e have historically and proudly eschewed private criminal prosecutions based on our common sense of democracy."); *id.* at 56 ("Never before in the history of the Republic have we passed a constitutional amendment to guarantee rights to a politically popular group of citizens at the expense of a powerless minority," or "to guarantee rights that intrude so technically into such a wide area of law, and with such serious implications for the Bill of Rights.").

⁴ *Debating the Value of Victims' Rights Laws*, All Things Considered, National Public Radio, April 29, 2007 (interview of Judge Paul G. Cassell), <http://www.npr.org/templates/story/story.php?storyId=9907104>.

⁵ Paul G. Cassell, *Treating Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure* (draft of January 16, 2007), <http://old.law.utah.edu/faculty/bios/cassellp/website/index.html>.

(b)(1), and would do nothing to stop wasteful litigation by persons whom the courts have uniformly held are not “crime victims” within the meaning of the CVRA.⁶ See Memorandum at 16-18.

Rule 12.1 should be withdrawn because it requires no showing by the victim or the government to avoid the ordinary (and constitutional) requirement of reciprocal discovery in alibi cases, much less any showing based on the Crime Victims’ Rights Act. Instead, it would create a new right for victims and a constitutionally prohibited advantage for the government. The rule is unconstitutional under *Wardius v. Oregon*, 412 U.S. 470 (1973), *Smith v. Illinois*, 390 U.S. 129 (1968) and *Alford v. United States*, 282 U.S. 687 (1931), and violates the Rules Enabling Act. See Memorandum at 1-5.

Rule 17, which would require a court order before service of a subpoena on a third party requiring the production of “personal or confidential” information about a victim, and notice to the victim absent “exceptional circumstances,” with no similar restriction on grand jury subpoenas, should be withdrawn, or at least re-written to change the “exceptional circumstances” exception to a “good cause” exception. This rule is based on the dangerous notion that victims’ “dignity and privacy” is threatened by ordinary procedures designed to facilitate adversarial testing. The circumstances listed in the Note as “exceptional” – loss or destruction of evidence and premature disclosure of defense strategy – are quite ordinary, not exceptional. The rule would abridge defendants’ Fifth and Sixth Amendment right against disclosure of defense strategy to the government,⁷ and Sixth Amendment right to confront and cross-examine without advance

⁶ See *In re Walsh*, slip op., 2007 WL 1156999 (3d Cir. Apr. 19, 2007) (civil plaintiff seeking restraining orders and arrests of various persons); *In re Siyi Zhou*, 198 Fed. Appx. 177 (3d Cir., Sept. 25, 2006) (similar); *United States v. Moussaoui*, ___ F.3d ___, 2007 WL 755276 (4th Cir. Mar. 14, 2007) (civil plaintiffs in Southern District of New York seeking to intervene in criminal case in Eastern District of Virginia for purpose of obtaining non-public discovery materials from criminal case); *In re Searcy*, 202 Fed. Appx. 625 (4th Cir. Oct. 6, 2006) (civil RICO plaintiff claiming entitlement to restitution and damages); *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 564 (2d Cir. 2005) (victims seeking to vacate settlement agreement approved by district court between United States and convicted, acquitted and uncharged persons; “the CVRA does not grant victims any rights against individuals who have not been convicted of a crime”); *United States v. Sharp*, 463 F.Supp.2d 556 (E.D. Va. 2006) (woman claiming right to make impact statement at defendant’s sentencing on the basis that her former boyfriend, not charged with any crime, abused her as a result of smoking marijuana purchased from defendant); *Estate of Musayelova v. Kataja*, slip op., 2006 WL 3246779 (D. Conn. Nov. 7, 2006) (plaintiffs seeking prosecution and sentencing of various uncharged persons).

⁷ See *Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985); *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947); *Weatherford v. Bursey*, 429 U.S. 554, 558 (1977); *Williams v. Woodford*, 384 F.3d 567, 585 (9th Cir. 2004); *Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995).

disclosure to the witness,⁸ in violation of the Rules Enabling Act. The rule would also unfairly disadvantage defendants as it does not apply to grand jury subpoenas, with which the government obtains its trial evidence. *See* Memorandum at 5-6.

Rule 18, which would require the court to set the place of trial within the district with due regard to the convenience of *non-testifying* victims (more accurately, alleged victims, as the question at trial is whether anyone is a victim and in certain cases, such as self defense, who is the victim), should be withdrawn because it is based on an interpretation of the CVRA as creating a general right to have the district court make “every effort” to ensure “the fullest attendance possible.” This is directly contrary to the plain language of the CVRA, as well as a clear explanation by the bill’s primary sponsor that the statute was drafted to avoid that very result. The rule would impose unwarranted hardship on the parties, witnesses and judges, would encourage mandamus actions without basis in the CVRA, and would violate the Rules Enabling Act by creating a new right for victims. *See* Memorandum at 6-8.

Rule 32(d)(2)(B), which would strike the requirement that victim impact information be “verified” and “stated in a nonargumentative style,” should be withdrawn or revised because it essentially instructs Probation Officers that such information need not be verified and may be stated in an argumentative style. The Subcommittee believes that “[a]ll information in the PSR should meet these requirements,” *see* March 25, 2007 Memorandum at 70, but neither the Rule nor its Note say so. The removal of the requirement without making clear that it applies to all information in a pre-sentence report would exacerbate what is already a serious problem of unreliable information in pre-sentence reports, in derogation of defendants’ right to be sentenced on the basis of accurate information. *See* Memorandum at 15-16.

Rule 32(i)(4) and its Committee Note would re-define the statutory right to “be reasonably heard” as a “right to speak directly to the judge,” and a right to be individually spoken to. This departs from the statutory language and would discourage courts from responding flexibly as Congress intended. Further, the rule makes no provision for notice or a fair opportunity to respond to a victim’s statement. **Rule 60(a)(3)** fails to provide any procedure to implement the right to be “reasonably heard.” Rule 32(i)(4) exceeds the plain language of the CVRA and is contrary to the Rules Enabling Act. Neither rule provides needed procedural guidance. The rules should be re-written. *See* Memorandum at 9-15.

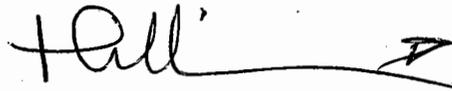
⁸ *See In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 893 (D.C. Cir. 1999); *United States v. Cerro*, 775 F.2d 908, 915 (7th Cir. 1985); *United States v. Bohle*, 445 F.2d 54, 75 (7th Cir. 1971). *See also* Fed. R. Evid. 613(a) (cross-examiner need not show witness document from which s/he is cross-examining, abrogating “Rule in Queen Caroline’s Case”); *Kirby v United States*, 174 US 47, 55 (1899) (Confrontation Clause permits impeachment “in every mode authorized by the established rules governing the trial or conduct of criminal cases.”).

Rule 60(a)(2) should be re-written to correctly incorporate the right “not to be excluded” (unless, in the case of a testifying witness, his or her testimony would be “materially altered”), and to provide that reasons be given for *any* decision under this rule. Like Rule 18, Rule 60(a)(2) is based on an erroneous interpretation of the CVRA as creating a general right to have the district court make “every effort” to ensure “the fullest attendance possible.” Whether a court decides to exclude a testifying victim or to allow her to remain, an adequate record of reasons is necessary, not just for a victim’s mandamus action but for a defendant’s appeal. *See* Memorandum at 6-8.

Rule 60(b) should be revised to provide “general rules of practice and procedure” to guide the courts, the parties and victims when victims seek to assert rights and to obtain a remedy if denied. The rule as written parrots some portions of the poorly coordinated procedural provisions of the CVRA, omits or misstates others, and fails to fill in the gaps. As a result, the most basic components of an orderly system are missing. Thus, the rules fail in their primary purpose. *See* Memorandum at 18-22.

We respectfully urge the Standing Committee to reject the Advisory Committee’s proposals for implementing the Crime Victims Rights Act.

Very truly yours,



Thomas W. Hillier, II
Federal Public Defender

TWH/mp
Attachment

MEMORANDUM

To: Judge Jones, Chair, Crime Victims' Rights Act (CVRA) Subcommittee
Cc: Judge Bucklew, Chair, Advisory Committee on Criminal Rules
Members, Criminal Rules Advisory Committee
From: Thomas P. McNamara
Thomas W. Hillier, II
Re: Rules 1, 12.1, 17, 18, 32 and 60
Date: April 11, 2007

Because the Crime Victims' Rights Act (CVRA) "reflects a careful Congressional balance between the rights of defendants, the discretion afforded the prosecution, and the new rights afforded victims," the Subcommittee resolved (1) to "incorporate, but not go beyond, the rights created by statute," (2) to adhere to the "specific rights" enumerated in the statute, and not use general language (such as the "right to be treated with fairness") to create rights not otherwise provided for in the statute, and (3) not to use the rules to resolve interpretive questions but to leave interpretation to the courts on a case-by-case basis.¹ Adherence to those principles would also ensure that the rules stayed within the bounds of the Rules Enabling Act. *See* 28 U.S.C. § 2072 ("The Supreme Court shall have the power to prescribe general rules of practice and procedure," which "shall not abridge, enlarge or modify any substantive right.").

Several of the rules recommended in the Subcommittee's March 25, 2007 memorandum would create rights for victims that do not exist in the statute, or that are based on the amorphous rights to "dignity and privacy," and, as written, would abridge, enlarge or modify substantive rights. Some should be withdrawn, but others could be helped with minor changes. At the same time, the proposed rules fail to provide "general rules of practice and procedure" in some respects where they are sorely needed by judges, lawyers and victims, or cut back on procedural protections currently in place.

I. Rules that Would Create New Rights for Victims and Abridge Defendants' Constitutional Rights

A. Rule 12.1: Non-Reciprocal Discovery of Address and Telephone Number of Alibi Rebuttal Witness

This rule should be withdrawn because it violates the Constitution, has no basis in the CVRA but instead creates a new right for victims and unfair advantage for the government, and therefore violates the Rules Enabling Act.

1. The proposed rule is unconstitutional.

¹ *See* Memorandum to Criminal Rules Advisory Committee from CVRA Subcommittee at 1-2 (Sept. 19, 2005); Memorandum to Standing Committee on Rules of Practice and Procedure from Criminal Rules Advisory Committee at 2 (Aug. 1, 2006).

The proposed rule would require the defendant, upon the government's request and on pain of not being permitted to present the defense, to disclose his alibi defense and alibi witnesses' names, addresses and telephone numbers. The defendant would then be required to make a showing of need for any victim rebuttal witness' address and telephone number. The current rule presumes that the defendant needs this information to locate and interview *all* alibi rebuttal witnesses. *See* Rule 12.1 & Note to 2002 Amendments. Thus, a judge may well conclude that a showing of an ordinary need to locate and interview an alibi rebuttal witness is not enough for a victim alibi rebuttal witness, and deny reciprocal discovery. If the court concludes that the defendant has made the requisite showing of need, it could either order the information disclosed, or allow the information to be withheld and fashion a "reasonable alternative procedure that allows preparation of the defense." In the latter case, again, the defendant would be denied reciprocal discovery. Once denied reciprocal discovery, the defendant could not retract his disclosure to the government. Reciprocal discovery would be denied, and the government given an unfair advantage, in the complete absence of a showing of any case-specific reason. Instead, the basis would be a presumption that all victims need protection from all defendants and that their dignity and privacy are threatened by a defendant's trial preparation, presumptions which are baseless and found nowhere in the CVRA.

The Supreme Court has held that this is unconstitutional:

[W]e do hold that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses. . . . Indeed, the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor. . . . It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.

Wardius v. Oregon, 412 U.S. 470, 475-76 & n. 9 (1973). It was no answer that the court *might* order reciprocal discovery after the defendant had disclosed his alibi information:

[I]t is this very lack of predictability which ultimately defeats the State's argument. At the time petitioner was forced to decide whether or not to reveal his alibi defense to the prosecution, he had to deal with the statute as written with no way of knowing how it might subsequently be interpreted. Nor could he retract the information once provided should it turn out later that the hoped-for reciprocal discovery rights were not granted.

Id. at 477.

A presumption that all victims are in need of protection from all defendants, rather than a case-by-case showing, is not a “strong showing of state interests.” See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608-09 (1982) (case-by-case showing was required to justify closure based on state interest in safeguarding psychological and physical well-being of testifying minors).

Even Judge Cassell acknowledges that it would be unconstitutional to require the defendant to disclose his alibi witness’ address and telephone number while allowing the court to deny reciprocal discovery from the government. See 1/16/07 Testimony of Paul G. Cassell at 38. His solution of not requiring either side to disclose the address or telephone number of a victim, however, is not in fact reciprocal and so is equally unconstitutional.²

The proposed rule is also unconstitutional under the line of cases holding that witnesses are not entitled to a presumption that their whereabouts may be withheld at the expense of the defendant’s rights to effectively investigate, to cross-examine, and to call witnesses in his own behalf. The law presumes the opposite. In *Smith v. Illinois*, 390 U.S. 129 (1968), the Supreme Court reversed a conviction where the trial court prohibited questions of a government witness regarding his real name and address, stating:

When the credibility of a witness is in issue, the very starting point in exposing falsehood and bringing out the truth through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness’ name and address open countless avenues of in-court examination *and out-of-court investigation*. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.

Id. at 131 (internal quotation marks and citations omitted) (emphasis supplied). See also *Alford v. United States*, 282 U.S. 687, 693 (1931) (“The question, ‘Where do you live?’ was not only an appropriate preliminary to the cross-examination of the witness, but on its face without any declaration of purpose as was made by [defense] counsel here, was an essential step in identifying the witness with his environment, to which cross-examination may always be directed.”). Disclosure of a key witness’s name and address before trial is often even more important than eliciting it in open court because it assures that the defendant can investigate the witness’s background to discover avenues for impeachment. *Martin v. Tate*, 96 F.3d 1448 (Table), 1996 WL 506503 *6 (6th Cir. 1996).

² Judge Cassell’s solution could be “even-handed” only if the witness for both sides was a victim, a circumstance we doubt has ever occurred. Also most unlikely is a case where the alibi witness is a victim and the rebuttal witness is not. The only scenario realistically to be expected is that the alibi witness is not a victim, the rebuttal witness is a victim, the defendant discloses his witness’ information, and the government does not.

In *Smith* and *Alford*, as in cases involving an alibi defense, the witness claimed to be a percipient witness to a key conversation or transaction with the defendant. These cases made clear that to require the defendant to establish that elicitation of the witness's identity and address would necessarily lead to discrediting the witness is itself "to deny a substantial right and to withdraw one of the safeguards essential to a fair trial." *Alford*, 282 U.S. at 692; *Smith*, 390 U.S. at 132 (same).

"*Alford* and *Smith* thus make it clear that a defendant is presumptively entitled to cross-examine a key government witness as to his address and place of employment." *United States v. Navarro*, 737 F.2d 625, 633 (7th Cir. 1984). To overcome that presumption, the government or the witness must make a specific showing that disclosure would endanger the witness' safety, or would *merely* harass, annoy, or humiliate the witness. See *Smith*, 390 U.S. at 133-34 (White, J., Marshall, J., concurring); *Alford*, 282 U.S. at 694; see also, e.g., *United States v. Hernandez*, 608 F.2d 741, 745 (9th Cir. 1974); *United States v. Dickens*, 417 F.2d 958, 961-62 (8th Cir. 1969); *United States v. Palermo*, 410 F.2d 468, 472 (7th Cir. 1969); *United States v. Varelli*, 407 F.2d 735, 750-51 (7th Cir. 1969); *United States v. Barajas*, 2006 WL 35529 **7-9 (E.D. Cal. 2006); *United States v. Fenech*, 943 F. Supp. 480, 488-89 (E.D. Pa. 1996). The proposed rule would reverse these presumptions and upset the constitutional balance.

2. The proposed rule has no basis in the CVRA.

Nowhere in the CVRA does it say that alibi rebuttal witnesses who are victims should have their addresses and telephone numbers withheld unless the court finds that the defendant has made a showing of need for the information, and even then can avoid disclosure under an alternative "reasonable procedure," which burdens the defense but not the government. In contrast, Congress specified that victims have a right not to be excluded unless the court finds by clear and convincing evidence that their testimony would be altered and there is no reasonable alternative to exclusion. See 18 U.S.C. § 3771(a)(3), (b)(1). Thus, when Congress meant to confer a specific substantive right on victims that would upset the traditional balance of our adversary system, it did so explicitly. It did not expect that such a right would simply flow from undefined rights, such as the right to "dignity and privacy," or from the right "to be protected from the accused" without any showing that protection is needed.

The proposed Committee Note states that the amendment implements a victim's right to be reasonably protected from the accused, but the rule is *unreasonable* because there is no such need in the vast majority of cases, and Rule 12.1(d) already allows an exception if such a need is shown.

The Note says that the rule also implements the right to be "treated with respect for the victim's dignity and privacy." This is a dangerous path. All witnesses are treated with dignity and privacy within the constraints and demands of the adversary system. This rule unjustifiably presumes that they are not, and worse, would presumptively deny reciprocal discovery on that basis. Suppose a judge orders disclosure, and the victim petitions for mandamus, not because there is any need to be protected from the accused,

but because the victim feels it is an affront to her dignity and privacy. How is anyone to contest the point? How is a court of appeals to decide? One thing is sure, it will cause waste and disruption. Further, if such amorphous concepts are used to justify this rule, there is no logical stopping point. Respect for dignity would require allowing the victim to litigate the case as a third party/private prosecutor. Respect for privacy would require the trial to be closed to the public, or preclude cross-examination of the victim. The flexible nature of these terms (as well as “fairness”) is revealed by the fact that they are invoked, as convenient, to claim that victims are the functional equivalent parties, or that they should be exempt from the obligations and inconveniences that defendants, prosecutors and other witnesses bear in the normal course.

Rule 12.1(d) should be withdrawn because the only constitutional procedure is already available under Rule 12.1(d). *If* the Committee must revise Rule 12.1, the following proposal makes explicit as to victims what is already available under Rule 12.1(d), and refers to Rule 60(b)(1)-(4) (manner, time, place and by whom a victim’s right may be asserted), which would allow a victim to assert her right to be protected from the accused (and therefore respond to Judge Cassell’s complaint on the issue), and ensure an orderly procedure for all concerned.

Rule 12.1. Notice of an Alibi Defense

(d) Exceptions.

- (1) In General.** For good cause, the court may grant an exception to any requirement of Rule 12.1(a)-(c).
- (2) Victim’s Address and Telephone Number.** If on motion in accordance with Rule 60(b)(1)-(4), the court finds that disclosure to the defendant of the address or telephone number of a victim whom the government intends to rely on as a rebuttal witness to the defendant’s alibi defense would violate the victim’s right to be reasonably protected from the accused, the court shall fashion a reasonable alternative procedure that ensures effective preparation of the defense and also reasonable protection of the victim.

B. Rule 17: Notice of Subpoena

While we continue to object to this rule because the CVRA does not provide even a qualified right to notice, the new proposal is an improvement. However, it does not sufficiently protect against premature disclosure of defense strategy or loss or destruction of evidence because the language explicitly allowing the order to be issued *ex parte* has been removed, and the circumstances mentioned in the note are not “exceptional.” This is particularly unfair because this proposal still creates an unfair advantage for the government by exempting grand jury subpoenas, which, as we have said before, the government uses to get the vast majority of its trial evidence, while defendants must rely on trial subpoenas.

We urge the Committee to replace “there are exceptional circumstances” in the Rule with “good cause is shown,” and to re-write the second and third sentences of the second paragraph of the Committee Note as follows:

The rule recognizes, however, that the defendant may show good cause that this procedure is not appropriate. Good cause may be shown, for example, if evidence might be lost or destroyed if the subpoena is delayed, or the defense would be unfairly prejudiced by premature disclosure of defense strategy.

C. Rules 18 and 60(a)(2): Right to “Every Effort to Permit the Fullest Attendance Possible”

Proposed Rule 18 should be withdrawn because there is no statutory authority for it, it would needlessly interfere with the court’s ability to set the place of trial, and it would impose unwarranted hardship on the parties and witnesses. Proposed Rule 60(a)(2) should be revised to incorporate, but not go beyond, 18 U.S.C. § 3771(a)(3) and (b)(1), and to provide that reasons must be given for *any* decision under the rule.

1. There is no general right to have the court make “every effort to assure the fullest attendance possible.”

Proposed Rules 18 and 60(a)(2) are both based on the incorrect premise that § 3771(b)(1) creates a general right to have the court make “every effort” to ensure the “fullest attendance possible,” enforceable through mandamus. Rule 18’s Committee Note states that proposed Rule 18 “implements the victim’s right to attend proceedings under . . . 18 U.S.C. § 3771(b).” Likewise, Rule 60(a)(2)’s Committee Note states that it “incorporates . . . 18 U.S.C. § 3771(b), which provides that the court shall make every effort to permit the fullest attendance possible.”

The “rights of crime victims” are set forth in subsection (a). The only “right” stated there is a “right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.” 18 U.S.C. § 3771(a)(3). Subsection (b)(1), which tells courts how to “afford” the rights in subsection (a), tells the court that before “making a determination described in subsection (a)(3),” that is, to exclude a testifying victim because her testimony would be materially altered, “the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding.” 18 U.S.C. § 3771(b)(1).

Thus, victims have a right, like all members of the public, not to be excluded from public court proceedings involving the crime. This is a qualified right, as the court may order the proceedings closed if the defendant’s superior right to a fair trial, the need to protect the safety of any person, or the need to protect sensitive information is shown to require exclusion. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-

07 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564, 581 (1980); *Estes v. Texas*, 381 U.S. 532 (1965); 28 C.F.R. § 50.9. The CVRA respects the qualified nature of this right as to victims by stating that victims have a “right not to be excluded from any such *public* proceeding.” See 150 Cong. Rec. S10910 (Oct. 9, 2004) (CVRA is not intended to alter existing law under which court may close proceedings).

Testifying victims can be excluded from a “public” proceeding under the circumstances set forth in subsections (a)(3) and (b)(1). If the court has determined that a testifying victim’s testimony would be materially altered, *then* the court must make every effort, by considering reasonable alternatives to complete exclusion, to permit the fullest attendance possible assuming the testifying victim so desires. The court might, for example, order that the victim witness testify before other witnesses who will testify on the same subject matter.

The court, however, has no general duty to “make every effort to permit the fullest attendance possible.” Taken to its logical conclusion, courts would have to provide transportation to victims, reschedule proceedings based on non-testifying victims’ vacation schedules, recess for their medical appointments, and whatever else “every effort to permit the fullest attendance possible” would require.

That this is not what Congress intended is not only clear in the plain statutory language, but in the floor statement of Senator Kyl:

I would like to turn to (a)(3), which provides that the crime victim has the *right not to be excluded* from any public proceedings. *This language was drafted in a way to ensure that the government would not be responsible for paying for the victim's travel and lodging to a place where they could attend the proceedings.*

In all other respects, this section is intended to grant victims the right to attend and be present throughout all public proceedings. This right is limited in two respects. First, the right is limited to public proceedings, thus grand jury proceedings are excluded from the right. Second, the government or the defendant can request, and the court can order, judicial proceedings to be closed under existing laws. This provision is *not intended to alter those laws or their procedures in any way.* . . . Despite these limitations, this bill *allows* crime victims, in the vast majority of cases, *to attend* the hearings and trial of the case involving their victimization. . . .

See 150 Cong. Rec. S10910 (Oct. 9, 2004). Senator Kyl also made clear that which is already clear in the statute: that the “fullest attendance possible” provision of subsection (b)(1) is not a generally applicable “right,” but only a step the court must take before excluding a testifying victim pursuant to subsection (a)(3):

The standards of "clear and convincing evidence" and "materially altered" are extremely high and intended to make exclusion of the victim quite rare, especially since (b) says that *"before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding."*

See 150 Cong. Rec. S10910-S10911 (Oct. 9, 2004).

2. Rule 18 should be withdrawn.

Because there is no support for Rule 18 in the statute, the proposed rule would create a new right for victims, contrary to the Rules Enabling Act. Non-testifying victims would be invited to use such a rule to enforce their "right" to decide where the trial would be held, and to do so -- unlike the defendant and actual witnesses -- under threat of mandamus. Non-testifying victims could thereby impose daily hardship and expense on the actual participants in what is already an arduous and costly process, though they have no such right by statute. The addition in the note of the sentence recognizing the court's "substantial discretion to balance *competing* interests" is not helpful, as it equates the convenience of non-testifying victims with that of the defendant and testifying witnesses in setting the place of trial.

3. Rule 60(a)(2) should be revised.

As written, Rule 60(a)(2) indicates that the law allowing closure may not apply to victims, and that victims have a general right to have courts undertake "every effort" to ensure their fullest possible attendance, enforceable through mandamus. The other problem with Rule 60(a)(2) is that it is unbalanced in requiring reasons to be stated on the record for exclusion but no reasons to be stated on the record for allowing a victim to attend and hear other testimony. A decision to allow the victim to remain -- which could result in tainted testimony being introduced against the defendant -- must surely be reasoned. And there must be an adequate record of reasons not just for a victim's mandamus action, but for a defendant's appeal.

What is needed is a procedure for carefully determining whether a testifying witness should be excluded, as proposed in Mr. Hillier's testimony at 30-31. We recognize that this would probably require another round of public comment, and so propose the following minor changes, as underlined:

(2) Attending the Proceeding. The court must not exclude a victim from a public court proceeding involving the crime, unless the court determines by clear and convincing evidence that the victim's testimony would be materially altered if the victim heard other testimony at that proceeding. If the court determines that the victim's testimony would be materially altered, the court must make every effort to permit the fullest attendance possible by the victim

and must consider reasonable alternatives to exclusion. The reasons for any decision under this rule must be clearly stated on the record.

COMMITTEE NOTE

Subdivision (a)(2). This subdivision incorporates 18 U.S.C. § 3771(a)(3), which provides that the victim shall not be excluded from public court proceedings unless the court finds by clear and convincing evidence that the victim's testimony would be materially altered by attending and hearing other testimony at the proceeding, and the second sentence of 18 U.S.C. § 3771(b)(1), which requires the court, once having determined that the victim's testimony would be materially altered, to make every effort to permit the fullest attendance possible by considering reasonable alternatives to exclusion. The right not to be excluded applies only in "public" court proceedings. It does not alter existing law under which the court may order a proceeding to be closed to protect interests superior to the qualified right of public access.

D. Rule 32(i)(4): Right to "Speak"/Rule 60(a)(3): Right to "Be Reasonably Heard"

Proposed Rule 32(i)(4) and its new Committee Note (1) would redefine the statutory right to "be reasonably heard" as a "right to speak directly to the judge . . . [a]bsent unusual circumstances," (2) would require the judge to "speak" to each victim individually, a requirement not found in the CVRA, (4) would discourage courts from responding flexibly on a case-by-case basis as the full Congress intended, and (4) makes no provision for notice or a fair opportunity to respond. As such, the rule goes beyond the plain language of the CVRA, is contrary to the Rules Enabling Act, and fails to provide needed rules of practice and procedure.

1. Rule 32(i)(4) is contrary to the plain statutory language.

The phrase "reasonably heard" is not ambiguous. Though Congress could very easily have enacted a right to be "addressed" and to "speak" directly from Fed. R. Crim. P. 32(i)(4)(B), it enacted a "right to be reasonably heard." "Reasonably heard" is a legal term of art meaning to bring one's position to the attention of the court, in person or in writing, as the court deems reasonable under the circumstances. *See O'Connor v. Pierson*, 426 F.3d 187, 198 (2d Cir. 2005); *Fernandez v. Leonard*, 963 F.3d 459, 463 (1st Cir. 1992); *Commodities Futures Trading Com. V. Premex, Inc.*, 655 F.2d 779, 783 n.2 (7th Cir. 1981); U.S.S.G. § 6A1.3, backg'd. comment. When Congress uses a legal term of art, it is presumed to intend its traditional meaning. *Morissette v. United States*, 342 U.S. 246, 263 (1952).

2. Congress intended that the courts would respond flexibly.

The full Congress did not enact a statute stating that victims have a right to "speak" to the court directly, though it could have, but rather a right to "be reasonably heard," and for good reason. A principal objection to the failed constitutional

amendment was its apparent creation of an absolute right to speak and prohibition on courts' ability to respond flexibly if, for example, there were multiple victims, the victim was involved in the criminal activity, the victim provoked the crime, or the victim's statement would violate the defendant's right to due process. *See* S. Rep. No. 108-191 at 76, 85, 106-107 & n.133 (Nov. 7, 2003) (minority views). The failed constitutional amendment stated that victim rights, including the right to be heard, "shall not be denied . . . and may be restricted only as provided in this article." S.J. Res. 1, § 1 (108th Cong.). The CVRA does not include that language and includes the modifier "reasonably." Thus, it is reasonable to assume that Congress intended for the courts to have the flexibility to permit victims to be "reasonably heard" under the variety of circumstances in which it will arise, and in a manner that does not infringe on the rights of the defendant or third parties, prosecutorial discretion, or the orderly administration of justice.

The Committee has been urged to look to the floor statements of the CVRA's sponsors (the disappointed sponsors of the failed constitutional amendment) rather than the statutory language to conclude that Congress, despite its enactment of a right to be "reasonably heard," really meant a "right to speak directly to the judge . . . [a]bsent unusual circumstances." The Committee should decline that invitation. As the Supreme Court has said:

Floor statements from two Senators [who sponsored the bill] cannot amend the clear and unambiguous language of a statute. We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text.

Barnhart v. Sigmon Coal Co., Inc. 534 U.S. 438, 457 (2002). Floor statements, in fact, may "open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President," *Regan v. Wald*, 468 U.S. 222, 237 (1984), and this may be particularly true of a bill's sponsor disappointed in some respect with the final bill. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2766 n.10 (2006).

It has been said that these particular floor statements should be followed, however, because other legislators did not register disagreement. *Kenna*, 435 F.3d at 1015-16 (citing *A Man for All Seasons*). This is irrelevant for reasons well-stated by Justice Scalia:

Of course this observation, even if true, makes no difference unless one indulges the fantasy that Senate floor speeches are attended (like the Philippics of Demosthenes) by throngs of eager listeners, instead of being delivered (like Demosthenes' practice sessions on the beach) alone into a vast emptiness. Whether the floor statements are spoken where no Senator hears, or written where no Senator reads, they represent at most the views of a single Senator.

Hamdan, 126 S. Ct. at 2815-16 (Scalia, J., dissenting). See also *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 390-91 (2000) (“the statements of individual Members of Congress (ordinarily addressed to a virtually empty floor) . . . [are not] a reliable indication of what a majority of both Houses of Congress intended when they voted for the statute before us. The *only* reliable indication of *that* intent—the only thing we know for sure can be attributed to *all* of them—is the words of the bill that they voted to make law.”) (Scalia, J., concurring) (emphasis in original).

3. **There is no settled caselaw to support a right to “speak,” nor should there be, as the courts must be able to respond on a case-by-case basis.**

Only one district court has reached the issue, in a case where it was actually in dispute and litigated, *cf.* footnote 4, *infra*, of whether the “right to be heard” really means a right to “speak.” Judge Zagel concluded that the “statute clearly and unambiguously . . . does not mandate oral presentation of the victim’s statement.” *United States v. Marcello*, 370 F.Supp.2d 745, 748 (N.D. Ill. 2005). The statute gives victims a right to be “reasonably heard,” the “ordinary legal and statutory meaning [of which] typically includes consideration of the papers alone.” *Id.* The “statute, which contains both a reasonableness requirement and a legal term of art (the opportunity to be ‘heard’), does not require the admission of oral statements in every situation, particularly one in which the victim’s proposed statement was not material to the decision at hand.” *Id.* at 745. Because the statutory language was clear, Judge Zagel declined to look to the floor sponsor’s statements, and also observed that “[n]owhere [in these floor statements] does one find the debate or exchange of ideas that more frequently accompanies the art of law-crafting.” *Id.* at 748-49.

Only one court of appeals has addressed the right “to be reasonably heard.” In sweeping language, the Ninth Circuit said that victims “now have an indefeasible right to speak.” *Kenna v. United States District Court*, 435 F.3d 1011, 1016 (9th Cir. 2006). In that case, the defendant was denied the right to brief the issue in the court of appeals, the government failed to brief it, *see* Hillier Testimony at 26-29, and one judge on the panel wrote separately to state that he doubted that the statute went that far. *Kenna*, 435 F.3d at 1018-19 (Friedman, J., dubitante). Further, because of the lack of clear rules of procedure, the court and the parties had no reasonable opportunity to develop an adequate factual or legal record in the district court.³

³ The victim advocates in that case, a clinic under the umbrella of Professor Beloof’s State/Federal Clinics and Demonstration Project, did not make a “motion asserting” the victim’s right to be heard as required by 18 U.S.C. § 3771(d)(3), nor did they give notice that they were about to file a mandamus action. If they had, the district court judge would have had an opportunity to hold a hearing to ascertain the content of Mr. Kenna’s intended speech and to hear from the parties. Instead, the only record was Mr. Kenna’s assertion that he wished to tell the court about impacts that had occurred since the co-defendant’s sentencing hearing three months prior, though it later emerged that Kenna wished to present facts and argument under the sentencing guidelines. *See* Hillier Testimony at 28-29.

The Ninth Circuit, relying on a representation by Kenna that he only wished to “allocute” about victim impact and not to “present evidence,” distinguished the case before it from one in which a victim wishes to “present evidence,” in which case being heard in writing may be appropriate. *Id.* at 1014 n.2.

Without briefing from the parties, the Ninth Circuit did not hear most of the relevant legal arguments, and concluded, “as did *Degenhardt*, that both readings of the statute are plausible.”⁴ *Kenna*, 435 F.3d at 1015, citing *United States v. Degenhardt*, 405 F. Supp.2d 1341 (D. Utah 2005) (Cassell, J.). In concluding that the phrase “reasonably heard” was ambiguous, the Ninth Circuit gave equal weight to Kenna’s dictionary definition of “hear” as “to perceive (sound) by the ear,” *Kenna*, 435 F.3d at 1014, contrary to at least two rules of statutory construction. See *Buckhannon Bd. And Home Care, Inc. v. West Virginia Dept. of Health and Human Services*, 532 U.S. 598, 615 (2001) (Scalia and Thomas, JJ., concurring) (meaning of a legal term of art is followed over a dictionary definition); *Sullivan v. Stroop*, 496 U.S. 478, 483 (1990) (“where a phrase in a statute appears to have become a term of art . . . any attempt to break down the term into its constituent words is not apt to illuminate its meaning.”). Further, the Ninth Circuit concluded that Congress’ use of the word “public” made “the right to be ‘heard’ at a ‘public proceeding’ . . . synonymous with ‘speak.’” *Kenna*, 435 F.3d at 1015. This too was wrong as the purpose of the word “public” in the CVRA was to limit the right to be “reasonably heard” to public, as opposed to closed, proceedings.⁵

Thus misled (in our view) to conclude that the language was ambiguous, the Ninth Circuit then turned to the floor statements of the bill’s sponsors stating that the purpose of the section was to allow the victim to directly address the court in person. *Kenna*. at 1015, quoting 150 Cong. Rec. S4268 (April 22, 2004) (statements of Sen. Kyl and Sen. Feinstein); 150 Cong. Rec. S10911 (Oct. 9, 2004) (statement of Sen. Kyl).

A different court of appeals, with all of the relevant facts and law before it, may well reach a more moderate conclusion.

⁴ In *Degenhardt*, the government announced prior to sentencing in December 2005 that some of the victims wished to speak at the sentencing hearing. Defense counsel, Assistant Federal Defenders, did not object or litigate the issue, since the judge had accepted Mr. Degenhardt’s guilty plea under Fed. R. Crim. P. 11(c)(1)(C) in May 2005. Mr. Degenhardt was sentenced on December 9, 2005, and judgment entered the same day. The *Degenhardt* opinion, issued thereafter on December 21, 2005, stated that “the court cannot agree with another district court’s conclusion that in-court victim allocation at one defendant’s sentencing eliminates the need to allow victim allocation when a co-defendant is sentenced,” citing to *Kenna*’s pending mandamus action before the Ninth Circuit. See 405 F. Supp.2d at 1348 n. 42. The opinion was submitted by the Crime Victim Legal Assistance Project to the Ninth Circuit under Fed. R. App. P. 28(j) the following day. See December 22, 2005, Letter of Steve Twist to Clerk, Ninth Circuit Court of Appeals, docketed December 23, 2005, *Kenna v. United States District Court*, No. 05-73467.

⁵ See 150 Cong. Rec. S10910 (Oct. 9, 2004); 150 Cong. Rec. S4268 (April 22, 2004). See also S. Rep. No. 108-191 at 38 (Nov. 7, 2003).

Finally, no court has gleaned from the CVRA a right to be spoken to individually by the court as the Committee Note suggests. Many victims, we suspect, would rather not be spoken to individually, but the proposed note would seem to require it whether they like it or not. Further, this has the potential of unfairly converting a hearing whose purpose is the sentencing of a criminal defendant -- whose constitutional right to liberty is at stake -- into a series of individual conversations with victims who do not have constitutionally protected rights at stake.⁶

3. The rule should provide for notice and a fair opportunity to respond.

The courts must have an orderly means of determining whether a person is a victim with a right to address the court, and if so, whether that address should be regulated as to form or content. And, if the victim intends to make statements or arguments that threaten the rights or interests of the defendant, the government or third parties, the parties must be given the opportunity to be heard to assist the court in resolving the matter in a fair and reasonable manner.

The court and the parties should not be blindsided by a victim exercising his right to be heard, or made to guess as to the content of the victim's intended statement. *Marcello*, 370 F.Supp.2d at 747-48 (government's argument that the court must hear the victim's views orally without providing a written summary and even if those views would have no bearing on the decision before the court was "extraordinary."). If the putative victim in the *Sharp* case, instead of filing a motion to be heard with a description of her intended testimony, had simply stood up and begun speaking, the personal and professional reputation of a third party (who was not charged with any crime) would have been damaged with no opportunity to defend himself, the parties would have had no opportunity to be heard, and the court could not have easily or reliably determined, on the spot, whether the putative victim was a victim within the meaning of the CVRA at all. See *United States v. Sharp*, 463 F.Supp.2d 556 (E.D. Va. 2006). Similarly, the court and the parties should know if the victim intends to offer factual testimony, so that the court can require the facts to be stated in writing, or the victim to be placed under oath, and his statement in whatever form subjected to the usual rudiments of adversarial testing. Cf. *Kenna*, 435 F.3d at 1014 n.2 (distinguishing the situation where a person may be "heard" on the papers because "Kenna does not claim the right to present evidence or testify under oath. . . . the right to present evidence . . . is not at issue here."). If, in round two, Kenna had not moved for the presentence report (ironically, *ex parte*), the court would

⁶ See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 125 S. Ct. 2796, 2810 (2005) ("the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations."); *Pusey v. City of Youngstown*, 11 F.3d 652, 656 (6th Cir. 1994) (victim had no constitutionally protected liberty interest in statutory right to notice of plea hearing because statute "does not specify how the victim's statement must affect the hearing nor does it require a particular outcome based on what the victim has said."); *Dix v. County of Shasta*, 963 F.2d 1296, 1300 (9th Cir. 1992) (in providing that judge must consider victim statements in imposing sentence, state victim rights statute did not create a constitutionally protected liberty interest because it did not mandate a particular result based on a finding about the victim).

not have known that he intended to offer facts and argument about the sentencing guideline calculation, the parties would not have had an opportunity to be heard, and the problems of *Kenna I* would have recurred in *Kenna II*. Cf. *In re Kenna*, 453 F.3d 1136 (9th Cir. 2006) (upholding district court's denial of claimed right to presentence report based on the theory Kenna had a right to be heard on correct guideline sentence).

As to responding to the statement itself, defendants have a right under the Due Process Clause to notice and the opportunity to challenge facts and arguments that may be used to deprive them of life, liberty or property. See *Burns v. United States*, 501 U.S. 129, 137-38 (1991); *Gardner v. Florida*, 430 U.S. 349, 351, 358 (1977); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *United States v. Curran*, 926 F.2d 59, 61, 63 (1st Cir. 1991). Rule 32 protects those rights, and the interests of the government as well, by providing notice in the presentence report; an opportunity to investigate, object and present contrary evidence and argument to the Probation Officer; an opportunity to file a sentencing memorandum with the court and to argue orally to the court; an opportunity for a hearing; the right to obtain witness' statements, to have witnesses placed under oath and to question witnesses at any such hearing; and a right to have the court resolve any disputed matter. See Rule 32(e)(2), (f), (g), (h), (i).

Unless whatever the victim has to say is included in the PSR (which it often will not be), those rules do not apply to the exercise of a victim's right to be "reasonably heard," which is particularly dangerous if the victim exercises an unannounced right to "speak." Unlike the government or any other witness, a victim could testify to factual evidence about herself or the defendant that could impact the sentencing decision without prior notice, any discovery of what she has said before or intends to say, or an adequate opportunity for the defendant to respond. A victim may also make damaging statements about third parties whose privacy is at stake, or reveal sensitive information about a pending investigation or a cooperating witness.

The absence of the basic procedural requirements of notice and an opportunity to respond would create an imbalance favoring victims over defendants. Even a defendant's right to allocute at sentencing is not absolute, and may be denied in certain situations, or limited as to duration and content. *United States v. Mack*, 200 F.3d 653 (9th Cir. 2000); *Ashe v. North Carolina*, 586 F.2d 334, 336-37 (4th Cir. 1978); *Marcello*, 370 F.Supp.2d at 750 & n.10. If the defendant wishes to testify as a witness, he is placed under oath, subjected to cross-examination, and limited to matters that are relevant and material and about which he is competent to testify. *Id.* at 750. The defendant may be precluded from testifying at all if he fails to comply with rules requiring notice, *Michigan v. Lucas*, 500 U.S. 145, 152-53 (1991); *Taylor v. Illinois*, 484 U.S. 400, 417 (1988); *Williams v. Florida*, 399 U.S. 78, 81-82 (1970), does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under the rules of evidence, *Taylor*, 484 U.S. at 410, may not "testify[] *falsely*," *Nix v. Whiteside*, 475 U.S. 157, 173 (1986) (emphasis in original), and has no right to introduce hearsay, *Chambers v. Mississippi*, 410 U.S. 484 (1973), or evidence that is otherwise unreliable. *United States v. Scheffer*, 523 U.S. 303, 309 (1998).

There seems to be no sound reason not to require notice and a fair opportunity to respond.

We urge the Committee to change the heading of Rule 32(i)(4) from “Opportunity to Speak” to “Opportunity to be Heard,” to refer to Rule 60(a)(3) for the victim’s right to be reasonable heard, and to amend Rule 60(a)(3) as follows:

Rule 32. Sentencing and Judgment

(i) Sentencing.

(4) Opportunity to be Heard.

(B) By a Victim. A victim’s right to be reasonably heard at sentencing is addressed in Rule 60(a)(3).

Rule 60. Victim’s Rights

(a) In General

(3) Right to be Reasonably Heard

At or before any public proceeding in the district court concerning release, plea, or sentencing, the court shall adopt appropriate procedures which afford any victim the right to be reasonably heard. Such procedures must afford the parties notice, including prompt disclosure of any statement of the victim in the possession of the court, the Probation Officer or either party, and a fair opportunity to respond.

III. General Rules of Practice and Procedure

A. Reliable Information in Presentence Reports, Rule 32(d)(2)(B)

We understand that the proposed rule seeks to treat information about victims the same as other information in the presentence report, and that the subcommittee believes that “[a]ll information in the PSR should meet these requirements.” See March 25, 2007 Memorandum at 70. The Committee Note says the former, but not the latter.

The Committee should ensure both evenhandedness and that all information in the presentence report is verified and stated in a nonargumentative style by saying so in the Committee Note, or, better, by adding as subsection (d)(4):

(4) Reliable Information. All information included in the presentence report must be verified and stated in a nonargumentative style.

In many districts, the unfortunate fact is that much of the information in presentence reports is unverified and often stated in a hostile or argumentative style. This has been identified as a serious problem by the Supreme Court, other courts and the Sentencing Commission.⁷ It is especially troubling because in several circuits, the mere inclusion of factual allegations in a PSR transforms them to “evidence” which the judge may adopt without the government introducing any actual evidence to support them, unless the defendant rebuts the allegations with actual evidence.⁸ The proposed rule as written would send the wrong message, in derogation of defendants’ right to be sentenced on the basis of accurate information.⁹

B. Definition of “Victim,” Rule 1(b)(11)

Proposed Rule 1(b)(11), which states that “[v]ictim’ means a ‘crime victim’ as defined in 18 U.S.C. § 3771(e),” remains problematic because (1) it would apply the CVRA’s definition where the CVRA does not apply, and (2) it fails to state that the offense by which the victim was allegedly harmed is one for which a defendant has been charged and is being prosecuted or has been convicted in a federal district court.

It would be a simple matter, and prudent, for Rule 1(b)(11) to state that the definition applies to the particular rules that implement the CVRA. The definition of “crime victim” in 18 U.S.C. § 3771(e) is limited in its application to “this chapter,” which consists of one statute, the CVRA. The proposed rule is unlimited, and any law in conflict with it would “be of no further force or effect.” 18 U.S.C. § 2072(b). A rule that fails to specify that the CVRA’s definition applies only to those rules that implement the

⁷ See *United States v. Booker*, 543 U.S. 220, 304 (2005) (Scalia, J., dissenting in part); *Blakely v. Washington*, 542 U.S. 296, 311-12 (2004); *United States v. Kandirakis*, 441 F. Supp. 2d 282, 303 (D. Mass. 2006); U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 50 (2004).

⁸ See *United States v. Prochner*, 417 F.3d 54, 66 (1st Cir. 2005); *United States v. Huerta*, 182 F.3d 361, 364 (5th Cir. 1999); *United States v. Hall*, 109 F.3d 1227, 1233 (7th Cir. 1997); *United States v. Terry*, 916 F.2d 157, 160-62 (4th Cir. 1990).

⁹ See *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *United States v. Tucker*, 404 U.S. 443, 447 (1972).

CVRA would lead to confusion, needless litigation, and the possible abridgement of defendants' rights.¹⁰

By incorporating 18 U.S.C. § 3771(e), proposed Rule 1(b)(11) would define "victim" for purposes of the Criminal Rules as "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." Without more, this suggests that persons who believe they were harmed by an "offense" have standing to assert rights, and bring mandamus actions, though no one has been charged, or is being prosecuted or has been convicted, of the "offense," in federal court. Civil plaintiffs have invoked the CVRA to claim rights to restitution, damages, and non-public criminal discovery.¹¹ Putative victims have claimed rights in criminal proceedings as victims of persons who were not charged with any offense or who were acquitted of offenses with which they were charged.¹² A putative victim could attempt to claim rights as a result of an offense "committed" in the District of Columbia that is being prosecuted in the courts of the District of Columbia, or not being prosecuted anywhere. While the courts in reported cases have rejected such claims,¹³ the fact remains that the language the proposed rule adopts, standing alone, has been read to permit them. The rules should put an end to this vexing and wasteful litigation. See *Moussaoui*, 2007 WL 755276 at *13-14 (citing waste of time, unfair burdens on criminal

¹⁰ A "crime victim" as defined in the CVRA could claim a right enforceable through mandamus to an order of notice under 18 U.S.C. § 3555, by virtue of Rule 38(e) and proposed Rule 1(b)(11), though there is no such right in the CVRA. Victims as defined in the CVRA may claim a right to restitution that is not provided by the restitution statutes. The definition would apply to an "organizational victim" under Rule 12.4(a)(2), which has nothing to do with the CVRA.

¹¹ See *United States v. Moussaoui*, ___ F.3d ___, 2007 WL 755276 (4th Cir. Mar. 14, 2007) (district court was without power to grant motion of civil plaintiffs in a case in the Southern District of New York to intervene in criminal case in the Eastern District of Virginia for purpose of obtaining non-public discovery materials from the criminal case); *In re Searcy*, 202 Fed. Appx. 625 (4th Cir. Oct. 6, 2006) (rejecting petition for mandamus by civil RICO plaintiff claiming entitlement to restitution and damages under the).

¹² *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 564 (2d Cir. 2005) (rejecting petition for mandamus seeking to vacate settlement agreement approved by district court between United States and convicted, acquitted and uncharged persons); *United States v. Sharp*, 463 F.Supp.2d 556 (E.D. Va. 2006) (denying putative victim's *ex parte* motion to make impact statement at defendant's sentencing on the basis that her former boyfriend, who was not charged with any crime, physically, mentally and emotionally abused her, which she claimed may have been caused by his use of marijuana purchased from defendant).

¹³ See *Moussaoui*, 2007 WL 755276 at *10 ("The rights codified by the CVRA . . . are limited to the criminal justice process."); *In re Searcy*, 202 Fed. Appx. 625 (CVRA has "no application . . . to these [civil] proceedings"); *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d at 564 ("the CVRA does not grant victims any rights against individuals who have not been convicted of a crime."); *Sharp*, 463 F.Supp.2d at 561 ("the CVRA only applies to [putative victim claiming right to be heard at sentencing] if she was 'directly and proximately harmed' as a result of the commission of the Defendant's federal offense.").

defendants, the government and the public, and slippery slope concerns as additional reasons not to permit victims to intrude upon criminal trials to obtain discovery for use in civil actions).

Doing so would be a correct interpretation of the statute Congress passed and an appropriate use of the Rules of Criminal Procedure. The CVRA directs the court to “ensure” that a victim is afforded the rights described in subsection (a) in “any court proceeding involving an offense against a crime victim.” 18 U.S.C. § 3771(b)(1). Even if a putative “crime victim” could claim some right outside the parameters of a pending court proceeding, it would not be within the scope of the Rules of Criminal Procedure. *See* Rule 1(a).

The Senate Judiciary Committee, even when considering a constitutional amendment, “anticipate[d] that courts, in interpreting the amendment, will . . . focus[] on the criminal charges that have been filed in court.” *See* S. Rep. No. 108-191 at 30 (Nov. 7, 2003). In enacting the Victim Witness Protection Act, Congress recognized that “[t]o order a defendant to make restitution to a victim of an offense for which the defendant was not convicted would be to deprive the defendant of due process of law.” H.R. Rep. No. 99-334, p. 7 (1985) and H.R. Rep. No. 98-1017, p. 83, n. 43 (1984) (quoted in *Hughey v. United States*, 495 U.S. 411, 421 n.5 (1990)). The Supreme Court then interpreted the definition of “victim” in the Victim Witness Protection Act, 18 U.S.C. § 3663(a)(2), as authorizing restitution only for “loss caused by the conduct underlying the offense of conviction.” *Hughey*, 495 U.S. at 420. Congress then passed the CVRA, defining “crime victim” in 18 U.S.C. § 3771(e) the same as “victim” is defined in 18 U.S.C. § 3663(a)(2) in relevant part. When Congress incorporates a term into a statute that the Supreme Court has previously interpreted, Congress is assumed to have incorporated that interpretation. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).

We urge the Committee to adopt the following alternative:

(11) “Victim” as that term is used in Rules 32 and 60 means a person directly and proximately harmed as a result of the commission of a Federal offense or the commission of an offense in the District of Columbia, with which a defendant has been charged and is being prosecuted or has been convicted, and which is the subject of a pending criminal proceeding in a United States district court or a territorial district court described in subdivision (a)(3) of this rule.

C. Enforcement and Limitations, Rule 60(b)

We have the following objections to Rule 60(b), with an alternative proposal that follows.

First, the rule mentions “any motion asserting a victim’s rights under these rules,” but it is somewhat hidden under the heading of “Time for Deciding a Motion,” and does not direct the victim’s attention to how a motion is to be made. This is inadequate for

victims because it does not tell them how to assert their rights. It is inadequate for the court and the parties because it fails to ensure that they will receive adequate notice of a claim that may quickly become a mandamus action. We therefore propose a rule stating that victims must assert rights by motion in accordance with the procedures otherwise applicable to parties under Rules 47 and 49. This would allow the parties and the victim to be heard, would ensure that the court has the relevant facts and law before it, would create a record for the court of appeals, and would facilitate the parties' participation in any mandamus action before the 72-hour timetable begins.¹⁴ The Committee Note could state that if a victim attempts to assert a right in a manner that does not comply with Rule 47 or Rule 49, the court should inform the victim of the proper procedure and allow the victim an opportunity to comply.

Second, the rule says nothing about when a victim must assert rights. A victim may attempt to assert rights after a proceeding has ended. This would not be helpful to the victim, the court, the defendant or the government. Consistent with 18 U.S.C. § 3771(d)(5)(A), the rule should state that victim rights must be asserted before or during the proceeding at issue.

Third, the CVRA provides for a stay or continuance of no more than five days for purposes of enforcing a victim's right, 18 U.S.C. § 3771(d)(3), but the rule says nothing about it. In *Kenna I*, the Ninth Circuit chided the district court for not postponing sentencing until the petition for writ of mandamus was resolved, six months after it was filed, though the CVRA required the decision to be made within 72 hours. *Kenna I*, 435 F.3d at 1018 n.5. Further, the district court had no notice that a petition for writ of mandamus would be filed. The rules can avoid such problems, in part, by stating the court's authority to grant a stay of up to five days, but only if the victim notifies the court of an intention to file a petition for a writ of mandamus.

Fourth, for clarity and convenience, especially for unrepresented victims and inexperienced counsel, the rule should direct attention to the Federal Rules of Appellate Procedure applicable to mandamus actions. This is especially necessary given the Ninth Circuit's failure to accord a defendant in a criminal case an opportunity to be heard in a mandamus action, and its inaccurate statement in *Kenna I* that a criminal defendant is not a party to a victim's mandamus action. *See* Fed. R. App. P. 21.

Fifth, in the subdivision applicable to a so-called motion to "reopen," the rule should use the term "asserted" because that is the term used in the statute, *see* 18 U.S.C. § 3771(d)(5)(A), the term "asked" is not used anywhere in the rules, has no legal meaning, gives no guidance to victims, and does not ensure notice to defendants whose plea or sentencing may be "reopened."

¹⁴ The need for such a rule is demonstrated by comparing the chaotic process in *Kenna I*, where no recognizable motion was made, with the more orderly and balanced process in *Kenna II*, where a motion was filed. *See* Hillier Testimony at 26-29.

Sixth, since the statute requires the motion to “reopen” to be made in the district court, the rule should state that there must be jurisdiction in the district court. Particularly if no stay has been imposed and/or the court of appeals exceeds the 72-hour limit, one or both parties may have to file a notice of appeal in order to protect their rights, in which case there may be no jurisdiction in the district court.

Seventh, the rule should require as a condition of a motion to “reopen” that the judgment has not become final. A judgment is not final until direct appeal is concluded and certiorari is denied or the 90-day period for filing a petition for certiorari has run. *See Clay v. United States*, 537 U.S. 522 (2003). The CVRA contemplates that the judgment will not be final, as it provides for a maximum of 21 days between denial of a motion asserting a victim’s right and the court of appeals decision on a petition for mandamus, *i.e.*, 10 days to file the petition, any intermediate Saturdays, Sundays and holiday, no more than 5 days for stay or continuance, and 3 days for decision. However, as in *Kenna I*, the judgment may become final, through no fault of the defendant whatsoever, but because the court of appeals did not comply with the CVRA’s timetable, which creates a conflict between defendants’ constitutional rights and victims’ statutory rights, which the Ninth Circuit recognized but did not resolve. *See* 435 F.3d at 1017-18. Congress clearly did not intend for a defendant’s plea or sentence to be “reopened” after the judgment has become final. Re-sentencing to a higher sentence or vacating a plea to a lesser offense at that point would, it seems, violate the Double Jeopardy Clause.¹⁵ To avoid confusion and the threat to defendants’ rights in the future, the rule should state that a motion to “reopen” may not be filed if the judgment has become final.

Eighth, the undefined term, “highest offense,” unfamiliar to judges and lawyers, should be defined.

Ninth, to maintain the careful balance Congress sought between victims’ statutory rights on the one hand, and constitutional rights, prosecutorial discretion, and the continued functioning of the constitutional adversarial system on the other, the rule, in

¹⁵ A defendant has a right under the Double Jeopardy Clause not to be sentenced to a higher sentence once he has a legitimate expectation in the finality of his sentence, *see United States v. DiFrancesco*, 449 U.S. 117 (1980), which occurs, *inter alia*, when the judgment has become final. *See id.* at 136 (noting that a defendant can have no expectation of finality in a sentence “until the appeal is concluded or the time to appeal has expired”); *United States v. Earley*, 816 F.2d 1428, 1434 (10th Cir. 1987) (noting that a court’s ability to modify a sentence has generally been recognized as “extending through the end of the direct appeals and retrial process,” and holding that double jeopardy barred imposing enhanced sentence where defendant “took no appeal” and instead began serving his sentence). The defendant also has a double jeopardy right against having a plea to a lesser offense vacated and a greater charge re-instated. *Ricketts v. Adamson*, 483 U.S. 1, 8 (1987). One of the objections to the failed constitutional amendment was that it could result in a sentence being vacated and the defendant being re-sentenced to a more severe sentence in violation of the Double Jeopardy Clause. *See* S. Rep. 108-191 at 103 (Nov. 7, 2003) (minority views). It was the understanding of opponents of the constitutional amendment that the CVRA did not permit that result. *See* 150 Cong. Rec. S4275 (April 22, 2004) (CVRA “addresses my concerns regarding the rights of the accused,” including “the Fifth Amendment protection against double jeopardy”) (statement of Sen. Durbin).

addition to prohibiting a new trial as relief, should state that in no case may the failure to afford a right under § 3771(a), or a claimed failure to afford such a right, result in the violation of any constitutional right. A defendant has due process rights to be accurately apprised of the consequences of a plea, *Mabry v. Johnson*, 467 U.S. 504, 509 (1984), and to specific enforcement of a promise made in a plea bargain, *Santobello v. New York*, 404 U.S. 257, 262 (1971), even if he pled guilty or agreed to plead guilty to a less serious offense than the most serious one charged. A victim may assert a right to be free from what she believes is unreasonable delay that would conflict with a defendant's due process right to prepare a defense. Because victims do not have constitutional rights, the rule should make clear that any relief granted to a victim under the statute may not violate the constitutional rights of others.

Tenth, the rule should clarify that the violation of any statutory right is prohibited unless the victim establishes a compelling need for the relief sought and that the ends of justice so require. For example, the defendant and the public have rights under the Speedy Trial Act. Anyone, including the defendant and other victims, has a statutory right to privacy in any records filed or testimony heard for purposes of issuing and enforcing an order of restitution. 18 U.S.C. § 3664(d)(4).

Finally, the rule should make clear that a victim, no less than a party, is subject to waiver of rights not asserted in a timely or otherwise regular manner. *See* Fed. R. Crim. P. 12(e).

(b) Enforcement and Limitations.

- (1) Motion Asserting Rights.** The assertion of a victim's rights under these rules shall be by motion in accordance with the procedures otherwise applicable to parties under Rules 47 and 49.
- (2) When Rights Must Be Asserted.** Any motion asserting a victim's rights under these rules must be made before or during the proceeding at issue.
- (3) Where Rights Must Be Asserted.** Rights under these rules must be asserted in the district court in which the defendant is being prosecuted for the crime charged.
- (4) Who May Assert Rights.** Rights under these rules may be asserted by the victim, the victim's lawful representative, the attorney for the government, or any other person authorized by 18 U.S.C. § 3771(d) and (e).
- (5) Time for Decision.** The court must promptly decide a motion asserting a victim's rights under these rules.
- (6) Stay of Proceedings.** If the court has denied a motion asserting a right under these rules, and the victim notifies the court of an intention to file a petition for writ of mandamus in the court of appeals under 18 U.S.C. § 3771(d)(3), the court

may stay the proceedings for a period not to exceed five days upon motion of the victim or either party.

(7) Writ of mandamus. The procedures governing a petition for a writ of mandamus under 18 U.S.C. § 3771(d)(3) are found in Rule 21 and other pertinent provisions of the Federal Rules of Appellate Procedure.

(8) Limitations on Relief. A victim may move to re-open a plea or sentencing hearing, in compliance with subsections (b)(1)-(3) of this rule, and only if:

(A) the victim asserted a right to be heard before or during a plea or sentencing proceeding in the district court in compliance with subsections (b)(1)-(3) of this rule and the district court denied the relief sought;

(B) the victim petitioned the court of appeals for a writ of mandamus within 10 days of such denial, and the writ is granted;

(C) jurisdiction over the case is in the district court;

(D) the judgment has not become final; and

(E) in the case of a plea, the accused did not plead nolo contendere or guilty to one or more counts carrying a cumulative statutory maximum sentence equal to or greater than the statutory maximum sentence for any other offense charged.

(9) Prohibition of Relief. In no case shall a failure to afford a victim any right under these rules, or a claimed failure to afford such a right, result in:

(A) a new trial;

(B) any violation of any constitutional right;

(C) any violation of any statutory right unless the victim establishes a compelling need for the relief sought and that the ends of justice so require.

(10) Waiver. A victim waives judicial enforcement of any right under these rules which is not asserted in accordance with this rule. For good cause shown, the court may grant relief from the waiver.

1 **Rule 29. Motion for a Judgment of Acquittal**

2
3 **(a) Time for a Motion.**

4 **(1) *Before Submission to the Jury.*** After the
5 government closes its evidence or after the close
6 of all the evidence, ~~the court on the defendant's~~
7 ~~motion must enter a judgment of acquittal of any~~
8 ~~offense for which the evidence is insufficient to~~
9 ~~sustain a conviction. The court may on its own~~
10 ~~consider whether the evidence is insufficient to~~
11 ~~sustain a conviction. If the court denies a motion~~
12 ~~for a judgment of acquittal at the close of the~~
13 ~~government's evidence, the defendant may offer~~
14 ~~evidence without having reserved the right to do~~
15 ~~so.~~ a defendant may move for a judgment of

16 acquittal on any offense. The court may invite the
17 motion.

18 **(2) After a Guilty Verdict or a Jury's Discharge.**

19 A defendant may move for a judgment of
20 acquittal, or renew such a motion, within 7 days
21 after a guilty verdict or after the court discharges
22 the jury, whichever is later. A defendant may
23 make the motion even without having made it
24 before the court submitted the case to the jury.

25 **(b) Ruling on a Motion Made Before Verdict.** If a
26 defendant moves for a judgment of acquittal before
27 the jury reaches a verdict (or after the court
28 discharges the jury before verdict), the following
29 procedures apply:

30 **(1) Denying Motion or Reserving Decision.** The
31 court may deny the motion or may reserve

32 decision on the motion until after a verdict. If the
33 court reserves decision, it must decide the motion
34 on the basis of the evidence at the time the ruling
35 was reserved. The court must set aside a guilty
36 verdict and enter a judgment of acquittal on any
37 offense for which the evidence is insufficient to
38 sustain a conviction.

39 **(2) Granting Motion; Waiver.** The court may not
40 grant the motion before the jury returns a verdict
41 (or before the verdict in any retrial in the case of
42 discharge) unless:

43 **(A)** the court informs the defendant personally
44 in open court and determines that the
45 defendant understands that:

46 **(i)** the court can grant the motion before
47 the verdict only if the defendant agrees

48 that the government can appeal that

49 ruling; and

50 (ii) if that ruling is reversed, the defendant

51 could be retried; and

52 **(B)** the defendant in open court personally

53 waives the right to prevent the

54 government from appealing a judgment of

55 acquittal (and retrying the defendant on

56 the offense) for any offense for which the

57 court grants a judgment of acquittal before

58 the verdict.

59 **(c) Ruling on a Motion Made After Verdict.** If a

60 defendant moves for a judgment of acquittal after the

61 jury has returned a guilty verdict, the court must set

62 aside the verdict and enter a judgment of acquittal on

63 any offense for which the evidence is insufficient to
64 sustain a conviction.

65 **(b) Reserving Decision.** ~~The court may reserve decision~~
66 ~~on the motion, proceed with the trial (where the~~
67 ~~motion is made before the close of all the evidence),~~
68 ~~submit the case to the jury, and decide the motion~~
69 ~~either before the jury returns a verdict or after it~~
70 ~~returns a verdict of guilty or is discharged without~~
71 ~~having returned a verdict. If the court reserves~~
72 ~~decision, it must decide the motion on the basis of the~~
73 ~~evidence at the time the ruling was reserved.~~

74 **(c) After Jury Verdict or Discharge:**

75 **(1) Time for a Motion.** ~~A defendant may move for a~~
76 ~~judgment of acquittal, or renew such a motion, within~~
77 ~~7 days after a guilty verdict or after the court~~
78 ~~discharges the jury, whichever is later.~~

79 ~~(2) **Ruling on the Motion.** If the jury has returned a~~
80 ~~guilty verdict, the court may set aside the verdict and~~
81 ~~enter an acquittal. If the jury has failed to return a~~
82 ~~verdict, the court may enter a judgment of acquittal.~~
83 ~~(3) **No Prior Motion Required.** A defendant is not~~
84 ~~required to move for a judgment of acquittal before the~~
85 ~~court submits the case to the jury as a prerequisite for~~
86 ~~making such a motion after jury discharge.~~
87

Committee Note

Subdivisions (a), (b), and (c) The purpose of the amendment is to allow the government to seek appellate review of any judgment of acquittal. At present, the rule permits the court to grant acquittals under circumstances where Double Jeopardy will preclude appellate review. If the court grants a Rule 29 acquittal before the jury returns a verdict, appellate review is not permitted because Double Jeopardy would prohibit a retrial. If, however, the court defers its ruling until the jury has reached a verdict, and then grants a motion for judgment of acquittal, appellate review is available, because the jury's verdict can be reinstated if the acquittal is reversed on appeal.

The amendment permits preverdict acquittals, but only when accompanied by a waiver by the defendant that permits the government to appeal and – if the appeal is successful – on remand to try its case against the defendant. Recognizing that Rule 29 issues frequently arise in cases involving multiple counts and or multiple defendants, the amendment permits any defendant to move for a judgment of acquittal on any count (or counts). Following the usage in other rules, the amendment uses the terms “offense” and “offenses,” rather than count or counts.

The amended rule protects both a defendant’s interest in holding the government to its burden of proof and the government’s interest in appealing erroneous judgments of acquittal, while ensuring that the court will only have to consider the motion once. Although the change has required some reorganization of the subdivisions, no substantive change is intended other than the limitation on preverdict rulings and the new waiver provision.

Subdivision (a). Amended Rule 29(a), which states the times at which a motion for judgment of acquittal may be made, combines provisions formerly in subdivisions (a) and (c)(1). No change is intended except that the court may not grant the motion before verdict without a waiver by the defendant.

The amended rule omits the statement in Rule 29(a) that: “If the defendant moves for judgment of acquittal at the close of the government’s evidence, the defendant may offer evidence without having reserved the right to do so.” The Committee concluded that this language was no longer necessary. It referred to a practice in some courts, no longer followed, of requiring a defendant to “reserve” the right to present a defense when making a Rule 29

motion. There is no reason to require such a reservation under the amended rule.

Subdivision (b). Amended Rule 29(b) sets forth the procedures for motions for a judgment of acquittal made before the jury reaches a verdict or is discharged without reaching a verdict. (There is, of course, no need to rule if a not guilty verdict is returned.) Prior to verdict, the Rule authorizes the court to deny the motion or reserve decision, but the court may not grant the motion absent a defendant's waiver of Double Jeopardy rights. *See Carlisle v. United States*, 517 U.S. 416, 420-33 (1996) (holding that trial court did not have authority to grant an untimely motion for judgment of acquittal under Rule 29).

Accordingly, if the defendant moves for a judgment of acquittal at the close of the government's evidence or the close of all the evidence, in the absence of a waiver the court has two options: it may deny the motion or proceed with trial, submit the case to the jury, and reserve its decision until after a guilty verdict is returned. As under the prior Rule, if the defendant made the motion at the close of the government's evidence, the court must grant the motion if the evidence presented in the government's case is insufficient, *see Jackson v. Virginia*, 443 U.S. 307 (1979), even if evidence in the whole trial is sufficient. If the government successfully appeals, the guilty verdict can be reinstated. *Cf. United States v. Morrison*, 429 U.S. 1 (1976) (holding that Double Jeopardy does not preclude appeal from judgment of acquittal entered after guilty verdict in bench trial, because verdict can be reinstated upon remand).

Similarly, if the defendant moves for a judgment of acquittal after the jury is discharged and the government wishes to retry the case,

absent a waiver the court has two options. It may deny the motion, or it may reserve decision, proceed with the retrial, submit the case to the new jury, and rule on the reserved motion if there is a guilty verdict after the retrial. *See Richardson v. United States*, 468 U.S. 317, 324 (1984) (“a retrial following a ‘hung jury’ does not violate the Double Jeopardy Clause”). After the second trial, the court must grant the motion if the evidence presented at the first trial was insufficient when the motion was made, even if the evidence in the retrial was sufficient. This procedure permits the government to appeal, because the verdict at the second trial can be reinstated if the appellate court rules that the judgment of acquittal was erroneous.

The court may grant a Rule 29 motion for acquittal before verdict only as provided in subdivision (b)(2), the waiver provision. Under amended Rule 29(b)(2), the court may rule on the motion for judgment of acquittal before the verdict with regard to some or all of the counts, after first advising the defendant in open court of the requirement of the Rule and the protections of the Double Jeopardy Clause, and after the defendant waives those protections on the record. Although the focus of the rule is on the waiver of the defendant’s Double Jeopardy rights, the rule does not refer explicitly to Double Jeopardy. Instead, it puts the waiver in terms a lay defendant can most readily understand: the defendant’s waiver allows the government to appeal a judgment of acquittal, and to retry him if that appeal is successful.

As with any constitutional right, the waiver of Double Jeopardy rights must be knowing, intelligent, and voluntary. *See generally Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *United States v. Morgan*, 51 F.3d 1105, 1110 (2d Cir. 1995) (“the act of waiver must be shown to have been done with awareness of its consequences”).

Although there are cases holding that a defendant's action or inaction can waive Double Jeopardy, the Committee believed that it was appropriate for the Rule to require waiver both under the rule and explicitly on the record. See *United States v. Hudson*, 14 F.3d 536, 539 (10th Cir. 1994) (when consent order did not specifically waive Double Jeopardy rights, no waiver occurred); *Morgan*, 51 F.3d at 1110 (civil settlement with government did not waive Double Jeopardy defense when settlement agreement was not explicit, even if individual was aware of ongoing criminal investigation). For a case holding that a defendant may waive his Double Jeopardy rights to allow the government to appeal, see *United States v. Kington*, 801 F.2d 733 (5th Cir. 1986), *appeal after remand*, *United States v. Kington*, 835 F.2d 106 (5th Cir. 1988).

Before the court may accept a waiver, it must address the defendant in open court, as required by subdivision (b)(2). A general model for this procedure is found in Rule 11(b), which provides for a plea colloquy that is intended to insure that the defendant is knowingly, voluntarily, and intelligently waiving a number of constitutional rights.

Subdivision (c). The amended subdivision applies to cases in which the court rules on a motion made after a guilty verdict. This was covered by subdivision (c)(2) prior to the amendment. The amended rule restates the applicable standard, using the same terminology as former subdivision (a)(1). No change is intended.