COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Pasadena, CA
January 14-15, 2008

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 14-15, 2008

1. Opening Remarks of the Chair

   A. Report on the September 2007 Judicial Conference session
   B. Transmission of Judicial Conference-approved proposed rules amendments to the Supreme Court
   C. Transmission of Proposed Evidence Rule 502 to Congress

2. **ACTION** – Approving Minutes of June 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 Appellate Rules Committee

   A. **ACTION** – Approving publishing for public comment proposed amendment to Rule 29
   B. Minutes and other informational items

6. Report of the Civil Rules Committee

   A. Preliminary review of proposed amendment to Rule 56 (summary judgment)
   B. Preliminary review of proposed amendment to Rule 26 (expert witnesses)
   C. Minutes and other informational items

7. Report of the Criminal Rules Committee

   A. **ACTION** – Approving publishing for public comment proposed amendments to Rules 5, 12.3, and 21
   B. Minutes and other informational items

8. Report of the Evidence Rules Committee

   - Minutes and other informational items

9. Report of the Bankruptcy Rules Committee

   A. **ACTION** – Approving publishing for public comment proposed amendments to Rules 1007, 1019, 4004, and 7001
   B. Minutes and other informational items

10. Long-Range Planning Report

11. National Academy of Public Administration Study Recommendations

12. *Bell Atlantic Corp. v. Twombly* Panel Discussion

13. Next Meeting: June 9-10, 2008

JUDICIAL CONFERENCE RULES COMMITTEES
November 14, 2007

Chairs	**Reporters**
Honorable Lee H. Rosenthal United States District Judge United States District Court 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600	Professor Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459
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Bankruptcy:

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Criminal:

Judge Reena Raggi (Standing Committee)

Evidence:

Judge Kenneth J. Meyers (Bankruptcy Rules Committee)
Judge Michael M. Baylson (Civil Rules Committee)
Judge John F. Keenan (Criminal Rules Committee)

Judge Marilyn Huff (Standing Committee)

Committee on Rules of Practice and Procedure
To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

Members	Position	District/Circuit	Start Date	End Dat
Lee H. Rosenthal Chair	D	Texas (Southern)	Chair: 2007	2010
David J. Beck	ESQ	Texas	2003	2009
Douglas R. Cox	ESQ	Washington, DC	2005	2008
Ronald M. George	CJUST	California	2006	2009
Harris L. Hartz	C	Tenth Circuit	2003	2009
Marilyn L. Huff	D	California (S)	2007	2010
John G. Kester	ESQ	Washington, DC	2004	2010
William J. Maledon	ESQ	Arizona	2005	2008
Daniel J. Meltzer	ACAD	Massachusetts	2006	2009
Craig S. Morford *	DOJ	Washington, DC	N/A	N/A
Reena Raggi	C	Second Circuit	2007	2010
James A. Teilborg	D	Arizona	2006	2009
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1A-B.

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 18, 2007

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All the following matters requiring the expenditure of funds were approved by the Judicial Conference *subject to the availability of funds* and to whatever priorities the Conference might establish for the use of available resources.

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At its September 18, 2007 session, the Judicial Conference of the United States:

Elected to the Board of the Federal Judicial Center Judge William B. Traxler, Jr., of the Court of Appeals for the Fourth Circuit, to fill the unexpired term of Chief Judge Karen J. Williams of the same court.

EXECUTIVE COMMITTEE

Approved a resolution in recognition of the substantial contributions made by the Judicial Conference committee chairs whose terms of service end in 2007.

Approved a resolution in memory of Karen Siegel, former Administrative Office Assistant Director for the Office of Judicial Conference Executive Secretariat.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

Amended the guidelines for handling bankruptcy mega cases to clarify that claims in mega cases may be filed directly with a third-party processor employed at the expense of the estate as permitted under 28 U.S.C. § 156(c).

COMMITTEE ON THE BUDGET

Approved the Budget Committee's budget request for fiscal year 2009, subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Approved 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, 7012, 7022, 7023.1, 8001, 8003, 9006, 9009, and 9024, and new Bankruptcy Rules 1021, 2007.2, 2015.1, 2015.2, 2015.3, 5008, and 6011, and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved revisions to Bankruptcy Official Forms 1, 3A, 3B, 4, 5, 6, 7, 9A-I, 10, 16A, 18, 19, 21, 23, and 24 to take effect on December 1, 2007.

Approved new Bankruptcy Official Forms 25A, 25B, 25C, and 26 to take effect on December 1, 2008.

Approved proposed amendments to Criminal Rules 1, 12.1, 17, 18, 32, 41(b), 45, and 60, and new Criminal Rule 61, and agreed to transmit them to the Supreme

Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed new Evidence Rule 502 and agreed to transmit it to Congress with a recommendation that it be adopted by Congress.

Approved sending to Congress a report on the Necessity and Desirability of Amending the Federal Rules of Evidence to Codify a "Harm to Child" Exception to the Marital Privileges.

1C.

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

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PETER G. McCABE
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CRIMINAL RULES

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EVIDENCE RULES

September 26, 2007

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman and Senator Specter:

On behalf of the Judicial Conference of the United States, I respectfully submit a proposed addition to the Federal Rules of Evidence. The Conference recommends that Congress adopt 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. Unlike all other federal rules of procedure prescribed under the Rules Enabling Act, those rules governing evidentiary privilege must be approved by an Act of Congress, 28 U.S.C. § 2074(b).

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 that the Judicial Conference consider proposing 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; and

- permit parties, and courts, to protect against the consequences of waiver by permitting disclosures of privileged information between the parties to 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 Advisory 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 that 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 Advisory 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. It is enclosed with 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.

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).

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 Advisory 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.

The Judicial Conference has no position on the merits of 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.

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 available on request.

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, as well as their reporters and consultants, are ready to assist Congress in any way it sees fit.

Sincerely,

Lee H. Rosenthal
Chair, Committee on Rules
of Practice and Procedure

Enclosure

cc: Members, Senate Committee on the Judiciary

PROPOSED NEW EVIDENCE RULE 502

COMMITTEE ON RULES OF
PRACTICE AND PROCEDURE
JUDICIAL CONFERENCE OF UNITED STATES
(September 2007)

PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE*

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

1 The following provisions apply, in the circumstances set
2 out, to disclosure of a communication or information covered
3 by the attorney-client privilege or work-product protection.
4 **(a) Disclosure made in a federal proceeding or to a**
5 **federal office or agency; scope of a waiver.** — When the
6 disclosure is made in a federal proceeding or to a federal
7 office or agency and waives the attorney-client privilege or
8 work-product protection, the waiver extends to an
9 undisclosed communication or information in a federal or
10 state proceeding only if:
11 **(1)** the waiver is intentional;
12 **(2)** the disclosed and undisclosed communications
13 or information concern the same subject matter; and

*New material is underlined.

14 (3) they ought in fairness to be considered
15 together.
16 (b) **Inadvertent disclosure.** — When made in a federal
17 proceeding or to a federal office or agency, the disclosure
18 does not operate as a waiver in a federal or state proceeding
19 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 Fed. R.
25 Civ. P. 26(b)(5)(B).
26 (c) **Disclosure made in a state proceeding.** — When
27 the disclosure is made in a state proceeding and is not the
28 subject of a state-court order concerning waiver, the
29 disclosure does not operate as a waiver in a federal
30 proceeding if the disclosure:

31 (1) would not be a waiver under this rule if it had
32 been made in a federal proceeding; or
33 (2) is not a waiver under the law of the state where
34 the disclosure occurred.
35 (d) **Controlling effect of a court order.** — A federal
36 court may order that the privilege or protection is not waived
37 by disclosure connected with the litigation pending before the
38 court – in which event the disclosure is also not a waiver in
39 any other federal or state proceeding.
40 (e) **Controlling effect of a party agreement**. — An
41 agreement on the effect of disclosure in a federal proceeding
42 is binding only on the parties to the agreement, unless it is
43 incorporated into a court order.
44 (f) **Controlling effect of this rule.** — Notwithstanding
45 Rules 101 and 1101, this rule applies to state proceedings and
46 to federal court-annexed and federal court-mandated
47 arbitration proceedings, in the circumstances set out in the

48 rule. And notwithstanding Rule 501, this rule applies even if

49 state law provides the rule of decision.

50 **(g) Definitions.** — In this rule:

51 **(1)** "attorney-client privilege" means the

52 protection that applicable law provides for confidential

53 attorney-client communications; and

54 **(2)** "work-product protection" means the

55 protection that applicable law provides for tangible material

56 (or its intangible equivalent) prepared in anticipation of

57 litigation or for trial.

Explanatory Note on Evidence Rule 502
Prepared by the Judicial Conference
Advisory Committee on Evidence Rules
(Revised 11/28/2007)

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product — specifically those disputes involving inadvertent disclosure and subject matter waiver.

2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Hopson v. City of Baltimore,* 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation") .

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable. Moreover, if a federal court's confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.

The rule makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client privilege or work-product immunity as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.

The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See, e.g., Nguyen v. Excel Corp.,* 197 F.3d 200 (5th Cir.

1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burleson,* 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (a). The rule provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. *See* Rule 502(b). The rule rejects the result in *In re Sealed Case,* 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The language concerning subject matter waiver — "ought in fairness" — is taken from Rule 106, because the animating principle is the same. Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.

To assure protection and predictability, the rule provides that if a disclosure is made at the federal level, the federal rule on subject matter waiver governs subsequent state court determinations on the scope of the waiver by that disclosure.

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of a communication or information protected as privileged or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any inadvertent disclosure of a communication or information protected under the attorney-client privilege or as work product constitutes a waiver without regard to the protections taken to avoid such a disclosure. *See generally Hopson v. City of Baltimore,* 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver.

Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal. 1985), set out a multi-factor test for determining whether inadvertent disclosure is a waiver. The stated factors (none of which is dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the

overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken "reasonable steps" to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

The rule applies to inadvertent disclosures made to a federal office or agency, including but not limited to an office or agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of pre-production privilege review, can be as great with respect to disclosures to offices and agencies as they are in litigation.

Subdivision (c). Difficult questions can arise when 1) a disclosure of a communication or information protected by the attorney-client privilege or as work product is made in a state proceeding, 2) the communication or information is offered in a subsequent federal proceeding on the ground that the disclosure waived the privilege or protection, and 3) the state and federal laws are in conflict on the question of waiver. The Committee determined

that the proper solution for the federal court is to apply the law that is most protective of privilege and work product. If the state law is more protective (such as where the state law is that an inadvertent disclosure can never be a waiver), the holder of the privilege or protection may well have relied on that law when making the disclosure in the state proceeding. Moreover, applying a more restrictive federal law of waiver could impair the state objective of preserving the privilege or work-product protection for disclosures made in state proceedings. On the other hand, if the federal law is more protective, applying the state law of waiver to determine admissibility in federal court is likely to undermine the federal objective of limiting the costs of production.

The rule does not address the enforceability of a state court confidentiality order in a federal proceeding, as that question is covered both by statutory law and principles of federalism and comity. *See* 28 U.S.C. § 1738 (providing that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken"). *See also Tucker v. Ohtsu Tire & Rubber Co.,* 191 F.R.D. 495, 499 (D.Md. 2000) (noting that a federal court considering the enforceability of a state confidentiality order is "constrained by principles of comity, courtesy, and . . . federalism"). Thus, a state court order finding no waiver in connection with a disclosure made in a state court proceeding is enforceable under existing law in subsequent federal proceedings.

Subdivision (d). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely

to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the communications or information could be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case is enforceable in other proceedings. *See generally Hopson v. City of Baltimore,* 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law. The rule provides that when a confidentiality order governing the consequences of disclosure in that case is entered in a federal proceeding, its terms are enforceable against non-parties in any federal or state proceeding. For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of "claw-back" and "quick peek" arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product. *See Zubulake v. UBS Warburg LLC,* 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents"). The rule provides a party with a predictable protection from a court order — predictability that is needed to allow the party to plan in advance to limit the prohibitive costs of privilege and work product review and retention.

Under the rule, a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation. Party agreement should not be a condition of enforceability of a federal court's order.

Under subdivision (d), a federal court may order that disclosure of privileged or protected information "in connection with" a federal proceeding does not result in waiver. But subdivision

(d) does not allow the federal court to enter an order determining the waiver effects of a separate disclosure of the same information in other proceedings, state or federal. If a disclosure has been made in a state proceeding (and is not the subject of a state-court order on waiver), then subdivision (d) is inapplicable. Subdivision (c) would govern the federal court's determination whether the state-court disclosure waived the privilege or protection in the federal proceeding.

Subdivision (e). Subdivision (e) codifies the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure between or among them. Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection against non-parties from a finding of waiver by disclosure, the agreement must be made part of a court order.

Subdivision (f). The protections against waiver provided by Rule 502 must be applicable when protected communications or information disclosed in federal proceedings are subsequently offered in state proceedings. Otherwise the holders of protected communications and information, and their lawyers, could not rely on the protections provided by the Rule, and the goal of limiting costs in discovery would be substantially undermined. Rule 502(f) is intended to resolve any potential tension between the provisions of Rule 502 that apply to state proceedings and the possible limitations on the applicability of the Federal Rules of Evidence otherwise provided by Rules 101 and 1101.

The rule is intended to apply in all federal court proceedings, including court-annexed and court-ordered arbitrations, without regard to any possible limitations of Rules 101 and 1101. This provision is not intended to raise an inference about the applicability

of any other rule of evidence in arbitration proceedings more generally.

The costs of discovery can be equally high for state and federal causes of action, and the rule seeks to limit those costs in all federal proceedings, regardless of whether the claim arises under state or federal law. Accordingly, the rule applies to state law causes of action brought in federal court.

Subdivision (g). The rule's coverage is limited to attorney-client privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges, remains a question of federal common law. Nor does the rule purport to apply to the Fifth Amendment privilege against compelled self-incrimination.

The definition of work product "materials" is intended to include both tangible and intangible information. *See In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) ("work product protection extends to both tangible and intangible work product").

2.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 11-12, 2007
San Francisco, California
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in San Francisco, California, on Monday and Tuesday, June 11 and 12, 2007. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Judge Sidney A. Fitzwater
Chief Justice Ronald M. George
Judge Harris L Hartz
John G. Kester, Esquire
Judge Mark R. Kravitz
William J. Maledon, Esquire
Deputy Attorney General Paul J. McNulty
Professor Daniel J. Meltzer
Judge James A. Teilborg
Judge Thomas W. Thrash, Jr.

The Department of Justice was also represented at the meeting by Ronald J. Tenpas, Associate Deputy Attorney General, and Alice S. Fisher, Assistant Attorney General for the Criminal Division.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
John K. Rabiej	Chief, Rules Committee Support Office
James N. Ishida	Administrative Office senior attorney
Jeffrey N. Barr	Administrative Office senior attorney
Joe Cecil	Research Division, Federal Judicial Center
Matthew Hall	Judge Levi's rules law clerk
Professor Geoffrey C. Hazard, Jr.	Committee consultant
Professor R. Joseph Kimble	Committee consultant

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Carl E. Stewart, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Thomas S. Zilly, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Susan C. Bucklew, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Levi noted that the agenda materials for the meeting were voluminous, consisting of five binders and several separate handouts. He suggested that the committee consider taking further steps to distribute the work more evenly between its January and June meetings, since the January meetings tend to have a lighter agenda. He expressed his gratitude to Judge Rosenthal for agreeing, on behalf of the Advisory

Committee on Civil Rules, to lighten the committee's agenda by deferring consideration of a proposed revision of FED. R. CIV. P. 56 (summary judgment) in order to pursue further dialog with the bar on the proposed rule.

Judge Levi reported with great sadness the death of Mark Kasanin, a distinguished San Francisco attorney and member of the Advisory Committee on Civil Rules from 1993 to 2002. He pointed to Mr. Kasanin's unrivaled expertise in admiralty law, his great insight and judgment, and his broad connections with the practicing bar. Judge Levi noted that Mr. Kasanin had brought to the committee's attention the difficult practical issues faced by the bar with regard to discovery of information stored in electronic form. Indeed, he had been instrumental in getting the advisory committee to initiate the project that eventually produced the package of "electronic discovery" amendments to the civil rules that took effect on December 1, 2006. Judge Levi said that Mark's wife, Anne, had come to all the committee meetings and was well loved by all. He asked the committee to send its condolences to her.

Judge Levi reported that the Chief Justice had named Judge Rosenthal to replace him as chair of the Standing Committee. He said that she would be an absolutely superb chair. He also reported that the Chief Justice had named: (1) Judge Kravitz to replace Judge Rosenthal as chair of the Advisory Committee on Civil Rules; (2) Judge Tallman (9th Circuit) to replace Judge Bucklew as chair of the Advisory Committee on Criminal Rules; (3) Judge Hinkle (N. D. Fla.) to replace Judge Smith as chair of the Advisory Committee on Evidence Rules; and (4) Judge Swain (S. D. N.Y.) to replace Judge Zilly as chair of the Advisory Committee on Bankruptcy Rules.

Judge Levi thanked Judge Kravitz for his enormous contributions to the Standing Committee, and most especially for his work in drafting and coordinating the package of time-computation rules to be considered by the committee later in the meeting. He expressed his delight that Judge Kravitz would soon take over as chair of the Advisory Committee on Civil Rules.

Judge Levi noted that Judge Bucklew had been in the eye of the storm during her term as chair of the Advisory Committee on Criminal Rules, as the committee considered several very controversial proposals of public importance that generated sharply divided views. He noted that it is extremely difficult to achieve common ground, but Judge Bucklew had been masterful in achieving it wherever possible.

Judge Levi pointed out that the Advisory Committee on Evidence Rules, under the leadership of Judge Smith, had worked hard to produce the proposed new FED. R. EVID. 502 (waiver of attorney-client privilege and work product protection), which should be of enormous benefit to the American legal system. He thanked Judge Smith for his exceptional leadership in producing a top-quality product.

Judge Levi pointed out that Judge Zilly had served as chair of the bankruptcy advisory committee during a period of extraordinary rules activity in the wake of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He noted that the committee had been amazingly productive in implementing the massive legislation in a very short period. He thanked Judge Zilly for his grace and good humor under pressure.

Judge Levi noted with regret that the terms on the Standing Committee of Judge Fitzwater and Judge Thrash were about to end and that they would attend their last meeting in January 2008. He said that they had been sensational committee members. Judge Fitzwater, he said, was exceptionally bright and a great problem-solver. Among other things, he noted, Judge Fitzwater had produced the template privacy rule used by the advisory committees to implement the E-Government Act of 2002.

Judge Thrash, he said, had been a member of the style subcommittee and had been instrumental in developing the electronic-discovery and class-action civil rules amendments. In addition, he pointed out, Judge Thrash had played a vital role in shaping the way that committee notes are written, believing that they should normally be short and to the point. He also praised Judge Thrash for his great wit and good heart.

Judge Levi also expressed appreciation for the superb support that he and the six rules committees have enjoyed from the staff of the Administrative Office. He noted that Judy Krivit had just announced her retirement after 16 years with the rules office, and he asked that the minutes reflect the committee's heartfelt thanks and gratitude for her dedicated service.

Judge Levi reported briefly on the rules changes approved by the Supreme Court in April 2007 that would take effect on December 1, 2007. He noted particularly the milestone achievement of restyling the entire Federal Rules of Civil Procedure. The restyled civil rules will also take effect on December 1, 2007.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee by voice vote voted without objection to approve the minutes of the last meeting, held on January 11-12, 2007.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported on three legislative matters of interest to the committee. First, he said, a subcommittee of the Judiciary Committee of the House of Representatives had just held a hearing on the proposed Bail Bond Fairness Act. The legislation would

directly amend FED. R. CRIM. P. 46 (release from custody) to limit a judge's authority to forfeit a bond for violation of any condition of release other than failure of the defendant to appear at a court proceeding. He reported that Judge Tommy Miller, a former member of the Advisory Committee on Criminal Rules, had testified at the hearing to express the opposition of the Judicial Conference to the legislation. He noted that the Department of Justice was also opposed to the measure. The bill had been reported out of the House Judiciary Committee in the last Congress and was expected to be reported out again this year. But, he said, the prospects for ultimate enactment in this Congress were not favorable.

Mr. Rabiej reported that a draft response had been prepared to a letter from Senator Kyl, which expressed concerns about the limited nature of the changes proposed by the advisory committee to the criminal rules to accommodate the Crime Victims Rights Act. He said that the draft was still being reviewed, but would be sent shortly.

Finally, Mr. Rabiej reported that the privacy amendments to the rules required by the E-Government Act of 2002 will take effect on December 1, 2007. He noted that the amendments essentially codify, with some adjustments, the Judicial Conference's existing privacy policy developed originally by its Court Administration and Case Management Committee.

He said that the Court Administration and Case Management Committee was in the process of updating the privacy policy and was exploring three issues that might have a future impact on the federal rules. First, he said, the committee would encourage the courts not to place certain types of documents in the public case file because they contain personal information that would have to be redacted. Second, the committee was examining a number of problems raised by the posting of transcripts on the Internet. He said that the new policy will likely state that transcripts should not be posted until 90 days after the transcript is delivered to the clerk of court.

The problem remains, though, as to who will be responsible for redacting personal information from the transcripts before they are posted. Under the new federal rules, responsibility falls on the person filing a document, but it is not reasonable to expect the court reporter to be responsible for redaction. Thus, he said, the Court Administration and Case Management Committee was considering requiring the parties to redact personal information and give their edits to the reporter. Finally, Mr. Rabiej said that the Court Administration and Case Management Committee was concerned about persons who surf the web in order to obtain embarrassing or sensitive information about individuals.

Mr. McCabe reported that the rules office was in the process of posting the rules committees' agenda books on the Internet. He noted that the staff was also continuing its efforts to locate and post historic rules committee documents.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported on the status of pending activities of the Federal Judicial Center (Agenda Item 4). He directed the committee's attention specifically to a preliminary report by the Center on the processing of capital habeas corpus petitions in the federal courts. The research, he said, shows great variation among the courts as to the speed at which they handle and terminate these cases. He noted, too, that a great deal of the time charged against the federal courts really consists of the time that cases are pending on remand in the state courts.

Judge Levi thanked the Center for its work in compiling and analyzing the local district court rules, orders, and policies dealing with *Brady v. Maryland* requirements. He said that the Center would be prepared to conduct further research on how the rules, orders, and policies actually work in practice, if the committee requests it. Mr. Cecil also reported that the Center was in the process of studying the local rules and procedures of the federal courts in implementing the Crime Victims' Rights Act.

REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Judge Kravitz and Professor Struve presented the report of the subcommittee, as set forth in their memorandum of May 9, 2007 (Agenda Item 5).

Judge Kravitz said that he and Professor Struve would address the time-computation template rule and substantive issues, and then each advisory committee would address its own specific rules. He noted that the template had been exceedingly difficult to perfect, but it had improved substantially over time due to many refinements suggested by the advisory committees and their reporters. He highlighted two changes that had been added to the template since the January 2007 meeting.

First, he explained that a number of statutes provide an explicit method for counting time, such as by specifying "business days" only. The template, he said, had been amended to apply only to statutes that do not themselves specify a method. Second, he said, the drafters of the template had struggled with how to count backwards when the clerk's office is inaccessible on the last day of a deadline. He thanked Judge Hartz for recommending that the inaccessibility provision be placed in a separate section. In addition, the committee note will emphasize that although a judge may set a different

time by order in a specific case, a district court may not overrule the provisions of the national rule through a local rule or standing order.

Professor Struve added that the template had been amended to add a definition of "state" that includes the District of Columbia and the commonwealths, territories, and possessions of the United States. She noted that the Advisory Committee on Appellate Rules was still considering the definition and whether to extend it to become a global definition for the appellate rules as a whole. She noted, too, that the template had been adjusted to take account of the fact that some circuits and districts span more than one time zone. She said that the advisory committees were still considering making that adjustment in their own rules.

Judge Kravitz pointed out that the committee was planning to seek legislation to change some short time periods set forth in statutes. The public comments, he said, should be helpful in identifying any statutes that need to be changed. Professor Struve added that the advisory committees had been working hard at identifying any statutes impacted by the proposed rules, and the Department of Justice should complete a comprehensive review of statutes by the end of June. She suggested that the rules web page could provide a link to the list of all the statutes that the committees discover.

Judge Kravitz said that consideration had been given to including language in the template authorizing a judge to alter statutory deadlines for a variety of circumstances, but the idea was not pursued. With regard to legal holidays, he said, the text of the rule will not be changed, but the committee note will include a new sentence addressing ad hoc legal holidays declared by the President, such as the holiday to honor the late President Gerald F. Ford. In addition, individual courts will have to coordinate all their local rules by December 1, 2009, to adjust to the new time-computation method. Finally, Judge Kravitz announced his appreciation that Judge Zilly and the Advisory Committee on Bankruptcy Rules had extended themselves to prepare a complete package of time-computation amendments to the bankruptcy rules so that they can be published at the same time as the time-computation amendments to the other rules.

Judge Kravitz reported that each of the advisory committees would publish its version of the time-computation amendments in August 2007. He said that careful consideration needed to be given to the format of the publication. He suggested that it would be best to include a covering memorandum from Professor Struve explaining what the committees are trying to do on a global basis, and also to put the bar at ease that the net result will be that existing deadlines will not be shortened. But, he said, each advisory committee will be publishing other rules amendments having nothing to do with time computation. So, it would be advisable to have a single time-computation package that stands out from any other proposed rule changes. It might also include a list of all

the specific time periods and rules being changed and alert the district courts to begin the process of making conforming changes in their local rules.

APPELLATE RULES TIME COMPUTATION

Judge Stewart reported that the Advisory Committee on Appellate Rules had adopted the template as a revision of FED. R. APP. P. 26. Professor Struve noted that the advisory committee had modified the template to add subparts to Rule 26(a)(4) to recognize that a court of appeals may span more than one time zone. This, she said, is more likely with the courts of appeals than the district courts. She also noted that the proposed definition of a "state" in the appellate rules is slightly different from the template version.

Professor Struve said that the advisory committee generally had increased the 7-day time periods in the rules to 14 days. But, she noted, the proposed change from 7 days to 14 days in Rule 4(a)(6) would require a statutory change to 28 U.S.C. § 2107 to make the rule and the statute consistent. In a couple of places, she added, the advisory committee had increased the time period from 7 days only to 10 days, rather than 14, based on policy considerations involving the need for prompt responses.

In addition, Professor Struve said that the advisory committee had compiled a list of statutory time limits that should be lengthened. But the list does not include various 10-day statutory periods for taking an appeal, *e.g.*, 28 U.S.C. §§ 1292(b), 1292(d)(1), and 1292(d)(2), which the new time-computation method would effectively shorten to 10 calendar days. She noted that before the 2002 amendments to FED. R. APP. P. 26, litigators had lived with 10 calendar days.

The committee without objection by voice vote approved the proposed time-computation rule amendments for publication.

BANKRUPTCY RULES TIME COMPUTATION

Judge Zilly reported that the Advisory Committee on Bankruptcy Rules had agreed to publish its time-computation changes to the bankruptcy rules on the same schedule as the other rules. The advisory committee, he said, agreed with the text of the template rule and accompanying committee note, including the most recent modifications. The template would appear as FED. R. BANKR. P. 9006(a). In addition, specific time changes would be made in 39 separate bankruptcy rules. The advisory committee, he said, had agreed with all the proposed conventions adopted by the other

advisory committees – such as increasing periods of fewer than 7 days to 7 days and increasing 10-day periods to 14 days – except in the case of two rules.

The committee concluded that two very short deadlines in the current rules should remain unchanged. First, under FED. R. BANKR. P. 1007(d) (list of 20 largest creditors), a debtor in a Chapter 9 case or Chapter 11 case has two days after filing the petition to file a list of its 20 largest unsecured creditors. Second, under FED. R. BANKR. P. 4001(a)(2) (ex parte relief from the automatic stay), after a party has obtained an ex parte lifting of the automatic stay, the other party has two days to seek reinstatement of the stay. The committee would retain both deadlines at two days.

Judge Zilly reported that the biggest controversy faced by the advisory committee was whether to change the current 10-day period for filing a notice of appeal under FED. R. BANKR. P. 8002. In the end, the committee decided to extend the deadline to appeal to 14 days, consistent with the general convention of increasing 10-day periods to 14 days.

The committee without objection by voice vote approved the proposed time-computation rule amendments for publication.

CIVIL RULES TIME COMPUTATION

Judge Rosenthal reported that the civil version of the template rule appeared as proposed FED. R. CIV. P. 6(a). She noted that the definition of a "state" had been bracketed in proposed Rule 6(a)(6)(B), and it was also included as a proposed amendment to FED. R. CIV. P. 81 (applicability of rules in general) as a global definition that would apply throughout the civil rules. The current Rule 81, she explained, includes the District of Columbia. It would be amended to include any commonwealth, territory, or possession of the United States.

She explained that in recommending changes to rules that contain specific time limits, the advisory committee had followed the convention of increasing periods of fewer than 7 days to 7-day periods and increasing 10-day periods to 14 days. But Rule 6(b) precludes a court from extending the current 10-day period for filing certain post-trial relief motions. Rather than follow the normal course of extending 10-day time periods to 14 days, the advisory committee had decided to fix the period for filing post-trial motions at 30 days, which is a more realistic period for the bar.

The committee without objection by voice vote approved the proposed time-computation rule amendments for publication.

CRIMINAL RULES TIME COMPUTATION

Judge Bucklew reported that the Advisory Committee on Criminal Rules had adopted the template as FED. R. CRIM. P. 45(a). She said that it had not had the opportunity to review the most recent changes in the text of the template, but she did not expect that it would have any problem in accepting them. She explained that the current criminal rule governing time computation, unlike the counterpart provisions in the civil, appellate, and bankruptcy rules, does not specify that the rule applies to computing time periods set forth in statutes. Some courts nonetheless have applied the rule when computing various statutory periods.

Professor Beale explained that it is not clear whether courts in general apply existing FED. R. CRIM. P. 45(a) to criminal statutes. Before the restyling of the criminal rules in 2002, Rule 45(a) had explicitly applied to computing time periods set forth in statutes. Deletion of the reference to statutes apparently was an unintentional oversight occurring during the restyling process. Nevertheless, some attorneys and courts still apply Rule 45 in computing statutory deadlines, as they did before the restyling changes.

Judge Bucklew referred to a few changes in individual time periods. With regard to FED. R. CRIM. P. 5.1 (preliminary examination), she said that the advisory committee would increase the 10-day time period to 14 days and the 20-day period to 21 days, which will require conforming changes in the underlying statute. The committee as a matter of policy decided to increase from 7 days to 14 days the deadlines specified in FED. R. CRIM. P. 29 (motion for a judgment of acquittal), FED. R. CRIM. P. 33 (motion for a new trial), and FED. R. CRIM. P. 34(b) (motion to arrest judgment) in order to give counsel more time to prepare a satisfactory motion. The advisory committee lengthened from 10 days to 14 days the maximum time in FED. R. CRIM. P. 41 (search warrant) to execute a warrant, but there was some sentiment among the committee members not to extend the period.

Professor Beale added that magistrate judges commonly require the government to execute a search warrant in less than the maximum 10 days specified in the current rule. Accordingly, the advisory committee did not believe that it was necessary to retain the 10-day period, rather than extend it to 14 days. She noted, too, that there had been some concern among committee members over extending the time to file a motion for a new trial, but the Federal Rules of Appellate Procedure expressly allow the district court to retain jurisdiction in this circumstance. She said that the advisory committee was of the view that the short time period in the current rules frequently leads parties to file bare-bones motions.

Judge Bucklew reported that the advisory committee was also recommending increasing from 10 days to 14 days the time limits in Rule 8 of the §§ 2254 and 2255 Rules for filing objections to a magistrate judge's report.

Professor Beale added that the advisory committee would make additional, minor changes in the text and note to take account of last-minute changes to the template suggested by the other advisory committees.

The committee without objection by voice vote approved the proposed time-computation rule amendments for publication.

EVIDENCE RULES TIME COMPUTATION

Judge Smith pointed out that the Federal Rules of Evidence do not lend themselves to a time-computation rule, and there is no need for one. Professor Capra added that there are no short time periods in the evidence rules, and a review of the case law had revealed no problems with the current rules. Accordingly, the Advisory Committee on Evidence Rules voted unanimously not to draft a time-computation rule.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachment of May 25, 2007 (Agenda Item 10).

Amendments for Publication

TIME-COMPUTATION RULES

FED. R. APP. P. 4, 5, 6, 10, 12, 15, 19, 25, 26, 27, 28.1, 30, 31, 39, and 41

As noted above on page 8, the committee approved for publication the proposed time-computation amendments to the Federal Rules of Appellate Procedure.

FED. R. APP. P. 12.1

Judge Stewart reported that his committee had been asked by the Advisory Committee on Civil Rules to consider adopting a new appellate rule to conform with the proposed new FED. R. CIV. P. 62.1 (indicative rulings). Several circuits, he said, have local rules or internal operating procedures recognizing the practice of issuing indicative rulings. Under the practice, a district court – after an appeal has been docketed and is still pending – may entertain a post-trial motion, such as a motion for relief from a judgment, and either deny it, defer it, or "indicate" that it might or would grant the motion if the court of appeals were to remand the action.

The proposal to formalize the indicative ruling practice in the national rules, he said, had been pending for several years, but had not aroused much enthusiasm in the appellate advisory committee. Some members simply saw no need for a rule. Nevertheless, the committee voted 5-3 to recommend a new appellate rule in order to conform with the new civil rule proposed by the civil advisory committee.

Judge Stewart noted that the original proposal from the Advisory Committee on Civil Rules had contained alternative language choices. One would authorize a district court to state that it "would" grant the motion if the court of appeals were to remand. The other would authorize the district court to state that it "might" grant the motion if remanded.

He said that the appellate advisory committee was of the view that the second formulation was too weak to justify a remand by the court of appeals, and the first formulation was too restrictive. After consulting with the other committees and their reporters, substitute language was agreed upon that allows the district court to "state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." He added that even if the district judge decides to rule on the matter, the court of appeals still has discretion to decide whether to remand.

Judge Stewart noted that the proposed FED. R. APP. P. 12.1 states that the moving party in the district court must provide prompt notice to the clerk of the court of appeals, but only after the district court states that it would grant the motion or that it raises a substantial issue. He noted that the clerks of the courts of appeals had stated strongly that they did not want to be notified at the time a motion is filed in the district court.

Judge Stewart pointed out that the proposed appellate rule covers rulings in both civil and criminal cases. The accompanying committee note explains that FED. R. APP. P. 12.1 could be used, for example, with motions for a new trial under FED. R. CRIM. P. 33. In addition, he said, the text sets the default in favor of the court of appeals retaining jurisdiction. It states that the appellate court may remand for further proceedings in the district court, but retains jurisdiction unless it expressly dismisses the appeal.

Judge Rosenthal explained that the proposed new FED. R. CIV. P. 62.1 had been presented to the Standing Committee at the January 2007 meeting. At that time, several suggestions were made regarding the text of the rule and the need to coordinate closely with the appellate advisory committee. That coordination, she said, had been very productive, and the resulting civil and appellate rules provide an intelligent way to frame precisely what the district court must do. Professor Cooper added that there are a few places in which the committee notes need to be modified further.

Several members said that the proposed rules would promote efficiency. One asked whether the appellate rule would govern bankruptcy appeals. Professor Struve replied that, as written, it would cover bankruptcy appeals, although they are not mentioned specifically in the text. She added that if the Federal Rules of Bankruptcy Procedure were amended to address indicative rulings, the proposed appellate rule would accommodate the change.

The committee without objection by voice vote approved both proposed new rules – FED. R. APP. P. 12.1 and FED. R. CIV. P. 62.1 – for publication.

FED. R. APP. P. 4(a)(4)(A) and 22(b)

Judge Stewart reported that the proposed amendments to Rules 4(a)(4)(A) (time to file an appeal) and 22(b) (certificate of appealability) were designed to conform the Federal Rules of Appellate Procedure to changes proposed by the Advisory Committee on Criminal Rules to the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255.

The committee without objection by voice vote approved the proposed amendments for publication. But later in the meeting, the committee voted to publish only the proposed amendment to Rule 22(b), which dealt just with the certificate of appealability. See page 41.

FED. R. APP. P. 4(a)(4)(B)(ii)

Judge Stewart explained that the proposed amendment would eliminate an ambiguity created as a result of the 1998 restyling of the Federal Rules of Appellate Procedure. The current, restyled rule might be read to require an appellant to amend its prior notice of appeal if the district court amends the judgment after the notice of appeal is filed – even if the amendment is insignificant or in the appellant's favor. The advisory committee, he explained, would amend the rule to return it to its original meaning. Thus, a new or amended notice of appeal would be required only when an appellant wishes to challenge an order disposing of a motion listed in Rule 4(a)(4)(A) or an alteration or amendment of a judgment on such a motion.

The committee without objection by voice vote approved the proposed amendment for publication.

FED. R. APP. P. 4(a)(1)(B) and 40(a)(1)

Judge Stewart reported that the advisory committee had approved amendments to Rule 4(a)(1)(B) (time for filing a notice of appeal) and Rule 40(a)(1) (time to file a petition for a panel rehearing) to make clear that they apply to cases in which a federal

officer or employee is sued in his or her individual capacity. The committee decided, however, to batch the proposals and await a time to present them with other amendments to the Standing Committee.

Judge Stewart added that the advisory committee also has under study the broader question of whether to treat state government officials and agencies the same as federal officers and agencies in providing them with additional time. The study, though, is unrelated to these proposed amendments.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. APP. P. 26(c)

Judge Stewart reported that the proposed amendment to Rule 26(c) (computing and extending time – additional time after service) would clarify the operation of the "three-day rule." The three-day rule gives a party an additional three days to act after being served with a paper unless the paper is delivered on the date of service stated in the proof of service. The proposal, he said, would bring FED. R. APP. P. 26 into line with the approach taken in FED. R. CIV. P. 6 by specifying that the three days are added after the period would otherwise expire under Rule 26(a). He noted that the amendment had been approved by the advisory committee in 2003, but batched for submission to the Standing Committee at a later time as part of a larger package of amendments.

Professor Struve explained that the advisory committee recommended publishing the amendment with two alternative versions of the committee note. Option A would be used if the time-computation amendments are adopted. Option B would be used if they are not. Judge Kravitz recommended that the rule be published with Option A of the note only, and Judge Stewart concurred.

The committee without objection by voice vote approved the proposed amendment and Option A of the accompanying committee note for publication.

FED. R. APP. P. 29(c)

Judge Stewart reported that the proposed amendment to Rule 29 (amicus curiae brief) would add a new paragraph (c)(7) to require an amicus brief to state whether counsel for a party authored the brief in whole or in part and list every person or entity contributing to the brief. Government entities, though, would be excepted. The proposed amendment, he said, tracked the Supreme Court's Rule 37.6 on amicus briefs.

Judge Stewart added that the matter became more complicated after the advisory committee's April 2007 meeting, when the Supreme Court published a proposed amendment to its rule that would require additional disclosures. The Court's proposal, he said, has produced some controversy and opposition both on constitutional and policy grounds. Therefore, the advisory committee was uncertain whether the Court would adopt the pending amendment to Rule 37.6.

As a result, the committee considered the matter by e-mail after the April meeting and proposed two alternative formulations of proposed FED. R. APP. P. 29. Option A would be published for public comment if the Supreme Court were to reject the proposed amendment to its Rule 37.6, and Option B would be published if the Court were to approve the amendment. The difference between the two lies in paragraph (c)(7) of Option B, which adds a requirement that the amicus brief indicate whether a party or a party's counsel is a member of the amicus or contributed money toward the brief.

Judge Stewart pointed out that the August 2007 publication date for the proposed amendment to FED. R. APP. P. 29(c) will arise after the Supreme Court is expected to act on its own rule. Accordingly, the advisory committee suggested that the Standing Committee approve both options. If the Court were to drop the amendment to its rule, Option A would be published. But if it were to proceed with the amendment, Option B would be published. In any event, he said, the rule does not present an emergency.

One member expressed concern about the substance of the proposal, especially its requirement that membership be disclosed. Others suggested that it would make sense to await final Supreme Court action before proceeding with a proposed change to the appellate rules. Judge Thrash moved to defer the proposed amendment.

The committee without objection by voice vote agreed to defer action on publication of the proposed amendment to Rule 29(c).

Informational Item

Judge Stewart reported that the advisory committee was continuing to hear from the chief judges of the circuits regarding the briefing requirements set forth in their local rules. He added that the committee was working with the attorneys general of the states on the advisability of giving them the same additional time that the appellate rules give to the federal government. And, he said, the committee would continue to examine the definition of a "state" in the appellate rules.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Zilly and Professor Morris presented the report of the advisory committee, as set forth in Judge Zilly's memorandum and attachments of May 8, 2007 (Agenda Item 8).

Amendments for Final Approval by the Judicial Conference

BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT PACKAGE

Amendments to Existing Rules
FED. R. BANKR. P. 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

New Rules
FED. R. BANKR. P. 1021, 2007.2, 2015.1, 2015.2, 2015.3, 5008, and 6011

Judge Zilly noted that most of the amendments presented for final approval had already been seen by the Standing Committee at earlier meetings and are part of a package of 32 rule amendments and 7 new rules necessary to implement the massive Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He explained that most of the amendments had been issued initially in October 2005 as interim rules. All the courts adopted them as local rules and have been operating under them since that time with very little difficulty.

He pointed out that the advisory committee had made some minor changes in the interim rules, added other rules not included in the interim rules, and published the whole package for public comment in August 2006. In addition, since the advisory committee did not have time to publish the proposed revisions in the Official Forms before they took effect in October 2005, the package also included all the forms for public comment.

Judge Zilly reported that the advisory committee had received 38 comments before publication and another 60 following publication. Several public comments addressed many different rules. He said that the advisory committee had not conducted the scheduled public hearing because there were no requests for in-person testimony. Nevertheless, there had been a great deal of written comment on the proposed rules, which are the product of a long process that began in 2005 with the interim rules.

The committee without objection by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FED. R. BANKR. P. 7012, 7022, 7023.1, and 9024

Judge Zilly reported that the proposed amendments to Rules 7012 (defenses and objections), 7022 (interpleader), 7023.1 (derivative proceedings by shareholders), and 9024 (relief from judgment or order) were necessary to conform the Federal Rules of Bankruptcy Procedure to the restyling of the Federal Rules of Civil Procedure effective December 1, 2007. He added that the proposed changes to the bankruptcy rules were purely technical, and there was no need to publish them for public comment.

The committee without objection by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Amendments to the Forms for Final Approval by the Judicial Conference

OFFICIAL FORMS 1, 3A, 3B, 4, 5, 6, 7, 9A-I, 10,
16A, 18, 19, 21, 22A, 22B, 22C, 23, and 24

Judge Zilly explained that the advisory committee had published for public comment all Official Forms in which any change was being recommended, even though the forms have been in general use since September 2005. As a result of the public comments, he said, the advisory committee had made some minor and stylistic changes in the forms.

He noted that Official Forms 19A and 19B, both dealing with the declaration of a bankruptcy petition preparer, would be consolidated. He said that new Official Form 22, the means test, had been extremely difficult to draft and had attracted a good deal of comment. He pointed out that the governing statutory provisions were unclear, and the public comments had raised 24 different categories of issues regarding the contents of the form. He explained that the committee had designed the form to capture all potentially relevant information from the debtor, but in some instances had left it up to individual courts to determine whether particular information is needed and how it should be used.

Professor Morris added that several of the changes in Form 22 made after the public comment period were designed to bring the text of the form closer to the text of the statute. He also explained that the advisory committee had added new language to the signature box on Form 1 (the petition) warning that the signature of the debtor's attorney constitutes a certification that the attorney has no knowledge after an inquiry that the information filed with the petition is incorrect.

The committee without objection by voice vote approved the proposed amendments to the Official Forms for final approval by the Judicial Conference, to take effect on December 1, 2007.

OFFICIAL FORMS 25A, 25B, 25C, and 26

Judge Zilly explained that new Official Forms 25A (reorganization plan) and 25B (disclosure statement) implement § 433 of the 2005 bankruptcy legislation, which specifies that the Judicial Conference should prescribe a form for a reorganization plan and a disclosure statement in a small business Chapter 11 case. New Official Form 25C (small business monthly operating report) implements §§ 434 and 435 of the legislation and provides a standard form to assist small business debtors in Chapter 11 cases to fulfill their financial reporting responsibilities under the Code. New Official Form 26 (periodic report concerning related entities) implements § 419 of the legislation, which requires every Chapter 11 debtor to file periodic reports on the profitability of any entities in which the estate holds a substantial or controlling interest. He added that the advisory committee recommended that these four new forms be approved by the Judicial Conference effective December 1, 2008.

The committee without objection by voice vote approved the proposed amendments to the Official Forms for final approval by the Judicial Conference, to take effect on December 1, 2008.

OFFICIAL FORM 1, EXHIBIT D

Judge Zilly explained that the proposed amendment of Exhibit D to Official Form 1 (individual debtor's statement of compliance with credit counseling requirement) would provide a mechanism for a debtor to claim an exigent-circumstances exemption from the pre-petition credit counseling requirements of the 2005 legislation. By using the form, the debtor would not have to file a motion to obtain an order postponing the credit counseling requirement. The revised Exhibit D would implement proposed new FED. R. BANKR. P. 1017.1, described below, which is being published for comment and would take effect on December 1, 2009.

The committee without objection by voice vote approved the proposed revision of Exhibit D for final approval by the Judicial Conference, to take effect on December 1, 2009.

Amendments to the Rules for Publication

TIME-COMPUTATION RULES

FED. R. BANKR. P. 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

As noted above on pages 8-9, the committee approved the proposed time-computation changes in the Federal Rules of Bankruptcy Procedure for publication.

OTHER RULES

FED. R. BANKR. P. 1017.1

Judge Zilly noted that the new Rule 1017.1 (exemption from pre-petition credit counseling requirement) would provide a procedure for the court to consider a debtor's request to defer the pre-petition credit counseling requirement of the 2005 statute because of exigent circumstances. It states that a debtor's certification seeking an exemption from the counseling requirement will be deemed satisfactory unless the bankruptcy court finds within 21 days after the certification is filed that it is not satisfactory. He added that Exhibit D, described above, was being added to Form 1 (the petition) to implement the proposed amendment.

FED. R. BANKR. P. 4008

Judge Zilly reported that the proposed amendment to Rule 4008 (filing of a reaffirmation agreement) would require that a reaffirmation agreement be accompanied by a cover sheet, as prescribed by a new official form. The new Official Form 27, he said, would gather in one place all the information a judge needs to determine whether the reaffirmation rises to the level of a hardship under the Bankruptcy Code.

FED. R. BANKR. P. 7052, 7058, and 9021

Judge Zilly reported that the proposed amendments to Rules 7052 (findings by the court) and 9021 (entry of judgment) and new Rule 7058 (entering judgment in an adversary proceeding) deal with the requirement that a judgment be set forth on a separate document. He noted that the Standing Committee at its January 2007 meeting had approved the advisory committee's recommendation that the separate document requirement be required for adversary proceedings, but not for contested matters. He

added that the advisory committee had made some changes in the language of the proposed rules at its last meeting.

The committee without objection by voice vote approved the proposed amendments and new rule for publication.

New Official Forms for Publication

OFFICIAL FORM 8

Judge Zilly reported that the proposed amendment to Official Form 8 (individual debtor's statement of intention) would implement the 2005 legislation by expanding the information that the debtor must provide regarding leased personal property and property subject to security interests. The form had been published for comment in August 2006 and rewritten by the advisory committee as a result of the comments. The committee recommended that the revised version be published for comment.

OFFICIAL FORM 27

Judge Zilly explained that proposed new Official Form 27 (reaffirmation agreement cover sheet), which is tied to the proposed amendment to Rule 4008, noted above, would provide the key information to enable a judge to determine whether the reaffirmation agreement creates a presumption of undue hardship for the debtor under § 524(m) of the Code.

The committee without objection by voice vote approved the proposed amendments to Official Form 8 and the proposed new Official Form 27 for publication.

Informational Items

Judge Zilly reported that the advisory committee had considered correspondence from Senators Grassley and Sessions regarding implementation of an uncodified provision in the 2005 bankruptcy legislation. The legislation includes a provision stating the sense of Congress that FED. R. BANKR. P. 9011 (signing of papers – representations and sanctions) should be amended to require a certification by debtors' attorneys that the schedules and statements of the debtor are well grounded in fact and warranted by existing law. The committee, he said, had spent a great deal of time on the issue and concluded after thorough examination that the suggested rule amendment would have an adverse impact on the management of bankruptcy cases and set a different standard for debtors' lawyers than for creditors' lawyers. Accordingly, the committee decided not to recommend amending Rule 9011.

Judge Zilly added that a separate requirement in the Act itself, 11 U.S.C. § 707(b)(4)(C) and (D), imposes a higher standard of review and accountability for attorneys filing Chapter 7 consumer cases. But it deals only with the schedules filed with the petition. The advisory committee, he said, had explored whether: (1) to expand the requirement to include schedules and amended schedules filed after the petition is filed; (2) to apply the requirement to other chapters of the Code; and (3) to apply it to creditor attorney filings as well as those of debtor attorneys. In the end, he said, the advisory committee decided to make none of the changes. It did, however, add a statement to the signature box of the petition reminding the attorney of the statutory requirements.

Judge Zilly added that the committee had received a letter from Representatives Conyers and Sanchez of the House Judiciary Committee commending it for the interim rules and its ongoing efforts to implement the 2005 bankruptcy legislation. The letter, he said, made three observations. First, it complimented the committee for its proposed Official Form 22 (the means test) and its instruction that debtors who fall below the statutory threshold income levels do not have to complete the entire form. Second, it agreed with the advisory committee's proposed amendment to Rule 1017(b) (dismissal or conversion of a case), which requires that a motion to dismiss a case for abuse under 11 U.S.C. § 707(b) or (c) state with particularly the circumstances alleged to constitute the abuse by the debtor. Third, it suggested that Rule 4002(b) (duty of the debtor to provide documentation) places too high a burden on a consumer debtor to provide documentation to the U.S. trustee. Judge Zilly explained that the U.S. trustees had wanted debtors to provide substantially more materials than the proposed rule requires. The advisory committee, he said, had worked on the matter for a long time and was sensitive to the burdens imposed on debtors. But it concluded that the documents required in the rule were either required by the statute or are important in a case.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set out in Judge Rosenthal's memorandum and attachments of May 25, 2007 (Agenda Item 9).

Amendments for Publication

TIME COMPUTATION RULES

FED. R. CIV. P. 6, 12, 14, 15, 23, 27, 32, 38, 50, 52,
53, 54, 55, 59, 62, 65, 68, 71.1, 72, and 81
SUPPLEMENTAL RULES B, C, and G

As noted above on page 9, the committee approved the proposed time-computation changes in the Federal Rules of Civil Procedure for publication.

FED. R. CIV. P. 62.1

As noted above on pages 12-13, the committee approved the proposed new Rule 62.1 (indicative rulings) for publication.

Informational Items

EXPERT-WITNESS DISCOVERY

Judge Rosenthal reported that the advisory committee was examining the experience of the bench and bar with the 1993 amendment to FED. R. CIV. P. 26 (a)(2)(B) (expert witness testimony). In particular, the committee was considering the extent to which communications between an attorney and an expert witness need be disclosed. The American Bar Association, she said, had urged that restrictions be placed on discovery of those communications, such as by limiting it to communications that convey facts only, and not opinion or strategy.

The advisory committee, she added, had thought that it would be very difficult to draw bright lines to guide attorneys in this area, but it had been encouraged by a recent mini-conference held with a group of experienced New Jersey lawyers. The state court rule in New Jersey limits discovery of conversations between attorneys and expert witnesses. The lawyers at the mini-conference uniformly expressed enthusiasm for the state rule and said that the rule minimizes satellite litigation over non-essential matters and improves professional collegiality. Judge Rosenthal added that the advisory committee was continuing to explore the issue and might come back at the next Standing Committee meeting with a request to publish a proposed amendment to Rule 26.

SUMMARY JUDGMENT

Judge Rosenthal reported that the advisory committee had approved a thorough revision of FED. R. CIV. P. 56 (summary judgment) at its April 2007 meeting, but had decided to defer publishing a proposal in order to engage in further dialogue with the bar.

She noted that Rule 56 had not been amended significantly since 1963. In 1992, there had been an unsuccessful attempt by the advisory committee to rewrite the rule thoroughly. That effort had produced a proposed rule that, among other things, would have codified the standard for granting summary judgment announced by the Supreme Court in its 1986 "trilogy" of landmark summary judgment cases.

By contrast, she emphasized, the current proposal does not address the standard. Rather, it focuses only on procedure. It is, moreover, a default rule that will apply only if a judge does not issue a specific order addressing summary judgment in a particular case. The proposed rule, she said, had been drawn largely from the best practices currently used in the district courts. She thanked the staff of the Federal Judicial Center and James Ishida and Jeffrey Barr of the Administrative Office for their comprehensive work in gathering and analyzing all the local rules of the district courts.

The proposed rule would require a party moving for summary judgment to set forth in separately numbered paragraphs the pertinent facts that are not in dispute and that entitle it to summary judgment as a matter of law. The opposing party, in turn, would have to set out in the same manner the facts that it claims are genuinely in dispute. The parties would also have to make appropriate references and file a separate brief as to the law.

She explained that lawyers had told the advisory committee that it would be extremely helpful to require these statements of undisputed facts. But, she added, in many cases the dueling statements of the parties are akin to ships passing in the night. They are often very lengthy and simply do not address each other. As a result, the advisory committee had attempted to draft the proposed rule in a manner that emphasizes that the parties must specify only those facts that are critical and relied on for, or against, summary judgment. She emphasized the importance of drafting a clear rule. To that end, it would be very beneficial to continue working with the bar to refine the text.

Judge Rosenthal pointed out that the advisory committee was concerned about what to do when an opposing party fails to respond to a summary judgment motion. She said that the case law of the circuits holds that a trial judge may not simply grant the summary judgment motion by default without a response. The local rules of some courts, she said, specify that any facts not responded to are deemed admitted, and judges in those courts say that they find these local rules helpful.

The advisory committee, she explained, had tried to set out in a clear way the steps that the court must follow under these circumstances. Accordingly, the proposed rule authorizes a trial judge to grant a motion for summary judgment, but only after following specific procedural steps and being convinced that the record supports granting the motion. Among other things, the judge would have to give the non-moving party another opportunity to respond before deeming facts admitted.

Judge Rosenthal said that the advisory committee's proposed rule did not address the substantive standard for granting summary judgment. But it would require the judge to state reasons for his or her decision on the motion. In addition, the rule mentions "partial summary judgment" by name for the first time.

A member noted that the draft proposed rule specifies the default procedures that must be followed unless the judge orders otherwise in a specific case. He asked whether the rule would also allow variation from the national rule by issuance of a local rule of court. He pointed out that the local rules of the court in which he practices most often differ substantially from the proposed national rule.

Judge Rosenthal responded that the rule would indeed allow judges to vary from the national default rule by orders in individual cases. But the national rule could not be overridden by local rules of court. In short, it would discourage blanket local court variations, but would allow case-specific variations. Professor Cooper added that the issue of local rules was addressed in the draft committee note to the rule.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Bucklew and Professor Beale presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum and attachments of May 19, 2007 (Agenda Item 7).

Amendments for Final Approval by the Judicial Conference

CRIME VICTIMS' RIGHTS ACT AMENDMENTS
FED. R. CRIM. P. 1, 12.1, 17, 18, 32, 60, and 61

Judge Bucklew reported that the package of rules changes to implement the Crime Victims' Rights Act, 18 U.S.C. § 3771, consisted of: (1) amendments to five existing rules; (2) a new stand-alone Rule 60 (victim's rights); and (3) renumbering current Rule 60 (title) as new Rule 61. The advisory committee, she said, had begun work on the package soon after passage of the Crime Victims' Rights Act in 2004, and it had reached two key policy decisions: (1) not to create new rights beyond those that Congress had specified in

the Act; and (2) to place the bulk of the victims' rights provisions in a single new rule to make it easier for judges and lawyers to apply. She said that additional rule amendments beyond this initial package might be recommended in the future, but the advisory committee had decided to defer making more extensive changes in order to monitor practical experience in the courts and case law development under the Act.

The proposed amendments, she said, had generated a good deal of controversy during the public comment period and had attracted criticism from both sides. The defense side expressed the fear that the proposed rules would tip the adversarial balance too far against criminal defendants. Victims' rights groups, on the other hand, objected that the proposals did not go far enough to enhance the rights of victims. A letter from Sen. Jon Kyl, she said, had stressed the latter point.

FED. R. CRIM. P. 1

Judge Bucklew explained that proposed Rule 1(b)(11) (scope and definitions) would incorporate the Act's definition of a crime victim. In response to the public comments, she noted, the advisory committee had added language to proposed Rule 60(b)(2) to specify that a victim's lawful rights may be asserted by the victim's lawful representative. In addition, the committee note had been revised to make it clear that a victim or the victim's lawful representative may participate through counsel, and the victim's rights may be asserted by any other person authorized by 18 U.S.C. § 3771(d) and (e). The committee note had also been amended to state that the court has the power to decide any dispute over who is a victim.

Professor Beale reported that one objection raised in several public comments was that the proposed rules do not define precisely who may be a victim. She suggested that if it turns out that the lack of a comprehensive definition causes any problems in actual practice, the advisory committee could come back later and propose a clarifying amendment.

FED. R. CRIM. P. 12.1

Judge Bucklew reported that the proposed amendments to FED. R. CRIM. P. 12.1 (notice of alibi defense) specify that a victim's address and telephone number will not be provided to the defendant automatically. The victim's address and telephone number will be provided only if the defendant establishes a need for them, such as in a case where the government intends to rely on a victim's testimony to establish that the defendant was present at the scene of the alleged offense. Moreover, even if the defendant establishes the need for the information, the victim may still file an objection.

Professor Beale pointed out that the federal defenders had commented that the proposed rule would upset the constitutional balance between prosecution and defense. Moreover, they argued that its requirement that a defendant establish a need for such basic information is unconstitutional because it is not a reciprocal obligation. She replied, though, that the rule does not violate the principle of reciprocal discovery. Rather, it is merely a procedural device, requiring the defendant to state that he or she has a need for the information and then giving the court a chance to decide the matter.

A member questioned the language that would require the defendant to establish a "need" for a victim's address and telephone number. He suggested that the word "need" was misleading and asked what showing of need the defendant would have to make beyond merely asking for the information. He noted that if the advisory committee had intended for the term "need" to mean only that the defendant *wants* the information, a different word should be used. Judge Levi replied that removing the requirement that the defendant show a "need" for the information would be seen as a big step backwards by victims' rights groups. Moreover, it would require that the rule be sent back to the advisory committee.

The member responded that he understood the highly politicized context of the rule. Nevertheless, he said that the proposed amendment as written simply does not say what the advisory committee apparently intended for it to say. He suggested that it might be rephrased to state simply that if the defendant "seeks" the information, the court may fashion an appropriate remedy. Judge Bucklew added that the advisory committee had something more than "seeks" in mind, but it had intended that the standard for the defendant's showing be relatively low. Professor Beale added that the advisory committee had rejected several alternative formulations because of the delicate balance of interests at stake. She said that the advisory committee did not want to turn the defendant's request into an automatic entitlement.

Another participant added that the proposed committee note explains that the defendant is not automatically entitled to a victim's address and phone number. Thus, the rule and the note together clearly suggest that "need" means something more than just a naked request from the defendant.

FED. R. CRIM. P. 17

Judge Bucklew stated that the proposed amendment to FED. R. CRIM. P. 17 (subpoena) would provide a protective device for third-party subpoenas. It would allow a subpoena requiring the production of personal or confidential information about a victim to be served on a third party only by court order. It also contains a provision allowing a court to dispense with notice to a victim in "exceptional circumstances."

She noted that the advisory committee had modified the rule after publication to make it clear that a victim may object by means other than a motion to quash the subpoena, such as by writing a letter to the court. In addition, based on public comments, the committee had eliminated language explicitly authorizing ex parte issuance of a subpoena to a third party for private or confidential information about a victim. Instead, a reference had been added to the committee note explaining that the decision on whether to permit ex parte consideration is left to the judgment of the court.

FED. R. CRIM. P. 18

Judge Bucklew explained that the proposed amendment to Rule 18 (place of prosecution and trial) would require a court to consider the convenience of any victim when setting the place of trial in the district. She added that no changes had been made in the text of the rule after publication, but some unnecessary language had been deleted from the committee note. In addition, language had been added to the note emphasizing the court's discretion to balance competing interests.

FED. R. CRIM. P. 32

Judge Bucklew said that the proposed revisions to Rule 32 (sentencing and judgment) would eliminate the entire current subdivision (a) – which defines a victim of a crime of violence or sexual abuse – because Rule 1 (scope and definitions) would now incorporate the broader, statutory definition of a crime victim.

Rule 32(c)(1) would be amended to require that the probation office investigate and report to the court whenever a statute "permits," rather than requires, restitution. In Rule 32(d)(2)(B), the advisory committee would delete the language of the current rule requiring that information about victims in the presentence investigation report be set forth in a "nonargumentative style." As amended, the rule would treat this information like all other information in the presentence report. Professor Beale added that some public comments had argued that all information in the presentence investigation report should also be verified. She added that some of the comments suggested additional changes that went beyond the scope of the current amendments, and these suggestions would be placed on the committee's future agenda.

Judge Bucklew reported that Rule 32(i)(4) (opportunity to speak) contained a number of proposed language changes. She said that the language of the current rule authorizing a victim to "speak or submit any information about the sentence" would be changed to require that a judge permit the victim to "be reasonably heard" because that is the precise term adopted by Congress in the statute.

FED. R. CRIM. P. 60

Judge Bucklew stated that proposed new Rule 60 (victim's rights) was the principal rule dealing with victims' rights. It would implement several different provisions of the Act and specify the rights of victims to notice of proceedings, to attendance at proceedings, and to be reasonably heard. It would also govern the procedure for enforcing those rights and specify who may assert the rights.

Paragraph (a)(1) would require the government to use its best efforts to give victims reasonable, accurate, and timely notice of any public court proceeding involving the crime. Paragraph (a)(2) would provide that a victim may not be excluded from a public court proceeding unless the court finds that the victim's testimony would be materially altered.

Paragraph (a)(3) would specify that a victim has a right to be reasonably heard at any public proceeding involving release, plea, or sentencing. Professor Beale explained that the advisory committee had limited the proposed rule to those specific proceedings. Victims' rights advocates, she said, had argued to expand the rule beyond the statute and give victims the right to be heard at other stages of a case. She added that it is possible that case law over time may expand the right to additional proceedings.

Judge Bucklew said that subdivision (d) of the proposed rule would implement several different sections of the Crime Victims' Rights Act. It would: (1) require the court to decide promptly any motion asserting a victim's rights under the rules; (2) specify who may assert a victim's rights; (3) allow the court to fashion a reasonable procedure when there are multiple victims in order to protect their rights without unduly prolonging the proceedings; (4) require that victims' rights be asserted in the district in which the defendant is being prosecuted; (5) specify what the victim must do to move to reopen a plea or sentence; and (6) make it clear that failure to accord a victim any right cannot be the basis for a new trial. She said that the primary criticism from victims' rights groups was that the new rule did not go far enough to expand the rights of victims.

Professor Beale added that, after publication, language addressing who may assert a victim's rights had been moved from Rule 1 to Rule 60. In addition, Rule 60 had been amended because the published version could have been read to require the court to pay the costs of a victim to travel to the trial – a right not required by statute. In addition, language had been added to clarify the procedure a court should follow "in considering whether to exclude the victim."

Professor Beale emphasized that questions had been raised throughout the rules process as to how far the limited, general rights specified in the statute should be repeated or elaborated upon in the rules. Judge Bucklew explained that victims' advocates had

argued that the basic statutory right that victims be treated with "fairness and dignity" should be the basis for providing a greater array of more specific rights in the rules.

FED. R. CRIM. P. 61

Judge Bucklew reported that the final change in the package was purely technical in nature – to renumber the current Rule 60 (title) as Rule 61. The rule states merely that the rules may be known and cited as the Federal Rules of Criminal Procedure. She said that structurally it should remain the last rule in the criminal rules.

Professor Meltzer moved that the package of crime victims' proposals be approved, but that proposed Rule 12.1 be remanded to the advisory committee for further consideration.

The committee by a vote of 6 to 3 rejected the motion to remand Rule 12.1. Then, with one objection, it voted by voice vote to approve the package of proposed amendments for final approval by the Judicial Conference.

Judge Bucklew noted that the package of victims' rights amendments had required a great deal of time and effort by the advisory committee. She thanked Judge Levi and John Rabiej for their invaluable assistance. Judge Teilborg added that he had been the Standing Committee's liaison to the advisory committee on the project, and he complimented both the advisory committee and Judge Bucklew personally for the superb way that they had navigated the package of rules in light of powerful forces and competing interests.

FED. R. CRIM. P. 41

Judge Bucklew reported that the advisory committee's proposed amendment to Rule 41 (search and seizure) would provide a procedure for issuing search warrants to assist criminal investigations in U.S. embassies, consulates, and possessions around the world. She said that the proposal had originated with the Department of Justice, based on practical problems that it had encountered in investigating crimes occurring in overseas possessions and embassies. Under the proposal, jurisdiction to issue warrants for execution overseas would be vested in the district where the investigation occurs or – as a default – in the U.S. District Court for the District of Columbia.

Judge Bucklew explained that the Judicial Conference had forwarded a proposed rule amendment on the same topic to the Supreme Court in 1990, but the Court had rejected it. She explained, however, that the current proposal was much more limited than the 1990 proposal, which would have applied beyond U.S. embassy and consular properties.

Judge Bucklew stated that the primary issue raised about the current proposal concerned its inclusion of American Samoa. The Pacific Islands Committee of the Ninth Circuit had suggested that if an amendment were to be made, it should be reviewed first by the judiciary of the territory and have the support of the Chief Justice of the High Court of American Samoa. This course of action would be consistent with long-standing practice based on the original treaties between the United States and American Samoa. Therefore, for purposes of public comment, the advisory committee had included American Samoa in brackets in the published text. Nevertheless, she said, the only comment responding to the issue had been made by the Federal Magistrate Judges Association, which saw no need to exclude American Samoa. In addition, the Department of Justice continued to express support for the proposal, noting that the current status was adversely affecting its law-enforcement efforts.

Judge Bucklew reported that the advisory committee had contacted the Pacific Islands Committee of the Ninth Circuit and explained that American Samoa would need to comment on the proposal if it wished to be excluded from the rule. But no communication had been received. Therefore, the advisory committee approved the rule without excluding American Samoa.

The committee voted unanimously by voice vote to approve the proposed amendment for final approval by the Judicial Conference.

FED. R. CRIM. P. 45

Judge Bucklew reported that the proposed amendment to Rule 45 (computing time) was purely technical in nature. As part of the recent restyling of the Federal Rules of Civil Procedure, some subdivisions of the civil rules governing service had been re-numbered. As a result, cross-references in FED. R. CRIM. P. 45(c) to various provisions of the civil rules will become incorrect when the restyled civil rules take effect on December 1, 2007. Therefore, the advisory committee recommended amending Rule 45(c) to reflect the re-numbered civil rules provisions. Because the amendment is purely technical, she said, the advisory committee suggested that there would be no need for publication.

The committee voted unanimously by voice vote to approve the proposed amendment for final approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 16

Judge Bucklew reported that the advisory committee had voted to recommend publishing a proposed amendment to FED. R. CRIM. P. 16 (discovery and inspection) that would require the government, on request, to turn over exculpatory and impeaching evidence favorable to the defendant. She traced the history of the proposal, beginning with a position paper submitted by the American College of Trial Lawyers in 2003. The College argued that unlawful convictions and unlawful sentencing have occurred because prosecutors have withheld exculpatory and impeaching evidence.

Judge Bucklew emphasized that the advisory committee had devoted four years of intensive study to refining the substance and language of the proposed amendment. She pointed out that the rule eventually approved by the advisory committee was considerably more modest than the changes recommended by the College, which had called for more extensive amendments both to Rule 16 and Rule 11 (pleas). The committee, she said, had debated and rejected proceeding with any amendments to Rule 11.

Judge Bucklew noted that the Federal Judicial Center had prepared an extensive report for the advisory committee in 2004 surveying all the local rules and standing orders of the district courts in this area. At the committee's request, the Center then updated the document on short notice in 2007. The report revealed that 37 of the 94 federal judicial districts currently have a local rule or district-wide standing order governing disclosure of *Brady* materials. She explained, however, that the Center had not searched beyond local rules and standing orders to identify the orders of individual district judges, which may be numerous. In addition, she said, most states have statutes or court rules governing disclosure.

The advisory committee, she said, had also reviewed a wealth of other background information, including a summary of the case law addressing *Brady v. Maryland* issues, pertinent articles on the subject, the American Bar Association's model rules of professional conduct governing the duty of prosecutors to divulge exculpatory information, and correspondence from the federal defenders.

Judge Bucklew reported that the Department of Justice strongly opposed the proposed amendment. In light of that opposition, she noted, former committee member Robert Fiske had suggested that in lieu of pursuing a rule amendment, it might be more practical for the committee to encourage the Department to make meaningful revisions in the U.S. Attorneys' Manual to give prosecutors more affirmative direction regarding their *Brady* obligations.

As a result of the suggestion, she said, the Department did in fact amend the manual to elaborate on the government's disclosure obligations. Judge Bucklew thanked the Department on behalf of the advisory committee for its excellent efforts in this respect. She gave special recognition to Assistant Attorney General Alice Fisher for leading the efforts and emphasized that the entire advisory committee believed that the changes had improved the manual substantially.

Nevertheless, she added, the advisory committee ultimately decided for two reasons that the manual changes alone could not take the place of a rule change. First, as a practical matter, the committee would have no way to monitor the practical operation of the changes or even to know about problems that might arise in individual cases. Second, the U.S. Attorneys' Manual is a purely internal document of the Department of Justice and not judicially enforceable.

Judge Bucklew added that the reported case law does not provide a true measure of the scope of possible *Brady* problems because defendants and courts generally are not made aware of information improperly withheld. She said that the advisory committee had received a letter from one of its judge members strongly supporting the proposed amendment. In the letter, the judge claimed that in a recent case before him the prosecutor had improperly failed to disclose exculpatory material and, despite the judge's prodding, the Department of Justice failed to discipline the attorney appropriately for the breach of *Brady* obligations.

Judge Bucklew stated that there are numerous cases in which courts have found that the prosecution had failed to disclose exculpatory material – if one includes cases in which the failure to disclose did not rise to constitutional dimensions and therefore did not technically violate the constitutional requirements of *Brady v. Maryland.* Beyond that, she said, it is simply impossible to know how many failures actually occur because only the prosecution itself knows what information has not been disclosed.

Judge Bucklew observed that the local rules and orders of many district courts address disclosure obligations, but they vary in defining disclosure obligations and specifying the timing for turning over materials to the defense. Some rules, for example, impose a "due diligence" requirement on prosecutors, while others do not. She added that the sheer number of local rules, together with the lack of consistency among them, argue for a national rule to provide uniformity. Moreover, just publishing a proposed rule for comment, she added, could produce meaningful information as to the magnitude of the non-disclosure problem. If the public comments were to demonstrate that the problems are not serious, the advisory committee could withdraw the amendment.

Professor Beale observed that two central trends currently prevail in the criminal justice system: (1) to recognize and enhance the rights of crime victims; and (2) to reduce

the incidence of wrongful convictions. The proposed rule, she said, would advance the second goal. It would also promote judicial efficiency by regulating the timing and nature of the materials to be disclosed.

The proposed amendment, she said, would require the government to disclose not just "evidence," but "information" that could lead to evidence. It also would require a defendant to make a request for the information. It speaks of information "known" to the prosecution, including information known by the government's investigative team. She noted that this provision was consistent with a line of *Brady* cases requiring disclosure of matters known not just to attorneys but also to law enforcement agents. She added that the Department of Justice was deeply concerned about the breadth of this particular formulation.

Professor Beale reported that a great deal of the advisory committee's discussion had focused on the need to have *Brady* materials disclosed during the pretrial period, rather than on the eve of trial. So, for purposes of timing, the proposed rule distinguishes between exculpatory and impeaching information. Impeaching evidence generally relates to testimony, and the Department is concerned that early disclosure increases potential dangers to witnesses. Therefore, the proposed amendment specifies that a court may not order disclosure of impeaching information earlier than 14 days before trial. That particular timing, she said, is more favorable to the prosecution than the current limits imposed by many local court rules. Moreover, the government has the option of asking a judge to issue a protective order in a particular case when it has specific concerns about disclosure.

Professor Beale reported that the Department had argued that the proposed rule is inconsistent with *Brady v. Maryland.* But, she said, the advisory committee was well aware that the proposed amendment is not compelled by *Brady*. Rather, *Brady* and related cases set forth only the minimal constitutional requirements that the government must follow. The proposed amendment, by contrast, goes beyond what the Supreme Court has said is the minimum that must be turned over. Moreover, it would provide consistent procedural standards for the turnover of exculpatory information.

Professor Beale explained that the advisory committee saw no need to include in the rule a definition of "exculpatory" or "impeaching" evidence. The amendment also does not require that the information to be turned over be "material" to guilt in the constitutional sense, such that withholding it would necessitate reversal under *Brady*. Professor Beale explained that the advisory committee did not want to use the word "material" because it might be read to imply all the familiar constitutional standards. She noted that other parts of Rule 16 use the term "material" in a different sense, referring to information "material" to the preparation of the defense.

Professor Beale stated that the proposed amendment would establish a consistent national procedure and bring the federal rules more in line with state court rules and the rules of professional responsibility. It would also introduce a judicial arbiter to make the final decision as to what must be disclosed. Accordingly, she said, the key dispute over the proposed amendment is whether the policy and practice it seeks to promote should be enforced through the U.S. Attorneys' Manual or a federal rule of criminal procedure.

Deputy Attorney General McNulty thanked Judge Bucklew and the advisory committee for working cooperatively and openly with the Department of Justice on the proposed rule. He pointed out that the Department had set forth its position in considerable detail in a memorandum recently submitted to the committee.

He emphasized the central importance of Rule 16 to prosecutors, and he pointed to the recent revisions in the U.S. Attorneys' Manual as tangible evidence of the Department's willingness to address the concerns expressed by the advisory committee and others and to ensure compliance with constitutional standards. He said, though, that the proposed amendment was deeply disturbing and would fundamentally change the way that the Department does business.

Mr. McNulty argued that there was simply no need for the amendment because the Constitution, Congress, and the Supreme Court have all specified the requirements of fairness and the obligations of prosecutors. All recognize the balance of competing interests. But the proposed rule, he said, goes well beyond what is required by the Constitution and federal statutes, and it would upset the careful balance that Congress and the courts have established.

The disclosure obligations proposed in the amendment, he said, also conflict with the rights of victims. The rule would move the Department of Justice towards an open file policy and make virtually everything in the prosecution's files subject to review by the defense, including information sensitive to victims, witnesses, and the police. In cases involving a federal-state task force, moreover, it might require that state information be turned over to the defense, in violation of state law. The amendment, also, he said, is inconsistent with the Jencks Act, with the rest of Rule 16, and with other criminal rules limiting disclosure and the timing of disclosure.

The proposed amendment, he added, would inevitably generate a substantial amount of litigation on such matters as whether exculpatory or impeachment information is "material." There is some question, he said, whether the rule removes "materiality" as a disclosure standard or whether it contains some sort of back-door materiality standard. At the very least, he said, the rule has not been thought through or studied adequately. In the final analysis, moreover, the rule will not achieve the goal of its proponents to prevent

abuses and miscarriages of justice because an unethical prosecutor determined to withhold specific information will find a way to avoid any rule.

Mr. McNulty concluded his presentation by emphasizing that the case for a rule change had not been made, and the proposed amendment should be rejected. Moreover, the significant revisions just made to the U.S. Attorneys' Manual should be given time to work. In the alternative, he said, the rule could be sent back to the advisory committee to work through the many difficult issues that have not yet been resolved.

Assistant Attorney General Fisher added that the advisory committee had made a conscious decision not to include a materiality standard in the amendment. In that respect, she said, the proposal is inconsistent with current local court rules, very few of which have eliminated the materiality requirement. It would also be inconsistent with the rest of Rule 16 in that respect. And it would undercut the rights of victims and their ability to rely on prosecutors to protect them. The proposal, in short, would create major instability and insecurity among witnesses, who will be less willing to come forward.

The committee chair suggested that the proposed amendment was not yet ready for publication, and he observed that the changes in the U.S. Attorneys' Manual were a very important achievement that should be given time to work Another member added that his district has an open file system that works very well. But, he said, it would be very helpful to obtain reliable empirical evidence to support the need for a change. The Department of Justice, he said, had done an excellent job in producing a detailed set of revisions to the prosecutors' manual. In the face of that achievement, he said, the committee should give the Department the courtesy of seeing whether or not the manual changes make a difference before going forward with a rule amendment that contains a major change in policy. He noted that there may well be problems in monitoring the impact of the manual changes but suggested that the committee work with the Department to explore practical ways to measure the impact of the manual changes.

Another member agreed and added that the essential impact of the proposed amendment will be to change the standard of review for failure to disclose – a very significant change. Professor Beale responded that the purpose of the amendment was not to change the standard of review, but to change pretrial behavior and provide clear guidance on what needs to be disclosed. She explained that in civil cases the parties are entitled to a great deal of discovery early in a case. In federal criminal cases, however, defendants often have to wait until trial before obtaining certain essential information. That, she said, is a glaring difference. She added that a court is more likely to require government disclosure at trial if it is required by Rule 16, and not just by the constitutional case law.

Another member stated that the proposed amendment would do far more than change the standard of review. It would, he said, radically expand the defendant's rights to pretrial discovery – a fundamentally bad idea. As drafted, he said, the rule has major flaws, and if published, the public comments will be completely predictable. The defense side will strongly favor an amendment that radically expands its pretrial discovery. The Department of Justice, on the other hand, will vigorously oppose the change.

He predicted that if the amendment were forwarded by the committee to the Judicial Conference, it would likely be rejected by that body. And if it were to reach the Supreme Court, it might well be rejected by the justices. Proceeding further with the proposed amendment, he said, would do irreparable damage to the reputation of the Standing Committee as a body that proceeds with caution and moderation. He added that there is nothing wrong with controversy *per se*, but the proposed rule is both controversial and wrong.

The amendment, he argued, takes a constitutional-fairness standard and converts it into a pretrial discovery procedure that gives the defense new trial-preparation rights. The case, he said, had not been made that the rule is necessary or that violations of disclosure obligations by prosecutors cannot be handled adequately by existing processes. He added that the most radical effect of the rule is found not in the text of the rule itself, but in the committee note asserting that the current requirement of materiality would be eliminated and that all exculpatory and impeachment information will have to be turned over to the defense, whether or not material to the outcome of a case.

Another member concurred and explained that when the Standing Committee agrees to publish a rule, there is an understanding that it has been vetted thoroughly. Publication, moreover, carries a rebuttable presumption that the proposal enjoys the committee's tentative approval on the merits. But, he said, the proposed amendment to Rule 16 does not meet that standard. The Rules Enabling Act process is structured to ensure that the Executive Branch has an opportunity to be heard. In this instance, he argued, the Executive Branch has expressed serious opposition to the proposal. Thus, with controversial proposals such as this, he argued, the committee owes it to the Judicial Conference, the Supreme Court, Congress, and the bench and bar generally that the rule is substantially ready when published.

One of the judges pointed out that his court's local rules require that information be disclosed before trial if it is material. He emphasized that if the committee were to approve an amendment, it should include a materiality standard. Without it, he said, courts will be inundated with essentially meaningless disputes over whether immaterial information must be turned over. The proposed rule, he argued, would also conflict with the Jencks Act and with constitutionally sound principles. He urged the committee to reject the amendment. Alternatively, he suggested that if the committee believes it

necessary to produce a rule to codify *Brady,* it should at least incorporate a materiality requirement.

Another member agreed with the criticisms expressed, but suggested it would be useful to have a uniform rule for the federal courts to provide greater guidance on B*rady* issues. The *Brady* standard, he said, applies after the fact. It is not really a discovery standard, but a sort of harmless error standard on appeal.

He said that the proposed amendment would represent a radical change for the federal courts. But, on the other hand, it would bring federal practice closer to that of the state courts. He noted that many believe that the state courts strike a fairer balance between giving defendants access to information and protecting witnesses and victims against harmful disclosures. He said that additional review of state and local practices might be useful.

Another member concurred in the criticisms of the amendment but said that the central issue before the Standing Committee was whether to publish the rule for public comment. Comments, he suggested, could be very useful. He noted that the proposal had been approved by the advisory committee on an 8-4 vote, demonstrating substantial support for it and arguing for publication. Moreover, he said, empirical research is very difficult to obtain in this area because the defense never finds out about material improperly withheld by prosecutors. He added that current practice under *Brady* is self-serving because it is only natural for a prosecutor in the middle of a case to convince himself or herself that a particular statement is not material. He concluded that disclosure of exculpatory and impeaching information is a matter that needs to be addressed, and the public comment period should be helpful in shedding light on current practices.

He expressed some skepticism regarding revisions to the U.S. Attorneys' Manual. For decades, he said, the Department of Justice has insisted that the manual is not binding, but it is now characterizing the recent changes on *Brady* materials as crucial. He was concerned, too, that the manual could be changed further at any time in the future.

Another participant concurred that quantitative information is difficult to obtain and suggested that the committee could gather a good deal more anecdotal information through interviews with judges, lawyers, and former prosecutors. If that were done, he said, it would be important to identify the nature of the criminal offense involved because it may turn out that disclosure is not handled the same way in different types of cases.

The committee's reporter stressed the importance of protecting the integrity and credibility of the Rules Enabling Act process. He said that the committee should proceed with caution and not risk its credibility by publishing a proposed amendment that is very controversial and not supported by sufficient research. He suggested that the rule be

deferred and the committee consider asking the Federal Judicial Center to conduct additional research.

Judge Hartz moved to reject the amendment outright and not to send it back to the advisory committee for further review. He suggested that the debate appeared to come down to an ideological difference of opinion over what information should be disclosed by prosecutors to defendants. The dispute, he said, is not subject to meaningful empirical investigation, and it would not be a good use of resources to return the matter to the advisory committee or to ask the Federal Judicial Center for further study.

Judge Bucklew said that the advisory committee had spent four years on the proposal and had discussed it at every committee meeting. A majority of the committee, she explained, believed strongly that the proposal was the right and fair thing to do. She agreed, though, that it was hard to see what good additional research, including anecdotal information, would produce. Therefore, she said, if the Standing Committee were to disagree with the merits of the proposal, it should simply reject the rule and not send it back to the advisory committee nor keep it on the agenda.

Professor Beale added that the advisory committee could continue to work on refining the proposal or conduct additional research, if that would help. But, she said, if the Standing Committee were to conclude that the amendment is fundamentally a bad idea in principle, it would ultimately be a waste of time to attempt to obtain more information.

She noted that conditions and prosecution policies vary enormously among judicial districts. In some districts, disclosure seems not to be a problem, but in others there may have been improper withholding of information. A study could be crafted to examine the differences among the districts and ascertain why there are disclosure problems in some districts, but not others. In the final analysis, though, if it appears that the Standing Committee will still oppose any amendment – even after additional research and tweaking – it would be wise just to end the matter and not expend additional time and resources on it.

One member suggested that it would be helpful to survey lawyers and judges on disclosure in practice. He pointed to the influential and outcome-determinative research conducted for the committee by the Federal Judicial Center in connection with FED. R. APP. P. 32.1, governing unpublished opinions. By analogy to that successful research effort, he recommended that more research be conducted – unless the committee concludes as a matter of policy that no amendment to Rule 16 would be acceptable.

Another member stated that he worried about the message the committee would send the bar by rejecting an amendment to Rule 16 out of hand. He noted that the bar is concerned that prosecutors do not always disclose information that they should. He

commended the Department of Justice for its good faith efforts to work with the committee and recommended that, rather than rejecting the proposed amendment outright, the matter be returned to the advisory committee to monitor the impact of the recent changes in the U.S. Attorneys' Manual.

The committee chair noted that there are many different local rules governing disclosure of exculpatory and impeachment information. With regard to the Federal Rules of Civil Procedure, he explained that the committee had found the lack of uniformity among districts to be intolerable. Consistency, he said, is very important to the unity of the federal judicial system. A defendant's right to exculpatory information should not vary greatly from court to court. Thus, if there is to be a national rule to codify *Brady* obligations, it should contain a clear standard. There is, he said, little support for a national open-file rule, but achieving consensus on the right balance would be very complex and difficult.

The chair suggested that there are various ways to elicit meaningful information from the legal community other than by publishing a rule or asking the Federal Judicial Center for additional research. He noted, for example, that the Advisory Committee on Civil Rules had conducted a number of conferences with the bar on specific subjects, and the committee's reporter had sent memoranda to the bar seeking views on discrete matters. He concluded that the Standing Committee should not tell the advisory committee that criminal discovery is off the table. It is, he said, a topic that needs further study. But the advisory committee should proceed slowly and methodically with any study.

Two members agreed that there is room for continuing study and input from bench and bar regarding pretrial discovery, the conduct of prosecutors, and uniformity among the districts. Nevertheless, they recommended that all work cease on the pending amendment to Rule 16 because it is too radical and cannot be fixed. Another member agreed that the proposed amendment is not the right rule, but suggested that the issues it raises are very important and need to be considered further. He said that there is room for further research and analysis to see whether a consensus can be developed on a uniform rule for the entire federal system. Thus, he recommended that the proposal be returned to the advisory committee, but not rejected outright.

Deputy Attorney General McNulty observed that even if the Standing Committee rejects the proposal, the advisory committee could still continue to explore the issues on its own in a slow and methodical manner. Slowing down the process, he said, was important to the Department, which has been concerned that it must continue to stay on the alert because the proposed amendment could resurface in revised form.

Judge Thrash observed that a consensus appeared to have emerged not to publish the proposed amendment, but to defer further consideration of it indefinitely, with the

understanding that the advisory committee will be free to study the topic matter further and take such further action as it deems appropriate at some future date. **He offered this course of action as a substitute motion for Judge Hartz's motion, with Judge Hartz's agreement.**

Deputy Attorney General McNulty agreed and added that the advisory committee would not be proceeding under any expectation as to when, if ever, the issue should come back to the Standing Committee.

The committee with one objection voted by voice vote to adopt Judge Thrash's substitute motion.

FED. R. CRIM. P. 7, 32, and 32.2

Professor Beale reported that the proposed amendments to Rules 7 (indictment and information), 32 (sentence and judgment) and 32.2 (criminal forfeiture) would clarify and improve the rules governing criminal forfeiture. She noted that the amendments were not controversial, and they had been approved unanimously by the advisory committee.

The committee voted unanimously by voice vote to approve the proposed amendments for publication.

FED. R. CRIM. P. 41

Judge Bucklew reported that the advisory committee recommended publishing proposed amendments to Rule 41 (search and seizure) to govern searches for information stored in electronic form. The amendments would acknowledge explicitly the need for a two-step process – first, to seize or copy the entire storage medium on which the information is said to be contained, and, second, to review the seized medium to determine what electronically stored information contained on it falls within the scope of the warrant.

Judge Bucklew explained that the search frequently occurs off-site after the computer or other storage medium has been seized or copied by law enforcement officers. She added that the revised rule specifies that in the case of seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to a description of the physical storage media seized or copied.

The committee voted unanimously by voice vote to approve the proposed amendments for publication.

RULE 11 OF THE RULES GOVERNING §§ 2254 AND 2255 PROCEEDINGS

Professor Beale explained that the proposed companion amendments to Rule 11 of the Rules Governing §§ 2254 and 2255 Proceedings (certificate of appealability and motion for reconsideration) would provide the procedure for a litigant to seek reconsideration of a district court's ruling in a habeas corpus case. They would specify that a petitioner may not seek review through FED. R. CIV. P. 60(b) (relief from judgment or order).

She reported that the advisory committee had considered a much broader proposal by the Department of Justice to eliminate coram nobis and other ancient writs, but it had decided on fundamental policy grounds against the change. Instead, the committee's proposal specifies that the only procedure for obtaining relief in the district court from a final order will be through a motion for reconsideration filed within 30 days after the district court's order is entered.

A member observed that the proposed amendment may narrow the scope of reconsideration in a way that the advisory committee did not intend. He noted that proposed Rule 11(b) may preclude the use of FED. R. CIV. P. 60(a) to seek reconsideration based on a clerical error – relief most often sought by the government. He suggested that the proposed rule may not be needed, and the stated justification for it was confusing. He also questioned whether the proposed rule did what it was intended to do, namely codify the Supreme Court's decision in *Gonzalez v. Crosby.* And he objected to the proposed 30-day time limit on the grounds that an unrepresented pro se litigant should not face a shorter time-limit than others.

Judge Levi asked whether, given these concerns, the advisory committee would be willing to hold the proposal for possible publication at a later time. Judge Bucklew agreed to recommend that only the proposed amendment to Rule 11(a) be published for public comment, and that the remainder of the rule be deferred for further consideration by the advisory committee.

The committee voted unanimously by voice vote to approve the proposed amendments to Rule 11(a) of both sets of rules for publication and to defer consideration publishing the proposed amendments to Rule 11(b) of both sets of rules.

Professor Struve noted that if the proposed amendment to Rule 11(b) did not go forward for publication, the Standing Committee should also not publish the proposed amendment to FED. R. APP. P. 4(a)(4)(A), which makes reference to the proposed new Rule 11(b). **Accordingly, the committee voted unanimously by voice vote not to publish the proposed amendment to FED. R. APP. P. 4(a)(4)(A).**

TIME-COMPUTATION RULES

FED. R. CRIM. P. 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, 59
RULE 8 OF THE RULES GOVERNING §§ 2254 AND 2255 PROCEEDINGS

As noted above on pages 10-11, the committee approved for publication the proposed time-computation amendments to the Federal Rules of Criminal Procedure.

Informational Items

FED. R. CRIM. P. 29

Judge Bucklew reported that the advisory committee had decided not to submit to the Standing Committee any proposed amendments to FED. R. CRIM. P. 29 (motion for a judgment of acquittal). The proposal published by the committee would have required a judge to wait until after a jury verdict to direct a verdict of acquittal unless the defendant were to waive his or her double jeopardy rights and give the government an opportunity to appeal the pre-verdict acquittal.

She noted that there had been a good deal of public comment on the proposal, most of it in opposition. Several different grounds had been offered for the objections – most noticeably that the amendments would exceed the committee's authority under the Rules Enabling Act, impose an unconstitutional waiver requirement, fail to provide needed flexibility to sever multiple defendants and multiple counts when necessary, and intrude on judicial independence. Several comments added that the proposed amendments were simply not needed because directed acquittals are rare in practice.

Judge Bucklew reported that the advisory committee first had voted 9 to 3 to reject the proposed rule, and then it voted 7 to 5 to table it indefinitely and not continue working on it. She added that most members of the advisory committee had simply not been convinced that a sufficient showing of need had been made to justify moving forward a proposal in the face of the many different objections raised.

A member explained that the Department of Justice had cited as a need for the rule several examples of pre-verdict acquittals that the Department considered improper. But, he said, research set forth in the committee materials suggested that the acquittals in those particular cases, upon closer examination, appear to have been justified. Professor Beale explained that the materials included a letter from the federal defenders containing detailed transcript quotations and references to demonstrate the reasons for the pre-verdict acquittals in those cases. This letter, she said, had had a large impact on the advisory committee.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachments of May 15, 2007 (Agenda Item 6).

Amendment for Final Approval of the Judicial Conference

FED. R. EVID. 502

Judge Smith reported that the advisory committee's primary impetus in proposing new Rule 502 (waiver of attorney-client privilege and work-product protection) was to address the high costs of discovery in civil cases. He explained that if the rules governing waiver were made more uniform, predictable, and relaxed, attorneys could reduce the substantial efforts they now expend on privilege review and decrease the discovery costs for their clients. Lawyers today, he said, must guard against the most draconian federal or state waiver rule in order to protect their clients fully against the danger of inadvertent subject-matter waiver.

Judge Smith added that national uniformity is greatly needed in this area. The bar, he said, has been strongly supportive of the proposed new rule, and their comments have been very useful in improving the text. He explained that proposed Rule 502(b) specifies that an inadvertent disclosure will not constitute a waiver if the holder of the privilege or protection acts reasonably to prevent disclosure and takes reasonably prompt measures to rectify an error. Subject-matter waiver will occur only when one side acts unfairly and offensively in attempting to use a privilege waiver as to a particular document or communication.

Professor Capra added that the bar believes strongly that the rule will be very beneficial. It would provide national uniformity and liberalize the current waiver standard in the federal courts. He noted that the text had been refined further since the April 2007 advisory committee meeting in response to suggestions from a Standing Committee member and the Style Subcommittee.

Professor Capra noted that Rule 502(c) deals with disclosure and waiver in state-court proceedings. He pointed out that the advisory committee had been very sensitive to federal-state comity concerns and had revised the rule to take account of comments made by the Federal-State Jurisdiction Committee of the Judicial Conference and state chief justices.

He emphasized that the rule will provide protection in state proceedings and, indeed, must do so in order to have any real meaning. But, he said, the rule does not

explicitly address disclosures first made in the course of state-court proceedings. Thus, if a party seeks to use in a federal proceeding a disclosure made in a state proceeding, the federal rule will not necessarily govern. Rather, the most protective rule would apply, *i.e.*, the one most protective of the privilege.

Professor Capra explained that Rule 502(d) is the heart of the new rule. It specifies that a federal court's order holding that a privilege or protection has not been waived in the litigation before it will be binding on all persons and entities in all other proceedings – federal or state – whether or not they were parties to the federal litigation. Rule 502(e) provides that parties must seek a court order if they want their agreement on the effect of disclosure to be binding on third parties.

Professor Capra reported that the Department of Justice had expressed concern over the committee's decision to extend Rule 502(b) to inadvertent disclosures made "to a federal office or agency," as well as "in a federal proceeding." He noted that members of the bar had argued that the cost of pre-production review of materials disclosed to a federal agency can be just as great as that before a court.

He explained that the Department of Justice was concerned that an Executive Branch officer does not generally know whether there has been a waiver. A matter before an agency is not yet a "proceeding," and there is no judge to whom the agency can go for a ruling on waiver. As a practical matter, then, an agency may get whip-sawed later if a party claims that it did not intend to waive protection or privilege. That scenario may occur now, but the Department believes that it is likely to happen more often under the proposed rule. He noted that the advisory committee was aware of the Department's concerns, but it was willing to accept that risk in return for the benefits of reducing the costs of discovery before government agencies.

Professor Capra reported that, as published, the rule had set forth in brackets a provision governing "selective waiver." The bracketed selective waiver provision had specified that disclosure of protected information to a federal government agency exercising regulatory, investigative, or enforcement authority does not constitute a waiver of attorney-client privilege or work-product protection as to non-governmental persons or entities, whether in federal or state court.

Professor Capra pointed out that the advisory committee had not voted affirmatively for the provision, but had included it for public comment at the request of the former chairman of the House Judiciary Committee. During the comment period, he said, the provision had evoked uniform and strong opposition from the bar, largely on the grounds that it would further encourage a "culture of waiver" and weaken the attorney-client privilege. On the other hand, he said, representatives of government regulatory agencies supported the selective waiver provision.

Professor Capra said that, as a result of the public comments, the advisory committee had decided that selective waiver was essentially a political question and should be removed from the rule. Instead, it agreed to prepare a separate report for Congress containing appropriate statutory language that Congress could use if it wanted to enact a selective waiver provision. The draft letter, he said, would state that the committee's report on selective waiver is available on request if Congress wants it. Professor Capra emphasized that the advisory committee did not want to let a controversial issue like selective waiver detract from, or interfere in any way with, enactment of the rest of the proposed new rule, which is non-controversial and will have enormous benefits in reducing discovery costs.

A member asked what good it does, once a disclosure in a state proceeding has been found to have waived the privilege in that state proceeding, for the privilege to be found protected in a later federal proceeding. As a practical matter, the disclosed information is already out. Professor Capra responded that the advisory committee had discussed these issues with the Conference of Chief Justices and had reached an agreement that the federal rule would apply if more protective of the privilege than the applicable state rule. In fact, though, most states have a rule on inadvertent disclosure similar to the proposed new federal rule, and the rule of some states is more protective of the privilege. Given those circumstances, he said, the concern may be largely theoretical. He added that it would be very complex to apply a state law of waiver that is *less* protective of the privilege than the federal rule. The proposed new rule would avoid that situation.

A member pointed out that even though the advisory committee had decided that the proposed new rule would not address the matter, selective waiver is still present. As a practical matter, once there is a federal judicial proceeding involving the federal government, proposed Rule 502(d) may function as a mechanism for a selective waiver. For example, a party may permit a document to be disclosed to its federal government opponent. Even if the privilege is found waived as to that document, there will not be a subject-matter waiver unless the exacting requirements of Rule 502(a) are met. If the court rules that there is no subject-matter waiver, the ruling will be binding in later proceedings under Rule 502(d). Thus, the new rule will give the government an incentive to initiate a judicial proceeding in the hope of extracting what would amount to a selective waiver.

Mr. Tenpas observed, regarding selective waiver, that the Department has been told for years by parties under investigation that they would like to turn over specific documents to the government, but could not afford to do so for fear of waiving the privilege as to everybody else. Ironically, he said, the same people now say that they are strongly opposed to a selective waiver rule.

He added that the Department would prefer that the rule proceed to Congress with a selective waiver provision included. He wanted to make sure that the issue is preserved and that the Department's support for sending the rest of the rule forward is not interpreted as a lack of support for selective waiver.

A member stated that he was distressed by the length of the proposed committee note. He said that it reads like a law review article and should be cut substantially. Professor Capra responded that a longer note was needed in this particular instance because it will become important legislative history when the rule is enacted by Congress. Another member pointed out that committee notes help to explain the rationale for a rule during the public comment process. But once the rule is promulgated, it might be better to have a shorter note on the books. He suggested that the note might be made shorter and some of its points transferred to a covering letter to Congress.

Professor Capra observed that when Congress enacted FED. R. EVID. 412 (relevance of alleged victim's past sexual behavior or predisposition) it had declared that the committee note prepared by the rules committees would constitute the legislative history of the statute. Congress, he said, could do the same thing with the proposed new Rule 502. That possibility, he said, would argue for a relatively lengthy note. He further commented that the signals the advisory committee reporters receive from the Standing Committee are not uniform as to what the committee notes are supposed to do. In any event, he said that he would cut back the length of the note in response to the members' comments.

Professor Coquillette added that committee notes often become fossilized over time. Statements that are very useful at the time a rule is adopted can, several years later, become unnecessary, disconnected, or wrong. The rules committees, however, cannot change a note without changing the rule. Also, he said, some lawyers only use the text of the rule, and they do not have ready access to committee notes and the treatises.

A member questioned the language of proposed Rule 502(b)(2) that the holder of a privilege must take "reasonable steps" to prevent disclosure. The whole point of the rule, he said, is that in a big document-production case an attorney need not search each and every document to uncover embedded privilege issues. But what, in fact, constitutes the "reasonable steps" that the attorney must take? He pointed out that he personally would avoid problems by reaching an early agreement in every case with his opponent to address inadvertent waiver. Professor Capra responded, however, that not every party can obtain such an agreement. Moreover, an attorney cannot know for certain in advance that he or she will reach an agreement with the opponent or be able to obtain a court order. He predicted that in time, few issues will arise under the language of Rule 502(b).

Mr. Tenpas explained further the Department of Justice's concern over extending the inadvertent waiver provision to documents turned over "to a federal office or agency." He explained that the Department was well aware that it is very expensive for a party to conduct privilege review of documents given to a federal agency, just as it is in litigation before a court. The proposed new rule, therefore, is designed to change parties' conduct in this regard, and reduce the costs of privilege review.

The problem for the government, though, is that the federal office or agency does not know whether a disclosure will constitute a waiver until it can obtain a ruling from a judge in some future litigation. He recognized that that is also the case now. But he argued that no one knows how many more privileged documents will slip through under the new rule, as compared to the current regime. The Department, he said, was concerned that it will occur more frequently under the proposed rule.

He suggested that it would make sense at this point to limit the new rule to federal court proceedings only. The committee could at a later date consider whether to extend it to documents disclosed to federal regulators.

Mr. Tenpas moved to amend proposed Rule 502(b) by striking from line 18 the words "or to a federal office or agency."

A member noted that consideration of proposed Rule 502 is different from the committee's usual rulemaking process because any rule pertaining to privileges must be affirmatively enacted by Congress. This circumstance creates practical problems if the committee wants to make additional changes later in light of experience under the rule. The committee could not then merely make changes through the rulemaking process, but would have to return to Congress for a further statutory amendment. This, he said, is an argument against making the change that the Department of Justice urges, i.e., deleting "or to a federal office or agency."

Judge Smith stated that the issue of including "a federal office or agency" in the inadvertent disclosure provision was not a deal-breaker for the advisory committee. The public comments, he said, had made it clear that something needs to be done as soon as possible to reduce the costs of privilege review in discovery. Thus, getting a new Rule 502 enacted by Congress is the main goal. Beyond that, he said, the rule should cover as many contexts as possible.

Mr. Tenpas stated that the main focus of the proposed rule is on litigation in court, not on dealings with federal agencies. Productions of documents to federal agencies outside litigation, he argued, do not entail huge document productions nearly so often as in litigation.

The committee voted by voice vote, with two objections, to deny the motion to strike the words "or to a federal office or agency."

Judge Hartz moved to approve Rule 502, subject to possible further refinements in the language regarding state proceedings.

Judge Levi stated that the proposed new rule is extremely important and will reduce the cost of litigation in a significant way. He recognized that the Department of Justice has had concerns about applying the rule's inadvertent waiver principles to documents disclosed "to a federal office or agency." Nevertheless, he implored the Department not to allow its opposition to that particular provision to be interpreted by Congress in any way as opposition to the rule. He said that Congress must not be sent signals that the rule is either complicated or controversial. To the contrary, he said, the public comments had demonstrated that the rule is universally supported, very important, and urgently needed. Mr. Tenpas responded that the Department of Justice would vote in favor of the proposed new rule.

The committee without objection by voice vote agreed to send the proposed new rule to the Judicial Conference for final approval.

ADAM WALSH CHILD PROTECTION ACT

Professor Capra reported that the Adam Walsh Child Protection and Safety Act of 2006 directed the committee to "study the necessity and desirability of amending the Federal Rules of Evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against (1) a child of either spouse; or (2) a child under the custody or control of either spouse."

Professor Capra pointed out that the Congressional reference had been generated by concern over a 2005 decision in the Tenth Circuit. The court in that case had refused to apply a harm-to-child exception to the adverse testimonial privilege. The defendant had been charged with abusing his granddaughter, and the court upheld his wife's refusal to testify against him based on the privilege protecting a witness from being compelled to testify against her spouse.

Professor Capra explained that the decision is the only reported case reaching that conclusion, and it does not even appear to be controlling authority in the Tenth Circuit. Moreover, there are a number of cases from the other circuits that reached the opposite conclusion. He said that the advisory committee had decided that there was no need to propose an amendment to the evidence rules to respond to a single case that appears to have been wrongly decided. He added that that the committee had been unanimous in its

decision not to recommend a rule, although the Department of Justice saw the enactment of a statute at the initiative of Congress as raising a different question.

Professor Capra reported that the advisory committee had prepared a draft report for the Standing Committee to send to Congress concluding that an amendment to the evidence rules is neither necessary nor desirable. At the request of the Department, however, the report also included suggested language for a statutory amendment should Congress decide to proceed by way of legislation. Mr. Tenpas added that cases involving harm to children are a growing part of the Department's activity, and the Department likely would not oppose a member of Congress introducing the draft rule language as a statute.

The committee without objection by voice vote approved the report for submission to Congress.

Informational items

Professor Capra reported that the advisory committee would begin the process of restyling the evidence rules in earnest at its November 2007 meeting. He noted that Professor Kimble, the committee's style consultant, was already at work on an initial draft of some rules.

Professor Capra said that the advisory committee had decided to defer considering any amendments to the evidence rules that deal with hearsay in order to monitor case law development following the Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36 (2004). He noted that earlier in the current term, the Court had ruled that if a hearsay statement is not testimonial in nature, there are no constitutional problems with admitting it. As a result, the advisory committee might begin to look again at possible hearsay exceptions.

REPORT ON STANDING ORDERS

Professor Capra said that Judge Levi had asked him to prepare a preliminary report on the proliferation of standing orders and how and whether it might be possible to regulate standing orders. He thanked Jeffrey Barr and others at the Administrative Office for gathering extensive materials on the subject for him.

He noted that standing orders are general orders of the district courts. But the term is also used to include the orders of individual judges. In addition, the difference between local rules and standing orders is not clear, as subject matter appearing in one court's local

rules appears in another's standing orders. In some instances, standing orders abrogate a local court rule, and some standing orders conflict with national rules.

Standing orders, unlike local rules, do not receive public input. They are easier to change but are not subject to the same review by the court or the circuit council. They are also harder for practitioners to find, as they are located in different places on courts' local web sites. Some courts, moreover, do not post standing orders, and many judges do not post their own individual orders. And the courts' web sites do not have an effective search function.

Professor Capra suggested that one question for the Standing Committee was to decide what can, or should, be done about the current situation. A few districts, he said, had made some attempt to delineate the proper use of standing orders, such as by limiting them to administrative matters and to temporary matters where it is difficult to keep up with changes, such as electronic filing procedures. He suggested that another approach would be to include basic principles in a local court rule and supplement them with a more detailed local practice manual.

Professor Capra pointed out that his preliminary report had set forth some suggestions as to the role that the Standing Committee might assume vis a vis standing orders. One possibility would be to initiate an effort akin to the local-rules project to inform the district courts of problems with their standing orders. But, he said, that course would require a massive undertaking. Another approach would be to focus only on those orders that conflict with a rule. Alternatively, the committee could list the topics that should be included in local rules and those that belong in standing orders. In addition, the committee might address best practices for local court web sites.

Members said that Professor Capra's report was excellent and could be very helpful to judges and courts. One suggested that the Judicial Conference should distribute the report to the courts and adopt a resolution on standing orders. Judge Levi added that the report was not likely to encounter much resistance because it does not tell courts what to do, but just recommends where information might be placed in rules or orders. He suggested that the report be presented at upcoming meetings of chief district judges and the district-judge representatives to the Judicial Conference. Finally, Judge Levi recommended that his successor as committee chair consider the best way to make use of the report.

REPORT ON SEALING CASES

Mr. Rabiej reported that the Executive Committee of the Judicial Conference had asked the rules committees, in consultation with other Conference committees, to address the request of the Court of Appeals for the Seventh Circuit that standards be developed for regulating and limiting the sealing of entire cases. He noted that there had been problems in a handful of courts regarding the docketing of sealed cases. The electronic dockets in those courts had indicated that no case existed, and gaps were left in the sequential case-numbering system. This led some to criticize the judiciary and accuse it of concealing cases. Corrective action has been taken, in that the electronic docket now states that a case has been filed, but sealed by order of the court.

Mr. Rabiej said that a complete solution to the problems of sealed cases may require a statute. Judge Levi decided to appoint a subcommittee, chaired by Judge Hartz and including members of other Conference committees, to study the matter and respond to the request of the Seventh Circuit. He said that a representative from each of the advisory committees should be included on the new subcommittee, as well as a representative from the Department of Justice.

NEXT COMMITTEE MEETING

The next meeting of the committee will be held on January 14-15, 2008, in Pasadena, California.

Respectfully submitted,

Peter G. McCabe,
Secretary

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ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

December 12, 2007

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Legislative Report*

Twenty-five bills were introduced in the 110th Congress that affect the Federal Rules of Practice, Procedure, and Evidence. A list of the relevant pending legislation is attached. Since the last Committee meeting, we have been focusing on the following matters:

Cameras in the Courtroom

United States Supreme Court. On January 22, 2007, Senator Arlen Specter (R-PA) introduced S. 344 (110th Cong., 1st Sess.) that would, among other things, amend title 28, United States Code, "[t]o permit the televising of Supreme Court proceedings." The legislation requires the Supreme Court to allow television coverage of all open sessions unless the Court decides, by a majority vote, that such coverage would violate a party's due process rights. The bill is similar to legislation approved by the Senate Judiciary Committee in the last Congress. Associate Justice Anthony Kennedy testified against televising Supreme Court proceedings at a hearing before the Senate Judiciary Committee on February 14, 2007. On December 6, 2007, the Senate Judiciary Committee voted, 11-7, in favor of the bill, but there was a technical violation of committee voting rules requiring approval by a majority of senators present and voting. To avoid a potential parliamentary dispute, the committee has scheduled another vote on December 13, 2007, to ratify the earlier vote.

On March 1, 2007, Representative Ted Poe (R-TX 2nd) introduced H.R. 1299 (110th Cong., 1st Sess.), which is identical to S. 344. The bill was referred to the House Judiciary Committee. There has been no further action on the legislation.

Federal Appellate and District Courts. On May 3, 2007, Representative Steve Chabot (R-OH) introduced the "Sunshine in the Courtroom Act of 2007" (H.R. 2128 110th Cong., 1st Sess.), which provides discretion to the presiding judge of a federal appellate or district court to permit the photographing, recording, or televising of court proceedings over which he or she presides. At the House Judiciary Committee markup session on October 24, 2007, three sets of amendments were adopted by voice vote. The first set of amendments: (1) barred interlocutory appeals of decisions to permit, deny, or terminate electronic media coverage; (2) expanded the

current bar of "televising" jurors to include the other forms of electronic media coverage identified elsewhere in the bill; and (3) barred electronic media coverage of the jury selection process. The second set of amendments gave the presiding judge "discretion to promulgate rules and disciplinary measures for the courtroom use of any form of media or media equipment and the acquisition or distribution of any of the images or sounds obtained in the courtroom." They also gave the presiding judge the discretion to require written acknowledgment of the rules by anyone before being allowed to acquire any images or sounds from the courtroom. The third set of amendments deleted from the bill the description of any guidelines promulgated by the Judicial Conference as being "advisory" and struck the language indicating that presiding judges may, "at the discretion of that judge," refer to the Conference guidelines. The House Judiciary Committee approved the legislation, as amended, by a vote of 17 to 11.

On January 22, 2007, Senator Charles Grassley (R-IA) introduced the "Sunshine in the Courtroom Act of 2007" (S. 352, 110th Cong., 1st Sess.), which is identical to H.R. 2128 and similar to legislation approved by the Senate Judiciary Committee in the last Congress. On December 6, 2007, the committee held a mark-up session on S. 352 and adopted some but not all of the changes which had been previously adopted for H.R. 2128 at its markup. During the mark-up session, however, S. 352 was withdrawn from further consideration and held over, at the request of Senator Schumer (one of the bill's sponsors).

The Judicial Conference generally opposes cameras in the courtroom (see, e.g., JCUS-SEP 94, p. 46; JCUS-SEP 99, p. 48), but has authorized each court of appeals to decide for itself whether to permit the taking of photographs and allow radio and television coverage of oral argument. (JCUS-MAR 96, p. 17.) (The Second and Ninth Circuits allow broadcast coverage of their proceedings, upon approval of the presiding panel.) There is no provision governing televising of proceedings in the Civil Rules, but Criminal Rule 53 prohibits the use of cameras in criminal proceedings. On November 5, 2007, Secretary Duff sent a letter to the Senate Judiciary Committee on behalf of the Judicial Conference strongly opposing S. 352. (See attached.) The Department of Justice also sent a letter on October 30, 2007, strongly opposing the same bill. There has been no further action on H.R. 2128 or S. 352.

Journalists' Shield

On May 2, 2007, Representative Rick Boucher (D-VA) introduced the "Free Flow of Information Act of 2007" (H.R. 2102, 110th Cong., 1st Sess.). On September 10, 2007, Senator Arlen Specter (R-PA), joined by Senators Charles Schumer (D-NY) and Richard Lugar (R-IN), introduced the "Free Flow of Information Act of 2007" (S. 2035, 110th Cong., 1st Sess.). Both bills are similar and they are similar to legislation introduced in the 109th Congress. The legislation generally gives journalists a limited privilege to withhold the identity of a confidential informant or other confidential information. A journalist may be required to reveal the identity of a confidential informant or disclose confidential information if a court finds, by a preponderance of the evidence, that a "party seeking to compel production of such testimony or document has exhausted all reasonable alternative [sources] of the testimony or document" and

that "nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in gathering news and maintaining the free flow of information." In a criminal investigation or prosecution, there must also be reasonable grounds to believe a crime has occurred and the information is critical to the investigation, prosecution, or defense. In addition, the bills specify that the content of any compelled information must be limited to the purpose of verifying published information and be narrowly tailored to avoid compelling the production of peripheral information.

On August 1, 2007, the House Judiciary Committee marked up and passed H.R. 2102, as amended. The amended bill limits the scope of a journalist's privilege to withhold confidential information by: (1) requiring disclosure of information to prevent or identify the perpetrator of a terrorist attack or harm to national security; (2) requiring disclosure of the identity of a person involved in leaking properly classified information; and (3) authorizing law enforcement officers to seek a court order compelling production of documents and information obtained as the result of eyewitness observations of alleged criminal or tortious conduct. The bill limits coverage to a person who "regularly" engages in the listed journalistic activities and includes exceptions to the definition of "covered person." The House passed the legislation by a vote of 398-21 on October 16, 2007.

On October 4, 2007, the Senate Judiciary Committee passed S. 2035 by a vote of 15-2. There has been no further action on the legislation.

Bail Bonds

On May 10, 2007, Representative Robert Wexler (D-FL) introduced the "Bail Bond Fairness Act of 2007" (H.R. 2286, 110th Cong., 1st Sess.). The bill is similar to legislation introduced in the 108th Congress and several previous Congressional sessions. Among other things, H.R. 2286 amends Criminal Rule 46(f)(1) by limiting the authority of a court to declare bail forfeited. (Criminal Rule 46(f)(1) provides that the court must declare bail forfeited if a person breached a condition of the bail bond.) H.R. 2286 amends the rule to limit the court's authority to declare bail forfeited only when the person actually fails to appear physically before a court as ordered, and not when the person violates some other collateral condition of release. The House passed the bill by voice vote on June 26, 2007. There has been no further action on the legislation.

Evidence Rule 804

On January 31, 2007, Senator Dianne Feinstein (D-CA) introduced the "Gang Abatement and Prevention Act of 2007" (S. 456, 110th Cong., 1st Sess.). Section 205 directs the Judicial Conference to study the necessity and desirability of amending Evidence Rule 804(b) to allow the admission into evidence of a statement of a witness who is unavailable to testify due to a

party's wrongdoing. The Senate Judiciary Committee passed the bill with amendments on June 14, 2007, and the legislation was passed by the Senate on September 21, 2007. The bill was received in the House and referred to the Committees on the Judiciary, Energy and Commerce, and Education and Labor. There has been no further action on S. 456.

Other Developments of Interest

Report to Congress on "Harm to Child" Exception. At its September 2007 session, the Judicial Conference adopted the Rules Committees' "Report on the Necessity and Desirability of Amending the Federal Rules of Evidence to Codify a 'Harm to Child' Exception to the Marital Privileges." The report was prepared in response to the *Adam Walsh Child Protection and Safety Act of 2006* (Pub. L. No. 109-248), which directed the Rules Committees to study the desirability of amending the Evidence Rules to "provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime" against a child. The report was transmitted to Congress on September 18, 2007. (See attached.)

Privilege Waiver. Also at its September 2007 session, the Judicial Conference approved proposed new Evidence Rule 502 on waiver of attorney-client privilege and work-product protection. Because the Rules Enabling Act requires that an evidentiary privilege must be enacted by an affirmative act of Congress, the Conference transmitted the proposed rule to the House and Senate Judiciary Committees on September 26, 2007, with a recommendation that it be enacted according to law. (*See supra* section 1-C of the agenda book.) A slightly revised committee note clarifying the intent of the rule was transmitted to Congress in late November 2007. (See attached.) On December 11, 2007, Senator Patrick Leahy (D-VT) introduced legislation to enact proposed Evidence Rule 502 (S. 2450, 110th Cong., 1st Sess.), which is identical to the proposed rule approved by the Conference in September. (See attached.)

James N. Ishida

Attachments

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

November 5, 2007

Honorable Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Honorable Arlen Specter
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC

Dear Mr. Chairman and Senator Specter:

The Judicial Conference of the United States strongly opposes the "Sunshine in the Courtroom Act of 2007," S. 352 (110th Cong.), because it would allow for the use of cameras in federal trial courts. This legislation, if enacted, has the potential to impair substantially the fundamental right of citizens to a fair trial, while undermining court security and the safety of trial participants, including judges. The Judicial Conference also opposes the legislation because it would allow for the use of cameras in all courts of appeals, rather than allowing that decision to be made first by each court of appeals, as is the present practice. I am providing these views and the following explanation to you on behalf of the Judicial Conference, the policy-making body for the Federal Judiciary.

The Judicial Conference's policy opposing the use of cameras in the federal trial courts is the result of decades of experience and study. Indeed, the Conference has studied and considered the issue in a number of different situations and contexts –

including a pilot project – and has determined that the presence of cameras in the federal trial courts is not in the best interests of justice.

Federal judges are charged with safeguarding each citizen's right to a fair and impartial trial. It is this right to a fair trial that is the crucial difference between the use of cameras in a trial court versus their present use in many legislative, administrative, or ceremonial proceedings. Thus, the paramount question in determining whether cameras should be used in federal courts should not be whether more openness would be enjoyed by the public and media, but whether the presence of cameras has the potential to deprive each citizen of his or her ability to have a claim or right fairly resolved in United States district courts. And, while the legislation provides for a judge's discretion to deny the use of cameras, the Judicial Conference believes it unwise to allow for the possibility that camera coverage of trial court proceedings could compromise a citizen's right to a fair trial, and this might not be evident until the televised trial was underway. Therefore, the Judicial Conference strongly opposes any legislation that would allow cameras in the federal trial courts.

The ways in which cameras can interfere with a fair trial are numerous. First, the broadcasting of proceedings can affect the way trial participants behave. On the one hand, it could produce an intimidating effect on litigants, witnesses, and jurors, many of whom have no direct connection to the proceeding and are involved in it through no action of their own. Witnesses might refuse to testify or alter their stories when they do testify if they fear retribution by someone who may be watching the broadcast. Although the present version of the Sunshine in the Courtroom Act prohibits the "televising" of any juror, photographs of jurors could be published in print media, such as newspapers and magazines, as well as on the Internet. Jurors might purposely answer *voir dire* questions with the intention of being removed from the jury pool. On the other hand, participants in the proceeding might change their behavior in ways to become more dramatic, to pontificate about their personal views, to promote commercial interests to a national audience, or to lengthen their appearance on camera. Such grandstanding would be disruptive to the proceedings. As a result, the Federal Judiciary is very concerned that the effect of cameras in the courtroom on participants could profoundly and negatively impact the trial process, thereby possibly interfering with a fair trial.

Whether or not participants in the proceeding change their behavior as a result of the presence of cameras, security and safety issues also arise. For judges and court employees, such as court reporters, courtroom deputies, and perhaps law clerks, showing

their image in the broadcast would allow them to be more easily identified, thereby making them easier targets for either attempts to influence the outcome of the matter or retribution for an unpopular court ruling. Threats against judges, lawyers, and other participants could increase. Similar security concerns are created for law enforcement personnel present in the courtroom, including U.S. marshals and U.S. attorneys and their staffs.

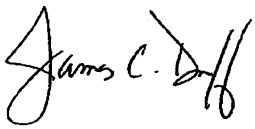
Moreover, camera coverage could create privacy concerns for many individuals involved in the trial, such as jurors, witnesses, and victims, some of whom are, at best, tangentially related to the case, but about whom very personal and identifying information may be revealed. For example, efforts to discredit a witness frequently involve the revelation of embarrassing personal information. It is one thing to have embarrassing facts or accusations aired in a courtroom; it is another entirely to have them aired on television with additional possibility of taping and replication. This concern can have a material effect on a witness's testimony or on his or her willingness to testify at all.

If camera coverage is permitted, it could become a potent negotiating tactic in pretrial settlement discussions. Parties may choose not to exercise their right to trial because of concerns regarding possible camera coverage. For example, allowing cameras could cause a "chilling effect" on civil rights litigation, since plaintiffs who have suffered sex or age discrimination may simply decide not to file suit if they learn that they may have to relive the incident and have that description broadcast to the public. Or, parties litigating over medical issues (like those caused by exposure to asbestos) may not wish to reveal their personal medical history and conditions to a broad audience.

Regarding the courts of appeals, the Judicial Conference has taken a different view. Because an appellate proceeding does not involve witnesses and jurors, the reasons for the Conference's strong opposition to cameras in the trial courts do not generally apply or are diminished. Therefore, 11 years ago, the Conference adopted the position that each court of appeals may decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments, subject to any restrictions in statutes, national and local rules, and such guidelines as the Conference may adopt. By allowing the individual courts of appeals to determine whether cameras will be allowed at their proceedings – rather than leaving the decision up to the presiding judge of each appellate panel as the bill proposes – litigants within each circuit are treated in a consistent and deliberate manner. Further, this approach avoids a piecemeal and *ad-hoc* resolution of the issue among the various panels convened within a court of appeals.

For these reasons, the Judicial Conference of the United States strongly opposes legislation that allows the use of cameras in the federal trial courts and that allows the use of cameras in all courts of appeals instead of deferring to individual appellate courts on such use. Thank you for the opportunity to provide the position of the Judicial Conference on this legislation, which raises an issue of vital importance to the Judiciary. Please do not hesitate to contact me if you have any questions or concerns regarding this matter.

Sincerely,



James C. Duff
Secretary

cc: Members of the Senate Judiciary Committee

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

September 18, 2007

Honorable Nancy Pelosi
Speaker
United States House of Representatives
H-232 United States Capitol Building
Washington, DC 20515

Dear Madam Speaker:

On behalf of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, I am pleased to transmit to you the *Report on the Necessity and Desirability of Amending the Federal Rules of Evidence to Codify a "Harm to Child" Exception to the Marital Privileges.*

The report is submitted to your committee consistent with § 214 of the Adam Walsh Child Protection and Safety Act of 2006 (Pub. L. No. 109-248). The legislation directed the rules committee to study the desirability of amending the Federal Rules of Evidence to "provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime" against a child. After extensive consideration and deliberation, the rules committee concluded that it is neither necessary nor desirable to amend the Evidence Rules to implement a harm to child exception to either of the marital privileges. The enclosed report contains the rules committee's findings and recommendations.

Sincerely,

James C. Duff
Secretary

Enclosure

cc: Honorable Steny H. Hoyer
Honorable John A. Boehner
Honorable John Conyers, Jr.
Honorable Lamar Smith

Report on the Necessity and Desirability of Amending the Federal Rules of Evidence to Codify a "Harm to Child" Exception to the Marital Privileges

PREPARED FOR THE
U.S. SENATE AND HOUSE OF REPRESENTATIVES

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

June 2007

Report on the Necessity and Desirability of Amending the Federal Rules of Evidence to Codify a "Harm to Child" Exception to the Marital Privileges

Judicial Conference Committee on Rules of Practice and Procedure

June 15, 2007

Introduction

Public Law No. 109-248, the Adam Walsh Child Protection and Safety Act of 2006, was signed into law on July 27, 2006. Section 214 of the Act provides:

> The Committee on Rules, Practice, Procedure, and Evidence of the Judicial Conference of the United States shall study the necessity and desirability of amending the Federal Rules of Evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against--
>
> (1) a child of either spouse; or
>
> (2) a child under the custody or control of either spouse.

* * *

This report of the Judicial Conference Committee on Rules of Practice and Procedure ("the Rules Committee") is in response to the Section 214 directive. The Advisory Committee on Evidence Rules ("the Advisory Committee") has conducted a thorough inquiry of the existing case law on the exceptions to the marital privileges that apply when a defendant is charged with harm to a child (the "harm to child" exception). The Advisory Committee has also reviewed the pertinent literature and considered the policy arguments both in favor and against a harm to child exception; and it has relied on its experience in preparing and proposing amendments to the Federal Rules of Evidence. The Advisory Committee has concluded — after extensive consideration and deliberation — that it is neither necessary nor desirable to amend the Evidence Rules to implement a harm to child exception to either of the marital privileges. The Rules Committee has reviewed the Advisory Committee's work on this subject and agrees with the Advisory Committee's conclusion.

This Report explains the conclusions reached by the Rules Committee and the Advisory Committee. It is divided into three parts. Part I discusses the Federal case law on the harm to child exception to the marital privileges. Part II discusses whether the costs of amending the Federal Rules of Evidence are justified by any benefits of codifying the harm to child exception; it concludes that the costs substantially outweigh the benefits. Part III sets forth suggested language for an amendment, should Congress nonetheless decide that it is necessary and desirable to amend the Federal Rules of Evidence to codify a harm to child exception to the marital privileges.

I. Federal Case Law on the Harm to Child Exception

Basic Principles

There are two separate marital privileges under Federal common law: 1) the adverse testimonial privilege, under which a witness has the right to refuse to provide testimony that is adverse to a spouse; and 2) the marital privilege for confidential communications, under which confidential communications between spouses are excluded from trial. The rationale for the adverse testimonial privilege is that it is necessary to preserve the harmony of marriages that exist at the time the testimony is demanded. The adverse testimonial privilege is held by the witness-spouse, not by the accused; the witness-spouse is free to testify against the accused but cannot be compelled to do so. *See Trammel v. United States,* 445 U.S. 40 (1980). The rationale of the confidential communications privilege is to promote the marital relationship at the time of the communication. The confidential communications privilege is held by both parties to the confidence. Thus, an accused can invoke the privilege to protect marital confidences even if the witness-spouse wishes to disclose them. *See United States v. Montgomery,* 384 F.3d 1050 (9th Cir. 2004).

These marital privileges are not codified in the Federal Rules of Evidence; they have been developed under the Federal common law, which establishes rules of privilege in cases in which Federal law provides the rule of decision. *See* Fed.R.Evid. 501.

The question posed by the Adam Walsh Child Protection Act is whether the Evidence Rules should be amended to codify an exception, under which information otherwise protected by either of the marital privileges would be admissible in a federal criminal case in which a spouse is charged with a crime against a child of either spouse or under the custody or control of either spouse. If such an exception were implemented, the following would occur in cases in which the defendant is charged with such a crime: 1) a spouse could be compelled, on pain of contempt, to testify against the defendant; and 2) a confidential communication made by an accused to a spouse would be disclosed by the witness over the accused's objection.

Case Rejecting the Harm to Child Exception to the Adverse Testimony Privilege

There is only one reported case in which a Federal court has upheld a claim of marital privilege in a prosecution involving a crime against a child under the care of one of the spouses. In *United States v. Jarvison,* 409 F.3d 1221 (10th Cir. 2005), the accused was charged with sexually abusing his granddaughter. The principal issue in the case was the validity of the defendant's marriage to a witness who had refused to testify based upon the privilege protecting a witness from being compelled to testify against a spouse. After holding that the marriage was valid, the court refused to apply a harm to child exception to the adverse testimonial privilege, and upheld the witness's privilege claim. The entirety of the court's analysis of the harm to child exception is as follows:

> The government invites us to create a new exception to the spousal testimonial privilege akin to that we recognized in *United States v. Bahe,* 128 F.3d 1440 (10th Cir.1997). In *Bahe,* we recognized an exception to the marital communications privilege for voluntary spousal testimony relating to child abuse within the household. Federal courts recognize two marital privileges: the first is the testimonial privilege which permits one spouse to decline to testify against the other during marriage; the second is the marital confidential communications privilege, which either spouse may assert to prevent the other from testifying to confidential communications made during marriage. *See Trammel,* 445 U.S. at 44-46, 100 S.Ct. 906; *Bahe,* 128 F.3d at 1442; *see also Jaffee v. Redmond,* 518 U.S. 1, 11, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996) (recognizing justification of marital testimonial privilege as modified by *Trammel* because it "furthers the important public interest in marital harmony"). In order to accept the government's invitation, we would be required not only to create an exception to the spousal testimonial privilege in cases of child abuse, but also to create an exception—not currently recognized by any federal court—allowing a court to compel adverse spousal testimony.

409 F.3d at 1231.

The court in *Jarvison* notes that its circuit had recognized a harm to child exception to the marital communications privilege in *United States v. Bahe,* 128 F.3d 1440, 1445-46 (10th Cir. 1997). The court in *Bahe* applied that exception to allow admission of the defendant's confidential statements to his wife concerning the abuse of an eleven-year-old relative. The *Jarvison* court made no attempt to explain why a harm to child exception should apply to the marital confidential communications privilege, but not to the adverse testimonial privilege.

It is notable that the court in *Jarvison* did not cite relatively recent authority from its own circuit that applied the harm to child exception to the adverse testimonial privilege – the precise privilege involved in *Jarvison*. In *United States v. Castillo,* 140 F.3d 874 (10th Cir. 1998), the court, without discussing its reasons, applied *Bahe* and found no error when the defendant's wife testified against him in a case involving abuse of the couples' daughters. The defendant argued that his wife should have been told she had a privilege not to testify against him. But the court found that no warning was required because the defendant was charged with harm to a child of the marriage, and therefore the spouse had no adverse testimonial privilege to assert. For purposes of the harm to child exception, the *Castillo* court made no distinction between the adverse testimonial privilege and the confidential communications privilege.

It should also be noted that the *Jarvison* court implied more broadly that no Federal court had ever applied an exception that would compel adverse spousal testimony. In fact at least one Federal court has upheld an order compelling a witness to provide adverse testimony against a spouse. *See, e.g., United States v. Clark,* 712 F.2d 299 (7th Cir. 1983) (affirming a judgment of criminal contempt against a witness for refusing to testify against his spouse; holding that privilege could not be invoked to prevent testimony about acts that occurred before the marriage).

Cases Recognizing Harm to Child Exception

All of the other federal cases dealing with the harm to child exception — admittedly limited in number — have applied it to both the adverse testimonial privilege and the confidential communications privilege.

Marital Communications Privilege

In *United States v. White,* 974 F.2d 1135, 1137-38 (9th Cir. 1992) the court permitted the defendant's wife to testify to a threat made to her by the defendant that he would kill both her daughter and her. The defendant was accused of killing his two-year-old stepdaughter, his wife's natural daughter. The court found that the marital communications privilege did not apply to the defendant's communication. The court stated:

> The public policy interests in protecting the integrity of marriages and ensuring that spouses freely communicate with one another underlie the marital communications privilege. *See Untied States v. Roberson,* 859 F.2d 1376, 1370 (9th Cir. 1988). When balancing these interests we find that threats against spouses and a spouse's children do not further the purposes of the privilege and that the public interest in the administration of justice outweighs any possible purpose the privilege serve [sic] in such a case. . . . [T]he marital communications privilege should not apply to statements relating to a crime where a spouse of a spouse's children are the victims.

974 F.2d at 1138.

In *Bahe, supra,* the court relied upon the reasoning in *White* to apply a harm to child exception to the marital communications privilege. It noted as follows:

> Child abuse is a horrendous crime. It generally occurs in the home. . . and is often covered up by the innocence of small children and by threats against disclosure. It would be unconscionable to permit a privilege grounded on promoting communications of trust and love between marriage partners to prevent a properly outraged spouse with knowledge from testifying against the perpetrator of such a crime.

138 F.3d at 1446.

The court also noted the strong state court authority, both in case law and by statute, for a harm to child exception to both of the marital privileges.

Similarly, in *United States v. Martinez,* 44 F. Supp. 2d 835 (W.D. Tex. 1999), the court held that the marital communications privilege was not applicable in a prosecution against a mother charged with abusing her minor sons. The court stated:

> Children, especially those of tender years who cannot defend themselves or complain, are vulnerable to abuse. Society has a stronger interest in protecting such children than in preserving marital autonomy and privacy. 25 Wright & Graham, Federal Practice and Procedure § 5593 at 762 (1989). "A contrary rule would make children a target population within the marital enclave." *Id.* at 761. *See also* 2 Louisell & Mueller, Federal Evidence, at 886 (1985). Society rightly values strong, trusting, and harmonious marriages. Yet, a strong marriage is more than the husband and wife, and it is more than merely an arrangement where spouses may communicate freely in confidence. A strong marriage also exists to nurture and protect its children. When children are abused at the hands of a parent, any rationale for protecting marital communications from disclosure must yield to those children who are the voiceless and powerless in any family unit.
>
> The Court has made a thorough search of the law in this circuit and has found no authority that would preclude this exception to the communications privilege in the context of a child abuse case. Nor has the Court found any law in our nation's jurisprudence that would extend the privilege under these circumstances. * * *
>
> The Court therefore concludes that in a case where one spouse is accused of abusing minor children, society's interest in the administration of justice far outweighs its interest in protecting whatever harmony or trust may at that point still remain in the marital relationship. "Reason and experience" dictate that the marital communications privilege should not apply to statements relating to a crime where the victim is a minor child.

44 F. Supp. 2d at 837.

Adverse Testimonial Privilege

In *United States v. Allery,* 526 F.2d 1362 (8th Cir. 1975), the court held that the adverse testimonial privilege was not available because the defendant was charged with the attempted rape of his twelve-year-old daughter. The court declared as follows:

> We recognize that the general policy behind the husband-wife privilege of fostering family peace retains vitality today as it did when it was first created. But, we also note that a serious crime against a child is an offense against that family harmony and to society as well.
>
> Second, we note the necessity for parental testimony in prosecutions for child abuse. It is estimated that over ninety percent of reported child abuse cases occurred in the home, with a parent or parent substitute the perpetrator in eighty-seven and one-tenth percent of these cases. Evidentiary Problems in Criminal Child Abuse Prosecutions, 63 Geo. L. J. 257, 258 (1974).

526 F.2d at 1366.

In addition, as discussed above, the Tenth Circuit in *United States v. Castillo,* 140 F.3d 874 (10th Cir. 1998), found that the adverse testimonial privilege was not applicable in a prosecution against a defendant for the abuse of his children.

Summary on Federal Case Law

The federal cases generally establish a harm to child exception for both marital privileges. The only case to the contrary refuses to apply the exception to the adverse testimonial privilege. But that case, *Jarvison*, is dubious on a number of grounds:

1. Its analysis is perfunctory.

2. It fails to draw any reasoned distinction between a harm to child exception to the marital communications privilege (which it recognizes) and a harm to child exception to the adverse testimonial privilege (which it does not recognize).

3. It is contrary to a prior case in its own circuit that applied the harm to child exception to the adverse testimonial privilege.

4. Its rationale for refusing to establish the exception to the adverse testimonial privilege is that no federal court had yet established it. But the court ignored the fact that the exception had already been established not only by a court in its own circuit but also by the Eighth Circuit in *Allery*.

5. Its assertion that no federal court had ever compelled a witness to testify against a spouse is incorrect.

II. The "Necessity and Desirability" of Amending the Federal Rules of Evidence to Include a Harm to Child Exception to the Marital Privileges.

A. General Criteria for Proposing an Amendment to the Evidence Rules

The Rules Committee and the Advisory Committee have long taken the position that amendments to the Evidence Rules should not be proposed unless 1) there is a critical problem in the application of the existing rules, and 2) an amendment would correct that problem without creating others. Amendments to the Evidence Rules come with a cost. The Evidence Rules are based on a shared understanding of lawyers and judges; they are often applied on a moment's notice as a trial is progressing. Most of the Evidence Rules have been developed by a substantial body of case law. Changes to the Evidence Rules upset settled expectations and can lead to inefficiency and confusion in legal proceedings. Changes to the Evidence Rules may also create a trap for unwary lawyers who might not keep track of the latest amendments. Moreover, a change might result in unintended consequences that could lead to new problems, necessitating further amendments.

Generally speaking, amendments to the Evidence Rules have been proposed only when at least one of three criteria is found:

1) there is a split in the circuits about the meaning of the Rule, and that split has existed for such a long time that it appears that the Supreme Court will not rectify it;

2) the existing rule is simply unworkable for courts and litigants; or

3) the rule is subject to an unconstitutional application.

B. Application of Amendment Criteria to Proposed Harm to Child Exception

Under the accepted criteria for proposing an amendment to the Evidence Rules, set forth above, there is only one reason that could possibly support an amendment proposing a harm to child exception to the marital privileges: a split in the circuits. The current common law approach is workable, in the sense of being fairly easily applied to any set of facts; if there is an exception, it applies fairly straightforwardly, and if there is no exception, there is no issue of application, because the privilege would apply. Nor is the current state of the common law subject to unconstitutional application, as there appears to be no constitutional issue at stake in the application of a harm to child exception to the marital privileges. So the split in the courts is the only legitimate traditional basis for proposing an amendment to codify a harm to child exception to the marital privileges.

But the split in the courts over the harm to child exception, discussed above, is different from the usual split that supports a proposal to amend an Evidence Rule. Two recent amendments are instructive for comparison. The amendment to Evidence Rule 408, effective December 1, 2006, was necessitated because the circuits were split over the admissibility of civil compromise evidence in a subsequent criminal case. The admissibility of civil compromise evidence in a subsequent criminal prosecution is a question that arises quite frequently, given the often parallel tracks of civil and criminal suits concerning the same misconduct. The circuits were basically evenly split on the question, and ten circuits had written decisions on the subject; it was not just one outlying case creating the conflict. Moreover, the proper resolution of the admissibility of compromise evidence in criminal prosecutions was one on which reasonable minds could differ. The disagreement was close on the merits and it was unlikely that any circuit would re-evaluate the question and reverse its course. Finally, the dispute among the circuits was at least 15 years old, so it appeared that the Supreme Court was unlikely to intervene as it had not already done so.

The amendment to Evidence Rule 609, effective December 1, 2006, was similar. The circuits disagreed on whether a trial court could go behind a conviction and review its underlying facts to determine whether the crime involved dishonesty or false statement, and thus was automatically admissible under Rule 609(a)(2). Every circuit had weighed in, and there was a reasonable disagreement on the question. Again, the disputed question was one that arose frequently in federal litigation, and the dispute was at least 10 years old.

In contrast, the split among the circuits over the harm to child exception is not deep; it is not wide; it is not longstanding; the issue arises only rarely in Federal courts; and the dispute is not one in which courts on both sides have reached a considered resolution after reasonable argument.

It is notable that there is no disagreement at all about the applicability of the harm to child exception to the marital privilege for *confidential communications*. All of the reported federal court cases have agreed with and applied this exception. So there is no conflict to rectify, and accordingly there would appear to be no need to undertake the costs of amendment the Evidence Rules to codify a harm to child exception to the confidential communications privilege.

As to the adverse testimonial privilege, there is a conflict, but it is not a reasoned one. As discussed above, the court in *Jarvison* created this conflict without actually analyzing the issue; without proffering a reasonable distinction between the two marital privileges insofar as the harm to child exception applies; and without citing or recognizing two previous cases with the opposite result, including a case in its own circuit. Indeed it can be argued that there is no conflict at all, because a court in the Tenth Circuit after *Jarvison* is bound to follow not *Jarvison* but its previous precedent, *Castillo*, which applied a harm to child exception to the adverse testimonial privilege.

In sum, an amendment providing for a harm to child exception to the marital privileges does not rise to the level of necessity that traditionally has justified an amendment to the Evidence Rules.

C. Other Problems That Might Be Encountered In Proposing an Amendment Adding a Harm to Child Exception

Beyond the fact that an amendment establishing a harm to child exception does not fit the ordinary criteria for Evidence Rules amendments, there are other problems that are likely to arise in the enactment of such an amendment.

1. Questions of Scope of the Harm to Child Exception

Drafting a harm to child exception will raise a number of knotty questions concerning its scope. The most difficult question of scope is determining which children would trigger the exception. Questions include whether the exception should cover harm to stepchildren, foster-children, and grandchildren. Strong arguments can be made that the exception should cover harm to children who are not related to the defendant or the witness, but who are within the custody or control of either spouse. But the term "custody or control" may raise questions of application that need to be considered, because it can be argued that a child was by definition within the defendant's custody or control when victimized by the defendant.

Another difficult question of scope is whether the harm to child exception should cover crimes against children older than a certain age. If a judgment is made that the exception should not be so broad as to cover, say, a father defrauding his adult son in a business transaction, then the question will be where to draw the line — adulthood, 16 years of age, etc.

Another question of scope is whether the harm to child exception should apply to *any* crime against a child. Certainly some crimes are more serious than others and so consideration might need to be given to distinguishing between crimes that are serious enough to trigger the exception and crimes that are not. A possible dividing line would be between crimes of violence and crimes of a financial nature. But even if that distinction has merit, the dividing line would have to be drafted carefully.

As discussed above, there are only a few federal cases on the subject of the existence of a harm to child exception, and none of these decisions provide analysis of the scope of such an exception. State statutes and cases are not uniform on the scope of the exception; for example, some states do not apply the exception where the crime is against an adult, while others set the age at 16. Codifying the harm to child exception runs the risk that important policy decisions about the scope of the amendment will have to be made without substantial support in the case law, and without the benefit of empirical research. Without such foundations, it is possible that an amendment could create problems of application that could lead to the necessity of a further amendment and all its attendant costs.

2. Policy Questions in Adopting the Harm to Child Exception to the Adverse Testimonial Privilege

Besides these questions of scope, the harm to child exception raises difficult policy questions as applied to the adverse testimonial privilege. The adverse testimonial privilege is held by the witness-spouse; if there is an exception to that privilege, the spouse can be compelled to testify, and accordingly, can be imprisoned for refusing to testify. The harm to child exception would apply to cases in which the defendant-spouse is charged with intrafamilial abuse. In at least some cases, it is possible that the child is not the only victim of abuse at the hands of the defendant — the witness-spouse may be a victim as well. It is commonly estimated that such overlapping abuse occurs in 40-60% of domestic violence cases; for example, a national survey of 6,000 families revealed a 50% assault rate for children of battered mothers. M.A. Straus and R.J. Gelles, *Physical Violence in American Families* (1996). In such cases, if the victim of domestic abuse is compelled to testify, the witness may suffer a risk of further harm from the defendant for providing adverse testimony. Application of the harm to child exception could place the spouse in the difficult circumstances of choosing between physical harm at the hands of the accused and a jail sentence for contempt.

Another problem is that the witness-spouse may suffer a personal risk of incrimination in testifying, because the witness-spouse may be subject to criminal prosecution for neglect or complicity. See *State v. Burrell*, 160 S.W.3d 798 (Mo. 2005) (prosecution of mother for endangering her child by permitting the child to have contact with an abusive father). In such cases, the harm to child exception will not assure the witness's testimony, because the witness who is reluctant to testify can still invoke her Fifth Amendment privilege.

However these policy questions should be resolved, they raise difficult issues and would seem to counsel caution (and perhaps empirical research) before a harm to child exception to the

adverse testimonial privilege is codified. See generally Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions,* 109 Harv. L.Rev. 1849 (1996) (discussing the debate and research on whether forcing a victim of domestic abuse to testify against the abuser will be beneficial or detrimental to the victim).

3. Departure from the Common Law Approach to Privilege Development

Federal Rule of Evidence 501 provides that privileges "shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience." The Rule gives the federal courts the primary responsibility for developing evidentiary privileges. When the Federal Rules were initially proposed, Congress rejected codification of the privileges, in favor of a common law, case-by-case approach. Given this background, it does not appear to be advisable to single out an exception to the marital privileges for legislative enactment. Amending the Federal Rules to codify such an exception would create an anomaly: that very specific, and rarely applicable, exception would be the only codified rule on privilege in the Federal Rules of Evidence. All of the other federally-recognized privileges would be grounded in the common law — including the very privilege to which there would be a codified exception. The Rules Committee and the Advisory Committee conclude that such an inconsistent, patchwork approach to federal privilege law is unnecessary and unwarranted, especially given the infrequency of cases involving a harm to child exception to the marital privileges. Granting special legislative treatment to one of the least-invoked exceptions in the federal courts is likely to result in confusion for both Bench and Bar.

The strongest argument for codifying an exception to a privilege is that the courts are in dispute about its existence or scope and this dispute is having a substantial effect on legal practice. But as stated above, any dispute in the courts about the existence of a harm to child exception is the result of a single case that is probably not controlling in its own circuit. Moreover, the application of the harm to child exception arises so infrequently that it can be argued that if a dispute exists, it does not justify this kind of special, piecemeal treatment.[1]

III. Draft Language for a Harm to Child Exception to the Marital Privileges

As stated above, the Rules Committee concludes that the benefits of codifying a harm to child exception to the marital privileges are substantially outweighed by the costs of such an amendment to the Federal Rules of Evidence. The Rules Committee recognizes, however, that there

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[1] The situation can be usefully contrasted with the proposed Rule 502 that has been approved by the Advisory Committee and is currently being considered by the Rules Committee. That rule is intended to protect litigants from some of the consequences of waiver of attorney-client privilege and work product that arise under federal common law. The Rules Committee has received widespread comment from the Bench and Bar that such protection is necessary in order to reduce the costs of pre-production privilege review in electronic discovery cases — dramatic costs that arise in almost every civil litigation. And federal courts are in dispute both on when waiver is to be found and on the scope of waiver.

are policy arguments supporting such an exception, and is sympathetic to the concern that the *Jarvison* case raises some doubt about whether there is a harm to child exception to the adverse testimonial privilege, at least in the Tenth Circuit. Accordingly, the Rules Committee has prepared language that could be used to codify a harm to child exception to the marital privileges, in the event that Congress determines that codification is necessary.

The draft language is as follows:

Rule 50_. Exception to Spousal Privileges When Accused is Charged With Harm to a Child

The spousal privileges recognized under Rule 501 do not apply in a prosecution for a crime [define crimes covered] committed against a [minor] child of either spouse, or a child under the custody or control of either spouse.

The draft language raises a number of questions on the scope of the harm to child exception. Those questions include:

1) Should the exception apply to harm to adult children? The draft puts the term "minor" in brackets as a drafting option. Another option is to provide a different age limit, such as 16. The Rules Committee notes that some state codifications limit the exception to harm to children of a certain age. *See, e.g.,* Mich. Comp. Law. Ann. § 600.2162 (18 years of age). Other states provide no specific age limitation. *See, e.g.,* Wash.Rev.Code § 5.60.060(1) (no age limit for harm to child exception).

2) Should the exception cover harm to children who are not family members but are present in the household at the time of the injury? The draft language covers, for example, harm to children who are visiting the household, so long as they are within the custody or control of either spouse. The draft language also covers harm to step-children, foster-children, etc. The Rules Committee notes that the states generally apply the harm to child exception to cover cases involving harm to a child within the custody or control of either spouse. See, *e.g., Daniels v. State,* 681 P.2d 341 (Alaska 1984) (harm to child exception applied to foster-child); *Stevens v. State,* 806 So.2d. 1031 (Miss. 2001) (exception for crimes against children applied in case in which defendant charged with murder of unrelated children); *Meador v. State,* 711 P.2d 852 (Nev. 1985) (statute providing exception to spousal testimony privilege for child in "custody or control" covered children spending the night with defendant's daughters); *State v. Waleczek,* 585 P.2d 797 (Wash. 1978) (term "guardian" in statute included situation in which couple voluntarily assumed care of child even though no legal appointment as guardian). As discussed above, however, some consideration might be given to whether "custody or control" might be so broad as to cover harm to any child that is allegedly injured by an accused.

3) Should the exception be extended to crimes involving harm to the witness-spouse? The draft language does not cover such crimes, as the mandate from the Adam Walsh Child Protection and Safety Act was limited to the harm to child exception. The Rules Committee notes, however, that a number of states provide for statutory exceptions to the marital privileges that cover harm to spouses as well as harm to children. *See*, e.g., Colo. Rev. Stat. § 13-90-107 (exception to adverse testimonial privilege where the defendant is charged with a crime against the witness-spouse); Wis. Stat. § 905.05 (providing an exception to both marital privileges in proceedings in which "one spouse or former spouse is charged with a crime against the person or property of the other or of a child of either"). *See also United States v. White,* 974 F.2d 1135, 1137-38 (9th Cir. 1992) (confidential communications privilege did not apply because the defendant was charged with harming his spouse); Holmes, *Marital Privileges in the Criminal Context: The Need for a Victim-Spouse Exception in the Texas Rules of Criminal Evidence,* 28 Hous. L.Rev. 1095 (1991).

4) Should the exception cover all crimes against a child? The draft language contains a bracket if the decision is made to specify the crimes that trigger the exception.

Conclusion

The Rules Committee and the Advisory Committee conclude that it is neither necessary nor desirable to amend the Federal Rules of Evidence to codify a harm to child exception to the marital privileges. The substantial cost of promulgating an amendment to the Evidence Rules is not justified, given that Federal common law (which Congress has mandated as the basic source of Federal privilege law) already provides for a harm to child exception — but for a single decision that is probably not good authority within its own circuit. Codifying a harm to child exception would also raise difficult policy and drafting questions about the scope of such an exception — questions that will be difficult to answer without reference to the kind of particular fact situations that courts evaluate under a common-law approach.

110TH CONGRESS
1ST SESSION

S. 2450

To amend the Federal Rules of Evidence to address the waiver of the attorney-client privilege and the work product doctrine.

IN THE SENATE OF THE UNITED STATES

DECEMBER 11, 2007

Mr. LEAHY (for himself and Mr. SPECTER) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the Federal Rules of Evidence to address the waiver of the attorney-client privilege and the work product doctrine.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. ATTORNEY-CLIENT PRIVILEGE AND WORK**
4 **PRODUCT; LIMITATIONS ON WAIVER.**

5 (a) IN GENERAL.—Article V of the Federal Rules of
6 Evidence is amended by adding at the end the following:

7 **"Rule 502. Attorney-Client Privilege and Work Prod-**
8 **uct; Limitations on Waiver**

9 "The following provisions apply, in the circumstances
10 set out, to disclosure of a communication or information

1 covered by the attorney-client privilege or work-product
2 protection.
3 "(a) DISCLOSURE MADE IN A FEDERAL PRO-
4 CEEDING OR TO A FEDERAL OFFICE OR AGENCY; SCOPE
5 OF A WAIVER.—When the disclosure is made in a Federal
6 proceeding or to a Federal office or agency and waives
7 the attorney-client privilege or work-product protection,
8 the waiver extends to an undisclosed communication or in-
9 formation in a Federal or State proceeding only if:
10 "(1) the waiver is intentional;
11 "(2) the disclosed and undisclosed communica-
12 tions or information concern the same subject mat-
13 ter; and
14 "(3) they ought in fairness to be considered to-
15 gether.
16 "(b) INADVERTENT DISCLOSURE.—When made in a
17 Federal proceeding or to a Federal office or agency, the
18 disclosure does not operate as a waiver in a Federal or
19 State proceeding if:
20 "(1) the disclosure is inadvertent;
21 "(2) the holder of the privilege or protection
22 took reasonable steps to prevent disclosure; and
23 "(3) the holder promptly took reasonable steps
24 to rectify the error, including (if applicable) fol-
25 lowing Federal Rule of Civil Procedure 26(b)(5)(B).

1 "(c) DISCLOSURE MADE IN A STATE PROCEEDING.—
2 When the disclosure is made in a State proceeding and
3 is not the subject of a State-court order concerning waiver,
4 the disclosure does not operate as a waiver in a Federal
5 proceeding if the disclosure:
6 "(1) would not be a waiver under this rule if it
7 had been made in a Federal proceeding; or
8 "(2) is not a waiver under the law of the State
9 where the disclosure occurred.
10 "(d) CONTROLLING EFFECT OF A COURT ORDER.—
11 A Federal court may order that the privilege or protection
12 is not waived by disclosure connected with the litigation
13 pending before the court—in which event the disclosure
14 is also not a waiver in any other Federal or State pro-
15 ceeding.
16 "(e) CONTROLLING EFFECT OF A PARTY AGREE-
17 MENT.—An agreement on the effect of disclosure in a
18 Federal proceeding is binding only on the parties to the
19 agreement, unless it is incorporated into a court order.
20 "(f) CONTROLLING EFFECT OF THIS RULE.—Not-
21 withstanding Rules 101 and 1101, this rule applies to
22 State proceedings and to Federal court-annexed and Fed-
23 eral court-mandated arbitration proceedings, in the cir-
24 cumstances set out in the rule. And notwithstanding Rule

1 501, this rule applies even if State law provides the rule
2 of decision.
3 "(g) DEFINITIONS.—In this rule:
4 "(1) 'attorney-client privilege' means the pro-
5 tection that applicable law provides for confidential
6 attorney-client communications; and
7 "(2) 'work-product protection' means the pro-
8 tection that applicable law provides for tangible ma-
9 terial (or its intangible equivalent) prepared in an-
10 ticipation of litigation or for trial.".
11 (b) TECHNICAL AND CONFORMING CHANGES.—The
12 table of contents for the Federal Rules of Evidence is
13 amended by inserting after the item relating to rule 501
14 the following:

"502. Attorney-client privilege and work-product doctrine; limitations on waiver.".

15 (c) EFFECTIVE DATE.—The amendments made by
16 this Act shall apply in all proceedings commenced after
17 the date of enactment of this Act and, insofar as is just
18 and practicable, in all proceedings pending on such date
19 of enactment.

○

PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE*

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

1 The following provisions apply, in the circumstances set
2 out, to disclosure of a communication or information covered
3 by the attorney-client privilege or work-product protection.
4 **(a) Disclosure made in a federal proceeding or to a**
5 **federal office or agency; scope of a waiver.** — When the
6 disclosure is made in a federal proceeding or to a federal
7 office or agency and waives the attorney-client privilege or
8 work-product protection, the waiver extends to an
9 undisclosed communication or information in a federal or
10 state proceeding only if:
11 (1) the waiver is intentional;
12 (2) the disclosed and undisclosed communications
13 or information concern the same subject matter; and

*New material is underlined.

14 (3) they ought in fairness to be considered
15 together.
16 (b) **Inadvertent disclosure.** — When made in a federal
17 proceeding or to a federal office or agency, the disclosure
18 does not operate as a waiver in a federal or state proceeding
19 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 Fed. R.
25 Civ. P. 26(b)(5)(B).
26 (c) **Disclosure made in a state proceeding.** — When
27 the disclosure is made in a state proceeding and is not the
28 subject of a state-court order concerning waiver, the
29 disclosure does not operate as a waiver in a federal
30 proceeding if the disclosure:

31 (1) would not be a waiver under this rule if it had
32 been made in a federal proceeding; or
33 (2) is not a waiver under the law of the state where
34 the disclosure occurred.
35 (d) **Controlling effect of a court order.** — A federal
36 court may order that the privilege or protection is not waived
37 by disclosure connected with the litigation pending before the
38 court – in which event the disclosure is also not a waiver in
39 any other federal or state proceeding.
40 (e) **Controlling effect of a party agreement.** — An
41 agreement on the effect of disclosure in a federal proceeding
42 is binding only on the parties to the agreement, unless it is
43 incorporated into a court order.
44 (f) **Controlling effect of this rule.** — Notwithstanding
45 Rules 101 and 1101, this rule applies to state proceedings and
46 to federal court-annexed and federal court-mandated
47 arbitration proceedings, in the circumstances set out in the

48 rule. And notwithstanding Rule 501, this rule applies even if

49 state law provides the rule of decision.

50 **(g) Definitions.** — In this rule:

51 **(1)** "attorney-client privilege" means the

52 protection that applicable law provides for confidential

53 attorney-client communications; and

54 **(2)** "work-product protection" means the

55 protection that applicable law provides for tangible material

56 (or its intangible equivalent) prepared in anticipation of

57 litigation or for trial.

Explanatory Note on Evidence Rule 502
Prepared by the Judicial Conference
Advisory Committee on Evidence Rules
(Revised 11/28/2007)

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product — specifically those disputes involving inadvertent disclosure and subject matter waiver.

2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Hopson v. City of Baltimore,* 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation") .

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable. Moreover, if a federal court's confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.

The rule makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client privilege or work-product immunity as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.

The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See, e.g., Nguyen v. Excel Corp.,* 197 F.3d 200 (5th Cir.

1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burleson,* 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (a). The rule provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. *See* Rule 502(b). The rule rejects the result in *In re Sealed Case,* 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The language concerning subject matter waiver — "ought in fairness" — is taken from Rule 106, because the animating principle is the same. Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.

To assure protection and predictability, the rule provides that if a disclosure is made at the federal level, the federal rule on subject matter waiver governs subsequent state court determinations on the scope of the waiver by that disclosure.

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of a communication or information protected as privileged or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any inadvertent disclosure of a communication or information protected under the attorney-client privilege or as work product constitutes a waiver without regard to the protections taken to avoid such a disclosure. *See generally Hopson v. City of Baltimore,* 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver.

Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal. 1985), set out a multi-factor test for determining whether inadvertent disclosure is a waiver. The stated factors (none of which is dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the

overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken "reasonable steps" to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

The rule applies to inadvertent disclosures made to a federal office or agency, including but not limited to an office or agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of pre-production privilege review, can be as great with respect to disclosures to offices and agencies as they are in litigation.

Subdivision (c). Difficult questions can arise when 1) a disclosure of a communication or information protected by the attorney-client privilege or as work product is made in a state proceeding, 2) the communication or information is offered in a subsequent federal proceeding on the ground that the disclosure waived the privilege or protection, and 3) the state and federal laws are in conflict on the question of waiver. The Committee determined

that the proper solution for the federal court is to apply the law that is most protective of privilege and work product. If the state law is more protective (such as where the state law is that an inadvertent disclosure can never be a waiver), the holder of the privilege or protection may well have relied on that law when making the disclosure in the state proceeding. Moreover, applying a more restrictive federal law of waiver could impair the state objective of preserving the privilege or work-product protection for disclosures made in state proceedings. On the other hand, if the federal law is more protective, applying the state law of waiver to determine admissibility in federal court is likely to undermine the federal objective of limiting the costs of production.

The rule does not address the enforceability of a state court confidentiality order in a federal proceeding, as that question is covered both by statutory law and principles of federalism and comity. *See* 28 U.S.C. § 1738 (providing that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken"). *See also Tucker v. Ohtsu Tire & Rubber Co.,* 191 F.R.D. 495, 499 (D.Md. 2000) (noting that a federal court considering the enforceability of a state confidentiality order is "constrained by principles of comity, courtesy, and . . . federalism"). Thus, a state court order finding no waiver in connection with a disclosure made in a state court proceeding is enforceable under existing law in subsequent federal proceedings.

Subdivision (d). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely

to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the communications or information could be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case is enforceable in other proceedings. *See generally Hopson v. City of Baltimore,* 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law. The rule provides that when a confidentiality order governing the consequences of disclosure in that case is entered in a federal proceeding, its terms are enforceable against non-parties in any federal or state proceeding. For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of "claw-back" and "quick peek" arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product. *See Zubulake v. UBS Warburg LLC,* 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents"). The rule provides a party with a predictable protection from a court order — predictability that is needed to allow the party to plan in advance to limit the prohibitive costs of privilege and work product review and retention.

Under the rule, a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation. Party agreement should not be a condition of enforceability of a federal court's order.

Under subdivision (d), a federal court may order that disclosure of privileged or protected information "in connection with" a federal proceeding does not result in waiver. But subdivision

(d) does not allow the federal court to enter an order determining the waiver effects of a separate disclosure of the same information in other proceedings, state or federal. If a disclosure has been made in a state proceeding (and is not the subject of a state-court order on waiver), then subdivision (d) is inapplicable. Subdivision (c) would govern the federal court's determination whether the state-court disclosure waived the privilege or protection in the federal proceeding.

Subdivision (e). Subdivision (e) codifies the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure between or among them. Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection against non-parties from a finding of waiver by disclosure, the agreement must be made part of a court order.

Subdivision (f). The protections against waiver provided by Rule 502 must be applicable when protected communications or information disclosed in federal proceedings are subsequently offered in state proceedings. Otherwise the holders of protected communications and information, and their lawyers, could not rely on the protections provided by the Rule, and the goal of limiting costs in discovery would be substantially undermined. Rule 502(g) is intended to resolve any potential tension between the provisions of Rule 502 that apply to state proceedings and the possible limitations on the applicability of the Federal Rules of Evidence otherwise provided by Rules 101 and 1101.

The rule is intended to apply in all federal court proceedings, including court-annexed and court-ordered arbitrations, without regard to any possible limitations of Rules 101 and 1101. This provision is not intended to raise an inference about the applicability

of any other rule of evidence in arbitration proceedings more generally.

The costs of discovery can be equally high for state and federal causes of action, and the rule seeks to limit those costs in all federal proceedings, regardless of whether the claim arises under state or federal law. Accordingly, the rule applies to state law causes of action brought in federal court.

Subdivision (g). The rule's coverage is limited to attorney-client privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges, remains a question of federal common law. Nor does the rule purport to apply to the Fifth Amendment privilege against compelled self-incrimination.

The definition of work product "materials" is intended to include both tangible and intangible information. *See In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) ("work product protection extends to both tangible and intangible work product").

LEGISLATION AFFECTING THE FEDERAL RULES OF PRACTICE AND PROCEDURE[1]
110th Congress

SENATE BILLS

- S.186 - *Attorney-Client Privilege Protection Act of 2007*
  - Introduced by: Specter
  - Date Introduced: 1/4/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/4/07). Judiciary Committee held hearing (9/18/07).
  - Related Bills: H.R. 3013
  - Key Provisions:

    — Section 3 amends **18 U.S.C. Chapter 201** by adding a new § 3014 that prohibits a federal agent or attorney in a federal investigation, civil enforcement matter, or criminal proceeding from demanding from an organization attorney-client privilege or work product protection materials. Section 3 also prohibits the government from basing its decision to file a charging document in a civil or criminal case on whether: (1) the attorney-client privilege or work product protection is asserted; (2) the organization provides counsel or pay attorney's fees for counsel appointed to represent an employee of the organization; (3) the organization enters into a joint defense, information sharing, or common-interest agreement with an employee in an investigation or enforcement matter; (4) the sharing of information with an employee in relation to an investigation or enforcement matter involving that employee; and (5) the organization fails to terminate an employee because that employee invoked his or her fifth amendment right against self incrimination or other legal right in response to a government request. Section 3 also states that it does not prohibit an organization from voluntarily offering to share "internal investigation materials of such organization."

- S. 344 - *To Permit the Televising of Supreme Court Proceedings*
  - Introduced by: Specter
  - Date Introduced: 1/22/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/22/07). Judiciary Committee held hearing (2/14/07).
  - Related Bills: S. 352, H.R. 1299

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[1]The Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence for the federal courts, subject to the ultimate legislative right of the Congress to reject, modify, or defer any of the rules. The authority and procedures for promulgating rules are set forth in the Rules Enabling Act. 28 U.S.C. §§ 2071-2077.

• Key Provisions:

— Section 1 amends **Chapter 45, Title 28, U.S.C.**, requiring the Supreme Court to permit television coverage of all open sessions of the Court unless the Court decides, by a majority vote of all justices, that allowing such coverage in a particular case would violate the due process rights of one or more of the parties.

- S. 352 - *Sunshine in the Courtroom Act of 2007*
  - Introduced by: Grassley
  - Date Introduced: 1/22/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/22/07). Senate Judiciary Committee held hearing (2/14/07).
  - Related Bills: S. 344, H.R. 1299, HR 2128
  - Key Provisions:

— Section 2 authorizes the presiding judge of an appellate court to permit the photographing, electronic recording, broadcasting, or televising of any public proceeding over which the judge presides. The presiding judge, however, may not permit the above: (1) in a proceeding involving only the presiding judge if that judge determines that the action would violate the due process rights of any party, or (2) in a proceeding involving more than one judge, a majority of judges determines that the action would violate the due process rights of any party.

Section 2 also authorizes the presiding judge of a district court to permit the photographing, electronic recording, broadcasting, or televising of any public proceeding over which the judge presides. Upon request of any witness in a trial proceeding, the court must order that the face and voice of the witness be disguised. The presiding judge in a trial must inform each witness who is not a party that he or she has the right to request that his or her image or voice may be disguised. The presiding judge must not permit the televising of any juror in a trial.

The Judicial Conference may issue advisory guidelines on the broadcast of court proceedings.

Section 2 contains a sunset provision that terminates the authority of a district court judge to allow the broadcast of district court proceedings three years after enactment of the Act.

- S. 456 - *Gang Abatement and Prevention Act of 2007*
  - Introduced by: Feinstein
  - Date Introduced: 1/31/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/31/07). Hearing held (6/5/07). Committee reported favorably with amendments (6/14/07). Reported with amendment in nature of substitute (7/30/07). Passed the Senate (9/21/07).

Referred to the House Judiciary, Energy and Commerce, and Education and Labor Committees (9/24/07). Referred to the House Subcommittee on Healthy Families and Communities (10/17/07).

- Related Bills: S. 990, S. 2237, H.R. 880, H.R. 1582, H.R. 1692, H.R. 3547
- Key Provisions:

  — Section 205 directs the Standing and Evidence Rules Committee to consider "the necessity and desirability of amending section 804(b) of the Federal Rules of Evidence to permit the introduction of statements against a party by a witness who has been made unavailable where it is reasonably foreseeable by that party that wrongdoing would make the declarant unavailable."

- S. 990 - *Fighting Gangs and Empowering Youth Act of 2007*
  - Introduced by: Menendez
  - Date Introduced: 3/26/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (3/26/07).
  - Related Bills: S. 456, S. 2237, H.R. 880, H.R. 1582, H.R. 1692, H.R. 3547
  - Key Provisions:

    — Section 310 amends **Evidence Rule 804(b)(6)** by providing that a "[a] statement offered against a party that has engaged, acquiesced, or conspired, in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

- S. 1267 - *Free Flow of Information Act of 2007*
  - Introduced by: Lugar
  - Date Introduced: 5/2/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (5/2/07).
  - Related Bills: H.R. 2102, S. 2035
  - Key Provisions:

    — Section 2 provides that a federal entity may not compel a "covered person" to testify or produce documents in any proceeding unless a court determines by a preponderance of the evidence that: (1) the party seeking the information has exhausted all reasonable alternative sources for the information; (2) in a criminal matter, there are reasonable grounds to believe that a crime has occurred and that the testimony or document sought is essential to the investigation, prosecution, or defense; (3) in a non-criminal matter, the testimony or document sought is essential to the successful completion of that matter; (4) in any matter in which the testimony or document sought could reveal the source's identity, disclosure is necessary to: (a) prevent imminent and substantial harm to national security, (b) prevent imminent death or significant bodily injury, or (c) determine who has disclosed a trade secret of significant value in violation of state or federal law, individually identifiable health information, or nonpublic personal information of any consumer in violation of federal law; and (5) nondisclosure of the information be contrary to public interest. Section 2 also requires that compelled disclosure of testimony or documents be limited and narrowly drawn.

- S. 1749 - *Crime Victims' Rights Rules Act of 2007*
  - Introduced by: Kyl
  - Date Introduced: 6/29/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (6/29/07).
  - Related Bills: None.
  - Key Provisions:

    — Section 1 expressed the sense of Congress that the Chief Justice should appoint at least one member on the Committee of Rules of Practice and Procedure and the Advisory Committee on Criminal Rules who is a victims' rights advocate.

    — The legislation amends 33 rules in the Federal Rules of Criminal Procedure that create additional rights for crime victims.

- S. 2035 - *Free Flow of Information Act of 2007*
  - Introduced by: Specter
  - Date Introduced: 9/10/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (9/10/07).

  Senate Judiciary Committee reported, with amendments, bill by vote of 15-2 (10/4/07).
  - Related Bills: H.R. 2102, S. 1267
  - Key Provisions:

    — Section 2 provides that a federal entity may not compel a "covered person" to testify or produce documents in any proceeding unless a court determines by a preponderance of the evidence that: (1) the party seeking the information has exhausted all reasonable alternative sources for the information; (2) in a criminal matter, there are reasonable grounds to believe that a crime has occurred, that the testimony or document sought is essential to the investigation, prosecution, or defense, and any unauthorized disclosure has caused significant, clear, and articulable harm to national security; (3) in a non-criminal matter, the testimony or document sought is essential to the successful completion of that matter; and (4) nondisclosure of the information be contrary to public interest. The content of any testimony or document compelled under this section must be: (1) limited to the purpose of verifying published information or describing surrounding circumstances relevant to the accuracy of the published information, and (2) be narrowly tailored in subject matter and period of time so as to avoid compelling production of peripheral, nonessential, or speculative information.

    — Section 2 does not apply to information obtained as a result of eyewitness observations of criminal conduct or commitment of criminal or tortious conduct by the covered person; information necessary to prevent or mitigate death, kidnaping, or substantial bodily harm; and information that a federal court has found by a preponderance of the evidence that would assist in preventing acts of terrorism in the United States or significant harm to national security.

- S. 2237 - *Crime Control and Prevention Act of 2007*
  - Introduced by: Biden
  - Date Introduced: 10/25/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (10/25/07).
  - Related Bills: S. 456, S. 990, H.R. 880, H.R. 1582, H.R. 1692, H.R. 3547
  - Key Provisions:

    — Section 245 directs the Judicial Conference to consider "the necessity and desirability of amending section 804(b) of the Federal Rules of Evidence to permit the introduction of statements against a party by a witness who has been made unavailable where it is reasonably foreseeable by that party that wrongdoing would make the declarant unavailable."

- S.2449 - *Sunshine in Litigation Act of 2007*
  - Introduced by: Kohl
  - Date Introduced: 12/11/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (12/11/07).
  - Related Bills: None
  - Key Provisions:

    — Section 2 amends **28 U.S.C. Chapter 111** by inserting a new section 1660. New section 1660 provides that a court shall not enter an order pursuant to Civil Rule 26(c) that (1) restricts the disclosure of information through discovery, (2) approves a settlement agreement that would limit the disclosure of such agreement, or (3) restricts access to court records in a civil case unless the court makes findings of fact that: (A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or (B)(i) the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and (ii) the requested protective order is no broader than necessary to protect the privacy interest asserted.

    — Section 3 states that the Act takes effect 30 days after enactment or applies only to orders entered in civil actions or agreements entered into on or after the effective date.

- S.2450 - *To amend the Federal Rules of Evidence to address the waiver of the attorney-client privilege and the work product doctrine*
  - Introduced by: Leahy
  - Date Introduced: 12/11/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (12/11/07).
  - Related Bills: None
  - Key Provisions:

    — Section 1 amends **the Federal Rules of Evidence** by adding a new Evidence Rule 502 on waiver of attorney-client privilege and work product protection. The legislation tracks the language of proposed Evidence Rule 502, as approved by the Judicial Conference of the United States at its September 2007 session.

HOUSE BILLS

- H.R. 851 -*Death Penalty Reform Act of 2007*
  - Introduced by: Gohmert
  - Date Introduced: 2/6/07
  - Status: Referred to House Committee on the Judiciary (2/6/07).
  - Related Bills: H.R. 1914
  - Key Provision:

    — Section 8 amends **Criminal Rule 24(c)** by permitting the court to empanel up to nine alternate jurors and allowing each side an additional four peremptory challenges when 7-9 alternate jurors are empaneled.

- H.R. 880 - *Gang Deterrence and Community Protection Act of 2007*
  - Introduced by: Forbes
  - Date Introduced: 2/7/07
  - Status: Referred to the House Committee on the Judiciary (2/7/07). Referred to House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security (3/1/07).
  - Related Bills: H.R. 1582, H.R. 1692, H.R. 3547, S. 456, S. 990, S. 2237
  - Key Provisions:

    — Section 113 amends **Evidence Rule 804(b)(6)** by codifying the ruling in *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000), which permits admission of statements of a murdered witness to be introduced against the defendant who caused the unavailability of the witness and members of the conspiracy if such actions were foreseeable by conspirators.

- H.R. 1012 - *Small Business Growth Act of 2007*
  - Introduced by: Buchanan
  - Date Introduced: 2/13/07
  - Status: Referred to the House Committees on Education and Labor, Small Business, Judiciary, Oversight and Government Reform, and Ways and Means (2/13/07). Referred to House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property (3/19/07). Referred to the House Subcommittee on Health, Employment, Labor and Pensions (6/5/07).
  - Related Bills: None
  - Key Provisions:

    — Title IV amends **Civil Rule 11** by: (1) imposing additional, mandatory sanctions on attorneys, law firms, and parties; (2) making the rule applicable in state cases affecting interstate commerce; (3) imposing a "three-strike" rule on attorneys who commit multiple violations of the rule; (4) creating a presumption of a rule violation when the same issue is relitigated; (5) providing enhanced sanctions for the willful and intentional destruction of documents in a pending federal court proceeding; and (6) by limiting a court's discretion in sealing a Rule 11 proceeding.

- H.R. 1299 - *To Permit the Televising of Supreme Court Proceedings*
  - Introduced by: Poe
  - Date Introduced: 3/1/07
  - Status: Referred to the House Committee on the Judiciary (3/1/07).
  - Related Bills: S. 344, S. 352, H.R. 2128
  - Key Provisions:

    — Section 1 amends **28 U.S.C. Chapter 45** by inserting a new section 678 requiring the Supreme Court to permit television coverage of all open sessions of the Court unless the unless the Court decides, by a majority vote of all justices, that allowing such coverage in a particular case would violate the due process rights of one or more of the parties.

- H.R. 1582 - *Gang Abatement and Prevention Act of 2007*
  - Introduced by: Schiff
  - Date Introduced: 3/20/07
  - Status: Read twice and referred to the House Committee on the Judiciary (3/20/07). Referred to the House Subcommittee on Crime, Terrorism, and Homeland Security (4/20/07).
  - Related Bills: H.R. 880, H.R. 1692, H.R. 3547, S. 456, S. 990, S. 2237
  - Key Provisions:

    — Section 205 directs the Standing and Evidence Rules Committee to consider "the necessity and desirability of amending section 804(b) of the Federal Rules of Evidence to permit the introduction of statements against a party by a witness who has been made unavailable where it is reasonably foreseeable by that party that wrongdoing would make the declarant unavailable."

- H.R. 1592 - *Local Law Enforcement Hate Crimes Prevention Act of 2007*
  - Introduced by: Schiff
  - Date Introduced: 3/20/07
  - Status: Read twice and referred to the House Committee on the Judiciary (3/20/07). Reported (Amended) by the Committee on Judiciary. H. Rept. 110-113. (4/30/2007). Passed by the House by a vote of 237-180 (5/3/2007). Received in the Senate, read twice, and referred to the Committee on the Judiciary (5/7/2007).
  - Related Bills: None
  - Key Provisions:

    — Section 6 amends **Chapter 13, Title 18, U.S.C.**, by including the following provision: "In a prosecution for an offense under this section, evidence of expression or associations of the defendant may not be introduced as substantive evidence at trial, unless the evidence specifically relates to that offense. However, nothing in this section affects the rules of evidence governing impeachment of a witness."

- H.R. 1692 - *Fighting Gangs and Empowering Youth Act of 2007*
  - Introduced by: Pallone

• Date Introduced: 3/26/07
• Status: Read twice and referred to the House Committees on the Judiciary, Education and Labor, and Financial Services (3/26/07). Referred to the House Subcommittee on Housing and Community Opportunity (6/8/07). Referred to House Subcommittee on Healthy Families and Communities (6/27/07).
• Related Bills: H.R. 880, H.R. 1582, H.R. 3547, S. 456, S.990, S. 2237
• Key Provisions:

— Section 310 amends **Evidence Rule 804(b)(6)** by providing that a "[a] statement offered against a party that has engaged, acquiesced, or conspired, in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

- H.R. 1914 -*Terrorism Death Penalty Act of 2007*

•Introduced by: Carter
• Date Introduced: 4/18/07
• Status: Referred to House Committee on the Judiciary (4/18/07). Referred to Subcommittee on Crime Terrorism, and Homeland Security (5/4/07).
• Related Bills: H.R. 851
• Key Provision:

— Section 3 amends **Criminal Rule 24(c)** by permitting the court to empanel up to nine alternate jurors and allowing each side an additional four peremptory challenges when 7-9 alternate jurors are empaneled.

- H.R. 2102 - *Free Flow of Information Act of 2007*

• Introduced by: Boucher
• Date Introduced: 5/2/07
• Status: Read twice and referred to the House Committee on the Judiciary (5/2/07). Hearing held (6/14/07). Committee held markup session and ordered reported (8/1/07). House passed bill with amendment below by vote of 398-21 (10/16/07).
• Related Bills: S. 1267, S. 2035
• Key Provisions:

— Section 2 provides that a federal entity may not compel a "covered person" to testify or produce documents in any proceeding unless a court determines by a preponderance of the evidence that: (1) the party seeking the information has exhausted all reasonable alternative sources for the information; (2) in a criminal matter, there are reasonable grounds to believe that a crime has occurred and that the testimony or document sought is essential to the investigation, prosecution, or defense; (3) in a non-criminal matter, the testimony or document sought is essential to the successful completion of that matter; (4) in any matter in which the testimony or document sought could reveal the source's identity, disclosure is necessary to: (a) prevent imminent and substantial harm to national security, (b) prevent imminent death or significant bodily injury, or (c) determine who has disclosed a trade secret of significant value in violation of state or federal law, individually identifiable health information, or nonpublic personal information of

any consumer in violation of federal law; and (5) nondisclosure of the information be contrary to public interest. Section 2 also requires that compelled disclosure of testimony or documents be limited and narrowly drawn.

[The Boucher/Pence amendment limits the scope of a journalist's protection by: (1) allowing disclosure of information to prevent or identify the perpetrator of a terrorist attack or harm to national security; (2) allowing disclosure of the identity of a person involved in leaking properly classified information; (3) permitting law enforcement officers to seek a court order compelling production of documents and information obtained as the result of eyewitness observations of alleged criminal or tortious conduct; (4) limiting coverage to a person who "regularly" engages in the listed journalistic activities and including exceptions to the definition of "covered person."]

- H.R. 2128 - *Sunshine in the Courtroom Act of 2007*
  - Introduced by: Chabot
  - Date Introduced: 5/3/07
  - Status: Read twice and referred to the House Committee on the Judiciary (5/3/07). Referred to the House Subcommittee on Courts, the Internet, and Intellectual Property (6/4/07). Subcommittee discharged (9/20/07). Judiciary Committee held hearing (9/27/07). Committee held markup session and ordered bill to be reported favorably by vote of 17-11 (10/24/07).
  - Related Bills: S. 344, S. 352, H.R. 1299
  - Key Provisions:

    — Section 2 authorizes the presiding judge of an appellate court to permit the photographing, electronic recording, broadcasting, or televising of any public proceeding over which the judge presides. The presiding judge, however, may not permit the above: (1) in a proceeding involving only the presiding judge if that judge determines that the action would violate the due process rights of any party, or (2) in a proceeding involving more than one judge, a majority of judges determines that the action would violate the due process rights of any party.

    Section 2 also authorizes the presiding judge of a district court to permit the photographing, electronic recording, broadcasting, or televising of any public proceeding over which the judge presides. Upon request of any witness in a trial proceeding, the court must order that the face and voice of the witness be disguised. The presiding judge in a trial must inform each witness who is not a party that he or she has the right to request that his or her image or voice may be disguised. The presiding judge must not permit the televising of any juror in a trial.

    The Judicial Conference may issue advisory guidelines on the broadcast of court proceedings.

Section 2 contains a sunset provision that terminates the authority of a district court judge to allow the broadcast of district court proceedings three years after enactment of the Act.

- H.R. 2286 - *Bail Bond Fairness Act of 2007*
  - Introduced by: Wexler
  - Date Introduced: 5/10/07
  - Status: Read twice and referred to the House Committee on the Judiciary (5/10/07). Referred to House Subcommittee on Crime, Terrorism, and Homeland Security (6/1/07). Subcommittee held markup session (6/12/07). Committee considered, held markup session, and ordered reported by voice vote (6/13/07). House Report 110-208 filed (6/22/07). House passed by voice vote (6/25/07). Received in Senate, read twice, and referred to Committee on the Judiciary (6/26/07).
  - Related Bills: None
  - Key Provisions:

    — Section 3 amends **Criminal Rule 46(f)(1)** limiting the authority of the court to declare bail forfeited. (Criminal Rule 46(f)(1) provides that the court must declare bail forfeited if a person breached a condition of the bail bond. H.R. 2286 amends the rule to limit the court's authority to declare bail forfeited only where the person actually fails to appear physically before a court as ordered, and not where the person violates some other collateral condition of release.)

- H.R. 2325 - *Court and Law Enforcement Officers Protection Act of 2007*
  - Introduced by: Gohmert
  - Date Introduced: 5/15/07
  - Status: Read twice and referred to the House Committee on the Judiciary (5/15/07). Referred to House Subcommittee on Crime, Terrorism, and Homeland Security (6/4/07).
  - Related Bills: None
  - Key Provisions:

    — Section 7(c) amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts by adding at the end the following: "Rule 60(b)(6) of the Federal Rules of Civil Procedure does not apply to proceedings under these rules."

- H.R. 3013 - *Attorney-Client Privilege Protection Act of 2007*
  - Introduced by: Scott
  - Date Introduced: 7/12/07
  - Status: Read twice and referred to the House Committee on the Judiciary (7/12/07). Referred to the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security (7/20/07). Markup session held and subcommittee forwarded to full committee by voice vote (7/24/07). Judiciary Committee held mark-up session and ordered reported by voice vote (8/1/07). House Report No. 110-445 filed (11/13/07). Passed House by voice vote (11/13/07).
  - Related Bills: S. 186

• Key Provisions:

— Section 3 amends **18 U.S.C. Chapter 201** by adding a new § 3014 that prohibits a federal agent or attorney in a federal investigation, civil enforcement matter, or criminal proceeding from demanding from an organization attorney-client privilege or work product protection materials. Section 3 also prohibits the government from basing its decision to file a charging document in a civil or criminal case on whether: (1) the attorney-client privilege or work product protection is asserted; (2) the organization provides counsel or pay attorney's fees for counsel appointed to represent an employee of the organization; (3) the organization enters into a joint defense, information sharing, or common-interest agreement with an employee in an investigation or enforcement matter; (4) the sharing of information with an employee in relation to an investigation or enforcement matter involving that employee; and (5) the organization fails to terminate an employee because that employee invoked his or her fifth amendment right against self incrimination or other legal right in response to a government request. Section 3 also states that it does not prohibit an organization from voluntarily offering to share "internal investigation materials of such organization."

● H.R. 3547 - *Gang Prevention, Intervention, and Suppression Act of 2007*

• Introduced by: Schiff

• Date Introduced: 9/17/07

• Status: Read twice and referred to the House Committees on the Judiciary and Education and Labor (9/17/07). Referred to the House Subcommittee on Healthy Families and Communities (10/17/07).

• Related Bills: S. 456, S. 990, S. 2237, H.R. 880, H.R. 1582, H.R. 1692, H.R. 3547

• Key Provisions:

— Section 204 directs the Judicial Conference to study **Evidence Rule 804(b)** "to determine the necessity and desirability of amending that section, including the possible expansion of section 804(b)(6), and shall make modifications as the Judicial Conference sees fit."

● H.R. 4302 - *To Amend Title 18, United States Code, to Require the Reading in Open Court in Criminal Cases of Crime Victims' Rights*

• Introduced by: Chabot

• Date Introduced: 12/6/07

• Status: Read twice and referred to the House Committee on the Judiciary (12/6/07).

• Related Bills: None

• Key Provisions:

— The bill amends 18 U.S.C. § 3771(b) by requiring the trial judge to read in open court the rights of crime victims at the start of every criminal proceeding or at sentencing.

SENATE RESOLUTIONS

- S.J. Res.

HOUSE RESOLUTIONS

- H.J. Res. 66 - *Proposing an Amendment to the Constitution of the United States to establish and protect the Rights of Victims of Violent Crimes*
    - Introduced by: Chabot
    - Date Introduced: 12/6/07
    - Status: Read twice and referred to the House Committee on the Judiciary (12/6/07).
    - Related Bills: None
    - Key Provisions:
        — The bill proposes an amendment to the Constitution providing for rights of crime victims.

3B.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

December 12, 2007

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Report of the Administrative Actions Taken by the Rules Committee Support Office*

The following report briefly describes administrative actions and some major initiatives undertaken by the Rules Committee Support Office to improve its support service to the rules committees.

Federal Rulemaking Website

The Forms Working Group (comprised of judges and clerks of court) recommended that the six forms appended to the Federal Rules of Appellate Procedure and the 39 Illustrative Forms appended to the Federal Rules of Civil Procedure be converted into a usable, word-processing format and made available on the judiciary's public website. (The forms had been previously available only in paper form.) AO staff converted the six Appellate Forms and the newly restyled Civil Forms into WordPerfect and Word-compatible formats and posted them last month on the Federal Rulemaking website at http://www.uscourts.gov/rules/newrules4.html.

The office continues to add rules-related records to the rules website. We have posted committee minutes and reports; committee agenda materials; information on legislation affecting the federal rules of practice, procedure, and evidence; and comments on proposed rules amendments published for public comment. The rules website, which was recently redesigned, continues to be one of the most popular sites on the judiciary's website. During the period from April 1, 2007, to October 31, 2007, users viewed over 1.5 million pages on the website.

Rules Committees' Records

Last year, the office completed a major project that involved retrieving, scanning, and posting to the rules website all available rules committees' minutes and reports contained on microfiche from 1935-present. These primary rules records allow users to conduct comprehensive research on the history of rules amendments. We are now working with a number of law libraries across the country to locate missing committee minutes and reports, which we will add to our collection and post on the website. Recently, we retrieved missing rules records from the Harvard University law school library. We also contacted a former

reporter to the Appellate Rules Committee, who indicated that she would forward missing advisory committee minutes and reports.

Committee and Subcommittee Meetings

For the period from May 1, 2007, to December 1, 2007, the office staffed eight meetings, including one Standing Committee meeting, five advisory committee meetings, a meeting of the informal working group on mass torts, and one conference on Civil Rule 56. We also arranged and participated in numerous conference calls involving rules subcommittees.

Miscellaneous

Rules Effective December 1, 2007. In November 2007, we advised the courts that Congress had taken no action on amendments approved by the Supreme Court on April 30, 2007, and that the following amendments and new rules took effect on December 1, 2007: Appellate Rule 25; Bankruptcy Rules 1014, 3007, 4001, 6006, and 7007.1, and new Rules 6003, 9005.1, and 9037; Restyled Civil Rules 1-86, Restyled Illustrative Civil Forms 1 through 82, and new Civil Rule 5.2; and Criminal Rules 11, 32, 35, 45, and new Rule 49.1. (The Model Form for Use in 28 U.S.C. § 2254 Cases Involving a Rule 9 Issue in the Appendix of Forms to the Rules Governing § 2254 Cases in the United States Courts was abrogated.)

Rules Transmitted to the Supreme Court. In December 2007, we delivered to the Supreme Court a package of proposed amendments to the Federal Rules of Bankruptcy, Civil, and Criminal Procedure, which were approved by the Judicial Conference at its March and September 2007 sessions.

Rules Published for Comment - August 2007. In August 2007, we prepared, published, and posted to the rules website the *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure,* seeking public comment on proposed amendments to Appellate Rules 4, 5, 6, 10, 12, 15, 19, 22, 25, 26, 27, 28.1, 30, 31, 39, 40, and 41, and new Rule 12.1; 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, 4008, 6003, 6004, 6006, 6007, 7004, 7012, 7052, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9021, 9027, and 9033, new Rules 1017.1 and 7058, revision to Official Form 8, and new Official Form 27; Civil Rules 6, 8, 12, 13, 14, 15, 23, 27, 32, 38, 48, 50, 52, 53, 54, 55, 56, 59, 62, 65, 68, 71.1, 72, 81, and new Rule 62.1, Supplemental Rules B, C, and G, and Illustrative Civil Forms 3, 4, and 60; and Criminal Rules 5.1, 7, 12.1, 12.3, 29, 32, 32.2, 33, 34, 35, 41, 45, 47, 58, 59, Rules 8 and 11 of the Rules Governing § 2254 Cases, new Rule 12 of the Rules Governing § 2254 Cases, and Rules 8 and 11 of the Rules Governing § 2255 Proceedings. We have received comments on the proposals, which are posted to the rules website at <http://www.uscourts.gov/rules/proposed0807-1.htm>. The public comment period ends on February 15, 2008.

FISA Court Draft Rules. In October 2007, we posted to the rules website, on behalf of the Foreign Intelligence Surveillance Court, proposed procedures for review of petitions filed pursuant to Section 105B(h) of the Foreign Intelligence Surveillance Act of 1978.

James N. Ishida

4.

Report of the Federal Judicial Center

Will be Sent in a Later Distribution

5A.

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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APPELLATE RULES

LAURA TAYLOR SWAIN
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

MEMORANDUM

DATE: December 12, 2007

TO: Judge Lee H. Rosenthal, 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 November 1 and 2 in Atlanta, Georgia. The Committee approved for publication two proposed amendments, but on further consideration decided to present only one of those proposals to the Standing Committee at its January 2008 meeting.

Part II of this report describes the Committee's proposed amendment to Rule 29 concerning amicus brief disclosures.

Part III covers other matters. The Committee approved a new Rule 1(b) that would define the term "state" for purposes of the Appellate Rules, but the Committee intends to further refine the proposal at its spring 2008 meeting. The Committee discussed the need to adopt interim changes to Form 4 to conform to new privacy requirements. The Committee discussed and retained four additional items on the study agenda, and removed one other item. The Committee also discussed correspondence relating to circuit-specific briefing requirements.

The Committee has tentatively scheduled its next meeting for April 10 and 11, 2008.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the November meeting[1] and in the Committee's study agenda, both of which are attached to this report.

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[1] These minutes have not yet been approved by the Committee.

II. Action Item

At our November 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 whether a party or a party's counsel contributed money that was intended to fund the preparation or submission of the brief, and to identify every person (other than the amicus, its members and its counsel) who contributed money that was intended to fund 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).

This proposal differs from the one that was presented at the Standing Committee's June 2007 meeting. Shortly before that June meeting, the Supreme Court published for comment a proposed amendment to Supreme Court Rule 37.6 that would have required amicus briefs to disclose whether a party or its counsel was a member of the amicus or contributed money to the preparation or submission of the brief. Because the Rule 29 proposal was modeled on Supreme Court Rule 37.6, the Appellate Rules Committee decided to present two alternative amendments to the Standing Committee – one for publication if the proposed amendment to Supreme Court Rule 37.6 were adopted, and the other for publication if the Rule 37.6 proposal were not adopted. However, after that decision, comments were submitted on the proposed Supreme Court Rule amendment that were highly critical; commenters asserted, among other things, that the proposed amendment, if adopted, would deter lawyers from joining groups that might be amici and would deter groups from seeking amicus status. Because the Appellate Rules Committee had not had a chance to consider those comments, and because it was not yet known what action the Supreme Court would take with respect to the Rule 37.6 amendment, the Standing Committee decided to hold off rather than publish the Rule 29 proposal in August 2007.

In late July, the Supreme Court adopted a revised version of Rule 37.6, which took effect October 1, 2007. The revised version requires the amicus to disclose whether a party or its counsel contributed money intended to fund the preparation or submission of the brief. The revisions clearly respond to the criticisms voiced during the public comment period, and response to the Supreme Court's Rule amendment seems to be favorable. Accordingly, the Appellate Rules Committee approved a redrafted Rule 29 proposal that tracks the language adopted in the Supreme Court's October 2007 amendment to Rule 37.6. The wording of the Rule 29 proposal differs in some respects from that of Rule 37.6, due to style input from Professor Kimble.

1 **Rule 29. Brief of an Amicus Curiae**

2 * * * * *

3 (c) **Contents and Form.** An amicus brief must comply with Rule 32. In addition to
4 the requirements of Rule 32, the cover must identify the party or parties supported
5 and indicate whether the brief supports affirmance or reversal. ~~If an amicus curiae~~
6 ~~is a corporation, the brief must include a disclosure statement like that required of~~
7 ~~parties by Rule 26.1.~~ An amicus brief need not comply with Rule 28, but must
8 include the following:

9 **(1)** a table of contents, with page references;

10 **(2)** a table of authorities — cases (alphabetically arranged), statutes and other
11 authorities — with references to the pages of the brief where they are
12 cited;

13 **(3)** a concise statement of the identity of the amicus curiae, its interest in the
14 case, and the source of its authority to file;

15 **(4)** an argument, which may be preceded by a summary and which need not
16 include a statement of the applicable standard of review; ~~and~~

17 **(5)** a certificate of compliance, if required by Rule 32(a)(7)~~.~~;

18 **(6)** if filed by an amicus curiae that is a corporation, a disclosure statement
19 like that required of parties by Rule 26.1; and

20 **(7)** unless filed by an amicus curiae listed in the first sentence of Rule 29(a), a
21 statement that, in the first footnote on the first page:

1 (A) indicates whether a party's counsel authored the brief in whole or
2 in part;
3 (B) indicates whether a party or a party's counsel contributed money
4 that was intended to fund preparing or submitting the brief; and
5 (C) identifies every other person — other than the amicus curiae, its
6 members, or its counsel — who contributed money that was
7 intended to fund preparing or submitting the brief.
8 * * * * *
9 **Committee Note**
10 **Subdivision (c).** Two items are added to the numbered list in subdivision (c).
11 The items are added as subdivisions (c)(6) and (c)(7) so as not to alter the numbering of
12 existing items. The disclosure required by subdivision (c)(6) should be placed before the
13 table of contents, while the disclosure required by subdivision (c)(7) should appear in the
14 first footnote on the first page of text.
15
16 **Subdivision (c)(6).** The requirement that corporate amici include a disclosure
17 statement like that required of parties by Rule 26.1 was previously stated in the third
18 sentence of subdivision (c). The requirement has been moved to new subdivision (c)(6)
19 for ease of reference.
20
21 **Subdivision (c)(7).** New subdivision (c)(7) sets certain disclosure requirements
22 for amicus briefs, but exempts from those disclosure requirements entities entitled under
23 subdivision (a) to file an amicus brief without the consent of the parties or leave of court.
24 Subdivision (c)(7) requires amicus briefs to disclose whether counsel for a party authored
25 the brief in whole or in part and whether a party or a party's counsel contributed money
26 with the intention of funding the preparation or submission of the brief. A party's or
27 counsel's payment of general membership dues to an amicus need not be disclosed.
28 Subdivision (c)(7) also requires amicus briefs to identify every other "person" (other than
29 the amicus, its members, or its counsel) who contributed money with the intention of
30 funding the brief's preparation or submission. "Person," as used in subdivision (c)(7),
31 includes artificial persons as well as natural persons.
32
33 The disclosure requirement, which is modeled on Supreme Court Rule 37.6,
34 serves to deter counsel from using an amicus brief to circumvent page limits on the
35 parties' briefs. *See Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (noting the

1 majority's suspicion "that amicus briefs are often used as a means of evading the page
2 limitations on a party's briefs"). It also may help judges to assess whether the amicus
3 itself considers the issue important enough to sustain the cost and effort of filing an
4 amicus brief.
5
6 It should be noted that coordination between the amicus and the party whose
7 position the amicus supports is desirable, to the extent that it helps to avoid duplicative
8 arguments. This was particularly true prior to the 1998 amendments, when deadlines for
9 amici were the same as those for the party whose position they supported. Now that the
10 filing deadlines are staggered, coordination may not always be essential in order to avoid
11 duplication. In any event, mere coordination – in the sense of sharing drafts of briefs –
12 need not be disclosed under subdivision (c)(7). *Cf.* Robert L. Stern et al., Supreme Court
13 Practice 662 (8th ed. 2002) (Supreme Court Rule 37.6 does not "require disclosure of any
14 coordination and discussion between party counsel and *amici* counsel regarding their
15 respective arguments . . . .").

III. Information Items

At the November meeting, the Committee also approved a new Rule 1(b) that would define the term "state" to include the District of Columbia and any commonwealth, territory or possession of the United States. This item reached the Committee's agenda at the suggestion of the time-computation subcommittee. The proposed amendment to Rule 26(a) that is currently out for comment includes a similar definition of the term "state" for purposes of Rule 26; the proposed new Rule 1(b) would provide the same definition for purposes of all the Appellate Rules. The Committee intends to refine the proposal further at its April 2008 meeting.

In the wake of the E-Government Act, new privacy rules have been adopted that require redaction of certain personal identifiers. Form 4, which concerns the information that must accompany a motion for permission to appeal in forma pauperis, requires immediate revision to conform to those privacy requirements. Aspects requiring attention include the Form's request for the applicant's full social security number and home address, and a question relating to dependents (including minor children). The Committee will work with CACM and other Committees and with Mr. Rabiej and Mr. McCabe to get the word out to the district courts and courts of appeals. Mr. Fulbruge, the Committee's liaison to the appellate clerks, has already reached out to his colleagues to alert them to these issues. Going forward, the Committee will consider permanent revisions to Form 4.

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. This amendment was held for later submission to the Standing Committee due to the Committee's practice of "bundling" proposed amendments. In the years since then, the

circuit split grew lopsided, with four out of six circuits taking the position that a Rule 7 bond can include at least some kinds of attorney fees. In the light of the developing caselaw, the Committee decided that the proposed amendment warrants further review. The Committee is undertaking empirical research (with advice and support from the Federal Judicial Center) to illuminate the relevant issues.

The Committee discussed and retained on its agenda three other items. First, the Committee considered issues raised by the Supreme Court's recent decision in *Bowles v. Russell*, 127 S. Ct. 2360 (2007). In *Bowles*, the Court held that Rule 4(a)(6)'s 14-day time limit on reopening the time to take a civil appeal is mandatory and jurisdictional, and barred the application of the "unique circumstances" doctrine to excuse violations of jurisdictional deadlines. Second, the Committee analyzed a proposal concerning amicus briefs with respect to panel rehearing and rehearing en banc. It has been suggested that the Appellate Rules could usefully address whether such amicus briefs can be filed at all; whether they can be filed with the consent of the parties, or whether court permission is required; and the length and timing requirements for such briefs. Third, the Committee discussed a proposal that Rule 35(e) should be amended to state that ordinarily the court will not grant rehearing en banc without first allowing a response to the request.

The Committee discussed for a third time a proposal by 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. The Committee had appointed an informal subcommittee to study the relevant issues, and had sought additional input from Virginia and other states. Based on that additional input, the Committee decided not to proceed further with the proposal; it was, therefore, removed from the study agenda. Following the November meeting, I wrote a letter to the Virginia State Solicitor General informing him of the Committee's decision not to proceed further with the proposal and thanking him and his colleagues for the input and cooperation that the Committee received while it considered the proposal.

So far, all but three circuits have responded to my letter to the Chief Judges of each circuit expressing the Committee's concern over circuit-specific briefing requirements. It may take some time for all the circuits to process the Committee's suggestions; some circuits may be most likely to do so as they review their rules in connection with the transition to the new electronic filing regime. In any event, the letter has already served the purpose of making the circuits aware of the issues relating to circuit-specific briefing requirements.

A member suggested that the Tenth Circuit's recent opinion in *Warren v. American Bankers Insurance of Florida*, 2007 WL 3151884 (10th Cir. 2007), raises significant issues concerning the operation of the separate document rule. The Reporter will investigate the matter and report on it at the Committee's spring meeting. In addition, two questions have arisen since the time of the November meeting and will likely be discussed at the spring meeting. One concerns a suggestion that the wording of Rule 4(c)(1)'s "prisoner mailbox" rule is ambiguous.

Another concerns a question raised by the Bankruptcy Rules Committee regarding the timing of counter-designations of the transcript under Rule 10.

Among the proposed amendments published for comment this past August were six Appellate Rules items: the time-computation template and deadlines package; new Appellate Rule 12.1 concerning indicative rulings; an amendment to Appellate Rule 22(b) concerning certificates of appealability (which corresponds to the Criminal Rules Committee's proposed amendment to Rule 11(a) of the rules governing proceedings under 28 U.S.C. §§ 2254 and 2255); an amendment to Appellate Rule 4(a)(4)(B)(ii) that is designed to correct a technical difficulty that crept into Rule 4 as a result of the 1998 restyling; amendments to Appellate Rules 4(a)(1)(B) and 40(a)(1) pertaining to the treatment of suits in which a federal officer or employee is sued in his or her individual capacity; and an amendment to Appellate Rule 26(c) designed to parallel Civil Rule 6's treatment of the "three-day rule." The Committee looks forward to considering the resulting comments at its April 2008 meeting.

5B.

DRAFT

Minutes of Fall 2007 Meeting of
Advisory Committee on Appellate Rules
November 1 and 2, 2007
Atlanta, Georgia

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, November 1, at noon at the Four Seasons Hotel in Atlanta, Georgia. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton,[1] Dean Stephen R. McAllister,[2] Mr. Mark I. Levy, and Ms. Maureen E. Mahoney. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), was present representing the Solicitor General. Also present were Judge Lee S. Rosenthal, Chair of the Standing Committee; Judge Harris L. Hartz, liaison from the Standing Committee; Professor Daniel Coquillette, Reporter to the Standing Committee;[3] Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Stewart welcomed the meeting participants. Judge Stewart and the Committee congratulated the Reporter on her recent wedding. Judge Stewart congratulated Judge Rosenthal on her new role as Chair of the Standing Committee, and expressed appreciation for her presence at the meeting. He noted also that the Committee appreciated the presence of Judge Hartz in his capacity as liaison from the Standing Committee. Judge Stewart noted with regret that Judge Ellis was unable to attend the meeting because he was presiding over a multi-week trial, and likewise that Mr. Bennett was on trial and unable to be present. Judge Stewart also noted with regret that Justice Holland was not present, but he mentioned that congratulations are due to Justice Holland for his recent receipt of the A. Sherman Christensen Award from the American Inns of Court. Judge Stewart noted Justice Holland's long involvement with, and many contributions to, the Inns of Court movement. Judge Stewart congratulated Mr. Letter on his

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[1] Due to scheduling conflicts, Judge Sutton attended part of the meeting on the afternoon of November 1 and was unable to be present on November 2.

[2] Dean McAllister attended the meeting on November 1 but was unable to be present on November 2.

[3] Professor Coquillette joined the meeting at 12:40 p.m. on November 1 and was present thereafter.

receipt of the Justice Tom C. Clark Award for Outstanding Government Lawyer, which was presented last month by the District of Columbia Chapter of the Federal Bar Association.

II. Approval of Minutes of April 2007 Meeting

The minutes of the April 2007 meeting were approved.

III. Report on June 2007 Meeting of Standing Committee

The Standing Committee approved for publication six sets of Appellate Rules amendments. Specifically, the Standing Committee gave permission to publish for comment the time-computation template and deadlines package; new Appellate Rule 12.1 concerning indicative rulings; an amendment to Appellate Rule 22(b) concerning certificates of appealability (which corresponds to the Criminal Rules Committee's proposed amendment to Rule 11(a) of the rules governing proceedings under 28 U.S.C. §§ 2254 and 2255); an amendment to Appellate Rule 4(a)(4)(B)(ii) that is designed to correct a technical difficulty that crept into Rule 4 as a result of the 1998 restyling; amendments to Appellate Rules 4(a)(1)(B) and 40(a)(1) pertaining to the treatment of suits in which a federal officer or employee is sued in his or her individual capacity; and an amendment to Appellate Rule 26(c) designed to parallel Civil Rule 6's treatment of the "three-day rule." Because the Standing Committee decided not to proceed at this time with the Criminal Rules Committee's proposed amendment to Rule 11(b) of the rules governing proceedings under 28 U.S.C. §§ 2254 and 2255, the corresponding proposal to amend Appellate Rule 4(a)(4)(A) was not approved for publication either. In addition, after discussing late-breaking developments that had occurred subsequent to the Advisory Committee's April meeting, the Standing Committee decided to await the Advisory Committee's further deliberations regarding the proposed amendment to Appellate Rule 29 (concerning amicus brief disclosures), rather than publishing that proposed amendment in August 2007.

At the Standing Committee meeting, Judge Levi appointed Judge Hartz as the chair of a subcommittee that will study issues relating to the sealing of entire cases. Judge Stewart reported that, subsequent to the Standing Committee meeting, he invited Judge Ellis to serve as the Appellate Rules Committee's member on that subcommittee, and Judge Ellis has agreed to serve. Judge Stewart noted that Judge Ellis has had experience with related issues in connection with cases in his district. Judge Hartz stated that the subcommittee's first meeting is scheduled for January, prior to the Standing Committee meeting; he observed that the longevity of the subcommittee will depend in part on how broadly its mandate is interpreted – i.e., whether it studies only the sealing of entire cases, or other issues relating to sealing. Judge Rosenthal noted that the FJC had done a very good study on sealed settlements (in response to congressional pressure to prohibit such practices), and that the Civil Rules Committee had concluded, in the light of the FJC's findings, that sealed settlements do not occur very often and that a rule prohibiting sealed settlements would simply lead litigants not to file their settlements at all.

Judge Rosenthal observed that new issues have arisen relating to sealing of items in the court record. For instance, the availability on the internet of information concerning plea agreements has led to issues relating to the website www.whosarat.com, which publicizes the identity of defendants who have entered into cooperation agreements. Judge Rosenthal reported that the latter topic is now under study by the Court Administration and Case Management Committee ("CACM") and the various Rules Committees.

As a final note, it was mentioned that new Rule 25(a)(5) (addressing privacy concerns relating to court filings) is on track to take effect December 1, 2007.

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 April 2007 meeting, Judge Stewart has received written responses from the Third, Sixth and Tenth Circuits. Judge Stewart noted that Chief Judge Tacha's letter on behalf of the Tenth Circuit raises a typical issue, which is that the Tenth Circuit is currently engaged in moving to the case management / electronic case filing system ("CM/ECF") and that the Circuit may take the opportunity to review the issues raised in Judge Stewart's letter in the course of a broader review designed to address the move to electronic filing. Judge Stewart predicted that it will take a while for the Circuits to transition to the electronic filing regime, but he stated that his letter has already served its purpose in making the circuits aware of the issues relating to circuit-specific briefing requirements.

Mr. Fulbruge noted that two circuits have already transitioned to electronic case management, and one circuit has already put in place electronic filing. He predicted that other circuits will likely make the transition to electronic case management during the next six months. Mr. McCabe reported that the bankruptcy courts – which were the first to implement CM/ECF – are at work on a new and improved version of it. A judge member observed that the Sixth Circuit will switch to electronic filing in April 2008, and he predicted that many briefing-related issues will percolate up once the electronic-filing regime takes effect. Another judge member reported that the Eighth Circuit's CM/ECF system has been fully operational since September 2007. He has been surprised to see how accepting the legal community is with respect to the new system; his assessment is that the transition has gone well in the Eighth Circuit. Judge Stewart noted that the Fifth Circuit has looked at the Eighth Circuit as a model for the transition to an electronic system. A member asked how the circuits that are switching to electronic filing are dealing with prisoner filings. Mr. Fulbruge explained that in the Fifth Circuit, prisoner filings will continue to be on paper. He noted, though, that some district courts in Texas scan all the prisoner filings in as electronic documents, which means that – with optical character recognition technology – if the original document was typed then the scanned electronic copy is largely word-searchable.

Mr. McCabe noted that a big issue concerns the logistics of getting the record to the Court of Appeals. For example, the AO has been working with the Social Security Administration to address the handling of the record in Social Security cases. Mr. Fulbruge agreed that paper records are a big issue – in particular, which courts will continue to use a paper record, and who will bear the costs of printing it. Mr. McCabe noted the possibility that a court might hire a contractor to do the printing. A member inquired whether the Eighth Circuit requires paper copies of filings now that it has switched to electronic filing. A judge member responded that paper copies need not be provided for documents filed electronically in the Eighth Circuit.

Judge Hartz reported that the Tenth Circuit is now receiving petitions and motions electronically, and that sometimes a motion or petition will be disposed of (based on the electronic filing) before the paper copy ever reaches chambers. Judge Stewart recalled that in the Fifth Circuit the courts' electronic-filing capabilities proved particularly useful in the wake of Hurricane Katrina. He noted the existence of debate over who should shoulder the task of printing paper copies: Reading all documents online instead of in print can be hard on the eyes, and judges may not want to tie up personnel in chambers with heavy printing requests.

V. Update on Public Comments Received to Date

Judge Stewart invited the Reporter to review the comments that the Committee has received so far on the proposed amendments that were published in August.

A comment on the time-computation proposals was received from Mr. Luchenitser of Americans United for Separation of Church and State, who suggests that Appellate Rule 26(c) should be amended so that its rendition of the three-day rule parallels that in Civil Rule 6. The Reporter noted that this comment can be taken as support for the proposed amendment to Appellate Rule 26(c) that has been published for comment.

The other comment that has been received so far is from the Committee on Civil Litigation of the Eastern District of New York ("EDNY Committee"), which writes in general opposition to the time-computation proposals, but supports certain of the Civil Rules Committee's proposals to lengthen specific Civil Rules deadlines. The EDNY Committee predicts that the proposed change in time-computation approach will cause much disruption, given the great number of affected deadlines that are contained in statutes, local rules, and standard forms. The EDNY Committee believes that the current time-counting system works well. To the extent that some litigants have difficulty computing time under the current approach, the EDNY Committee suggests that one could build into the electronic case filing software a program that could perform the necessary computations. The EDNY Committee notes that as to short time periods set by the Rules, the proposed amendments mitigate the effect of no longer skipping weekends, but do not offset the fact that under the new approach holidays will no longer be skipped either. The EDNY Committee argues strongly that if the new time-counting approach is adopted then Congress must be asked to lengthen all affected statutory time periods.

Likewise, the EDNY Committee notes that steps must be taken to lengthen all affected time periods set by local rules and standing orders. The EDNY Committee observes that some local rules contain periods counted in business days, and notes that any change in the time-counting rules should be tailored so as not to change such periods to calendar days. The EDNY Committee warns that the proposed amendments, by clarifying the way to compute backward-counted time periods, would effectively shorten the response time allowed under rules that count backwards. Moreover, the EDNY Committee notes that the proposed time-computation template (like the existing rules) does not provide for a longer response time when motion papers are served by mail. The EDNY Committee proposes that the best solution to the backward-counting problem is to eliminate backward-counted periods; as an example, the EDNY Committee points to the Local Civil Rule 6.1 which is in use in the Eastern and Southern Districts of New York. The Reporter observed that the EDNY Committee's comment, which was received very recently, will be carefully reviewed by the various participants in the time-counting project.

The Reporter noted that Mr. Letter had consulted with his counterpart on the Criminal Rules Committee concerning the proposed new Appellate Rule 12.1, and she invited Mr. Letter to report on the DOJ's view of the proposed new rule. Mr. Letter predicted that the DOJ will likely ask that Rule 12.1's Note be amended to say that Rule 12.1's indicative-ruling procedure would not generally apply in criminal cases. Prosecutors have indicated they have only seen two types of instances in the criminal context where the indicative-ruling procedure could be relevant. One has to do with motions under Criminal Rule 33(b) concerning newly discovered evidence. The other has to do with motions under Criminal Rule 35(b), concerning correcting or reducing a sentence for assistance to the government. The DOJ is concerned that, without the narrowing language in the Note, the advent of Rule 12.1 could prompt a flood of meritless filings by prisoners seeking to make inappropriate use of the new Rule. Mr. Letter observed that motions under Criminal Rule 35(a) (to correct a clear sentencing error) do not need an indicative-ruling mechanism because Appellate Rule 4(b)(5) makes clear that a trial court retains jurisdiction to rule on Rule 35(a) motions. Mr. Letter noted that one option might thus be to amend Appellate Rule 4(b)(5) to say that a district court retains jurisdiction to rule on all motions under Criminal Rule 35, rather than limiting Appellate Rule 4(b)(5) to motions under Criminal Rule 35(a). The Reporter responded that such an extension of Appellate Rule 4(b)(5) might increase the possibility of friction between the trial and appellate courts, given that the time limits on Rule 35(b) motions are much looser than those on Rule 35(a) motions. Mr. Letter suggested that if the Appellate Rule 4(b)(5) approach is not viable, then perhaps Rule 12.1 could cover Criminal Rule 35(b) motions as well as motions under Criminal Rule 33(b).

Judge Rosenthal noted that the Criminal Rules Committee has been asked to comment formally on proposed Rule 12.1. She observed that the Civil Rules Committee had faced a similar problem concerning the scope of proposed Civil Rule 62.1, and that the Civil Rules Committee had decided to give Rule 62.1 a potentially broad scope in civil cases. Judge Rosenthal noted that it is hard to assess the magnitude of the risk that the new Rule 12.1 will cause a flood of meritless filings; she predicted that, in any event, it was unlikely that prisoner litigants would read the Committee Note to the new Rule.

A judge member asked why Rule 12.1's indicative-ruling procedure would not be useful in the criminal context when dealing with a change in the law, such as the Booker decision. Mr. Letter undertook to raise that question with his colleagues in the DOJ. Another appellate judge noted that he had seen a couple of cases in which the court had remanded, and in which the indicative-ruling procedure could have been employed; he noted, however, that courts had been getting by without a formal procedure for indicative rulings. An attorney member asked why the indicative-ruling procedure might not be useful with respect to any instance where there is a change in the law. Mr. Letter responded that such instances are less likely to come up in the criminal context because criminal appeals move so quickly. A judge member noted that because many judges are unfamiliar with the indicative-ruling procedure, they find other ways to handle situations when they arise. Judge Rosenthal observed that the need for a rule on indicative rulings may be greater on the civil than on the criminal side.

Mr. Rabiej noted that a consolidated Rules hearing has been scheduled for January 16, 2008 in Pasadena (after the Standing Committee meeting), and that an additional Appellate Rules hearing has been scheduled for February 1, 2008 in New Orleans. He observed that those wishing to testify at one of the hearings must make their interest in testifying known at least 30 days prior to the hearing.

VI. Action Item

A. Item No. 06-04 (FRAP 29 – amicus briefs – disclosure of authorship or monetary contribution)

Judge Stewart invited the Reporter to introduce the following proposed amendment and Committee Note:

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)~~.~~;

(6) if filed by an amicus curiae that is a corporation, a disclosure statement like that required of parties by Rule 26.1; and

(7) unless filed by an amicus curiae listed in the first sentence of Rule 29(a), 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;

(B) indicates whether a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) identifies every other person — other than the amicus curiae, its members, or its counsel — who contributed money that was intended to fund preparing or submitting the brief.

* * * * *

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.

Subdivision (c)(7). New subdivision (c)(7) sets certain disclosure requirements for amicus briefs, but exempts from those disclosure requirements entities entitled under subdivision (a) to file an amicus brief without the consent of the parties or leave of court. 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 contributed money with the intention of funding the preparation or submission of the brief. A party's or counsel's payment of general membership dues to an amicus need not be disclosed. Subdivision (c)(7) also requires amicus briefs to identify every other "person" (other than the amicus, its members, or its counsel) who contributed money with the intention of funding the brief's preparation or submission. "Person," as used in subdivision (c)(7), includes artificial persons as well as natural persons.

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 . . . .").

The Reporter briefly reviewed the history of the proposal. In November 2006, the Committee voted to amend the Appellate Rules to require that amicus briefs indicate whether counsel for a party authored the brief and to identify persons (other than the amicus, its members, or its counsel) who contributed monetarily to the preparation or submission of the brief. The Committee's consensus was that the Rule should be modeled on Supreme Court Rule 37.6. In April 2007, the Committee approved a proposed amendment to Appellate Rule 29, modeled closely on Supreme Court Rule 37.6 as it then stood. Subsequently, the Supreme Court published for comment a proposed amendment to Supreme Court Rule 37.6 that would have required amicus briefs to disclose whether a party or its counsel was a member of the amicus or contributed money to the preparation or submission of the brief. By email circulation, the Committee considered alternative language that would conform the Appellate Rule 29 proposal to the amended language then proposed for Supreme Court Rule 37.6. By email, the Committee decided to present two alternative amendments to the Standing Committee – one for publication if the proposed amendment to Supreme Court Rule 37.6 were adopted, and the other for publication if the Rule 37.6 proposal were not adopted. After that decision, comments were submitted on the proposed Supreme Court Rule amendment that were highly critical; commenters asserted, among other things, that the proposed amendment, if adopted, would deter lawyers from joining groups that might be amici and would deter groups from seeking amicus status. Because the Appellate Rules Committee had not had a chance to consider those comments, and because it was not yet known what action the Supreme Court would take with respect to the Rule 37.6 amendment, the Standing Committee decided to hold off rather than publish the Rule 29 proposal in August 2007. In late July, the Supreme Court adopted a revised version of Rule 37.6, which took effect October 1, 2007. The revised version requires the amicus to disclose whether a party or its counsel contributed money intended to fund the preparation or submission of the brief. The revisions clearly respond to the criticisms voiced during the public comment period, and response to the Supreme Court's Rule amendment seems to be favorable. Accordingly, the Reporter redrafted the Rule 29 proposal to track the language adopted in the Supreme Court's October 2007 amendment to Rule 37.6. The wording of the Rule 29 proposal differs in some respects from that of Rule 37.6, due to style input from Professor Kimble.

An attorney member noted his impression that people who had been concerned about the proposed Supreme Court Rule 37.6 amendment as initially published were satisfied with the revised language. He stated that he supports the proposed amendment to Appellate Rule 29. There was some discussion of the differences between the language of the Rule 29 proposal and the wording of current Supreme Court Rule 37.6; one attorney member stated a preference for the wording of the Rule 29 proposal because it is clearer than the language used in the Supreme Court rule. It was observed that the Committee Note explains that the amendment is modeled on the Supreme Court rule.

A motion to approve the proposed amendment was moved and seconded. Without objection, the Committee by voice vote approved the proposed amendment.

VII. Discussion Items

A. Item No. 03-02 (proposed amendment concerning bond for costs on appeal)

Judge Stewart invited the Reporter to summarize the issues surrounding Item No. 03-02. In 2003, the Committee decided to amend Appellate Rule 7 to make clear that Rule 7 "costs" for which an appeal bond can be required do not include attorney fees. At the time of the Committee's 2003 decision, there was an evenly-divided circuit split on the question. The proposal was held (pursuant to the Committee's practice) to await submission to the Standing Committee along with other proposals. In spring 2007, the Committee decided not to send the Rule 7 proposal forward to the Standing Committee, having noted some issues with the drafting of the proposal. By fall 2007, the original evenly-divided circuit split has grown lopsided, with four circuits holding that Rule 7 "costs" can include at least some types of attorney fees, and two circuits taking the contrary view. This altered landscape makes it worthwhile for the Committee to revisit its earlier decision in order to assure itself that the proposed amendment is still warranted.

The Reporter briefly reviewed the relevant caselaw. First, though the Supreme Court's 1985 decision in *Marek v. Chesny* is not directly on point, it is worth summarizing because its reasoning is germane. In *Marek*, the Court held that Civil Rule 68's reference to "costs" includes attorney fees where there is statutory authority for the award of attorney fees and the relevant statute defines "costs" to include attorney fees. In so holding, the Court reasoned that neither Rule 68 nor its Note defined "costs," and that the drafters of the original Rule were aware of extant fee-shifting statutes and presumably drafted against the backdrop of those statutes.

The Reporter next summarized the caselaw on the Rule 7 issue itself. Two circuits – the D.C. Circuit and the Third Circuit – have held that Rule 7 costs cannot include attorney fees. These courts reasoned that Rule 7 costs include only those costs that may be taxed under Rule 39, and that Rule 39 costs do not include attorney fees. By contrast, the Second, Sixth, Ninth and Eleventh Circuits have held that at least some attorney fees can be included among Rule 7 costs. These circuits' views vary in some respects. For example, the Eleventh Circuit will include statutory attorney fees among Rule 7 costs, but only if the statutory language defines attorney fees as part of "costs"; the Sixth Circuit, by contrast, has rejected the view that the statutory language must define the attorney fee as part of the costs. Though the Ninth Circuit has held that Rule 7 costs can include statutory attorney fees, it has also held that Rule 7 costs cannot include attorney fees that might be assessed for a frivolous appeal under Appellate Rule 38; the latter type of attorney fee is hard to gauge prospectively (especially for a district court) and its inclusion could chill valid appeals.

Judge Stewart noted a decision handed down by the Fifth Circuit the day before the meeting, in which the panel reduced a $150,000 Rule 7 bond to $1,000. The case concerned an appeal bond required as a condition of the appeal of an objector to a class action settlement; it did not present the question of a statutorily-authorized attorney's fee. Judge Rosenthal noted that it

is interesting that the issue came up in the context of a class action. She observed that there are few tools available to a district judge to prevent a proposed class settlement from being hijacked by objectors. The use of an appeal bond is almost the only way to counter opportunistic objectors. But there is a question what label one puts on the bond. Here, the district judge evidently couched the bond as justified by the judge's view that the appeal was frivolous; perhaps the bond could have been justified instead on another ground, such as the possibility of statutory interest. Judge Rosenthal noted that unlike the possibility of an eventual award of attorney fees for a frivolous appeal under Rule 38, a Rule 7 appeal bond requirement can provide an up-front deterrent to frivolous appeals. She noted that there are "opt out farmers" who have been known to mount campaigns to blow up proposed class settlements.

An attorney member suggested that the Committee should not limit its focus to class actions, and asked whether data are available on whether courts are actually awarding attorney fees under Appellate Rule 38. Another attorney member asked how Rule 7 bonds differ from supersedeas bonds. The Reporter stated that whereas a supersedeas bond is required as a condition of staying the judgment pending appeal, a Rule 7 bond is designed to protect the appellee against the possibility that the appellant will inflict costs on the appellee as a result of the appeal itself. Another member queried whether large Rule 7 bonds would ever be required of defendants of limited means. The Reporter responded that in some fee-shifting contexts – such as the Copyright Act – the inclusion of attorney fees in a Rule 7 bond could affect the appeal of a litigant of limited means. Also, though the availability of in forma pauperis status could address the difficulties of some poor litigants, there might be some litigants not poor enough for i.f.p. status but impecunious enough to suffer hardship from a large Rule 7 bond requirement. Also, i.f.p. status is unavailable to corporate litigants.

A member stated that the proposal seems to raise policy issues concerning access to courts. Decisions whether or not to discourage a particular type of appeal are not, he suggested, the types of choices that the rulemakers are supposed to make. He argued that he would want to know what impact the proposed amendment would have.

Another member responded that the general topic of cost bonds is already covered by Rule 7 – showing that it is appropriate for rulemaking – and that it was unlikely that a better solution to the problem could be obtained from Congress or the Supreme Court than from the rulemaking process. This member suggested that Rule 38 attorney fees should not be taken into account in setting Rule 7 bonds (because determining an appeal's frivolity in advance is unmanageable), but that it may be appropriate to take into account the availability of attorney fees that Congress has defined as "costs."

Professor Coquillette noted that commentators have suggested that sometimes the Supreme Court would prefer to abstain from addressing an issue and let the rulemaking process address it instead. He observed that the rulemakers' statutory mandate includes maintaining consistency in the nationwide application of the Rules.

An attorney member agreed that the rulemaking process has comparative advantages over other avenues of change, but – observing that the rulemakers do not yet know enough to assess the relevant issues – he asked whether it might be possible to have hearings on the topic. Judge Rosenthal stated that it has proven very useful in the past to hold a miniconference on the topic of proposed rulemaking, before publishing a proposal for comment. Participants in the miniconference can be selected to represent various practice areas and sectors that could be affected by the rulemaking change under discussion. The Civil Rules Committee, for example, is using this technique to examine issues relating to Civil Rule 56. A member agreed that such a miniconference would not be unprecedented. Another member asked whether the topic is significant enough to warrant a miniconference; Judge Rosenthal responded that a miniconference need not be an involved proceeding – it can take just half a day in Washington, D.C., for example. Professor Coquillette agreed that mini-conferences have frequently been used.

Judge Stewart asked whether the FJC might be able to assist the Committee. For example, if the Committee has a sense of the frequency with which attorney fees are included in Rule 7 bonds, and the types of cases in which this occurs, and the frequency with which parties decide not to appeal when a large Rule 7 bond is required, that might help the Committee to shape the miniconference. Judge Rosenthal volunteered the assistance of her rules clerk to help the Reporter look through the district court decisions that are available online. She also noted that the rules clerk could assist in assessing how Rule 7 bond rulings are docketed in her district, which would then enable the Committee to focus the inquiries that might be pursued by the FJC. Mr. Fulbruge noted that as a prospective matter, the CM/ECF system can assist the Committee: If district clerks can be asked to use certain language when docketing motions and rulings concerning Rule 7 bonds, then those docket entries will be much more readily searchable. The Reporter stated that she would be very grateful for the assistance of Judge Rosenthal's rules clerk, and that she also looked forward to working with Ms. Leary to shape the necessary inquiries.

In summary, the following inquiries will be pursued concerning the inclusion of attorney fees (including both statutory attorney fees and Rule 38 attorney fees) in Rule 7 bonds. The Reporter will work with Judge Rosenthal's rules clerk, Andrea Thomson, and in tandem with guidance from Ms. Leary and the FJC, to assess what information is currently available from docketing statements, focusing first (as a sample) on docket information from Judge Rosenthal's district. The Reporter and Ms. Thomson will also look at electronically available district court rulings. Armed with that information, the group can consider designing a possible study that the FJC might undertake. Then, based on the information gained through these inquiries, the group can confer on the possible design of a mini-conference (which might, if all goes quickly, be held in tandem with the spring meeting).

A member asked whether it would be appropriate to reach out to some congressional committees for their views on the policy issues. It was observed that it would be preferable to

get a good deal more information and to engage in a good deal more study before taking such a step.

By consensus, Item No. 03-02 was retained on the study agenda.

B. Item No. 06-06 (proposals to amend FRAP 4 and 40 with respect to cases involving state government litigants)

Judge Stewart invited Dean McAllister to report on behalf 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 reported that, subsequent to the Committee's April 2007 meeting, he wrote on the subcommittee's behalf to make Mr. Thro aware of the concerns and questions that had been discussed at the April meeting. Dean McAllister raised the matter in June at the the State Solicitors and Appellate Chiefs Conference sponsored by the National Association of Attorneys General; at the NAAG meeting, Dean McAllister discerned little active support for the proposal among other state attorneys general. Dean McAllister noted that Barbara Underwood, the New York Solicitor General, questioned the usefulness of Virginia's proposal.

A member expressed puzzlement why the momentum behind Virginia's proposal had dissipated. He noted that because many other states had initially signed on to the letter in support of Virginia's proposal, it would be useful to inquire where those states currently stand. Dean McAllister noted that another member (not then in attendance at the meeting) had suggested that the states initially supporting the Virginia proposal had not realized the proposal's full implications.

Dean McAllister suggested that Judge Stewart might write a letter (to be distributed through NAAG) noting that the Committee does not perceive a consensus among state attorneys general in favor of the Virginia proposal, and asking state attorneys general to let the Committee know if they continue to support the proposal.

Judge Stewart agreed to write on the Committee's behalf. He suggested that the letter should note that the Committee has had the proposal on its agenda for three meetings; that the Committee appreciates the states' input on the proposal and has studied it carefully; but that based on the information that the Committee has at this time, the Committee is inclined not to take additional action. Based on this understanding, by consensus, Item No. 06-06 was removed from the study agenda.

C. Item No. 07-AP-C (proposal to amend FRAP 4 in the light of proposed amendments to Rules 11 of the rules governing proceedings under 28 U.S.C. §§ 2254 and 2255)

The Reporter noted that the proposed amendment to Rule 11(b) of the rules governing proceedings under 28 U.S.C. §§ 2254 and 2255 has been remanded to the Criminal Rules Committee for further study. Pending the Criminal Rules Committee's review of the Rule 11(b) proposal, there is no action that needs to be taken by the Appellate Rules Committee on the corresponding proposal to amend Appellate Rule 4(a)(4)(A).

D. Item No. 07-AP-D (FRAP 1 – definition of "state")

Judge Stewart invited Mr. Letter to report on the results of his inquiries concerning the views of entities that would be affected by the proposed definition of the term "state" in the Appellate Rules. The proposal would define "state" as follows:

Rule 1. Scope of Rules; <u>Definition;</u> 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]~~ **<u>Definition.</u>** <u>In these rules, "state" includes the District of Columbia and any commonwealth, territory, or possession of the United States.</u>

(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.

Mr. Letter pursued inquiries through the U.S. Attorney's offices in various places that would be affected by the proposed definition. Those offices themselves have expressed no objections to the proposal. Mr. Letter asked the U.S. Attorney's offices in Puerto Rico, the Virgin Islands, Washington D.C., and Guam to contact their local counterparts to see if there are any objections to the proposal. (He was unable to find a U.S. Attorney's office that covered either American Samoa or the Northern Mariana Islands.) Local justice officials in Puerto Rico and D.C. see no problem with the proposed definition. He does not yet have an answer from officials in the Virgin Islands, but his contacts in the U.S. Attorney's office have been pressing further for an answer. He was unable to obtain a response from officials in Guam.

It was noted that American Samoa had previously expressed reservations about a proposed rule amendment that would affect it. Professor Coquillette recalled that the issue in that instance had to do with extraterritorial warrants. Mr. Letter explained that the Pacific Islands Committee of the Judicial Council of the Ninth Circuit had expressed objections to the inclusion of American Samoa in a proposed amendment to Criminal Rule 41 that would authorize certain overseas search warrants. Ultimately, despite those objections, the Standing Committee voted to include American Samoa in the extraterritorial warrant provision.

A motion to approve the proposed new Rule 1(b) was moved and seconded, and passed by voice vote without opposition.

E. Items awaiting initial discussion

1. Item No. 07-AP-E (consider possible FRAP amendments in response to *Bowles v. Russell* (2007))

Judge Stewart invited the Reporter to present an overview of the issues raised by the Supreme Court's recent decision in *Bowles v. Russell*, 127 S. Ct. 2360 (2007). In *Bowles*, the Court held that Rule 4(a)(6)'s 14-day time limit on reopening the time to take a civil appeal is mandatory and jurisdictional, and barred the application of the "unique circumstances" doctrine to excuse violations of jurisdictional deadlines.

After the district court denied Bowles' habeas petition, Bowles failed to file a notice of appeal within the 30-day limit set by rule and statute. Bowles' counsel subsequently moved for an order reopening the time to file an appeal under Rule 4(a)(6), and the district court granted the motion. Both rule and statute limited the allowable extension to 14 days after the date of entry of the order reopening the time, but the district court erroneously set a date (February 27) which extended the time by 17 days. Bowles' counsel filed the notice of appeal on February 26 – within the time set by the order but outside the limits set by rule and statute. A closely divided Supreme Court held that the 14-day period was mandatory and jurisdictional, and thus that Bowles' appeal must be dismissed. The majority relied heavily on the notion that the time period was jurisdictional because it was set by statute. As the Court reasoned, because Congress decides whether the courts can hear cases at all, it can also determine under what circumstances the courts can hear them. Though Bowles had argued that his reliance on the date set by the judge should have excused his untimely filing under the "unique circumstances" doctrine, the Court overruled that doctrine with respect to deadlines – like Rule 4(a)(6)'s 14-day deadline – that are jurisdictional. The dissenters vigorously contested the majority's view that the deadline was jurisdictional, and would have applied the unique circumstances doctrine to excuse Bowles' late filing.

The Reporter noted that the Court's reliance on the statutory nature of the 14-day deadline is not necessarily persuasive, given that 28 U.S.C. § 2107 has historically been modeled on the relevant Rules rather than vice versa. It remains to be seen how courts will treat other Rule 4 deadlines after *Bowles*. Presumably, the Rule 4 deadlines that have a statutory backing will, like the 14-day limit in *Bowles* itself, be held jurisdictional. But non-statutory Rule 4 deadlines could be viewed as claim-processing rules rather than jurisdictional limits, under the Court's prior decisions in *Eberhart* and *Kontrick*. Prudent litigants, however, would be well advised to comply carefully with all Rule 4 deadlines.

The question before the Committee is whether it might take any action in response to *Bowles*. One option might be to re-define which of the Rule 4 deadlines are jurisdictional. Another option might be to reinstate the unique circumstances doctrine. But as to either of these options, there is a question of rulemaking power. The *Bowles* majority closed by stating, "[i]f rigorous rules like the one applied today are thought to be inequitable, Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits." This language might be read to suggest that the rulemakers do not currently possess that power. Such a conclusion would surprise the rulemakers who adopted the 1966, 1979 and 1991 amendments to Rule 4, each of which forgave untimeliness that would otherwise (under the then-current statute) have doomed an affected appeal. But the conclusion does fit logically with the Court's current view that the statutory appeal deadlines are jurisdictional. The traditional view has been that rules adopted via the rulemaking process are not to affect the courts' subject matter jurisdiction; and though there are limited statutory authorizations for rulemaking that does affect appellate subject matter jurisdiction, those authorizations would not encompass the possible responses to *Bowles*. The Reporter noted that she has had very helpful discussions with Professor Cooper, who has suggested the possibility of exploring ways to respond to *Bowles* through matters that

are recognized to be within the scope of the rulemaking power, such as by altering the way in which the Rules define the entry of judgment or the motions that suspend the running of the time to appeal. But, as Professor Cooper has noted, such approaches may seem circuitous and somewhat artificial when compared with more direct responses such as reinstating the unique circumstances doctrine for all deadlines or redefining which deadlines are jurisdictional.

A member noted that she has always assumed that all the deadlines set by Appellate Rule 4 are jurisdictional. A judge observed that the *Bowles* approach is consistent with the Supreme Court's treatment of the deadlines for seeking Supreme Court review. An attorney member stated that he did not find the Supreme Court's reliance on the statutory nature of the deadline very persuasive. He noted that if one were writing on a clean slate, one could choose among a variety of options – for example, that no appeal deadlines are jurisdictional; or that all are jurisdictional; or that there should be a unique circumstances doctrine. He observed that a key question is who should make those decisions; if the rulemakers were to go forward, he suggested, it would be prudent to obtain ratification from Congress. One would not, he stated, want uncertainty concerning an issue of jurisdiction.

Another attorney member observed that – given the notoriety of the *Bowles* decision – one might assume that if Congress were upset with the approach taken in *Bowles*, Congress would address the matter. A member suggested that only Congress can act to change the approach taken in *Bowles*. Professor Coquillette stressed that the *Bowles* decision has ramifications that will extend throughout all the Rules systems, not just the Appellate Rules; he cautioned that the rulemakers should not be hasty to conclude that there is a lack of rulemaking authority in the area.

Judge Rosenthal noted that the effect of the approach taken in *Bowles* was relatively unlikely to be felt by the attorneys on the Rules Committees, since those attorneys are less likely to miss deadlines. She observed that the effect would likely be felt more acutely in cases litigated by less able lawyers, or by pro se litigants. She pointed out the difficulties that the district courts will face when confronted by uncertainty as to whether a particular deadline is jurisdictional. She predicted that the Bankruptcy Rules Committee and the Civil Rules Committee will also be interested in *Bowles*'s implications. She noted the Rules Committees' historic involvement in questions relating to deadlines.

A member asked whether other Rules Committees should also be looking into the implications of the *Bowles* decision. Judge Rosenthal stated that it is important to get a sense of what the Supreme Court does next in this area, as well as what the lower courts do. An attorney member stated that it is important to avoid suggesting either that the Advisory Committee lacks authority to respond to issues raised by *Bowles* or that the Advisory Committee does not care about those issues. A judge asked whether it is clear that the jurisdictional-deadlines issue will come back up to the Supreme Court. A member noted that the *John R. Sand & Gravel* case, which is before the Court this Term, presents the question of whether the Tucker Act's statute of limitations limits the subject matter jurisdiction of the Court of Federal Claims.

Judge Stewart noted the difficulty of predicting, after *Bowles*, which deadlines are jurisdictional and which are not. If a deadline is jurisdictional, then the court must investigate the question of compliance with the deadline whether or not counsel raises an objection; this adds another layer to the court's workload. There have been a range of reactions to *Bowles*, from those that are approving to those that are highly critical. The *Bowles* decision will have a range of systemic consequences.

By consensus, Item No. 07-AP-E was retained on the study agenda. Judge Rosenthal predicted that the other Rules Committees would also consider *Bowles*'s implications, and she observed that there would also be discussion of *Bowles* at the January Standing Committee meeting.

2. Item No. 06-08 (proposed FRAP rule concerning amicus briefs with respect to rehearing)

Judge Stewart invited the Reporter to discuss the proposal concerning amicus briefs with respect to panel rehearing and rehearing en banc. The Reporter thanked Mr. Levy for raising a number of good questions which the Appellate Rules do not currently address: Can such amicus briefs be filed at all? Can they be filed with the consent of the parties, or is permission of the court by motion required? What is the maximum length for such briefs? And when are they due -- at the same time as the petition or 7 days later?

The Reporter noted that Rule 29's text does not explicitly answer any of these questions. The 1998 Committee Note, which dates from the amendment that introduced the 7-day stagger in briefing deadlines, observes that the court may grant permission to file an amicus brief in a context where a party does not file a principal brief – for example, in support of a petition for rehearing. The Note states that in such a situation, the court will set a filing deadline.

The Reporter's research indicates that five circuits – the First, Second, Fourth, Sixth, and Eighth – currently have no local rule or other provision addressing the matter. The Fourth Circuit, however, has indicated in a 2006 decision that it disfavors requests to file an amicus brief in the first instance at the stage of a request for rehearing. The other eight circuits have local rules or provisions that address various aspects of the matter; the local rule recently adopted by the Ninth Circuit provides the most detailed and comprehensive treatment.

On the question of whether amicus briefs can be filed at all, it is interesting as a point of comparison to note that the Supreme Court does not permit amicus briefs with respect to rehearing. The D.C. Circuit permits amicus briefs on rehearing only by invitation of the court. The Fourth Circuit, as noted, disfavors amicus filings on rehearing if the amicus did not seek to participate in earlier briefing. Some circuits may limit amicus filings at the rehearing stage if the filing would result in a judge's disqualification. A number of circuits, though, do have local

rules or provisions that – by regulating the submission of amicus briefs on rehearing – display an assumption that such briefs will sometimes be filed.

On the issue of whether a motion is required, or whether party consent suffices, circuits take varying approaches. The Ninth Circuit's rule tracks Appellate Rule 29(a)'s approach. In the Eleventh Circuit, government amici need neither party consent nor court permission, but other amici must obtain court permission. In the Federal Circuit, court permission is always required.

At least three circuits have provisions regulating the length of the briefs. Two circuits specifically address the question of timing for amicus briefs on the question of whether rehearing should be granted, while three circuits have addressed the timing of amicus briefs during briefing that ensues after a grant of rehearing en banc. A variety of other circuit-specific provisions address other aspects of amicus filings with respect to rehearing.

A national rule on the subject could provide practitioners with guidance and reduce circuit-to-circuit variations. But a national rule would alter local practices in some circuits in a way that might conflict with some judges' preferences. The Reporter noted that if the Committee decides to consider a adopting a national rule, it should consider whether the national rule should address all or only some of the questions just mentioned, and should also consider whether the practice concerning rehearing should differ in some respects from Appellate Rule 29's approach to amicus briefs more generally.

Mr. Levy explained that he suggested that this item be placed on the Committee's agenda because he is often asked about the practice for amicus filings with respect to rehearing. Moreover, at the time that he raised the question, two circuits were looking at the possibility of making local rules on the subject, and he wondered whether the Committee might wish to consider a national rule. Mr. Levy noted that he disagrees with the Fourth Circuit's view, in that he believes that an amicus's lack of prior involvement should not disqualify the amicus from participating at the rehearing stage.

Professor Coquillette asked whether it is felt that the current diversity in circuit practice is justified by variations in local conditions. Mr. Levy noted that circuits differ with respect to their willingness to grant rehearing en banc. A judge noted that even if there are no inherent local variations, differences among circuits with respect to amicus filings may grow out of different histories, in particular circuits, with respect to en bancs. The judge asked Mr. Levy whether his concerns would be assuaged if each circuit made clear its approach to amicus filings in relation to rehearing. Mr. Levy responded that such clarity would go a long way toward meeting his concerns; later in the discussion, however, he noted that he would not favor an outcome in which additional circuits decided to bar the amicus filings. On that basis, he stated, he would prefer a national rule permitting such filings to a more gradual circuit-by-circuit approach.

Mr. Fulbruge recounted that the frequency of en bancs varies by circuit. Judge Stewart observed that the Fifth Circuit actually blocks out time in the yearly schedule for en banc arguments. Mr. Fulbruge reported that in the Fifth Circuit, both requests for and grants of rehearing (either panel or en banc) have declined over time. He noted that there have been some issues in the Fifth Circuit relating to the possibility that some entities seek to file amicus briefs with the object of causing a recusal. Mr. Letter observed that the Fifth Circuit's rule addresses the disqualification issue but does not answer the other questions posed by Mr. Levy. Mr. Letter noted the argument that amicus filings (concerning rehearing) by the DOJ may be authorized by 28 U.S.C. § 516; but he observed that certainty on the question would be useful. A judge member stated that his impression is that younger judges are more likely to vote for en bancs. Seven years ago, he recalled, en bancs were a relatively rare occurrence in his circuit, but that has changed after the recent appointments to the circuit.

Judge Rosenthal suggested that if the main problem is that there are gaps in the circuits' local rules, the Committee might work with CACM to coordinate a request to the circuits to clarify their requirements. A member asked whether the Committee might wish to consider adopting a default rule that would govern in the absence of a circuit-specific requirement. Professor Coquillette noted that one option is to develop a model for a uniform local rule on the subject. Another member stated that, in considering the matter, it would be useful to know whether judges think that amicus briefs concerning rehearing are actually useful. Judge Stewart observed that it would be hard to discern judges' views on that question, and that cultures vary from circuit to circuit; for example, the Seventh Circuit seems less likely than other circuits to welcome amicus filings. He noted that in some instances, amicus briefs have been filed that were more helpful than the parties' briefs; thus, he would not favor a rule that barred amicus filings. An attorney member suggested that the D.C. Circuit might feel that their situation differs from that of other circuits, because the D.C. Circuit does not grant rehearing en banc all that often, and if it permitted amicus filings with respect to rehearing it might receive many more than some other circuits do. (On the other hand, the member noted that if one is drawing a comparison to Supreme Court practice, one should not only look at the practice with respect to rehearing, since a more apt analogy might be the practice with respect to certiorari petitions.) An attorney member agreed that judges' preferences vary with respect to amicus briefs; he also noted, though, that there is a virtue in allowing amici to air their views.

Judge Rosenthal cautioned that the Committee should think carefully about whether the question is one that is appropriate for a national rule. There can be a danger to trying to have it both ways – i.e., to adopt a default rule but to allow local rulemakers to opt out. That approach was tried with respect to Civil Rule 26(a), and what happened was that the district courts opted out in droves – which was particularly problematic in that instance given Civil Rule 26(a)'s potential impact. Professor Coquillette recalled that the local opt-out in Rule 26(a) was forced on the rulemakers by others; he observed that the Civil Rules Committee currently faces similar pressures with respect to local practices on summary judgment.

A member suggested that the question is whether the Committee feels that this matter is more like briefing rules (as to which the Committee has allowed, but discouraged, local requirements) or more like citation of unpublished opinions (as to which the Committee adopted a national rule); he stated that he believes persuasion is the better approach to take in this instance. Professor Coquillette noted, as a precedent, that CACM has in the past developed model local rules, for example, with respect to electronic filing.

An attorney member observed that a national rule permitting amicus filings concerning rehearing would not be as intrusive on circuit preferences as a national rule preempting all circuit-specific briefing requirements: If judges don't want to read the resulting amicus filings, he suggested, they need not do so. Mr. Letter stated that this issue does not seem comparable to the variation in circuit briefing rules; here, it would be better for there to be a rule that governs, even if it is not a national rule. He noted that the government almost never opposes amicus filings in the court of appeals. A judge responded that if judges know that they will not read amicus filings on a particular topic, it would seem wrong to have a local rule that allows those filings. He noted that the circuits' response to Judge Stewart's letter concerning circuit-specific briefing requirements shows that it would be difficult to induce the circuits to address the amicus-brief issue without a nudge; working with CACM, he suggested, could be an effective way to provide such a nudge. Mr. Rabiej noted that a model local rule could be developed either by CACM or by the Advisory Committee; he observed that the track record for adoption of CACM's proposed local rules has not been all that good. Professor Coquillette noted that he had offered CACM's experience by way of example, and not to indicate that he thought CACM should necessarily be the entity to perform the drafting. Mr. McCabe noted that CACM's best outcome, in terms of adoption, was the model local rule on electronic filing; but he observed that that result has been the exception. A judge suggested that the key is to present the circuits with a list of the questions that local circuit rules should answer – rather than to tell the circuits how they should answer each of those questions.

Judge Rosenthal commented that even if the circuits take no action on the suggestion, one would be no worse off than before. She suggested that a request to the circuits would be most effective if the Committee makes a persuasive case concerning the need for local rules; thus, for example, if the ABA Section on Litigation voiced support for the proposal, that would be helpful.

Mr. Levy moved that the Committee decide to adopt a national rule on amicus filings with respect to rehearing, with the rule's content to be determined subsequently. Mr. Letter seconded the motion. An attorney member stated that the Committee should consult the D.C. Circuit for its views before publishing a proposed rule. Mr. Letter volunteered to contact the D.C. Circuit's Clerk. A member questioned whether the Committee should vote on Mr. Levy's motion without first deciding the content of the proposed rule. Mr. Letter suggested that the motion should be amended to state that the Committee would retain the matter on its study agenda and consider it further at the next meeting. The member who had raised the question stated that he would be amenable to that approach, but that if the proposal turns out to be one for a national rule he would vote against it. After this discussion, Mr. Levy withdrew the motion.

By consensus, the Committee retained Item 06-08 on its study agenda. The Reporter will work with Mr. Letter and Mr. Levy to develop a proposal for the Committee's consideration at the spring meeting.

3. Item No. 07-AP-F (amend FRAP 35(e) so that the procedure with respect to responses to requests for hearing or rehearing en banc will track the procedure set by FRAP 40(a)(3) with respect to responses to requests for panel rehearing)

Judge Stewart invited the Reporter to describe the issues raised by Item No. 07-AP-F. This Item arises from a suggestion made by Judge Jerry Smith. Judge Smith points out that while Rule 40 assures litigants that ordinarily the court will request a response to a petition for panel rehearing before granting such a petition, Rule 35 provides no such assurance with respect to requests for rehearing en banc. Judge Smith suggests that Rule 35(e) should be amended to state that ordinarily the court will not grant rehearing en banc without first allowing a response to the request.

The Reporter noted that during the Committee's deliberations over the restyling of the Appellate Rules, the Committee discussed but rejected the option of eliminating this difference between Rules 35 and 40. From the minutes, it appears that one or more members relied on the notion that if en banc rehearing is granted, there will be a later opportunity for the party opposing the petition to respond – namely, during the en banc briefing.

The Reporter briefly reviewed the circuit-specific provisions on this question. Currently, seven circuits have no rule or other local provision that would assure the opponent of a petition for rehearing en banc that it will be asked to respond before rehearing en banc is granted. Five circuits have provisions stating that the court will not, or ordinarily will not, grant rehearing en banc without first ordering a response. Another circuit has an internal operating procedure that, in practice, likely assures that in most instances a response will be requested prior to a grant of rehearing en banc. As a point of comparison, the Supreme Court Rules state that the Court ordinarily will not grant rehearing without first requesting a response.

Mr. Fulbruge noted that although the Fifth Circuit does not have a local rule on point, in practice the court requests a response before granting rehearing en banc. Judge Stewart agreed that, in practice, the court would not grant rehearing en banc without requesting a response. He noted, as well, that a response to the request for rehearing en banc can assist the court in reaching a resolution that stops short of rehearing en banc; for example, the panel might change some aspects of the language in the panel opinion.

Judge Hartz noted that though the Tenth Circuit does not have a local rule on point, in practice the court calls for a response prior to granting a request for rehearing en banc. On the other hand, Judge Hartz noted, the court does order en bancs *sua sponte* without first requesting a

response. Judge Stewart noted that a fair number of rehearings en banc are initiated by a circuit judge rather than by the parties.

Mr. Letter cautioned that it is not always the case that the party opposing rehearing en banc will get an opportunity to submit new briefing during the en banc procedure itself. For example, in the Ninth Circuit, the court does not always call for new briefs when it grants rehearing en banc. He suggested that it is good to call for a response before granting rehearing en banc, because giving the party a chance to submit its views in opposition to rehearing contributes to the perception that the process is fair. This is true, Mr. Letter suggested, not just when a party requests rehearing en banc but also when the court grants rehearing en banc sua sponte.

An attorney member stated that he believes the proposal makes sense, although he has not considered the question of whether the court should provide an opportunity for a response before it grants rehearing en banc sua sponte. He noted a general trend in the Appellate Rules toward treating panel rehearing and rehearing en banc the same way. Another attorney member stated that seemed to be no grounds for objection to the proposed rule change, but, on the other hand, that it is not clear whether there is a need for it: As a practical matter, the courts seem to ask for a response before granting rehearing en banc. A judge noted that if Rule 35 is amended, there is the question of whether to cover sua sponte grants of rehearing en banc. It was noted that one could draft the response provision so it does not apply to sua sponte en bancs; and it was also observed that the Rule 40 provision contains the qualifier "ordinarily."

By consensus, Item No. 07-AP-F was retained on the study agenda.

4. Item No. 07-AP-G (amend FRAP Form 4 to conform to privacy requirements)

Judge Stewart invited Mr. McCabe to present Item No. 07-AP-G, which concerns the implications of the new privacy requirements for Appellate Form 4.

Mr. McCabe explained that the Administrative Office produces a number of forms, and has a working group that provides advice on them and on other forms. Among the forms appended to the Appellate Rules is Form 4, which concerns the information that must accompany a motion for permission to appeal in forma pauperis. Form 4 is referred to in Rule 24, which states that motions for leave to proceed in forma pauperis status must attach an affidavit that shows in the detail prescribed by Form 4 the party's inability to pay.

In the wake of the E-Government Act, the courts have adopted new privacy rules that require redaction of certain personal identifiers. An effort has been made to review the AO's many forms for consistency with the new privacy requirements. The AO's committee has identified a number of forms for court filings that ask the litigant to include a social security number.

There is thus a need to consider amending Form 4. There is also the question of what form should be used in the district courts. Perhaps Form 4 can be adapted for use in the district courts. But some district judges argue that they do not need all the detail required by Form 4, especially in prisoner cases. One option might be to use something like Form 4 for use in non-prisoner cases, and to have a shorter, simpler form for use in prisoner cases. In the meantime, it is necessary to bring the current forms into compliance with the new privacy requirements. Mr. McCabe also noted that an effort is underway to restyle all of the forms. Mr. Rabiej noted that the district courts' shorter form is used in habeas cases, where the fee is $ 5.00; questions concerning a $ 5.00 fee would not seem to justify a lengthy affidavit form.

Mr. Coquillette pointed out that, while the Committee is considering revisions to Form 4, it may wish to consider Question 10, which requests the name of any attorney whom the litigant has paid for services in connection with the case, as well as the amount the litigant has paid. Mr. Coquillette stated that the National Association of Criminal Defense Lawyers has argued that these questions seek information that is protected by the attorney-client privilege; he noted that some other commentators dispute that view.

Mr. Fulbruge noted that it is important to require some sort of personal identifying information, especially since many litigants may have common surnames. Mr. Rabiej asked whether including the last four digits of the person's social security number would suffice. Judge Rosenthal stated that in addition, it is important to require the person's full name. She stated support for the notion of having one form that can be used in both the district courts and the courts of appeals. She observed that current Form 4 includes what seems like excessive detail for in forma pauperis requests; why does the judge need to know about the person's laundry and dry cleaning? Mr. Rabiej recounted that the Supreme Court Clerk had specifically requested that detailed questions be included in Form 4.

Judge Rosenthal stressed the need to act quickly to eliminate the request for the full social security number. Judge Rosenthal observed that the issue of home addresses should also be looked at, and that Form 4's Question 7 – relating to dependents – raises privacy issues concerning minor children. The Committee will work with CACM and other Committees and with Mr. Rabiej and Mr. McCabe to get the word out to the district courts and courts of appeals. Mr. Fulbruge suggested that it will also be important to get word to prison libraries. Mr. Fulbruge volunteered to reach out to his colleagues among the circuit clerks to alert them to these issues.

VII. Additional Old Business and New Business

A. Information item relating to Item No. 06-05 (statement of issues to be raised on appeal)

The Reporter drew the Committee's attention to the correspondence from Judge Jan

DuBois, who wrote to the Reporter to express support for Judge Baylson's proposal for a FRAP rule modeled on Pennsylvania Rule of Appellate Procedure 1925(b). The Reporter noted that she had had a very helpful telephone discussion with Judge DuBois concerning his support for the proposal, and that she had assured Judge DuBois that she would make the Committee aware of his thoughts on the matter.

B. New Business

Judge Stewart noted that, pursuant to the Chief Justice's new policy, the Chairs of the Rules Committees will be attending the Judicial Conference's discussions concerning long-range planning. Thus, if members have suggestions concerning long-range planning issues, Judge Stewart would be happy to discuss them.

A judge member noted that the Tenth Circuit's recent opinion in *Warren v. American Bankers Insurance of Florida*, 2007 WL 3151884, raises significant issues concerning the operation of the separate document rule. Mr. Letter agreed that the questions raised in *Warren* are important. The Reporter suggested that she should investigate the matter and report on it at the Committee's spring meeting.

VIII. Date and Location of Spring 2008 Meeting

The Committee tentatively discussed April 10 and 11 as possible dates for the Committee's Spring 2008 meeting. The date and location will be announced.

IX. Adjournment

The Committee adjourned at 9:45 a.m. on November 2, 2007.

Respectfully submitted,

_____

Catherine T. Struve
Reporter

Advisory Committee on Appellate Rules
Table of Agenda Items — December 2007

FRAP Item	Proposal	Source	Current Status
01-03	Amend FRAP 26(a)(2) to clarify interaction with "3-day rule" of FRAP 26(c).	Roy H. Wepner, Esq.	Discussed and retained on agenda 04/01 Referred to Civil Rules Committee 04/02 Draft approved 11/03 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07
03-02	Amend FRAP 7 to clarify whether reference to "costs" includes only FRAP 39 costs.	Advisory Committee	Discussed and retained on agenda 05/03 Draft approved 11/03 for submission to Standing Committee Discussed and retained on agenda 04/07 Discussed and retained on agenda 11/07
03-09	Amend FRAP 4(a)(1)(B) & 40(a)(1) to clarify treatment of U.S. officer or employee sued in individual capacity.	Solicitor General	Discussed and retained on agenda 11/03; awaiting revised proposal from Department of Justice Tentative draft approved 04/04 Revised draft approved 11/04 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice Discussed and retained on agenda 04/06; Department of Justice will monitor practice under the Act
05-05	Amend FRAP 29(e) to require filing of amicus brief 7 *calendar* days after *service* of principal brief of party supported.	Brian Wolfman Public Citizen Litigation Group	Discussed and retained on agenda 04/06; awaiting report from Department of Justice Further consideration deferred pending consideration of items 06-01 and 06-02, 11/06
05-06	Amend FRAP 4(a)(4)(B)(ii) to clarify whether appellant must file amended notice of appeal when court, on post-judgment motion, makes favorable or insignificant change to judgment.	Hon. Pierre N. Leval (CA2)	Discussed and retained on agenda 04/06 Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07

FRAP Item	Proposal	Source	Current Status
06-01	Amend FRAP 26(a) to adopt template proposed by Time-Computation Subcommittee.	Standing Committee	Discussed and retained on agenda 04/06 Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07
06-02	Amend various rules to adjust deadlines to compensate for new time-computation method.	Standing Committee	Discussed and retained on agenda 04/06; deadline subcommittee appointed Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07
06-04	Amend FRAP 29 to require that amicus briefs indicate whether counsel for a party authored brief and to identify persons who contributed monetarily to preparation or submission of brief.	Hon. Paul R. Michel (C.J., Fed. Cir.) and Hon. Timothy B. Dyk (Fed. Cir.)	Discussed and retained on agenda 11/06 Draft approved 04/07 for submission to Standing Committee Remanded by Standing Committee for consideration of new developments, 06/07 Draft approved 11/07 for submission to Standing Committee
06-08	Amend FRAP to provide a rule governing amicus briefs with respect to rehearing en banc.	Mark Levy, Esq.	Discussed and retained on agenda 11/07
07-AP-B	Add new FRAP 12.1 concerning the procedure to be followed when a district court is asked for relief that it lacks authority to grant due to a pending appeal.	Civil Rules Committee 1/07	Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07
07-AP-C	Amend FRAP 4(a)(4)(A) and 22 in light of proposed amendments to Rules 11 of the rules governing 2254 and 2255 proceedings.	Criminal Rules Committee 1/07	Draft approved 04/07 for submission to Standing Committee FRAP 22 amendment approved for publication by Standing Committee 06/07 FRAP 22 amendment published for comment 08/07
07-AP-D	Amend FRAP to define the term "state."	Time-computation Subcommittee 3/07	Discussed and retained on agenda 04/07 Tentative draft approved 11/07
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07

FRAP Item	Proposal	Source	Current Status
07-AP-F	Amend FRAP 35(e) so that the procedure with respect to responses to requests for hearing or rehearing en banc will track the procedure set by FRAP 40(a)(3) with respect to responses to requests for panel rehearing.	Hon. Jerry E. Smith	Discussed and retained on agenda 11/07
07-AP-G	Amend FRAP Form 4 to conform to privacy requirements.	Forms Working Group, chaired by Hon. Harvey E. Schlesinger	Discussed and retained on agenda 11/07
07-AP-H	Consider issues raised by Warren v. American Bankers Insurance of Florida, 2007 WL 3151884 (10th Cir. 2007), concerning the operation of the separate document rule.	Appellate Rules Committee	Awaiting initial discussion
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Awaiting initial discussion

6A.

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

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CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

To: **Honorable Lee H. Rosenthal, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Honorable Mark R. Kravitz, Chair**
Advisory Committee on Federal Rules of Civil Procedure

Date: **December 17, 2007**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts on November 8 and 9, 2007. Draft Minutes of the meeting are attached. On November 6, the Rule 56 Subcommittee held a "miniconference" on the Rule 56 draft that was included with the Advisory Committee Report to the June 2007 meeting of the Standing Committee. The Discovery Subcommittee met several times by conference calls over the summer and into the fall. These activities are reported in the discussion items below.

Several Civil Rules amendments were published for comment in August 2007, including the Civil Rules part of the Time-Computation project. Few comments were received during the early part of the comment period. The full set of comments will be reviewed and the proposals will be considered for further action at the April Advisory Committee meeting.

No action items are presented in this report.

Three discussion items are presented in Part I. The first two, involving summary judgment and discovery of expert trial witnesses, are presented for initial reactions that will help the Advisory Committee as it prepares what may become recommendations to publish amendments next summer. The third, involving notice pleading, is presented for advice on whether, and perhaps when, it will be appropriate to consider the impact of *Bell Atlantic Corp. v. Twombly*, 2007, 550 U.S. ___, 127 S.Ct. 1955. This topic will be presented through a panel discussion.

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

I DISCUSSION ITEMS

A. Rule 56: Summary Judgment

The Rule 56 proposals described here have been developed in a Rule 56 Subcommittee chaired by Judge Michael Baylson and refined in Advisory Committee discussions. The process has been advanced by the valuable contributions of the many lawyers, judges, and academics who participated in two miniconferences in January and November 2007. Studies by the Federal Judicial Center also have provided important insights into the operation of present Rule 56. Memoranda on

local rules by Jeffrey Barr and James Ishida of the Rules Committee Support Office demonstrated the widespread adoption and great variety of local rules. A preliminary FJC report and the local rules memoranda are attached.

These proposals represent an effort to improve the procedures for making, opposing, and resolving summary-judgment motions. From the beginning, the Committee has been determined that no change should be attempted in the summary-judgment standard or in the assignment of burdens between movant and nonmovant. The amendments are designed to be neutral as between plaintiffs and defendants. The aim is a better Rule 56 procedure that improves alike the prospects of good motions and good responses, while equally deterring bad motions and bad responses. No prediction is offered whether the result will be more or fewer motions, or more or fewer summary judgments. Improved procedures may, for example, reduce strategic use of summary-judgment motions as a short-cut means to discover an adversary's positions and evidence or as unworthy means of increasing delay and expense. The need to identify clearly the facts said to be established beyond genuine dispute, and to point directly to the record materials that make them so, should discourage motions with little or no chance of success. Even if an ill-founded motion is made, clear presentation will facilitate an efficient response and prompt denial. Improved procedures, on the other hand, may encourage well-founded motions and focused responses, facilitating well-informed decision.

Rule 56 has been held on the Civil Rules agenda for several years following an attempt at thorough revision that failed in 1992; a summary of that attempt is attached. It has been brought back for active consideration in conjunction with ongoing discovery amendments and with consideration of notice pleading. Efforts to achieve fully satisfactory discovery practices have continued without surcease for forty years and show no sign of abating. Notice pleading, the gateway to discovery, has been the subject of puzzled attention for nearly twenty years, and has been brought back to the fore by the *Twombly* decision discussed elsewhere in these materials. Summary judgment is widely recognized as the third main component of the 1938 revolution that established notice pleading and sweeping discovery. The question is whether improvements in summary judgment procedure, made without changing the standard for summary judgment or the related moving burdens, can improve the role of summary-judgment as the third leg of the notice-pleading, discovery, summary-judgment stool.

More concrete considerations supplemented these overarching concerns. Rule 56 has not been amended, apart from the Style Project, for many years. Practice has grown increasingly out of touch with the present rule text. Most districts have adopted local rules to supplement the national rule. The local rules are not uniform, and at times direct practices that are inconsistent from one district to another. It is useful, and increasingly important, to restore greater uniformity through a national rule that builds on the most successful local rules as well as on proliferating interpretations of present Rule 56 text.

It bears emphasizing again that the summary-judgment project began with the determination that the standard for granting summary judgment should not be reconsidered. Restatement of the summary-judgment burdens also was placed off limits because the burdens are closely tied to the standard. It is better to leave these matters to continuing evolution under the 1986 Supreme Court decisions that have guided practice for the last twenty years and more.

An advanced Rule 56 draft was included in the agenda materials for the June 2007 Standing Committee meeting. The draft was not brought on for discussion because more pressing matters in the five-volume agenda left no room for extended consideration. The Advisory Committee and Subcommittee have taken advantage of the time afforded by the resulting hiatus to revise the draft. A second miniconference was held in November to follow up the lessons of the January miniconference with an entirely different but equally diverse group of lawyers, academics, and

judges. The discussion inspired new recommendations by the Subcommittee that were acted upon by the Advisory Committee and further refined by the Subcommittee after the Committee meeting.

The current draft is presented now for purposes of initial discussion. The hope is to learn as much as can be in the time available in the January agenda to advance preparation of a draft that will be ripe for a recommendation at the June meeting to publish proposed Rule 56 amendments for public comment.

Some of the more particular issues that may benefit from discussion are identified by footnotes in the draft rule text and Committee Note. Broader issues are noted here.

Subdivision (a)

Subdivision (a) brings the basic summary-judgment authority up to the front of the rule, in a manner parallel to the closely related Rule 50 provisions for judgment as a matter of law. It also anticipates the repeated later references to summary judgment on a claim, defense, or part of a claim or defense. These provisions do not alter present practice. To the contrary, the statement of the summary-judgment standard emphasizes continuity by taking the words of present Rule 56(c) with only one change, substituting "genuine dispute" for "genuine issue" of fact.

Subdivision (a) also directs that the court must state on the record the reasons for granting — and should state the reasons for denying — summary judgment. Courts of appeals regularly emphasize the need for an explanation of orders granting summary judgment, and lawyers regularly emphasize the importance of guidance on the issues the court believes require trial. As explained in the Committee Note, these statements do not require the detail or formality of Rule 52 findings of fact. The form and detail of the statement of reasons are left to the court's discretion.

Subdivision (c)

In many ways subdivision (c) is the core of the newly elaborated Rule 56 procedure. It grows out of procedures established by many local rules. One goal, indeed, is both to propagate the best lessons to be drawn from the local rules and to establish a uniform template that will work well for most cases. As might be expected, these provisions have been vigorously discussed and debated. Different local practices fostered by divergent local rules win strong support from those who have worked successfully with each particular variation.

The first point to note in describing subdivision (c) is that it establishes a general practice that will serve the needs of most cases without requiring that all cases be fit into the same mold. The first paragraph recognizes that the court may order a different procedure in a case. It is limited to directions by order in a case; it does not contemplate local rules or "standing orders" that routinely displace subdivision (c) procedures for all cases.

Subdivision (c)(2) describes the general procedure for motion, response, and reply. The movant provides three things: a motion identifying the claim, defense, or part of each claim or defense as to which summary judgment is sought; a concise statement of facts in separately numbered paragraphs; and a brief. The response must address each fact, accepting, disputing, or accepting in part and disputing in part. The response also may challenge the admissibility of evidence relied on by the movant, and may assert additional facts that preclude summary judgment. The movant must reply to any additional facts.

Each statement or dispute of fact must ordinarily be supported by citations to particular parts of materials in the record. But subdivision (c)(2)(D)(ii) recognizes that a motion, response, or reply may be made without specific record citations. A response, for example, may assert that the

materials relied on in a motion to show the absence of a genuine dispute do not show that. Similarly, a reply may assert that additional facts relied on to show a genuine dispute do not do that. The most sensitive part of this item reflects the Supreme Court's ruling in the Celotex case that a party who does not have the trial burden of producing evidence of a fact may support a summary-judgment motion by "showing" that the party who has the trial burden cannot product admissible evidence to support the fact. It is essential that the rule recognize this definition of the Rule 56 moving burden, however unusual it may be for a movant to rely on such a showing without pointing to particular parts of materials in the record. At the same time it is better that the rule not attempt to elaborate on any continuing uncertainty as to what a movant must do to establish such a "showing." The proposed draft simply accepts the guiding language, relying on continuing evolution in the courts.

The rule text says only that materials cited to support a statement or dispute of fact must be in the record. The Committee Note supplements the text by recognizing that the court may direct that the materials be gathered in an appendix, or that a party provide directions on how to find materials buried in a mammoth record. That authority is securely anchored in subdivision (c)(1). Earlier drafts also recognized the legitimacy of local rules requiring an appendix. Such rules do not seem inconsistent with the proposed rule text; despite continuingly ambivalent feelings about local rules, it may be desirable to restore this sentence.

Some hesitation has attended draft subdivision (c)(2)(E). This subdivision confirms common statements that the court need not consider materials not cited by the parties. At the same time it seeks clarity by confirming that the court may consider record materials not cited by the parties. It does not seem wise to require a court, for example, to grant summary judgment in the face of a genuine dispute established by record materials that a nonmovant has not had the wit to cite. But this subparagraph might seem to threaten adversary control of the case. It deserves close discussion.

Subdivision (e)

Subdivision (e) 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). Ordinarily a court will respond in the manner identified by subdivision (e)(1), affording an opportunity to respond in proper form. But the court need not do that, and may well abandon the effort after an unsuccessful attempt. Beyond that point, three main approaches could be taken. One would treat the failure to respond or an improper response as a default, leading to summary judgment without examining the motion or supporting materials to determine whether the movant is entitled to judgment as a matter of law. Subdivision (e) rejects this approach. A second — reflected in more than a dozen local rules — would "deem admitted" facts asserted by the movant but not properly responded to. This approach is not the same as default. If there is no response to a summary-judgment motion, or if 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 considered accepted, together with facts otherwise established beyond genuine dispute, support summary judgment. This approach is one of the alternatives recognized in subdivision (e). A third approach would have the judge examine the motion and supporting materials, allowing summary judgment only if the movant has carried the summary-judgment burden even as to facts that might have been considered accepted. This approach too is recognized as an available alternative; when it is taken, 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.

A footnote to subdivision (e) identifies the question whether the rule text should also address a motion — not only a response or reply — that does not comply with subdivision (c) requirements.

Other Subdivisions

The remaining subdivisions are important but have not seemed to present as many issues for discussion. Some of the finer points are identified by the footnotes added to the rule text and Committee Note.

Subdivision (b) carries forward the timing provisions that were published for comment as part of the Time-Computation Project in August 2007. Changes are made only to adapt these provisions to the amended Rule 56 structure.

Subdivision (d) carries forward present subdivision (f). After exploring more extensive changes, the Committee decided that it is better to rely on the well-developed case law than to attempt to capture the multiple relevant factors in a more elaborate rule. The Committee also considered and rejected adding a requirement that a party asking more time for discovery or other investigation describe the facts it hopes to prove. The new text does add an explicit recognition that the court may deny a premature motion rather than carry it forward. The detailed statements and citations required by subdivision (c) enhance the prospect that any consideration of summary judgment after further significant discovery would require such thorough revision as to make it better to start over.

Subdivision (f) 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 (g) 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 or to establish that a material fact is not genuinely in dispute. A footnote in the draft identifies an issue that was much discussed — whether to add further explicit recognition that the court may (or even should) identify material facts that are genuinely in dispute. This paragraph has been omitted on the view that the subdivision (a) behest to state the reasons for denying summary judgment suffices; it might impose untoward burdens to urge greater detail here.

Subdivision (h), finally, carries forward with only one change present Rule 56(g)'s 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

This proposal draws from the laboratories provided by many local rules and by many years of evolution in practice. It attempts to synthesize the procedures that have been most effective, providing both guidance and consistency lacking in present Rule 56, as well as necessary flexibility to tailor the procedures to the needs of particular cases. Public comment will provide on a larger scale the benefits that have been gained from two successful miniconferences, further revealing the lessons of experience and ensuring achievement of the intended purpose to improve Rule 56 procedures and make them more consistent without changing the standard for summary-judgment rulings or making it either easier or more difficult to obtain summary judgment.

Rule 56: December 12, 2007 Revisions

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 56. Summary Judgment

1 **(a) Summary Judgment.** A party may move for summary
2 judgment on part or all of a claim or defense. The court
3 should[1] grant summary judgment if there is no genuine
4 dispute as to any material fact and a party is entitled to
5 judgment as a matter of law. The court must state on the
6 record the reasons for granting — and should state on

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[1] Until November 30, 2007, Rule 56(c) said that the court "shall" grant summary judgment. As explained in the Committee Note for the Style Project revisions, "shall" — a word forbidden in any Rules usage — was rendered as "should." The courts have long recognized discretion to deny summary judgment even when the summary-judgment record seems to show that a movant is "entitled to judgment as a matter of law." The present project is not bound by the Style Project protocol that no change could be made in a rule's meaning. Some Advisory Committee members have urged that "must" should be substituted for "should." They believe that a party who has successfully undertaken to show there is no genuine dispute as to any material fact is truly "entitled" to summary judgment. The Committee majority continues to believe that a one-way discretion to deny summary judgment is important. A trial record may provide a more secure foundation for deciding important issues. Holding trial may require less work than resolving facts on the borderline of genuine dispute, particularly if resolution in favor of summary judgment is followed by reversal. The losing party and the public may trust the trial process better than summary judgment.

7 the record the reasons for denying — summary
8 judgment.

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

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

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

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

19 **(c) Procedures.**

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

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

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

24 **(i)** identify each claim, defense, or the part
25 of each claim or defense as to which
26 summary judgment is sought; and

27 **(ii)** be accompanied by[2] a [separate] concise
28 statement in separately numbered
29 paragraphs of only those material facts[3]

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[2] The Subcommittee and Committee debated at length the choice between a "two-document" approach that incorporates the statement of undisputed facts in the motion and the "three-document" approach that — absent a contrary order — requires a motion, a separate statement, and a brief. The three-document approach prevailed. The motion is a summary statement of the relief requested. Several judges stated that they begin with this statement, then read the brief to establish the context, and go to the statement of undisputed facts and supporting citations only as the third step.

As a drafting matter, "accompanied by" may suffice to convey the separate-document approach. If so, we can delete the bracketed "[separate] concise statement in separately numbered paragraphs," avoiding the repeat use of "separate." But this may be a message that wants reinforcement.

[3] The miniconferences provided many testimonials to the tendency of some lawyers to produce bloated — and counterproductive — statements of "undisputed facts," at times running to more than 100 pages. Quite a few suggested that the rule should impose at least a

30 that the movant asserts are not
31 genuinely in dispute and entitle the
32 movant to summary judgment.

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

34 **(i)** must, by correspondingly numbered
35 paragraphs, accept, dispute, or accept in
36 part and dispute in part — either
37 generally or for purposes of the motion
38 only — each fact in the Rule
39 56(c)(2)(A)(ii) statement;

40 **(ii)** may state without argument that the
41 material cited to support a fact is not
42 admissible in evidence; and

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default limit: 10 undisputed facts, or 20. The limit has not seemed attractive. What is left is an attempt at gentle persuasion — the statement must be "concise," and must address "only" "material" facts. The Committee Note fleshes out this effort. It has been difficult to find words to express more forceful encouragement.

43 **(iii)** may state in separately numbered
44 paragraphs additional material facts that
45 preclude summary judgment.

46 **(C)** *Reply.* The movant must[4] reply in the form
47 required for a response to any additional
48 fact stated in the response.

49 **(D)** *Citing Support for Positions.* A statement or
50 dispute of fact must be supported by:

51 **(i)** citations to particular parts of materials in
52 the record, including depositions,
53 documents, electronically stored
54 information, affidavits or declarations,
55 stipulations (including those made for
56 purposes of the motion only),

[4] The consequences for failing to respond or reply are addressed by subdivision (e). "Must" here is consistent with "may" in the (b)(3) time-to-reply provision — no reply is required, or even permitted, when the response does not state additional facts.

57 admissions, interrogatory answers, or
58 other materials; or

59 **(ii)** a showing that the materials cited to
60 dispute or support the fact do not
61 establish a genuine dispute or the
62 absence of one, or that an adverse party
63 cannot produce admissible evidence to
64 support the fact.[5]

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[5] This language carries forward language from the Celotex opinion stating that a party who does not have the trial burden of producing evidence of a fact may carry the Rule 56 burden by "showing" that an opposing party cannot produce evidence to carry its trial burden. Celotex Corp. v. Catrett, 1986, 477 U.S. 317, 325: "But we do not think the Adickes language quoted above should be construed t omean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, as we have explained, the burden on the moving party may be discharged by 'showing' — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case." No attempt is made to resolve the ambiguities that continue to lurk in this language, particularly understanding how a party "shows" or "points out" an absence of evidence. Lower courts have not been entirely uniform in interpreting it, and it may be expected that the case law will continue to evolve. Although the Rule 56 burden is in some

65 **(E) Materials not Cited.** The court may — but
66 need not — consider materials of record
67 outside those called to its attention under
68 Rule 56(c)(2)(D).[6]

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ways independent of the standard for determining whether there is a genuine dispute, attempts to clarify the moving burden would severely test the self-imposed purpose to address only the procedures, not the standard, for summary judgment. However these questions come to be resolved, improved Rule 56 procedures will better enable the parties to carry their respective burdens.

[6] This provision appeared in early drafts, was deleted, and then restored. Trial judges lament that summary judgments are reversed for failure to look to record information not cited by the parties. A clear statement that the court need not consider uncited materials, reflecting common statements in appellate opinions and in some local rules, would be welcome. But the statement could be misleading if the rule text does not also recognize that the court may deny summary judgment despite a nonmovant's inept failure to point to record information that does establish a genuine dispute. On the other hand, recognizing the authority to look beyond the parties' record citations may raise concerns that the court will rely on materials the parties recognize as unreliable. The Committee Note attempts to illustrate the intended uses of this provision.

69 **(F)** *Affidavits or Declarations.*[7] An affidavit or
70 declaration used to support a motion,
71 response, or reply must be made on personal
72 knowledge, set out facts that would be
73 admissible in evidence, and show that the
74 affiant or declarant is competent to testify on
75 the matters stated.

76 **(G)** *Brief.* A party must submit its contentions as
77 to the controlling law or the facts in a
78 separate brief filed with the motion, response,
79 or reply.[8]

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

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

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

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

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

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

Committee Note?

December 12, 2007 draft

88 **(e) Failure to Respond or Properly Respond.**[9] If a
89 response or reply does not comply with Rule 56(c) — or
90 if there is no response or reply — the court may:

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[9] Some observers suggested that this subdivision should also address a motion that fails to comply with the requirements of (c)(2)(A). It was decided, at least tentatively, that there is no need to do so. Courts know how to deal with defective motions without further guidance. This subdivision is designed to address questions raised by local rules and general practices relating to defective responses.

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

91 **(1)** afford an opportunity to respond or reply as
92 required by Rule 56(c);

93 **(2)** consider a fact [as] accepted for purposes of the
94 motion;

95 **(3)** grant summary judgment if the motion and
96 supporting materials show that the movant is
97 entitled to it;[10] or

98 **(4)** issue any other appropriate order.

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

101 **(1)** grant summary judgment for a nonmovant;

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

102 **(2)** grant or deny a motion for summary judgment on
103 grounds not raised by the motion or response; or

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

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

109 **(1)** may grant partial summary judgment on a claim,
110 defense, or part of a claim or defense; and

111 **(2)** may enter an order or memorandum stating any
112 material fact — including an item of damages or
113 other relief — that is not genuinely in dispute and
114 treating the fact as established in the action.[11]

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[11] There has been lively discussion of a possible third paragraph: "should identify on the record material facts that are genuinely in dispute." This paragraph would recognize the value of guiding the parties by statements more detailed than contemplated by the subdivision (a) provision that the court should state the reasons for

115 **(h) Affidavit or Declaration Submitted in Bad Faith.**[12] If

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denying summary judgment. If it were included in the rule text, the Committee Note might look like this:

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

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

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

116 satisfied that an affidavit or declaration under this rule
117 is submitted in bad faith or solely for delay, the court —
118 after notice and a reasonable time to respond — may
119 order the submitting party to pay the other party the
120 reasonable expenses, including attorney's fees, it
121 incurred as a result. An offending party or attorney may
also be held in contempt.

COMMITTEE NOTE

1 Rule 56 is revised to improve the procedures for presenting and
2 deciding summary-judgment motions and to make the procedures
3 more consistent with those already used in many courts. The standard
4 for granting summary judgment remains unchanged. The language
5 of subdivision (a) continues to require that there be no genuine
6 dispute as to any material fact and that a party be entitled to judgment
7 as a matter of law. The amendments will not affect continuing
8 development of the decisional law construing and applying these
9 phrases. The source of contemporary summary-judgment standards
10 continues to be three decisions from 1986: *Celotex Corp. v. Catrett*,
11 477 U.S. 317; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242; and
12 *Matsushita Electrical Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574.

13 The practice and procedures implementing Rule 56 have grown
14 away from the rule text. Many districts have adopted local rules

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bearing might be a substantial inroad on the general attorney-fee rules. Employment cases might be particularly troubling, since they often involve statutory fee provisions designed to favor plaintiffs.

15 governing summary-judgment motion practice. These local rules
16 have generated many of the ideas incorporated in these amendments.
17 Not surprisingly, some local rules provisions are inconsistent with
18 parallel provisions in the local rules of other courts. So too some are
19 inconsistent — or at least fit poorly — with some of these
20 amendments. Local rules committees should review their local rules
21 to ensure they continue to meet the Rule 83 standard that they be
22 consistent with and not duplicate Rule 56.

23 ***Subdivision (a).*** Subdivision (a) carries forward the summary-
24 judgment standard expressed in former subdivision (c), changing only
25 one word — genuine "issue" becomes genuine "dispute." "Dispute"
26 better reflects the focus of a summary-judgment determination. There
27 is no change in the rule that a court has discretion to deny summary
28 judgment even if it does not appear that there is a genuine dispute. It
29 may be less burdensome or more transparent to hold trial than to
30 resolve close questions whether the summary-judgment standard is
31 satisfied. Or information not admissible at trial may show a prospect
32 that a nonmovant will be able to find sufficient admissible evidence
33 in time for trial. As observed in the Committee Note to the 2007
34 amendments, the direction that summary judgment "should" be
35 granted "recognizes that courts will seldom exercise the discretion to
36 deny summary judgment when there is no genuine issue as to any
37 material fact."

38 The reference to "any material fact" is carried forward
39 unchanged, recognizing that the materiality of a fact may be
40 conditional upon other facts. If the defendant was not driving the
41 automobile involved in the accident and there is no basis for vicarious
42 liability, the character of the driver's conduct is not material as to this
43 defendant, even though it would be material to a claim against the
44 driver.

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

48 Subdivision (a) also adds a new direction that the court must
49 state on the record the reasons for granting, and should state the
50 reasons for denying, summary judgment. Most courts recognize these
51 practices, which facilitate appeals or subsequent trial-court
52 proceedings. The form and detail of the statement of reasons are left
53 to the court's discretion.

54 The statement on granting summary judgment is not a matter of
55 finding facts in the sense of Rule 52. Appellate review will continue
56 to be as a matter of law. But the statement should identify the general
57 reasons that support the judgment, addressing the dispositive facts
58 and underlying law in a way that supports the decision whether to
59 appeal and the argument and decision of the appeal. And the court
60 may, if it wishes, address other issues as well. It might be useful for
61 purposes of appellate review, for example, to state that not only is
62 there no genuine dispute whether the defendant was driving the
63 automobile but in addition the defendant has established beyond
64 genuine dispute that the driver was not negligent — or to state that
65 there is a genuine dispute as to the driver's negligence.

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

71 ***Subdivision (b).*** The timing provisions in former subdivisions
72 (a) and (c) were consolidated and substantially revised as part of the
73 Time Project amendments that took effect in 2009. These provisions
74 are adapted by new subdivision (b) to fit the context of amended Rule
75 56.[13]

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[13] The overlined material is retained provisionally. If the Time Project amendments go forward on schedule it will be deleted.

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

81 ~~The presumptive timing rules are default provisions that may be~~
82 ~~altered by an order in the case or by local rule. Scheduling orders are~~
83 ~~likely to supersede the rule provisions in most cases, deferring~~
84 ~~summary-judgment motions until a stated time or establishing~~
85 ~~different deadlines. Scheduling orders tailored to the needs of the~~
86 ~~specific case, perhaps adjusted as it progresses, are likely to work~~
87 ~~better than default rules. A scheduling order may be adjusted to adopt~~
88 ~~the parties' agreement on timing, or may require that discovery and~~
89 ~~motions occur in stages — including separation of expert-witness~~
90 ~~discovery from other discovery.~~

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

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

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

101 The subdivision (c) procedure is designed to fit the practical
102 needs of most cases. Paragraph (1) recognizes the court's authority
103 to direct a different procedure by order in a case that will benefit from
104 different procedures. The parties may be able to agree on a procedure
105 for presenting and responding to a summary-judgment motion,
106 tailored to the needs of the case. The court may play a role in shaping
107 the order under Rule 16.

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

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

120 The motion must be accompanied by a separate concise
121 statement in separately numbered paragraphs of only those material
122 facts that the movant asserts are not genuinely in dispute and entitle
123 the movant to judgment as a matter of law. Many local rules require,
124 in varying terms, that a motion include a statement of undisputed
125 facts. In some cases the statements and responses have expanded to
126 identification of hundreds of facts, elaborated in hundreds of pages
127 and supported by unwieldy volumes of materials. This practice is
128 self-defeating. To be effective, the motion should focus on a small
129 number of truly dispositive facts.

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

136 The response also may be used to challenge the admissibility of
137 material cited to support a fact. The challenge can be supported by
138 argument in the brief, or may be made in the brief alone. There is no
139 need to make a separate motion to strike. If the case goes to trial,
140 failure to challenge admissibility at the summary-judgment stage does

141 not forfeit the right to challenge admissibility at trial. (This challenge
142 to the admissibility of materials relied upon by an adversary to
143 support a summary-judgment assertion that a fact is not subject to
144 genuine dispute is different from supporting a summary-judgment
145 motion by arguing that a party who has the trial burden of production
146 cannot produce admissible evidence to support a fact. See
147 subdivision (c)(2)(D)(ii).)

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

151 If the response states additional facts the movant must reply to
152 the additional facts in the form required for a response. The
153 exchanges stop at this point. The rule does not provide for a sur-reply
154 to additional facts stated in the reply, nor for still further stages. But
155 the court may order further exchanges if that would aid in deciding
156 the motion.

157 Subparagraph (c)(2)(D) addresses the ways to support a
158 statement or dispute of fact. Item (i) describes the familiar record
159 materials commonly relied upon and requires that the movant cite the
160 particular parts of the materials that support the facts. Specific
161 citations are important to enable the parties and the court to address
162 the facts efficiently and effectively. Specific citations to factual
163 materials often will be provided even by a party who does not have
164 the trial burdens on an issue, including citations to discovery
165 responses, stipulations, or other concessions by the party who does
166 have the trial burdens. Materials that are not yet in the record —
167 including materials referred to in an affidavit or declaration — must
168 be placed in the record. Legal sources cited to support a party's
169 position need not be filed.[14] Once materials are in the record, the
170 court may, by order in the case, direct that the materials be gathered

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

171 in an appendix, a party may voluntarily submit an appendix, or the
172 parties may submit a joint appendix.[15] Direction to a specific location
173 in an appendix satisfies the citation requirement. So too it may be
174 convenient to direct that a party assist the court in locating materials
175 buried in a voluminous record.

176 Subdivision (c)(2)(D)(ii) recognizes that a party need not always
177 point to specific record materials. One party, without citing any other
178 materials, may respond or reply that materials cited to dispute or
179 support a fact do not establish a genuine dispute or the absence of
180 one. And a party who does not have the trial burden of production
181 may rely on a showing that a party who does have the trial burden
182 cannot produce admissible evidence to support the fact.

183 Subdivision (c)(2)(E) reflects judicial opinions and local rules
184 provisions stating that the court may decide a motion for summary
185 judgment without undertaking an independent search of the record.
186 The court is entitled to rely on the adversaries to identify all the
187 information relevant to the decision. Independent searching may even
188 be dangerous because Rule 5(d)(1) directs that many disclosure and
189 discovery materials must not be filed until they are used in the action;
190 parties that do not rely on filed materials may neglect to file other
191 materials that dispel the effects of filed materials. Nonetheless, the
192 rule also recognizes that a court may consider record materials not
193 called to its attention by the parties. This authority is more likely to
194 be appropriate when uncited material shows there is a genuine
195 dispute. If the court intends to rely on uncited material to grant
196 summary judgment it often should give notice to the parties by
197 analogy to subdivision (f)(2).

198 Subdivision (c)(2)(F) carries forward some of the provisions of
199 former subdivision (e)(1). Other provisions are relocated or omitted.

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[15] Up to now, this part of the Note has recognized the legitimacy of local rules that require an appendix. Judge Fitzwater feels strongly about the value of local rules. Should we restore the blessing?

200 The requirement that a sworn or certified copy of a paper referred to
201 in an affidavit be attached to the affidavit is omitted as unnecessary
202 given the requirement in subdivision (c)(2)(D)(i) that a statement or
203 dispute of fact be supported by materials in the record.

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

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

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

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

224 It may be better to deny a motion that is clearly premature,
225 without prejudice to filing a new motion after further discovery.
226 Further discovery may so change the record that both the statement
227 of material facts required by subdivision (c)(2)(A)(ii) and the record
228 citations required by subdivision (c)(2)(D) will have to be
229 substantially changed. But it may be feasible to defer consideration
230 of the motion if there is a prospect that it can be addressed without
231 substantial change after further discovery.

232 ***Subdivision (e).*** Subdivision (e) addresses questions that arise
233 when a response or reply does not comply with Rule 56(c)
234 requirements or when there is no response or no reply to additional
235 facts stated in a response. Summary judgment cannot be granted by
236 default even if there is a complete failure to respond or reply, much
237 less when an attempted response or reply fails to comply with all Rule
238 56(c) requirements. Subdivision (e)(3) recognizes that the court can
239 grant summary judgment only if the motion and supporting materials
240 show that the movant is entitled to it. At the same time the court may
241 consider a fact as accepted for purposes of the motion when response
242 or reply requirements are not satisfied. This approach reflects the
243 "deemed admitted" provisions in many local rules. The fact is
244 accepted only for purposes of the motion; if summary judgment is
245 denied, a party who failed to make a proper Rule 56 response or reply
246 remains free to contest the fact in further proceedings. And the court
247 may choose not to consider the fact as accepted, particularly if the
248 court knows of record materials that show grounds for genuine
249 dispute.

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

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

264 ***Subdivision (f).*** Subdivision (f) brings into Rule 56 text a
265 number of related procedures that have grown up in practice. After

266 giving notice and a reasonable time to respond the court may grant
267 summary judgment for the nonmoving party, grant or deny a motion
268 on grounds not raised by the motion or response, or consider
269 summary judgment on its own.

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

280 This procedure is carried forward in a form that better conforms
281 to common practice. The frequent use of summary judgment to
282 dispose of some claims, defenses, or parts of claims or defenses is
283 recognized. The court's discretion to determine whether partial
284 summary judgment is useful is more clearly identified.

285 If it is readily apparent that summary judgment cannot be
286 granted the court may properly decide that the cost of determining
287 whether some potential disputes may be eliminated by summary
288 disposition is greater than the cost of resolving those disputes by
289 other means, including trial. Even if the court believes that a fact is
290 not genuinely in dispute it may refrain from entering partial summary
291 judgment on that fact. The court has discretion to conclude that it is
292 better to leave open for trial facts and issues that may be better
293 illuminated — perhaps at little cost — by the trial of related facts that
294 must be tried in any event. Exercise of this discretion may be
295 affected by the nature of the matters that are involved. The polices
296 that underlie official-immunity doctrines, for example, may make it
297 important to grant partial summary judgment for a defendant as to
298 claims for individual liability even though closely related matters

299 must be tried on essentially the same claims made against the same
300 defendant in an official capacity.

301 ***Subdivision (h).*** Subdivision (h) carries forward former
302 subdivision (g) with two changes. Sanctions are made discretionary,
303 not mandatory, reflecting the experience that courts seldom invoke
304 the independent Rule 56 authority to impose sanctions. See Cecil &
305 Cort, Federal Judicial Center Memorandum on Federal Rule of Civil
Procedure 56(g) Motions for Sanctions (April 2, 2007). And the need
for notice and a reasonable time to respond is brought into rule text.

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

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 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

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[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

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.

LOCAL RULES[1] 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."

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

[2]N.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."

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[4]S.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

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[5]S.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).

[6]S.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]

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[7]E.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. Tenn. 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).

[8]S.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]

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[9]D. 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).

[10]S.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).

[11]S.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).

[12]D. 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).

[13]*See* 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).

[14]D. 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).

[15]S.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]

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[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);

[17] S.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

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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).

[18]S.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).

[19]D. 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).

[20]D. 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).

[22]D. Alaska LR 7.1(d)(2).

[23]D. 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]

[24]D. 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 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 92[1] 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

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

[2]Six 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 districts[4] do not require the

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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).

[3]District 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.

[4]Southern 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 districts[7] 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 judges[8] 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.

[5]*See* Appendix.

[6]Middle 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, Northen 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.

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

[8]Eight 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]

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[9]The 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.

[10]The 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.

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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)).

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November 2, 2007

Memorandum

To: Judge Michael Baylson

From: Joe Cecil and George Cort

Subject: Initial Report on Summary Judgment Practice Across Districts with Variations in Local Rules

The Advisory Committee on Civil Rules asked the Federal Judicial Center to examine summary judgment practice across federal district courts as a means of assessing the potential impact of the proposed amendments to Rule 56. Those proposed amendments will, among other things, require the movant to "state in separately numbered paragraphs only those material facts that the movant asserts are not genuinely in dispute and entitle the movant to judgment as a matter of law," and require the respondent to address each one of those facts in similarly numbered paragraphs.

We sorted each federal district court into one of three groups based the districts' local rules governing summary judgment, relying on the analysis of local rules by Jeffrey Barr and James Ishida to guide this classification.[1] The first group consisted of twenty federal districts that have local rules with summary judgment requirements similar to those of the proposed amendment. In general, local rules in these districts require the moving party to include a statement of undisputed facts with its motion for summary judgment, and require the non-moving party to respond to the movant's statement, fact by fact. We assumed that summary judgment practice in these districts follows a pattern that will become common in other federal districts if the proposed amendments are adopted.

The second group consisted of thirty-six federal district courts with local rules that require the moving party to include a statement of undisputed facts, but do not require the respondent to address each fact. We believe that summary judgment practice in these

[1] Memorandum to Judge Michael Baylson from Jeffrey Barr and James Ishida, Survey of District Court Local Summary Judgment Rules (March 21, 2007).

districts may have some, but not all, of the characteristics of summary judgment practice under the proposed amendment.

The third group consisted of thirty-six federal district courts that do not require the moving party to submit a statement of undisputed facts with its motion, either because these courts do not have a local rule governing summary judgment practice or because the courts' local rules do not address the manner in which the motion should be presented. We believe that summary judgment practice in this third group would be most affected by the proposed amendment. A list of the districts in each of the three groups is presented in Appendix A.

Tables 1 through 5 report the nature and outcome of individual summary judgment motions in the three groups of districts. Tables 6 through 12 report the characteristics of the cases in which the summary judgment motions are filed and resolved. Each table first reports the results for all cases in each of the three groups of districts, and then reports the results separately for five broad types of cases – contracts, torts, employment discrimination, other civil rights, and other remaining cases.

After removing problematic cases, our analyses found very few meaningful differences in summary judgment practice across the three groups of district courts. (We interpret a meaningful difference as exceeding five percentile points.) Summary judgment motions are filed and granted at approximately the same rate across all three groups. It appears that more time is required to resolve motions in districts that require stipulation of facts by both the movant and respondent (see Table 5). A few differences also were found among certain types of cases. Defendants in "other civil rights cases" may be less likely to file summary judgment motions in districts that require such stipulation of facts (Tables 6 and 7). Summary judgment motions in employment discrimination cases in such districts also are more likely to be granted rather than remain unresolved (Table 3), though there is no difference in the percentage of motions granted and denied (Table 4). Employment discrimination cases also are somewhat more likely to be terminated by summary judgment in districts that require stipulated facts, a difference that approaches our standard for a meaningful difference (14% vs. 10% and 9%).

Methodology Note

This study examined summary judgment practice in the 276,120 civil cases terminated the federal district courts in Fiscal Year 2006. We used Case Management / Electronic Case Filing (CM/ECF) data to identify 60,013 summary judgment motions and related court orders. Where necessary, we recoded these orders to indicate the final action taken by the court. We then determined, for each case, the number and type of summary judgment motions, number of motions by plaintiffs and defendants, number of motions granted in whole or in part, number of motions denied, the number of motions in which the court took no action, whether the case was terminated by summary judgment, and the time require to resolve the motion.

Some motions, cases, and districts were excluded from the analyses. We were unable to obtain useable CM/ECF data from five districts: Northern District of Ohio, Western District of Wisconsin, District of Oregon, District of the Northern Marianas Islands, and District of the Virgin Islands. We excluded an additional six districts due to difficulty interpreting the CM/ECF codes: Eastern District of Pennsylvania, Eastern District of Michigan, District of Minnesota, Central District of California, Southern District of California, and District of Delaware.

We included in the analyses only cases originally filed in the specified district, cases removed to the district from state court, and cases transferred to the district through a change of venue. We excluded cases designated as class actions (though we have learned from other research that the attorney designation of a class action is an imprecise indicator of such cases), cases consolidated in multidistrict litigation proceedings, cases reopened or remanded from the courts of appeals, and cases appealed from magistrate judges' rulings. We also excluded asbestos personal injury product liability cases, bankruptcy appeals and withdrawals (because summary judgment motions are not filed, social security cases (because summary judgment motions are the procedural device used to review the decision of the administrative law judge), and prisoner cases (because such cases are likely to be exempt from the proposed rule due to the pro se nature of the plaintiff). Finally, we removed from the third group of districts those cases terminated by seventeen judges who, according to the district web site, routinely use a standing order that requires the parties to engage in the kinds of stipulations and presentation required by the proposed local rule

After these exclusions, we were left with 118,796 cases, or 43 percent of cases terminated in FY 2006. Of these cases, 20,697 contained at least one motion for summary judgment. In total, we analyzed 39,120 motions for summary judgment. For the final report we will resolve the data problems for as many of the excluded districts as we can and add them to the analysis.

Table 1: Party Moving for Summary Judgment

Motions in:		Local Rule Requires Stipulated Facts by: Movant & Respondent	Movant Only	Not in Local Rule	Total Motions
All Cases	Defendant	73%	72%	73%	28342
	Plaintiff	26%	26%	24%	9934
	No Moving Party	1%	2%	3%	844
Contracts	Defendant	56%	59%	56%	
	Plaintiff	**42%**	40%	**35%**	
	No Moving Party	**2%**	0%	**10%**	
Torts	Defendant	85%	85%	87%	
	Plaintiff	14%	14%	12%	
	No Moving Party	1%	1%	1%	
Employment Discrimination	Defendant	90%	90%	91%	
	Plaintiff	9%	9%	8%	
	No Moving Party	1%	1%	0%	
Other Civil Rights	Defendant	83%	81%	84%	
	Plaintiff	16%	17%	16%	
	No Moving Party	1%	2%	1%	
Other	Defendant	58%	57%	62%	
	Plaintiff	41%	40%	36%	
	No Moving Party	1%	3%	2%	

Table 2: Type of Summary Judgment Motion

Motions in:		Local Rule Requires Stipulated Facts and Response by: Movant & Respondent	Movant Only	Not in Local Rule	Total Motions
All Cases	Summary Judgment	92%	87%	89%	34816
	Partial Summary Judgment	8%	12%	11%	4089
	Rule 54 Motion	0%	1%	1%	215
Contracts	Summary Judgment	88%	82%	86%	
	Partial Summary Judgment	12%	18%	14%	
	Rule 54 Motion	1%	1%	1%	
Torts	Summary Judgment	90%	84%	86%	
	Partial Summary Judgment	10%	15%	13%	
	Rule 54 Motion	0%	1%	1%	
Employment Discrimination	Summary Judgment	96%	94%	96%	
	Partial Summary Judgment	4%	6%	4%	
	Rule 54 Motion	0%	0%	0%	
Other Civil Rights	Summary Judgment	94%	92%	93%	
	Partial Summary Judgment	5%	8%	7%	
	Rule 54 Motion	0%	0%	1%	
Other	Summary Judgment	90%	85%	87%	
	Partial Summary Judgment	9%	14%	13%	
	Rule 54 Motion	1%	1%	1%	

Table 3: Action on Summary Judgment Motion

Motion in:		Local Rule Requires Stipulated Facts and Response by: Movant & Respondent	Movant Only	Not in Local Rule	Total Motions
All Cases	Denied	17%	15%	16%	6208
	Grant Whole or Part	31%	25%	27%	10748
	Adopt Mag R&R	0%	0%	0%	7
	Moot	2%	2%	2%	778
	No Disposition	50%	58%	55%	21379
Contacts	Denied	17%	17%	17%	
	Grant Whole or Part	24%	21%	20%	
	Adopt Mag R&R	0%	0%	0%	
	Moot	3%	2%	2%	
	No Disposition	56%	60%	61%	
Torts	Denied	17%	17%	17%	
	Grant Whole or Part	25%	22%	25%	
	Adopt Mag R&R	0%	0%	0%	
	Moot	2%	3%	2%	
	No Disposition	55%	59%	56%	
Employment Discrimination	Denied	13%	12%	11%	
	Grant Whole or Part	**46%**	37%	**35%**	
	Adopt Mag R&R	0%			
	Moot	2%	1%	1%	
	No Disposition	**39%**	**49%**	**53%**	
Other Civil Rights	Denied	15%	10%	14%	
	Grant Whole or Part	34%	28%	33%	
	Adopt Mag R&R	0%	0%	0%	
	Moot	2%	1%	3%	
	No Disposition	**49%**	**60%**	50%	
Other	Denied	20%	18%	19%	
	Grant Whole or Part	26%	22%	25%	
	Adopt Mag R&R	0%	0%	0%	
	Moot	3%	2%	2%	
	No Disposition	**51%**	**59%**	54%	

Table 4: Outcome of Summary Judgment Motions Granted or Denied

		Local Rule Requires Stipulated Facts and Response by:			
Motions in:		Movant & Respondent	Movant Only	Not in Local Rule	Total Motions
All Cases	Denied	35%	38%	37%	6208
	Grant Whole or Part	65%	62%	63%	10748
Contracts	Denied	42%	46%	45%	
	Grant Whole or Part	58%	54%	55%	
Torts	Denied	41%	43%	41%	
	Grant Whole or Part	59%	57%	59%	
Employment Discrimination	Denied	22%	25%	24%	
	Grant Whole or Part	77%	74%	75%	
Other Civil Rights	Denied	30%	26%	29%	
	Grant Whole or Part	70%	74%	71%	
Other	Denied	44%	45%	43%	
	Grant Whole or Part	56%	55%	57%	

Table 5: Median Weeks to Disposition for Motions Granted (Whole or Part) or Denied

Motions in:	Local Rule Requires Stipulated Facts by: Movant & Respondent	Movant Only	Not in Local Rule	Total Motions
All Cases	**23**	**17**	**14**	16,427
Contracts	**23**	**16**	**14**	
Torts	**23**	**13**	**12**	
Employment Discrimination	**26**	**17**	**16**	
Other Civil Rights	**21**	19	**14**	
Other	**23**	18	**15**	

Table 6: Cases with at least One Summary Judgment Motion Filed by Any Party

	Local Rule Requires Stipulated Facts by:			
	Movant & Respondent	Movant Only	Neither Party	Total Cases
All Cases				
No Motions	85%	82%	81%	98099
At Least One Motion Filed	15%	18%	19%	20697
Types of Cases with at Least One Motion				
Contracts	15%	19%	20%	
Torts	13%	13%	12%	
Employment Discrim.	35%	35%	38%	
Other Civil Rights	**19%**	26%	**28%**	
Other	9%	12%	13%	

Table 7: Cases with at least One Summary Judgment Motion by Defendant

	Local Rule Requires Stipulated Facts by:			
	Movant & Respondent	Movant Only	Neither Party	Total Cases
All Cases				
No Motions	87%	85%	84%	101170
At Least One Motion	13%	15%	16%	17626
Types of Cases with at Least one Motion by a Defendant				
Contracts	10%	14%	14%	
Torts	11%	12%	11%	
Employment Discrim.	34%	34%	38%	
Other Civil Rights	**18%**	23%	**26%**	
Other	7%	9%	10%	

Table 8: Cases with at least One Summary Judgment Motion by Plaintiff

	Local Rule Requires Stipulated Facts by:			
	Movant & Respondent	Movant Only	Neither Party	Total Cases
All Cases				
No Motions	95%	94%	94%	111966
At Least One Motion	5%	6%	6%	6830
Types of Cases with at Least one Motion by a Plaintiff				
Contracts	9%	11%	11%	
Torts	2%	2%	2%	
Employment Discimin.	3%	4%	3%	
Other Civil Rights	4%	6%	6%	
Other	5%	7%	7%	

Table 9: Cases with at Least One Summary Judgment Motion by a Plaintiff and at least One Summary Judgment Motion by a Defendant

	Local Rule Requires Stipulated Facts by:			
	Movant & Respondent	Movant Only	Neither Party	Total Cases
All Cases				
No Motions	97%	96%	97%	114915
At Least One Motion	3%	4%	3%	3881
Types of Cases with at Least one Motion by a Plaintiff and One by a Defendant				
Contracts	5%	6%	6%	
Torts	1%	1%	1%	
Employment Discrim.	3%	3%	2%	
Other Civil Rights	3%	4%	4%	
Other	3%	4%	4%	

Table 10: Cases with at least One Summary Judgment Motion Granted in Whole

	Local Rule Requires Stipulated Facts by:			
	Movant & Respondent	Movant Only	Neither Party	Total Cases
All Cases				
No Motions	94%	95%	94%	112,157
At Least One Motion	6%	5%	6%	6,639
Types of Cases with at Least one Motion Granted in Whole				
Contracts	5%	5%	5%	
Torts	4%	3%	3%	
Employment Discrimin.	17%	13%	13%	
Other Civil Rights	8%	9%	9%	
Other	3%	3%	4%	

Table 11: Cases with at Least One Summary Judgment Motion Granted in Whole of Part

	Local Rule Requires Stipulated Facts by:			
	Movant & Respondent	Movant Only	Neither Party	Total Cases
All Cases				
No Motions	93%	94%	93%	110,502
At Least One Motion	7%	6%	7%	8,294
Types of Cases with at Least one Motion Granted in Whole or Part				
Contracts	6%	6%	7%	
Torts	5%	4%	4%	
Employment Discrimin.	21%	16%	17%	
Other Civil Rights	10%	11%	12%	
Other	4%	4%	5%	

Table 12: Cases with Terminated by Summary Judgment

	Local Rule Requires Stipulated Facts by:			
	Movant & Respondent	Movant Only	Neither Party	Total Cases
All Cases				
Not Terminated by Summary Judgment	93%	94%	93%	114,410
Terminated by Summary Judgment	4%	4%	3%	4,386
Types of Cases Terminated by Summary Judgment				
Contracts	3%	3%	3%	
Torts	2%	2%	1%	
Employment Discrimin.	**14%**	10%	**9%**	
Other Civil Rights	6%	6%	6%	
Other	2%	2%	3%	

Note: Court records include no specific designation of cases terminated by a grant of a summary judgment motion. This designation was constructed for this table by identifying those cases that court records indicate were resolved through a dispositive motion before trial and included at least one summary judgment motion that was granted in whole.

Appendix A: Classification of Individual Districts

Local Rule Requires Fact-by-Fact Stipulation And Response	Local Rule Requires Fact-by-Fact Stipulation by Movant Only	Local Rule does not Address format of Summary Judgment Motion
Arizona	Alabama - Southern	Alabama - Middle
California - Eastern	Arkansas - Eastern	Alabama - Northern
Connecticut	Arkansas - Western	Alaska
Georgia - Middle	California – Central*	California - Northern
Georgia - Northern	District of Columbia	California – Southern*
Illinois - Central	Florida - Northern	Colorado
Illinois - Northern	Florida - Southern	Delaware*
Iowa - Northern	Georgia - Southern	Florida - Middle
Iowa - Southern	Hawaii	Guam
Maine	Idaho	Illinois - Southern
Nebraska	Indiana - Northern	Kentucky - Eastern
New York - Eastern	Indiana - Southern	Kentucky - Western
New York - Northern	Kansas	Maryland
New York - Southern	Louisiana - Eastern	Michigan – Eastern*
Oregon*	Louisiana - Middle	Michigan - Western
Pennsylvania - Middle	Louisiana - Western	Minnesota*
Pennsylvania - Western	Massachusetts	Mississippi - Northern
Puerto Rico	Missouri - Eastern	Mississippi - Southern
South Dakota	Missouri - Western	North Carolina - Eastern
Tennessee - Middle	Montana	North Carolina - Western
	Nevada	North Dakota
	New Hampshire	Ohio – Northern*
	New Jersey	Ohio - Southern
	New Mexico	Rhode Island
	New York - Western	South Carolina
	North Carolina - Middle	Tennessee - Eastern
	Oklahoma - Eastern	Tennessee - Western
	Oklahoma - Northern	Texas - Northern
	Oklahoma - Western	Texas - Southern
	Pennsylvania – Eastern*	Texas - Western
	Texas - Eastern	Virginia - Western
	Utah	Washington - Eastern
	Vermont	Washington - Western
	Virgin Islands*	West Virginia - Northern
	Virginia - Eastern	West Virginia - Southern
	Wyoming	Wisconsin - Eastern

* Districts excluded from the reported analyses. No information on local rules for Wisconsin – Western and Northern Marianas Islands was found, and those districts also were excluded from the analysis.

6B.

B. Expert Trial Witness Disclosure and Discovery

For more than a year, the Discovery Subcommittee has been considering changes to the expert disclosure and discovery procedures in Civil Rule 26. The possible changes concern expert witnesses only. No consideration has been given to the provisions of Rule 26(b)(4)(B) that sharply limit discovery as to "consulting" experts who have been retained or specially employed in anticipation of litigation but are not expected to be called as a witness at trial. The possible changes include the disclosure provisions in Rule 26(a)(2)(A) and (B), as well as discovery of communications between an attorney and a testifying expert, draft expert reports, and expert working papers. The Subcommittee and Committee hope to have formal proposals ready for consideration at the June Standing Committee meeting. This report introduces the issues and previews possible Rule 26 amendments.

Background: Rule 26 requires a party to disclose the identity of any witness it may use at trial to present evidence under Evidence Rules 702, 703, or 705. It also requires disclosure of a written report by some, but not all, expert witnesses. The disclosure requirement has in turn affected expert-witness discovery.

Expert witness discovery was first directly addressed in the Civil Rules by Rule 26(b)(4), added in 1970 at the same time as work product protection was first addressed by Rule 26(b)(3). In the 1970 version, Rule 26(b)(4) was explicitly separated from work product protection. In 1993, the expert witness discovery provisions were substantially revised and Rule 26(a) disclosure practice was adopted. Rule 26(a)(2)(B) requires disclosure of a detailed written report prepared by the witness "if the witness is one retained or specially employed to provide expert testimony in the case or whose duties as the party's employee regularly involve giving expert testimony." The report must include not only "a complete statement of all opinions the witness will express and the reasons for them," but also "the data or other information considered by the witness in forming them." The 1993 Committee Note adds this statement:

> The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts in forming their opinions – whether or not ultimately relied upon by the expert – are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

The report requirement is secure in the rules; no question has been raised concerning its continuing vitality. The reference to "other information," in conjunction with the Committee Note, has, however, led courts to hold that communications between retaining attorneys and their expert witnesses generally are subject to full discovery. Courts also generally hold that drafts of expert reports may be discovered.

ABA Proposal: In 2006, the Federal Practice Task Force of the Litigation Section of the American Bar Association recommended that federal and state discovery rules be amended to prohibit the discovery of draft expert reports and attorney-expert communications. The Task Force recommendation was later approved by the ABA House of Delegates. A copy of the Task Force's report is attached.

The Task Force noted that the discoverability of attorney-expert communications and draft expert reports has resulted in artificial procedures and expensive litigation practices. Experts and counsel often go to great lengths to avoid the creation of draft reports, creating drafts only in electronic form, deleting all electronic drafts, and even scrubbing hard drives to prevent the

subsequent discovery of drafts. Lawyers and experts often avoid written communications or the creation of notes on the part of the expert, encumbering attorney-expert communications and the formulation of effective and accurate litigation opinions. Litigants often engage in expensive discovery seeking to obtain draft reports or attorney-expert communications. Parties often retain two sets of experts, one for consultation purposes and a second for testimony. Some experienced lawyers avoid such expense and inefficiency by agreeing that draft reports and attorney-expert communications will not be discoverable in the litigation.

The Task Force concluded that discovery of draft reports and attorney-expert communications rarely yields information that influences the outcome of the case. The merits of expert opinions, not draft reports or communications with counsel, tend to be the most important considerations at trial.

Believing that the benefits of full expert discovery do not justify the costly and inefficient practices that have developed since 1993, the ABA Task Force made the following recommendations:

(i) an expert's draft reports should not be required to be produced to an opposing party;

(ii) communications, including notes reflecting communications, between an expert and attorney who has retained the expert should not be discoverable except on a showing of exceptional circumstances;

(iii) nothing in the preceding paragraph should preclude opposing counsel from obtaining any facts or data the expert is relying on in forming his or her opinion, including that coming from counsel, or from otherwise inquiring fully of an expert into what facts or data the expert considered, whether the expert considered alternative approaches or into the validity of the expert's opinions.

Treating Physicians and Employee Experts: Because Rule 26 requires that expert reports be produced only by experts specially retained for the litigation or employees whose job regularly includes the providing of expert testimony (Rule 26(a)(2)(B)), some categories of expert witnesses are not required to produce reports. Treating physicians, for example, are not generally viewed as having been "specially retained" for the litigation and typically are not required to prepare expert reports, and yet they often provide important opinion testimony under Rule 702. If treating physicians are asked to opine on causation or prognosis issues that were not addressed during treatment, a good argument can be made that the physicians should be required to provide some form of expert report. When such a report is not prepared, parties often are surprised at trial by the undisclosed physician opinions and courts are required to choose between requiring a surprised party to respond to the opinion or depriving the propounding party of an expert opinion that Rule 26 did not require to be disclosed in a report.

Employee witnesses also often provide important testimony under Rule 702. Rule 26's contrary directive notwithstanding, several courts have held that employee witnesses who do not regularly give expert testimony must produce expert reports. These courts have reasoned that Rule 702 opinions provided by employees should, in fairness, be disclosed to the opposing party. Report requirements have therefore been imposed on employee witnesses even though not required by Rule 26. See, e.g., Prieto v. Malgor, 361 F.3d 1313, 1319 (11th Cir. 2004); Minn. Min. & Mfg. Co. v. Signtech USA, Ltd., 177 F.R.D. 320, 325 (D. Minn. 1998).

The Subcommittee's Work to Date: The Discovery Subcommittee has studied the issues raised by the ABA Task Force and the testimony of treating physicians and employee experts. The Subcommittee has held two mini-conferences, one in January of 2007 with a cross-section of

attorneys from around the country, and a second in April of 2007 with a cross-section of attorneys from New Jersey, a state that has prohibited discovery of draft reports and attorney-expert communications. Notes on the April miniconference are attached to illustrate the remarkable unanimity of opinions favoring the New Jersey rule, which commanded support by lawyers from all branches of practice.

In addition, the Subcommittee has held a number of conference calls to discuss these issues in detail; research has been conducted on selected topics; and these issues have been addressed at some length in three meetings of the Advisory Committee. Attached to this memorandum is a report prepared in advance of the Advisory Committee's meeting in November of 2007. The report identifies issues that are now under consideration by the Subcommittee.

Treating Physicians and Employee Experts: The Subcommittee has reached a fairly firm conclusion on the issues presented by treating physicians and employees who do not regularly give expert testimony. The Subcommittee believes that Rule 26(a)(2)(A) should be amended to require that attorneys – not the experts – provide disclosures regarding opinions to be provided at trial by treating physicians, employee experts, and others not retained or specially employed to give expert testimony. These lawyer disclosures would not be as detailed as the written reports required of specially retained experts, but would put opposing counsel on notice of expert opinions to be provided under Rule 702. The attorney making the disclosures under Rule 26(a)(2)(A) would be required to identify the subject matter on which the witness is expected to provide expert testimony and the substance of the facts and opinions about which the witness is expected to testify. The Subcommittee's current draft of a proposed amendment to Rule 26(a)(2)(A) reads as follows (new language is underscored):

(2) Disclosure of Expert Testimony.

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

(i) the subject matter on which the witness is expected to provide evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) the substance of the facts and opinions to which the witness is expected to testify.

Such disclosures would provide the opposing party with notice of the expert opinions to be provided by treating physicians or employee experts, and the opposing party could then decide whether to depose the witness to obtain additional information.

The Subcommittee has concluded that Rule 26(a)(2)(B) written reports should not be required of treating physicians and employee witnesses who do not regularly give expert testimony. Attorneys consulted by the Subcommittee have stated that treating physicians will be unwilling to cooperate in litigation if they are required to write expert reports and that testimony of employee experts generally is not problematic. Consistent with the 1993 exemption of such witnesses from the report requirement, the Subcommittee believes that the attorney disclosures should be required in lieu of expert reports. Such a change would be intended to nullify cases that have imposed report requirements on employee witnesses.

Draft Reports: After conferring with attorneys at the January and April mini-conferences, the Subcommittee has concluded that draft reports should be protected from discovery. This conclusion primarily results from a cost-benefit analysis. The Subcommittee has concluded that the marginal benefits resulting from discovery of draft reports are clearly outweighed by the costs incurred in artificially avoiding the creation of drafts and the discovery fights over drafts. Protecting draft reports from discovery would eliminate many of these artificial procedures and much of this litigation cost, while enabling lawyers and experts to collaborate more freely in the preparation of a final written report of the expert's opinions. The Subcommittee has concluded that draft reports should receive the same protection as other trial preparation materials under Rule 26(b)(3). Thus, draft reports would be subject to discovery only if the "substantial need" and "undue hardship" tests are satisfied. The Committee Note would make clear that a lawyer's desire to obtain draft reports in order to enhance his cross-examination of the expert at trial would not ordinarily satisfy the substantial need and undue hardship requirements.

Attorney-Expert Communications: After consulting with counsel at the January and April mini-conferences, and discussing the subject extensively, the Subcommittee has also concluded that some attorney-expert communications should receive work product protection. Again, this conclusion results primarily from a cost-benefit analysis. The costs incurred by parties in avoiding direct communications or the creation of notes, and in retaining second sets of experts, substantially outweigh the benefits derived from opening attorney-expert communications to discovery. The Subcommittee has found, however, that this issue presents serious line-drawing challenges.

We have considered the ABA's proposal that would place virtually all attorney-expert communications off limits. This approach is similar to the rule now followed in New Jersey, where communications constituting the "collaborative process" between the attorney and expert are protected from discovery. This approach has the virtue of eliminating many of the problems presented by the current rule. Attorneys and experts no longer need to avoid the creation of notes of conversations, free collaboration can occur in preparation of the expert's opinions, and attorneys are not required to retain second sets of experts in order to test hypotheses or consult generally with an expert about the case. Although there is much to be said for these advantages, the Subcommittee sees more serious disadvantages from such broad protection of attorney-expert communications. A full inquiry into the evolution of an expert's opinion is often necessary to evaluate the merits of that opinion, and such an inquiry may necessarily include the collaborative efforts between the expert and the attorney. Some attorney-expert communications might also go directly to expert bias, such as the promise of other work if the expert provides the opinions sought by the lawyer. Because the Subcommittee is not convinced that all attorney-expert communications should be placed off limits, we tentatively have decided that the ABA proposal is too broad.

The Subcommittee has considered an approach that would protect from discovery any attorney-expert communications that (a) reveal the lawyer's mental impressions or opinions concerning the litigation or (b) concern aspects of the litigation other than the opinions to be expressed by the expert at trial. Although protecting attorney mental impressions and opinions might facilitate some broader communication between lawyers and experts, such a protection might present serious practical problems for litigants and judges. Distinguishing between attorney-expert communications that reflect the lawyer's thinking and those that do not could prove quite difficult in most cases. Parties might end up litigating about this issue, defeating some of the cost-saving goals of this effort, and judges might be placed in the unenviable position of reviewing attorney-expert communications in camera in order to separate lawyer mental impressions from the rest of the communications. And if these practical line-drawing problems render the protection of lawyer mental impressions uncertain, lawyers will not include them in their communications with experts and any benefits of the protection will be lost. One approach, then, might be to leave this issue out of the rule and allow courts to decide what protection, if any, to afford lawyer mental impressions communicated to experts.

The Subcommittee does see a distinct benefit to be gained from protecting attorney-expert communications concerning aspects of the litigation other than the opinions to be expressed by the expert at trial. Some of the expense of litigation could be avoided if lawyers were free to have their experts critique the opinion of the opposing side's expert, prepare an outline for cross-examination of expert or fact witnesses, or express views on the merits of the litigation or the settlement value of the case. Permitting such communications to occur without fear of later discovery would result in better-informed lawyers and decrease some of the expense incurred in retaining second sets of experts.

The Subcommittee has also spent significant time discussing the treatment of expert notes and work papers. The ABA proposal would place such written materials, at least to the extent they reflect attorney-expert communications, off-bounds in discovery. Although we have considered affording some level of protection to such materials in order to foster full collaboration between attorneys and experts, we tentatively have concluded that such papers are too central to the development of an expert's opinion to make them non-discoverable.

One of the grounds on which courts have permitted discovery of draft reports and attorney-expert communications is the present requirement that the parties disclose not only the "data" considered by the expert, but also any "other information" considered. Consistent with the Subcommittee's conclusion that draft reports should not be subject to disclosure, the Subcommittee has concluded that the disclosure requirement should be limited to "facts or data" considered by the expert, not "facts or other information." This is the formulation proposed by the ABA Task Force and included in the New Jersey rule, where it appears to have worked well. The Subcommittee also discussed the ABA's suggestion that the rule be changed to require disclosure only of facts or data "relied on" by the expert, as opposed to facts or data "considered" by the expert. The Subcommittee believes this change would unduly constrict expert disclosure and discovery.

The Subcommittee's conclusions represent a work in progress. We hope to have a final recommendation ready for the Advisory Committee next Spring.

Additional Issues: The Subcommittee is also addressing interesting legal issues that arise from these possible amendments. We have wondered, for example, whether lawyers would rely on these protections if they were concerned that the protection might be lost in future cases. Research by Monica Fennell and Jeff Barr at the AO has revealed, however, that work product protection generally survives the case in which the work product is created, particularly if the case in which it is later challenged includes an attorney or party who was involved in creation of the work product initially.

Andrea Thomson, Judge Rosenthal's law clerk, has provided helpful research on whether protections placed in Rule 26 would apply at trial. The research has been undertaken in response to a similar concern – whether protections placed in Rule 26 might prove meaningless if draft reports or protected attorney-client communications could be obtained at trial. The Subcommittee recognizes that Rule 26 is a rule of discovery, not a rule of evidence, but has concluded that any revised Rule 26 will provide helpful guidance on what is truly relevant to evaluating an expert's opinion: full inquiry into the facts and data considered by the expert, the process by which the expert's opinions were developed, and any factors that might show bias. Subjects falling outside these areas of full inquiry are less relevant and protecting them from disclosure will eliminate some of the inefficiencies of the current system. As noted above, the Subcommittee has not come to rest on just where the lines should be drawn, but it is undertaking this work with a consciousness of limitations on the Advisory Committee's role.

Conclusion: The Subcommittee thus far has concluded that drafts of Rule 26(a)(2)(B) reports should not be discoverable, but it continues to debate discovery of communications between

attorneys and experts. Communications that do not involve matters on which the expert will express opinions at trial are promising candidates for protection. Communications made in the course of developing trial opinions present strongly competing considerations. On one hand, the discoverability of such communications has led to costly litigation practices such as the retention of second sets of experts and avoiding the creation of notes and work papers. The communications also may involve "core" work product – the attorney's mental impressions, conclusions, opinions, or legal theories – or even privileged information. On the other hand, these communications may be important to understanding the evolution and value of the expert's opinions, and much wasted effort could be spent trying to draw lines between communications that reveal core work product and communications that do not. The Subcommittee will continue to study these issues.

The Subcommittee is also conscious of the fact that prohibiting discovery will not accomplish its objectives unless inquiry at trial also is prohibited. The discovery rules cannot directly address evidence rulings at trial, but the expectation is that disclosure and discovery regarding all facts or data considered by the expert, coupled with discovery regarding all attorney-expert communications about the opinions to be expressed at trial, should encompass all questioning that would ordinarily be permitted during a trial.

It may help to focus these problems by offering a sample that illustrates one possible approach. This example has not been considered by the Subcommittee in this form, and includes in brackets a provision that could easily be deleted as deliberations proceed. It opts for an escape that allows discovery on the showings provided for work product, an analogy that may or may not hold up. With those caveats, here is a possible addition to Rule 26(b)(4)(A):

> The protection of trial-preparation materials established by Rule 26(b)(3)(A) and (B) applies to drafts of a report required by Rule 26(a)(2)(B), [communications in any form between retaining counsel and the expert that reflect counsel's mental impressions, conclusions, opinions, or legal theories concerning the litigation,] and communications in any form between retaining counsel and the expert regarding aspects of the litigation other than the opinions the expert will express.

The Subcommittee welcomes input from the Standing Committee on these challenging issues.

EXPERT DISCOVERY ISSUES

Since the April meeting, the Discovery Subcommittee has given considerable further attention to issues of discovery regarding expert witnesses. On the day before the April meeting began, it held a mini-conference with New Jersey lawyers to learn more about their experience with a New Jersey state-court rule that imposed limits on expert-witness discovery. A brief report on that event was made during the April meeting. Since then, the Subcommittee has held telephone conferences on six occasions -- May 8, June 22, July 17, Aug. 17, Sept. 12, Sept. 28, and Oct. 11 -- to discuss these matters further. In addition, Judge Kravitz and Prof. Marcus participated in a panel discussion during the ABA convention devoted to expert discovery issues.

The Subcommittee has found the issues raised more intricate and challenging than might have been expected. As a consequence, it does not return with fully-formed proposals for possible amendments. Instead, it returns with some ideas fairly fully formed and others still forming. The purpose of this memorandum is to sketch the work done since the April meeting and introduce the issues raised. During the meeting, the Subcommittee hopes to receive advice and reactions from the other members of the full Advisory Committee.

Besides this memorandum, the agenda book should also include the following materials that should help to flesh out the picture regarding the issues raised:

(1) Notes on Oct. 11 conference call

(2) Notes on Sept. 28 conference call

(3) Notes on Sept. 12 conference call

(4) Sept. 5, 2007, memo regarding issues to be discussed on Sept. 12. (Ultimately the conference calls on Sept. 12, Sept. 28, and Oct. 11 largely dealt with these issues. Accordingly, the memorandum seems useful to provide a context for appreciating the discussion during those calls. In addition, it sets out a variety of considerations that bear generally on the matters discussed and that may be useful as background.)

(5) Notes on Aug. 17 call

(6) Research memo from Matt Hall (Matt Hall was Judge Levi's Rules Clerk. At the request of the Subcommittee, he did research on the showings necessary to obtain discovery of material protected under Rule 26(b)(3) or 26(b)(4))

(7) Notes on April 18 mini-conference with New Jersey lawyers

The purpose of this memorandum is to introduce these issues with some specifics on current thoughts about possible amendments. As noted above, the Subcommittee is not presently recommending going forward with any of these amendment ideas, although some have advanced relatively well along in the amendment process. In some instances, there is also a rough draft of a possible Committee Note.

The Subcommittee has not seen these drafts of possible amendments before the were included in the agenda book, although they attempt to carry forward ideas discussed during the Subcommittee's deliberations. The Subcommittee has not yet discussed any draft Committee Note language. So all of these matters remain open for discussion by the Subcommittee and the full Committee and will certainly be revised before being formally submitted to the full

Committee. Needless to say, some or all current ideas may be discarded after further examination.

For the present, then, the memorandum proceeds with the following:

(1) Disclosure under Rule 26(a)(2)(A) regarding expert witnesses not required to provide reports

(2) Report requirements in Rule 26(a)(2)(B) -- revisions to deal with issues of disclosure of attorney-expert communications and disclosure of draft reports

(3) Addition to Rule 26(b)(3) to limit discovery of attorney-expert communications or draft reports

(4) The problem of expert "work papers"

Because the notes on the last four conference calls (and the memorandum on which the last three calls focused) provide considerable detail about the drafting refinements that have occupied the Subcommittee, it does not seem important to provide a detailed introduction about those matters. But some overview of the orientation of the discussions leading up to those calls seems helpful to acquaint the full Committee with developments since the April meeting.

By way of background, at the April meeting the discussion included presentation of the idea that attorney disclosure should be required for expert witnesses who do not have to provide reports under Rule 26(a)(2)(B). That issue was the first that called the Committee's attention to expert discovery roughly three years ago. Then it seemed that some courts were requiring full reports from these exempted witnesses, somewhat in the teeth of what the rule said, because they thought that disclosure was very important to permit the other side a fair chance to prepare to meet those expert opinions.[1] But requiring a full report of such witnesses could present difficulties. Treating physicians would probably resist preparing reports. Imposing the "waiver" consequences of the report requirement on in-house experts who don't regularly testify might produce difficulties also (although other changes now being discussed might reduce those difficulties). The Subcommittee's idea presented in April was to require attorney disclosure rather than a full report from these people. Since then, the Subcommittee has continued to regard this addition as important,[2] and item (1) in this memorandum therefore deals with this issue.

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[1] Not all courts have taken this view of the current exemption. For example, in Watson v. United States, 485 F.3d 1100, 1107-08 (10th Cir. 2007), the court rejects the argument that a report should be required because it is otherwise unfair to allow a party to call an expert to offer opinions on the ground that the drafters of the 1993 amendments decided not to require reports from these witnesses.

[2] Recent decisions show that courts still resist the exemption from the report requirement in Rule 26(a)(2)(B). For example, in Dyson Technology, Ltd v. Maytag Corp., 241 F.R.D. 247 (D. Del. 2007), the court held that the cases requiring full expert reports even of those experts whom current (B) exempts were persuasive and therefore not only that a full report was required as to an employee who did not ordinarily offer expert testimony, but also that as a result all privileged or work product information considered by the witness was subject to the waiver consequences we have been trying to ameliorate. Although this issue arises infrequently in reported cases, then, it continues to arise with vigor.

A related issue involved treating physicians. Another concern regarding expert witness disclosure was the failure to identify a treating physician as an expert witness. If the doctor will testify about causation or prognosis, that testimony ordinarily would come in under Fed. R. Evid. 702, 703, and 705, making identification of the doctor pursuant to Rule 26(a)(2)(A) necessary even if a report need not be prepared.[3] Failure to identify could therefore raise the risk that the doctor would be prevented from testifying.[4] The Subcommittee discussed including a reference

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[3] Recent cases highlight these issues. In Kirkham v. Societe Air France, 236 F.R.D. 9 (D.D.C. 1006), defendants moved to strike plaintiff's designation of two treating doctors as expert witnesses or to require that they provide reports. The court said that treating doctors can testify without preparing a report, but added that "the applicability of the written report requirement to treating physicians who provide expert testimony is unclear because, in practice, the testimony of treating physicians often departs from its traditional scope -- the physician's personal observations, diagnosis and treatment of the patient -- and addresses causation and predictions about the permanency of plaintiff's injuries, matters that cross over into classic expert testimony. Thus, there are widely divergent views within the federal courts on whether a treating physician providing expert testimony is required to provide an expert report in advance of testifying under Rule 26(a)(2)(B)." Id. at 11. See also Gonzalez v. Executive Airlines, Inc., 236 F.R.D. 73, 79 (D.P.R. 2006) ("Because they necessarily rely on their opinions as experts in treating patients, treating physicians are not bound by the expert report requirements of Rule 26 so long as they limit their testimony to those opinions they formed and relied on during the course of their examination and/or treatment of the patient. Any opinions that they form outside the context of their examination of the patient, however, constitute expert opinion testimony and are subject to the more stringent requirements of Rule 26(b)(4)(B).").

[4] A recent example is Fielden v. CSX Transportation, Inc., 482 F.3d 866 (6th Cir. 2007). Plaintiff sued his employer, claiming that he had developed carpal tunnel syndrome due to his work. He provided no expert reports by the deadline for serving them. Defendant then moved for summary judgment on the ground there was no evidence of causation even though plaintiff had listed his treating doctors in answer to an interrogatory as witnesses who would testify on causation. Plaintiff opposed the motion with a letter report from a treating physician that counsel had obtained after the cutoff for expert disclosure. Although the doctor's deposition had been taken, and had shown that the doctor developed his conclusion about causation as a part of treatment (see id. at 867 n.1), the district judge held that the letter report had to be excluded under Rule 37(c)(1).

The Court of Appeal reversed:

> Fielden did not retain Dr. Fischer for the purposes of providing expert testimony because there is evidence that Dr. Fischer formed his opinions as to causation at the time he treated Fielden and there is no evidence that Dr. Fischer formed his opinion at the request of Fielden's counsel. * * * Under a straightforward reading of the rule and its advisory note, Fielden did not need to file an expert report from Dr. Fischer.
>
> This conclusion is supported by the obvious fact that doctors need to determine the cause of an injury in order to treat it. Determining causation may therefore be an integral part of "treating" a patient.

Id. at 869-70. At the same time, the court recognized that "[a] party might attempt to avoid Rule 26(a)(2)(B)'s requirement by having a treating physician testify on an issue instead of having an expert do so." Id. at 870. And in order to reach its decision in this case the appellate court had to

to treating physicians in the text of Rule 26(a)(2)(A) to alert lawyers to the existing need at least to identify those witnesses, as well as the need to provide disclosure under the new disclosure requirement, but decided that it was inadvisable to single out these expert witnesses. Below, there is an attempt in the draft Committee Note to highlight the need at least to identify treating physicians, along with the need to provide disclosure regarding their testimony. Adding a disclosure requirement not only provides appropriate notice to the other side of the likely content of doctors' opinions, but also may alert lawyers to the need to identify doctors who will offer such opinions.

Regarding attorney-expert communications, the Subcommittee first thoroughly discussed the basic question whether such protection should be provided. Although a different conclusion is possible,[5] the Subcommittee unanimously concluded that providing protection would be desirable. The costs of intense inquiry into attorney-expert communications and draft reports were high, and the benefits low in terms of actually providing information important either to determining whether the expert should be allowed to testify under Daubert or whether the jury should accept the testimony.[6]

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deal with and distinguish a lot of other cases.

See also Botnic v. Zimmer, Inc., 484 F.Supp.2d 715 (N.D. Ohio 2007) (plaintiff's failure to provide an expert report announcing expert opinions from a treating physician warranted exclusion of the physician's testimony).

[5] Consider Elm Grove Coal Co. v. Director, Off. of Workers Comp. Programs, 480 F.3d 278 (4th Cir. 2007), in which the court dealt with the specialized question of discovery in administrative proceedings under work product provisions essentially identical with those applicable in court under the Civil Rules, but minus the 1993 expert disclosure provisions. The administrative proceeding had accepted a claim by Blake, a retired coal miner, for benefits under the Black Lung Benefits Act arising from his work for Elm Grove. Blake's expert witnesses testified that Blake's lawyers had provided them with materials and were involved in drafting of their reports, but the ALJ refused to order production of draft reports or discovery of attorney-expert communications. The Court of Appeals concluded that discovery had to be ordered. It explained as follows (id. at 301):

> [W]e are unable, in these circumstances, to agree that Blake's expert witnesses could be properly and fully cross-examined in the absence of the draft reports and attorney-expert communications sought by Elm Grove. As the Supreme Court has cautioned, "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." [citing Daubert] And, as several courts have observed, it is important to the proper cross-examination of an expert witness that the adverse party be aware of the facts underlying the expert's opinions, including whether the expert made an independent evaluation of those facts, or whether he instead adopted the opinions of the lawyers that retained him.

[6] Another point to keep in mind goes back before the 1993 adoption of Rule 26(a)(2)(B). Some fifteen years before that amendment, Judge Frankel concluded that Fed. R. Evid. 612(2) ordered disclosure of what the lawyer gave an expert witness, even though seemingly core work product. If one wants to clear the field, therefore, it might be important to consider amendments to the Civil Rules saying that discovery may be had only on a very exacting showing, does that trump (or at least inform) a determination whether production should be ordered pursuant to Evidence Rule 612(2) because "it is necessary in the interests of justice."

Once that initial determination was made, the extent and location of protection became the focus of much discussion. The concern about the extent of protection was that, given the current atmosphere of intense scrutiny of these topics in many courts, lawyers would continue to press for such discovery unless it were forbidden or virtually forbidden. Thus, for example, one suggestion was that discovery of draft reports be flatly prohibited. But a flat prohibition seemed odd; if discovery of the work done by a nontestifying expert could be had under Rule 26(b)(4)(B) in exceptional circumstances, it would be strange for discovery with regard to the drafts done by a testifying expert to be completely off limits. As an alternative, the "exceptional circumstances" standard of Rule 26(b)(4)(B) (seemingly favored by the ABA in its resolution) was also considered, as was work-product protection as provided in Rule 26(b)(3)(A) and (B). To shed light on the choice between the Rule 26(b)(3) and (b)(4) standards, Matt Hall, Judge Levi's Rules Clerk, was enlisted to do research on the application of those standards. His research report should be included in these agenda materials. It indicated that the showing required to justify discovery under Rule 26(b)(3) is quite demanding, and that the seemingly higher standard of Rule 26(b)(3)(B) is not clearly preferable. The Subcommittee decided that the Rule 26(b)(3) standard was the proper fit. It concluded also that trying to set a new standard would lead to undesirable complications; better to choose one already recognized by the courts and counsel.

Regarding location, the Subcommittee extensively discussed three possible locations. First, a protective provision could be located in Rule 26(a)(2), which was in a sense the source of the current "problem." But that might raise questions about whether the protection extended beyond disclosure and also applied to discovery. It also considered locating the provision in Rule 26(b)(4)(A), because the expert's deposition is likely to be the main setting in which these issues will be thrashed out. But once the decision was made to use the standard for discovery articulated in Rule 26(b)(3), that made including the provision in (b)(4) questionable. In addition, including the provision in (b)(3) had the advantage of making it clear that it applied to all discovery methods, not just depositions. Further drafting concerns exist about how to frame

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There is, of course, a very good argument that Rule 612 was never about the situation we are addressing in our discussion because the expert witness is not using the sort of materials the lawyer is likely to provide "to refresh memory for the purpose of testifying," which is what Rule 612 is focused upon. There is usually no issue of refreshing memory here. We are, instead, talking of materials the lawyer provides to the potential expert witness to orient her to the issues in the case, long before the expert testifies and often long before a decision whether this person will be identified as a witness is made. Maybe, indeed, it would make sense for Rule 612(2) to apply (in civil cases) only to materials used by the expert witness after she has been identified under Rule 26(a)(2)(A). Then, at least, the idea of refreshing memory may be salient.

It could thus well be argued that Evidence Rule 612(2) could easily co-exist with the regime outlined in this memorandum, and that amendments to the Civil Rules could be pursued without a glance at Rule 612. In addition, the idea that the more specific controls over the more general (if that applies to provisions from different sets of rules) arguably means that the addition of Rule 26(a)(2) in 1993 superseded the pervious decisions based on Rule 612. It seems likely that since 1993 the decisions have focused on Rule 26(a)(2) and not on Rule 612.

Nonetheless, it may be unwise to assume that a change to the Civil Rules will be treated as superseding decisions based on Rule 612. Reference to this issue in a Committee Note to an amendment of a Civil Rule might be helpful, but it is not clear that it could do much about the interpretation to be given to an Evidence Rule. The draft Committee Notes below do not include discussion of Evidence Rule 612.

such a protection, but item (3) below offers first-cut ideas that can serve as the focus for discussion during this meeting.

Item (2) below, therefore, includes possible amendments to Rule 26(a)(2) that parallel and provide a basis for the protections outlined in item (3). It specifies that only a "final" report must be disclosed, to deal with arguments that there is still a requirement to disclose draft reports. And it removes the phrase "or other information," which seems to have provided support for disclosure or discovery regarding attorney-expert communications. Instead, it says that disclosure is required of "the facts or data considered by the witness." This phrase is further explained in the draft Committee Note. The Subcommittee discussed, but unanimously rejected, changing "considered" to "relied on." Such a change, it was feared, would unduly curtail legitimate inquiry into the basis of the opinions to be presented at trial.

Regarding draft reports, the Subcommittee eventually decided to treat these in the same way as lawyer-expert communications. Accordingly, item (3) below permits discovery of draft reports only upon the showing required for discovery of work product under Rules 26(b)(3)(A) and (B). The Subcommittee considered limiting protection for draft reports to those "prepared by the witness." But eventually it decided that this limitation would produce time-consuming and pointless inquiries into the relative roles of the lawyer and the witness in preparing the final report. In addition, the risk that the lawyer would simply write the report and have the expert sign it seemed not to be too pressing because such an expert would be very vulnerable to cross-examination.[7]

Finally, item (4) below briefly introduces the problem of expert "work papers" on which the Subcommittee hopes for considerable input and advice from the full Committee. Some courts assert that such materials are not discoverable,[8] but often justifications for probing such materials are accepted. As the notes of the Sept. 28 and Oct. 11 conference calls report, the Subcommittee has considered this issue at some length. At present, it seems that there are two competing considerations that bear on whether protection should be given such materials. On the one hand, if the absence of protection means that some experts will adopt strategies to avoid creating such working papers that interfere with their effective preparation, providing the protection might not take anything away from the other side and promote efficiency in the use of experts. On the other hand, inquiry into the work papers prepared by the expert during the development of the opinions to be expressed in testimony seems central to adequate probing of the opinions that will be presented. Indeed, even the testing of nontestifying experts may sometimes be discoverable under Rule 26(b)(4)(B) when no alternative source of essential information exists. Making the materials generated during preparation of the opinions offered by the testifying expert almost as hard to obtain (as by protecting them unless the Rule 26(b)(3)(A) and (B) showing can be made) may be unwise.

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[7] On this point, consider Faruki, Cross-Examination That Hurts the Witness, Not You, 33 Litigation 38, 39 (Spring 2007):

> With an expert whose report was largely ghostwritten by counsel, traps abound unless the expert has studied and internalized the report. For example, if the expert does not know what is in her own lengthy report, you may find opportunities to have the expert deny having reviewed documents or performed an analysis that the report says she did review or perform.

[8] See., e.g., McDonald v. Sun Oil Co., 423 F.Supp.2d 1114 (D. Or. 2006) (experts' working notes were not subject to disclosure during discovery).

A related consideration that the Subcommittee has discussed is the proper treatment of experts who are designed to testify on some matters and also serve as "sounding boards" with regard to general strategy. If the goal is to discourage the wasteful practice of hiring two sets of experts, curtailing inquiry into the preparatory activities of the expert witness may be necessary to avoid trespassing also into the work done by the expert in the "consulting" role. On one level, this focuses on what was "considered by" the expert in reaching the opinions to be offered at trial. When the expert explores various analytical methods or tests before settling on one that will be the basis for the opinion offered at trial, the question whether the others were considered in reaching the opinion to be offered become central. On another level, it focuses on whether strategic interaction with the lawyer about the conduct of the case should be accessible because the expert is to testify. For example, if the expert advises the lawyer on how to probe or challenge the report of the other side's expert, should that interaction be regarded as discoverable? A likely response would be that it does not relate to "facts or data" considered by the expert in reaching her own opinions, but it is a legitimate concern in addressing the problem raised by item (4).

The Subcommittee has reached no conclusion about whether any rulemaking to deal with the issues presented in item (4) would be appropriate. It will attempt during the November meeting to make clear the tradeoffs and considerations that bear on the question whether to proceed further on this topic. It is worth noting, however, that this specific subject was not raised in the ABA resolution, and that pursuing rule change ideas like those described in items (1), (2), and (3) may produce considerable benefits without necessitating a venture also into the topic introduced in item (4).

Duration of work product protection: During the Oct. 11 conference call, as reflected in the notes of that call, the Subcommittee also began discussion of the question whether it should broaden its inquiry to include discussion of the duration of work product protection. Presently, many courts apparently regard protection as ending once the litigation is completed. But for many litigants related litigation may begin or continue after the suit for which the work was initially done has ended.

The Supreme Court dealt with related issues in FTC v. Grolier, Inc., 462 U.S. 19 (1983). In a concurring opinion, Justice Brennan articulated reasons supporting extension of protection beyond the first suit: "Any litigants who face litigation of a commonly recurring type -- liability insurers, manufacturers of consumer products or machinery, large-scale employers, securities brokers, regulated industries, civil rights or civil liberties organizations, and so on -- have an acute interest in keeping private the manner in which they conduct and settle their recurring legal disputes." Id. at 31. But the question whether this concern has particular salience in relation to the work of expert witnesses, and the way in which it should be handled when the party for whom the expert worked in the earlier case is different from the party for whom the expert is working in the current case, raised issues beyond the current understanding of the Subcommittee.

For the present, the Subcommittee intends to explore these issues further, and it invites the full Committee to provide reactions and advice about this topic.

(1) Disclosure under Rule 26(a)(2)(A) regarding expert witnesses not required to provide reports

Rule 26. Duty to Disclose: General Provisions Governing Discovery

(a) Required Disclosures

* * *

(2) ***Disclosure of Expert Testimony***

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

(i) the subject matter on which the witness is expected to provide evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) the substance of the facts and opinions to which the witness is expected to testify.

Draft Committee Note[9]

Rule 26(a)(2)(A). Rule 26(a)(2)(A) is amended to mandate disclosures regarding the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B). Before 1993, an interrogatory seeking the identity of expert witnesses permitted inquiry about the opinions to be offered by all such witnesses. The expert report requirement of Rule 26(a)(2)(B) -- added in 1993 -- calls for much more extensive information, but that rule exempted certain expert witnesses from providing a report at the same time it eliminated the former interrogatory practice. This amendment adds disclosure requirements regarding those exempted witnesses in Rule 26(a)(2)(A)(i) and (ii).[10] These new provisions include information that formerly could be obtained by interrogatory. Under Rule 26(b)(4)(A), the depositions of these expert witnesses may be taken, using the information provided by this disclosure. The goal is to ensure fair notice of the expected expert testimony.

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[9] The Subcommittee has not discussed any draft Committee Note. These drafts are provided only to indicate what sorts of discussion might be included, and to shed light on the discussion of the possible rule changes outlined in text.

[10] Initially, the Subcommittee considered including also an additional requirement -- "(iii) a summary of the grounds for each opinion." Eventually that was dropped on the ground that it was not urgently needed and that it might present considerable difficulties with regard to some witnesses affected, particularly treating physicians.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. Reasoning that having a report before the deposition or trial testimony of all expert witnesses is desirable, these courts have disregarded the limitations on who must prepare a report under Rule 26(b)(2)(B). But with the addition of this disclosure requirement to provide advance information about the opinions of such witnesses, courts should no longer be tempted to overlook Rule 26(a)(2)(B)'s limitations on the full report requirement.

Sometimes the person who will offer expert testimony also will be a "fact" witness -- often called a "hybrid expert." A frequent example is a treating physician or other health care professional. Another recurrent example is an employee of a party who does not regularly provide expert testimony. Often such witnesses provide not only testimony about strictly historical facts but also evidence under Fed. R. Evid. 702, 703, or 705. Parties must identify such witnesses under Rule 26(a)(1)(A) and provide the required disclosure with regard to such opinions. Failure to do so may lead to requests to exclude evidence under Rule 37(c)(1).

[Additional issues may arise with "hybrid experts." First, if the person's deposition has already been taken as a "fact" witness, there may be an objection that it cannot be taken under Rule 26(b)(4)(A) because of the one-deposition limitation of Rule 30(a)(2)(A)(ii). In general, such objections should not be well-taken to the extent the deposition is limited to the opinions enumerated in the Rule 26(a)(1)(A) disclosure; otherwise a party could prevent an expert deposition by designating as its expert a fact witness who had already been deposed. But if the party who designated the witness can show that the original deposition fully explored the issues on which the opinion testimony will focus, that may be a ground for a protective order against a further deposition of the witness.

Second, the ten-deposition limit of Rule 30(a)(2)(A)(i) might be raised if a party who seeks to take the person's deposition after the Rule 26(a)(1)(A) designation has taken ten depositions already. If the designated expert was one of those ten, the expert deposition should be viewed as separate from the "fact" witness deposition for purposes of the ten-deposition limit; otherwise, parties might be deterred from designating as experts those who have already been deposed as fact witnesses. This treatment is consistent with regarding the expert deposition of the witness as separate from a prior deposition of the same person as a "fact" witness for purposes of the one-deposition rule.

In regard to both types of Rule 30(a)(2)(A) issues, the parties should try to reach agreement, and in the absence of such agreement courts will need to design appropriate arrangements for the circumstances in individual cases.][11]

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[11] The bracketed material is a very rough first effort at addressing issues that might properly be foreseen in the Note. Perhaps, however, it would be better to remain silent on them. But it could be better to propose different default views.

(2) Report requirements in Rule 26(a)(2)(B) -- revisions to deal with issues of disclosure of attorney-expert communications and disclosure of draft reports

Rule 26. Duty to Disclose: General Provision Governing Discovery

(a) Required Disclosures

* * *

(2) Disclosure of Expert Testimony

* * *

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

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data ~~or other information~~ considered by the witness in forming them.

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous ten years;

(v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

Draft Committee Note

Rule 26(a). Rule 26(a)(1) and (2) are amended -- together with Rule 26(b)(3) -- to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony from those expert witnesses not required to provide expert reports and limit the disclosure obligation -- whether under Rule 26(a)(1)(A) or (B) -- to facts or data considered by the witness. In addition, the amendments make clear that draft expert reports need not be disclosed. Rule 26(b)(3) is amended to limit discovery regarding communications between expert witnesses and counsel or of draft reports. Together, these changes provide

broadened disclosure regarding some expert testimony and curtail disclosure and discovery that have proven counterproductive.

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

In 1993, major rule changes were made regarding expert discovery. The former expert-witness interrogatory provision was removed. Rule 26(a)(2) was added requiring disclosure -- without the need for a discovery request -- identifying every expert witness. As to all such witnesses retained or specially employed to provide expert testimony, and as to any employee of a party whose duties regularly included giving expert testimony, an extensive report was required, including a complete statement of all opinions to be presented at trial and the basis for those opinions, all exhibits to be used in relation to the opinions, a detailed listing of the witness's qualifications, including all publications during the prior ten years, a list of all cases in which the witness testified as an expert during the prior four years, and the compensation to be paid to the expert. Rule 26(b)(4)(A) was amended at the same time to provide each party the right to take the deposition of another party's expert witness. Rule 37(c)(1) was added to preclude testimony at trial on matters not properly disclosed before trial.

The current amendments narrow none of these 1993 provisions. Indeed, by adding an obligation to provide disclosure about expert witnesses who are not required to provide expert reports, they strengthen disclosure about certain expert witnesses.

[Insert Committee Note on Rule 26(a)(2)(A) amendment here]

Rule 26(a)(2)(B). One aspect of the 1993 amendments has produced problems, however, which these amendments seek to cure. Under Rule 26(a)(2)(B), an expert report was also to include "the data or other information considered by the witness in forming the opinions." This provision has been widely interpreted to call for disclosure of all communications between counsel and expert witnesses required to provide reports, and to require production of drafts of expert reports. The Committee has been repeatedly informed that these features of practice under the 1993 amendments have produced considerable costs without corresponding benefits. The American Bar Association has adopted a resolution urging that court rules be changed to protect against undue intrusion into collaboration between attorneys and expert witnesses and to preclude production of draft reports.

The sole justification for discovery from retained experts is to permit preparation of effective cross-examination of the expert testimony to be offered at trial. Before 1993, the authorized interrogatory provided only a limited opportunity to prepare for expert testimony at trial. The 1993 amendments' introduction of disclosure and the expert report, combined with depositions of right, provided a valuable expansion of that opportunity. This expansion could be particularly important in relation to determinations whether proposed expert testimony should be admitted under the standards of Daubert v. Merrell Dow Pharmaceuticals. Inc., 509 U.S. 579 (1993).

The Committee has been told repeatedly that routine discovery into attorney-expert communications and regarding draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts -- one for purposes of consultation and another to testify at trial -- because disclosure of their collaborative interactions with expert consultants

would reveal their most sensitive and confidential case analyses, often called "core" or "opinion" work product. The cost of retaining a second set of experts gives an advantage to those litigants who can afford this practice over those who cannot. At the same time, attorneys often feel compelled to adopt an excessively guarded attitude toward their interaction with testifying experts that impedes effective communication. Experts might adopt strategies that protect against discovery but also interfere with their effective work, such as not taking any notes, never preparing draft reports, or using sophisticated software to scrub their computers' memories of all remnants of such drafts. In some instances, outstanding potential expert witnesses may simply refuse to be involved because they would have to operate under these constraints.

Discovery or cross-examination focused on the details of attorney-expert communications, or minor variations between draft reports and final reports, can consume much time without producing corresponding benefits. Only rarely -- if at all -- does such discovery contribute significantly to a court's decision whether to admit proposed expert testimony under *Daubert* or to a jury's decision whether to accept or reject the expert's testimony at trial. Much more often, inquiry into these matters has proved to be a waste of time and money.

Recognizing these drawbacks, experienced attorneys often stipulate to forgo disclosure or discovery regarding attorney-expert communications beyond the facts or data considered by the expert, and to forgo disclosure or discovery of draft reports. The widespread use of stipulations to avoid the effect of broad interpretations of Rule 26(a)(2)(B) is a signal that the rule provisions interfere with effective practice. At least one state -- New Jersey -- has amended its discovery rules to insulate against such discovery. See N.J. R. 4:10-2(d)(1). The Committee has been informed that the New Jersey rule change was well-received by the bar, and that it has worked well in practice.

Rule 26(a)(2) is therefore amended to specify that disclosure is required only of "final" reports. Rule 26(b)(3)(D) is added to provide that discovery of draft reports may be allowed under some circumstances, but only by satisfying the provisions of Rule 26(b)(3)(D) can a party obtain such discovery. This amendment does not weaken the duty to supplement under Rule 26(e), however; like other disclosure obligations, expert reports must be supplemented as provided in Rule 26(e).

In addition, Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all "facts or data considered by the witness in forming" the opinions to be offered. This amendment deletes the phrase "or other information" included in 1993, which has been one ground for decisions requiring disclosure of all attorney-expert communications and draft reports. The refocus on "facts or data" is meant to limit the disclosure requirement (and corresponding opportunity for discovery) to material of a factual nature, as opposed to theories or mental impressions of counsel. At the same time, the intention is that "facts or data" be interpreted broadly to require disclosure of any material received by the expert, from whatever source, that contains factual ingredients likely to affect or bear on the opinions to be offered at trial. The disclosure obligation -- and discovery opportunity -- extends to any facts or data "considered" by the expert, not only that relied upon by the expert. In this way, the important advantages of the 1993 amendments can be preserved while the excessive costs and intrusion into attorney-expert communications experienced in some cases under the 1993 version of the rule can be curtailed.[12]

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[12] This paragraph is a first effort to explain how "facts or data" should be interpreted to ensure that parties get what they need to mount an effective challenge to the adversary's expert testimony. If we go forward, the content and placement of this explanation in a Note will be important.

Rule 26(b)(3)(D) permits discovery regarding attorney-expert communications or draft reports only upon a showing that the party seeking discovery has a substantial need for such discovery. Given the breadth of the disclosure and discovery opportunity regarding facts or data considered by the expert, it is expected that this showing can be made only rarely, as explained further in the Committee Note to Rule 26(b)(3)(D). Even where that showing of need is made, the protections of Rule 26(b)(3)(B) apply to guard against disclosure of mental impressions, opinions, or legal theories [of counsel]. In this way, these amendments will guard against the difficulties that have been reported under existing practice.

(3) Addition to Rule 26(b)(3) to limit discovery of attorney-expert communications or draft reports

Rule 26. Duty to Disclose: General Provision Governing Discovery

* * *

(b) Discovery Scope and Limits.

* * *

(3) ***Trial Preparation; Materials.***

* * *

(D) *Communications between counsel and an expert witness.* A party may obtain discovery regarding communications between a person who has been identified under Rule 26(b)(2)(A) and [retaining] {a party's} counsel -- or regarding a draft report prepared by such a person -- only with regard to facts or data considered by the expert in forming the opinions the expert will express. The court may order further discovery only on a showing that satisfies Rule 26(b)(3)(A)(i) and (ii). If the court orders further discovery, the protection of Rule 26(b)(3)(B) applies [to counsel's mental impressions, opinions, or legal theories].[13]

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[13] An alternative to the version in text that was also discussed by the Subcommittee could be as follows:

(D) *Communications between counsel and an expert witness.* All communications between [retaining] {a party's} counsel and a person who has been identified as an expert witness under Rule 26(a)(2)(A) -- and any draft report -- are protected as trial preparation material under Rule 26(b)(3)(A) and (B), except that disclosure and discovery are allowed with regard to facts or data considered by the expert in forming opinions the witness will express.

The text version may be preferred because it avoids the argument that the protection is limited to "documents and tangible things," as in Rule 26(b)(3)(A), because the phrase "subject to Rule 26(b)(4)" complicates the use of Rule 26(b)(3)(A) protections for expert witnesses, and

Draft Committee Note

Rule 26(a)(2)(B) is amended to require expert-witness disclosure only with regard to the "facts or data considered" by the expert in forming the opinions to be expressed in testimony, and to require only that a final report be provided. As explained in relation to that amendment, experience under case law that required disclosure or permitted discovery of attorney-expert communications or draft reports has shown that this form of discovery has many negative consequences and few positive benefits.

Rule 26(b)(3)(D) is added to provide protection comparable to work-product protection under Rule 26(b)(3)(A) and (B) for all attorney-expert communications. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether or not they are required to provide reports under Rule 26(b)(2)(B). It applies to all communications, whether in writing, by e-mail, or otherwise. Thus, Rule 26(b)(3)(A)'s limitation of its protection to "documents and tangible things" does not apply to the protection provided by Rule 26(b)(3)(D).

Rule 26(b)(3)(D) provides similar protection against discovery for draft expert reports. The term "draft report" refers to any document or electronically stored information in the form of a report prepared before service of the final report. With regard to a supplemental report provided pursuant to Rule 26(e), the term would include any draft of such supplemental material. But scientific testing of material involved in the litigation, and notes of such testing, would not be exempted from disclosure to the extent that related to any opinion or conclusion reached by the expert witness.[14] [And if the testing resulted in the destruction of the material so that it could not be tested by other parties, that might be an exceptional circumstance that would warrant permitting discovery even of preliminary analyses that were not the basis for any opinion or conclusion reached by the expert witness.][15]

Discovery is permitted regarding attorney-expert communications or draft reports only in limited circumstances and by court order. No such discovery may be obtained unless the party seeking it can make the showing specified in Rule 26(b)(3)(A)(ii) -- that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be extremely rare for a party to be able to make such a showing with regard to expert-attorney communications.

Rule 26(a)(2)(B) requires disclosure of all facts or data considered -- not just relied on -- by the expert in forming the opinions to be presented at trial. Rule 26(b)(3)(D) authorizes searching examination of the development of the expert's opinions, including consideration of alternative approaches to the issues presented and methods or information not considered by the

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because it is possible to make it clear that the protections of Rule 26(b)(3)(B) apply only with respect to the mental impressions, etc., of counsel.

[14] This discussion would need to be reevaluated depending on what is done about expert "work papers." If protection is afforded to "work papers," that may bear on discovery of the material mentioned in text.

[15] The bracketed material was prompted by questions during the Aug. 9 ABA event. It is really about a separate problem that is more akin to a ground for discovery under Rule 26(b)(4)(B) regarding the work of a nontestifying expert.

expert.[16] A party that believes full disclosure or discovery has not been provided with regard to such facts or data may present that contention to the court under Rule 37, but such a contention is not a ground for broaching the protection against inquiry into attorney-expert communications or draft reports. To the contrary, the assumption of the rule is that the broad disclosure Rule 26(a)(2)(B) requires -- coupled with permission under Rule 26(b)(3)(D) to inquire by deposition and otherwise about any facts or data considered by the expert -- should abundantly empower the interrogating lawyer. Against this background, it is not enough for a party to suggest that further discovery might yield something more of value to examining the expert witness.[17]

If the rare case in which a party does nonetheless make a showing of such a substantial need for discovery regarding attorney-expert communications, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). This protection should not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial.[18] But the court should protect against inquiry into the attorney's mental impressions even if a party has made the showing of need required to justify any discovery.

This stringent protection is limited to communications between the expert witness and ["retaining"] {a party's} counsel. The difficulties that the Committee has learned about arise from the relationship between lawyers handling litigation and expert witnesses they retain to assist in that litigation, including providing testimony. The protection is limited to that situation. But in appropriate cases, it may be that an expansive interpretation should be given to this term. For example, it may happen that a party is involved in a number of suits about a given product or service, and that a given expert witness is retained to testify on that party's behalf in several such cases. In such a situation, a court should recognize that "retaining" counsel should include all lawyers acting on behalf of the client in relation to the related litigation. Other situations involving similar reasons for interpreting ["retaining counsel"] {"a party's counsel"} expansively may exist.

Although Rule 26(b)(e)(D) forbids discovery of draft reports, there should be no limitation on inquiry into the basis for any opinion expressed in an expert witness's final report. Either during deposition or at trial, full and searching inquiry into the grounds for such opinions -- including alternative theories or methods considered and rejected by the witness -- should be allowed.[19]

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[16] This assertion may need to be reexamined if protection is to be afforded for expert "work papers."

[17] This is a first-cut effort to provide a clear statement in the Note about the difficulty of justifying discovery based on the "I think that the lawyer coached the witness" assertion.

[18] Again, this point may need to be reconsidered if protection will be afforded to the expert's "work papers."

[19] This paragraph is intended to foreclose objections to deposition or trial questioning about the expert's process of analysis. Is it sufficient? It should also be noted that it might be in tension with protection for an expert's "work papers."

(4) The problem of expert "work papers"

The expert "work papers" topic focuses on notes, etc., prepared by the expert in connection with readying the opinions to be offered at trial. We have heard a great deal about counsel telling their experts never to take notes, and about experts who have developed rather elaborate ways of leaving no traces of their thinking processes. We have also heard that lawyers often feel constrained to hire a second set of experts for frank communication about the case that won't be subject to discovery. The protections afforded by a rule like 26(b)(3)(D) -- described in item (3) above -- would at least partially respond to those concerns and reassure counsel. But arguably allowing inquiry into the preparation of the opinions to be expressed by the expert would also intrude into those candid exchanges about the case unless protection were provided for the expert's preparation activities. Practiced experts might still avoid taking notes. Canny lawyers might tell their experts to create a file entitled "draft report" immediately and put all their thoughts down there in order to provide protection against discovery.

This topic surfaced during the Subcommittee's discussions since the April Committee meeting. As footnotes above suggest, it bears on the first three topics because it could affect the latitude allowed a party to probe the opinions to be offered by an expert witness. Arguably, the greater that latitude, the clearer the point that generally precluding discovery of attorney-expert communications and draft reports does not materially impair the legitimate interests of the other side. Expert discovery was never a way to gather relevant information in general, but only a way to empower the other side to challenge the opinions to be offered. At the same time, the broader the inquiry into development of the expert's opinions, the greater the temptation to engage in strategic behavior to foil discovery.

Discussion of these issues was central to the Sept. 28 and Oct. 11 conference calls, and the notes of those calls contain much important detail about that discussion. As yet, the Subcommittee has not reached a conclusion about whether any effort to provide protection for expert work papers should be undertaken. It has not discussed broader protection for preparatory work done by testifying experts (e.g., forbidding deposition questioning about that work), but might give serious consideration to some possible rulemaking to facilitate the work of experts and enable lawyers to speak candidly with them.[20]

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[20] Only for purposes of suggesting what a rulemaking effort might look like, it might become a new Rule 26(b)(3)(D):

> **(E)** *Expert witness work papers*. Any document, electronically stored information, or tangible thing containing or embodying the preliminary analysis of a person identified as an expert witness under Rule 26(a)(2)(A) is protected as trial preparation material. The court may order discovery of such material only on a showing that satisfies Rule 26(b)(3)(A), and subject to the protections of Rule 26(b)(3)(B) [for counsel's mental impressions, conclusions, opinions, or legal theories].

The Subcommittee has only discussed the general topic of whether there should be serious consideration of protection of expert "work papers." This rough draft is provided only because sometimes possible rule language lends concreteness to discussion.

The "dual purpose" use of a single expert might provide particularly difficult problems. If discovery is allowed only about the opinions to be expressed at trial, it appears that with regard to the other work done by the person as a consultant the protections of Rule 26(b)(4)(B) would apply. If so, it may well be that there will be frequent occasions when retaining counsel contend that the discovery goes beyond what is allowed regarding the opinions to be offered at trial. But how readily could that protection be applied if there is a close relationship between the opinions to be offered and the opinions that are not to be offered?

No doubt experts would prefer to have "work product" protection for their trial preparation activities that correspond to what lawyers are afforded under Rule 26(b)(3). No doubt affording them such protection -- at least with regard to "work papers" -- would also provide comfort to lawyers deciding how broadly or candidly they could discuss the case with the expert. If such protection is not forthcoming, it may be that amendments like the ones sketched in parts (1) through (3) will not achieve their purpose of eliminating the unfortunate practices that have arisen since 1993.

But further constraints on discovery regarding the basis for the opinions to be offered might significantly compromise the ability of the opposing party to prepare those opinions. And work papers may be key to that challenge.

MINI-CONFERENCE ON NEW JERSEY
EXPERT DISCOVERY PRACTICE
April 18, 2007
New York, NY

These notes describe the discussions during the Mini-Conference held by the Discovery Subcommittee of the Advisory Committee on Civil Rules regarding New Jersey state court expert discovery practice in New York on April 18, 2007. Members of the discovery Subcommittee present included Judge David Campbell (Chair), Chilton Varner, Daniel Girard, Anton Valukas, Peter Keisler and Theodore Hirt, as well as Prof. Richard Marcus (Special Reporter). Also present from the Advisory Committee were Judge Lee Rosenthal (Chair) and Prof. Edward Cooper (Reporter). Representing the Administrative Office were Peter McCabe, John Rabiej, James Ishida, and Jeffrey Barr. Also present, from the Federal Judicial Center, were Joseph Cecil and Thomas Willging. Invited participants to the conference included William Buckman, Douglas Eakeley, Jeffrey Greenbaum, John Zen Jackson, James Martin, Alan Medvin, Gary Potters, Ellen Relkin, Ezra Rosenberg, Christopher Seeger, and Richard Williams. Also present as an observer was Alfred Cortese.

Judge Rosenthal welcomed the invited participants, explaining that their input would be extremely valuable to the Committee in determining whether to consider revisions to federal-court expert discovery practices resembling the changes introduced in New Jersey state court practice. On behalf of the Discovery Subcommittee, Judge Campbell emphasized the value of receiving a hands-on report from counsel familiar with the recent changes in New Jersey practice.

At Judge Campbell's invitation, the various New Jersey lawyers introduced themselves and summarized their varying practice experiences. There was a broad range of experience. Some lawyers specialize in mass tort litigation, but there were representatives of both the plaintiff and defendant sides of such litigation. Others mainly handled plaintiffs' personal injury work, including medical malpractice. Some did insurance defense and coverage litigation. One specialized in plaintiffs' civil rights litigation. Another is with the New Jersey Attorney General's office and supervises litigation on behalf of all agencies, involving tort and employment litigation, and oversees litigation on both the defense and plaintiff side.

The overall topic was introduced as emerging from initial consideration of asserted problems with Rule 26(a)(2)(B)'s exemption from the report requirement for employees who do not regularly testify as experts, and then focusing on issues involved with treating doctors. Concern with those problems has been eclipsed, however, by more recent expressions of uneasiness about the intrusion of expert discovery into areas otherwise protected by privilege or work product. Before 1993, Rule 26 had only authorized an interrogatory about the contours of expert witness testimony. In many places depositions commonly followed, either by agreement or by court order, but the rule did not guarantee a right to take the expert witness's deposition. The 1993 amendments thus changed the rule very substantially by introducing disclosure, including a report that was much more comprehensive than the prior interrogatory answer, and by guaranteeing the right to take the expert witness's deposition after disclosure. The Committee Note accompanying the 1993 amendment said that privilege protection did not apply to what the expert was given by the lawyer or to their communications. The impact of prospective disclosure and discovery on free and productive communication between lawyers and the experts they hire prompted the ABA to adopt a resolution in 2006 recommending rule changes to insulate that interaction and to protect against discovery of experts' draft reports.

Judge Campbell then reported that, in general, it appeared that the majority of the participants in the Subcommittee's January mini-conference in Scottsdale, Ariz., had favored the ABA approach that would guard against intrusion into the collaborative relationship of the lawyer and the expert witness. At the same time, some lawyers strongly opposed these changes,

arguing that they would unduly constrict the opportunity to show that the witness was not the true source of the testimony being offered, and that the lawyer was really speaking through the witness.

The existence of this debate pointed up the value of receiving information from those who had been operating in a system governed by a rule resembling what the ABA was endorsing. The New Jersey changes of approximately five years ago seem to present just such a situation, so this mini-conference was intended to follow up on the questions left unresolved by the January event. The materials for this mini-conference outlined a number of questions on which the Subcommittee sought guidance. It seemed useful to consider four general topics during this conference: (1) the reasons for and the reception of the New Jersey rule change; (2) how the revised New Jersey rule was working; (3) potential problems that might arise if the Civil Rules were amended in a similar way, such as having lawyers ghost write expert reports and unduly limiting inquiry into the reports through depositions; and (4) the impact under the New Jersey practice of the conditional access it appears to authorize to lawyer-expert interactions, and whether that possibility undermined the protective provisions of the New Jersey rule.

Three of the participants were directly involved in the development of the New Jersey rule as members of the state's Civil Practice Committee, which recommends procedural changes to the state's Supreme Court, which in turn has authority to adopt such changes.

The background was that before 1993 the New Jersey practice was like the pre-1993 federal one -- "you could send an interrogatory." There was no mandatory disclosure. But the actual practice was nonetheless to provide written reports. With the 1993 change in federal practice, however, the New Jersey state court practice changed as well even though the rule had not changed. Depositions became more expensive, and often focused largely on what attorneys did in relation to the production of the report. This led to "uncomfortable constraints" on the side producing the report. One lawyer offered the example of a situation in which the expert had worked up a 165-page report and the lawyer went to the expert's office and made oral comments on the report before it had ever been printed. "I would not ask for drafts." Sometimes experts would come to the lawyers' offices with laptops on which they had electronic versions of their drafts. Alternatively, the experts would read the draft reports to the lawyers over the phone, and the lawyers would offer their comments. One concern was that if the lawyer's correction of simply factual matters were know that would make the expert look bad -- "you didn't even understand the facts, did you?" So lawyers would tell experts "Don't take notes. Just listen."

It was asked whether lawyers often stipulated around this potential intrusion. One attorney said he did not. "This was something you had to deal with." An example was the Adler case decided by Judge Walsh (who was the chair of the drafting subcommittee of the New Jersey civil practice committee that drafted the new New Jersey rule). In that case, an inexperienced expert actually printed off a draft report, and the judge felt he had to order it produced even though he thought that production in discovery should not be authorized. [In case it would be of use, a summary of this case is included in the Appendix to these notes.]

Given these difficulties, there seemed at that time to be three possibilities for New Jersey practice: (1) keep things as they were, (2) add protections against discovery, or (3) allow caselaw to develop on the topic. The eventual decision was that caselaw would not be a good solution, and that things should be changed. Hence the proposal for the new rule.

There was little dissent, if any, when the change was announced. Although there is usually no public hearing process for New Jersey rule changes unless there is controversy, there was a lot of publicity about this one. There were front-page articles in the New Jersey legal

papers. Lawyers knew this was being proposed. (At least one invited lawyer whose office is in Manhattan confirmed being aware of the proposal.) The change was viewed as welcome by attorneys across the board. Things had reached a point at which half the time in an expert deposition might be occupied with these essentially unimportant topics about the interaction with the lawyer. And lawyers had to spend a lot of time working on the initial development of the expert's reports.

It was asked whether experts ever did their initial reports by themselves -- without the lawyers' involvement. One attorney involved in the development of the rule said that "Now I want to collaborate because of discovery of drafts. Before discovery came up, I was more likely to leave the expert alone."

Another lawyer involved in the development of the new rule explained that the practice in New Jersey had been to produce reports and then take depositions. This contrasts with the practice in state court in New York, where expert discovery is usually limited to complex cases. It was recognized in New Jersey that the facts given to the expert were discoverable. But with the advent of the new federal practice under the 1993 amendment to the federal rule, depositions began to go through machinations about what was a draft. People would ask supplemental interrogatories -- "Did the expert prepare a draft?" One lawyer observed that "We tried to say it was work product, but the better argument was that it was not within our definition of work product." In toxic tort cases there would be seven or eight day depositions involving word-by-word analyses of reports and draft reports.

Another lawyer emphasized that this change in practice after 1993 produced significant discomfort. The first question would be "Did your lawyer . . ." That put the spotlight on the lawyer. Under the new rule, "you zero in on the substance of the report." "This rule furthers collegiality, and takes away the sideshow focusing on what the lawyer did."

It was asked whether these lawyers found themselves retaining a second set of experts due to the prospect of discovery. One attorney said that in bigger cases the client would sometimes insist on it to protect against discovery.

A question was raised about the amount of publicity of the rule change and the reaction to it. The response was that the New Jersey Civil Practice Committee has a two-year cycle on recommending rule changes that is well known. Lawyers know that every other January there will be a report on proposed new rules. The reports are published in the legal press. There are rarely hearings; they are only for topics that provoke great controversy. Although it is impossible to say who reads the newspaper reports carefully, there were articles in the New Jersey Lawyer and the New Jersey Law Journal. "This was well known and well publicized." There was no controversy.

Another lawyer seconded this view. "This was universally well-accepted." This lawyer recalled that before the rule change there was inquiry into drafts often; only once did anything of importance emerge. Since he represents public bodies, he never had two sets of experts, for that would be too costly. More generally, the practice before the New Jersey rule change produced problems for less wealthy clients.

Another attorney who represents plaintiffs in mass tort litigation reported that he often handles litigation with coordinated state-court and federal-court cases. He urges litigants in those cases to stipulate to the New Jersey practice for all the cases. Sometimes defense counsel will resist. He can't understand their resistance. To prepare for this conference, he talked to a

number of plaintiffs' attorneys. Nine out of ten say a draft of the report is not useful. It is just a way to attack defense counsel. That is not useful.

Another plaintiffs' lawyer volunteered that "Any time a lawyer's conduct becomes the focus, that is bad for the system." When the case involves an attack on an attorney, that is harmful. Jury consultants show that these attacks are not even useful; the juries know that the experts are retained by the lawyers and responsive to their objectives.

Because the New Jersey practice is that the facts used by the expert are discoverable, it was asked how the line is drawn between what is and is not discoverable. The response is that "There is a pretty clear line." A defense lawyer cited Franklin v. Milner, 375 A.2d 1244 (1977), a case in which the court parsed a letter to the expert to determine what constituted facts provided to the expert and what constituted work product. [In case it would be of use, a summary of this case is included in the Appendix to these notes.]

Another plaintiff's lawyer pointed out that in the Bextra and Celebrex MDL proceedings, pending in U.S. District Court in San Francisco, Judge Breyer by pretrial order had adopted the parties' stipulation to protect against discovery:

> No Production of Drafts, Work Product, or Deliberative Process. With regard to exchange of expert reports, the parties hereby stipulate that draft reports need not be disclosed and that other writings between the expert and the counsel that reveal work product or deliberative communications between the expert and the attorneys need not be produced.

In re Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation, MDL No. 1699, Pretrial Order No. 21 paragraph 11 (March 16, 2007). By letter agreement, the parties extended this provision to cover oral communications between counsel and the experts. Initially, defendant Pfizer had balked at this stipulation, but it later agreed.

Bextra is the first mass tort with such a stipulation. One reason for the Bextra order was that there was a tight deadline for completing expert discovery. The expert witnesses were located around the world -- some in England and New Zealand. Without such an arrangement, counsel might think they have to travel to meet the witness, or insist the witness travel long distances to counsel's offices, to avoid creating discoverable drafts. This would be very time-consuming and wasteful, and particularly difficult with the schedule so tight. That is why there was such a stipulation.

This plaintiffs' mass tort lawyer sees no difficulty in probing the analytical basis for the expert's opinion without having draft reports.

Another plaintiffs' mass tort lawyer agreed. "If you ghost a report, the expert will be ripped apart."

Another attorney agreed. "You can address these issues with hypothetical questions -- Would your opinion change if . . ." I will get the expert's file, and also a privilege log of what's been held back. I can proceed from there. This lawyer added that ghostwriting of reports is not a problem. "This rule takes the pressure off. I can let the expert work up the report on her own." Nonetheless, this lawyer said "I'm very careful about what I give to my expert to keep things from being produced." He added that "not every communication is protected" because only the collaborative process is protected.

It was noted that under the New Jersey rule the protection is limited to the "collaborative process," suggesting that a fair amount of interaction may not be protected. One lawyer offered a simple example: In an auto accident case, the lawyer sends the expert the police report. But the expert gets the direction of the defendant's car wrong. The lawyer calls this mistake to the attention of the expert, who corrects it. The fact that the lawyer sent the expert the police report is subject to discovery. The fact that the expert made this mistake is not.

Should this matter? One attorney said that at trial it would be effective to say "You said the car was going south when it was going north. Were you equally careful with the rest of your analysis?" Another lawyer volunteered that a Daubert decision might be affected by this -- "You mean the 'expert' doesn't know the difference between North and South?" But the common view of those present was that no legitimately important opportunity to challenge the expert's testimony would be lost.

Another question was whether inserting an "escape hatch" into a protective rule permitting a court to order disclosure in exceptional circumstances would produce undesirable consequences. [It is worth noting that the New Jersey rule seems to say that discovery may be ordered if a standard like the one in Rule 26(b)(3) is met.]

One attorney responded that such a possibility "would chill the collaborative process." Another noted that e-mail has become universal and necessary. Allowing intrusion into that can be crippling to effective work of attorneys. Another noted that allowing the possibility of access will cause motion practice for the court. Another noted that there is now a real problem with lack of collegiality between counsel. The New Jersey rule is a positive development, and it fosters collegial relations. There are fewer games of gotcha. We should craft rules that foster collegiality rather than gotcha behavior.

Another attorney turned to the concern about attorneys ghost-writing expert reports. At three levels, he felt there was not a problem:

First, this concern disregards the purpose of the expert report. The report does not have pristine independent importance. It was introduced because it is better than the an attorney's interrogatory answer. The real goal is to give the other side a fair opportunity to inquire into the grounds for the expert's opinion. That is possible without access to draft reports or to the collaboration between the lawyer and the expert. Ghost-writing a report simply won't work without access. "The witness will be ripped up" if the report is somebody else's work.

Second, most experts have integrity. They feel it's their job to work up the analysis and do the report. That is also a pragmatic value because they should realize that if they can't explain the results they will be ripped up.

Third, for some people there is a need for the lawyer's help and focusing on that is distracting. For example, if an auto mechanic would not be comfortable writing up a report the lawyer can assist. Making a big deal out of that activity by the lawyer is not sensible.

Another lawyer (a plaintiffs' lawyer) summed up the discussion -- "This is a cross-section of attorneys who are unanimous this has worked well. We say this is a shared view of all attorneys in New Jersey. And this is a bright line test that works for us."

A defense lawyer agreed. "This has led to a sort of behavior change. We're glad to be Jersey lawyers." But this lawyer said that he would make one change. He would not cut off the protection as of the date that the final report is served. the plaintiffs' lawyer who had just spoken

agreed -- the distinction in treatment between pre- and post-report communications with the expert was a problem.

A plaintiffs' mass tort lawyer mentioned that in some such cases plaintiff and defendant attorneys agree that the protection should not end with the service of the final report.

Another lawyer explained why this has been a good rule for lawyers -- "As an attorney, I don't have an obligation to go after this material. My client may want me to make the other lawyer's life more difficult, but now that I can't do so, and that temptation has been removed." He added that "Nobody bothers with the pre- and post-report distinction." Instead people respect the protection without regard to chronology.

It was asked whether there are any New Jersey cases interpreting this new rule. The answer is that there are not, and that the absence of interpretation shows that the rule is clear and is working. He added that introducing an escape hatch would have bad results.

This prompted the observation that the New Jersey rule seems already to have an escape hatch using the standard required to obtain access to work product. Don't New Jersey lawyers think they can get this? Why don't they try?

The initial response was that there is a body of law in New Jersey on access to the work of nontestifying experts, which is very difficult to justify. Another lawyer said that "exceptional circumstances" is an almost insurmountable obstacle to discovery. He added, however, that even that would undermine the protection provided by the rule. This prompted the remark that the rule seems to allow access on a less compelling showing, and the observation that it is interesting that people are not trying to gain access. The answer was that this was a result of the standard -- discovery is only allowed if you can't get what you are seeking from any other source.

A lawyer who practices in both New York and New Jersey added that "A lot of this is culture. It's a different feel over there."

After a break, another attorney sought to correct what he feared might be a misimpression -- that the New Jersey bar is so collegial that the practice in question was largely a cultural feature of that bar, not something that could be adopted elsewhere. Actually, New Jersey is right between New York and Philadelphia, and it is not different from a lot of other metropolitan areas.

At this point, two more attorneys joined the conference, and they were asked to offer their views on the New Jersey rule.

One, who represented civil rights plaintiffs and defendants in criminal cases, said he liked the rule. He usually represents people with limited means in suits against governmental agencies. He doesn't want to be sidetracked on a tangent regarding how many drafts there were. This sort of thing will delay the case. In the long run, it's more efficient and less of a burden for plaintiffs. He hasn't found smoking guns using the federal rule that would justify the negative features of that rule. He added that it's not always a good idea to depose the other side's expert. Why educate them? But it is essential to have an expert report; attorney disclosure is not an adequate substitute.

The other lawyer handles class actions and other complex civil litigation from a defense perspective. His experience is that the New Jersey rule is a good one. It's become popular enough that in federal class actions parties now stipulate to the New Jersey rule. He contrasted

the New Jersey approach to admissibility of scientific opinion testimony. There he would strongly urge adopting Daubert. [This elicited strong disagreement from plaintiff lawyers who said the vigorous disagreement on this issue showed that they don't agree with defense counsel on much more than the wisdom of the New Jersey rule under discussion in this conference.] But it's surprising how easy it is to persuade parties to stipulate to this discovery rule in multiparty federal cases. And he's seen no disadvantage in the Daubert process in doing so; it is possible to challenge the plaintiff's expert evidence without the more intrusive federal rule.

It was asked whether these attorneys have run into downsides to the New Jersey rule. One attorney offered that there is still a risk of waiver if the witness overtly relies on the lawyer. But in one case where that sort of issue arose he was able to avoid being immersed in side-issues as a result.

Another question was whether counsel retain draft reports. One response was that it's not so much that you have a file called "draft reports," but that you don't have an elaborate and protective relationship with your expert. Another said that "I want to know what will be in the report before the report is developed. It's unrealistic to say experts prepare their reports without attorneys."

Another attorney said that he communicates by e-mail with his experts, and they send him draft reports. He's sure he has them somewhere as a result.

Another lawyer noted that experts' behavior has not changed even if New Jersey lawyers' behavior has. Many experts testify across the land, not just in New Jersey.

Another attorney recalled a New Jersey federal judge who would often order that all draft expert reports be retained. "This would lead to settlement. Who can live with this?"

Returning to the question of an escape valve, it was noted that there seemed no enthusiasm for such a provision, but that there was unhappiness with limiting the protection to the pre-report stage. One attorney responded that the rule change was to avoid issues and another said the current exception is "an illusory exception."

Another lawyer said that he is still retaining drafts, but also that he spends a lot of time with experts before retaining them. "No matter what the rule says, I'll be very cautious. I don't need the protection of the rule. But I don't want this to be a distraction. And I've found few smoking guns, so I think it is mainly a harmful distraction."

Another inquiry was about the term "collaborative process" that appears in the rule. Was this a term of art before the rule? Is it defined anywhere?

This question prompted the response that the fact there are not reported cases shows that the rule is understood and is working. Another said that the Adler case introduced the phrase "collaborative process," and that Judge Walsh (who wrote that opinion) wrote it into the rule (as Chair of the subcommittee that produced the proposed rule).

Another lawyer volunteered that this rule facilitates getting the best possible experts. An example was a possible expert witness who was a high-ranking academic with many grant proposals and other concerns. Such a person will refuse to serve as a witness in a regime that requires the elaborate and pointless activities produced by the federal rule. The New Jersey rule, on the other hand, provides a way to recruit such a person.

Another attorney noted that the collaborative process is less likely to be important for the "professional" expert witness. It's the people who don't do this all the time who benefit from that collaboration. Another said "These are the experts we want. They hate this kind of sideshow. Sometimes we can't get them under the federal rule." Yet another illustrated with the sorts of struggles experts face under the federal rule -- "Do I have to preserve draft reports on Webex?"

Another question was whether the framers of the New Jersey rule thought about limiting discovery to items relied upon by the expert witness. The answer was that this was discussed and the broader "considered by" terminology was chosen to make the rule sweep more broadly. Another explained that the New Jersey practice was too narrow.

Another question was whether the New Jersey rule has resulted in time savings in depositions. One attorney said that a significant amount of time has been saved due to the rule. Another said that he had a "gut feeling" that there were time savings. Another added that the quality of the report was better, which could save time in depositions.

One lawyer noted, however, that "I talk to my expert more now, so that's a larger cost. But you get a better report." Another acknowledged that deposition preparation may be longer, so that there are probably not major cost savings.

A plaintiffs' lawyer said that, in his cases, the deposition is shorter, although it may be that the defendant has to pay for a longer preparation session.

Another said the practice is more efficient, but added that it has not eliminated the need sometimes to hire a consulting expert.

A plaintiffs' mass tort lawyer stressed that the rule saves time on turn-around. "Now we don't have to go in person to talk to the expert."

The conference ended at 3:45 p.m.

APPENDIX

Because several lawyers referred to the following two New Jersey cases, it seemed useful to include a summary of them.

Adler v. Shelton, 778 A.2d 1181 (N.J. Super. 2001), was decided by Judge Walsh, a member of the committee that drafted the New Jersey procedure on which the mini-conference focused. The dispute there was about the production of a draft report of a structural engineer. The suit claimed that defendant architects had misdesigned plaintiffs' house. Plaintiffs had a roof leak and hired a contractor to deal with the problem. He in turn hired a structural engineer who concluded that plaintiffs' home was in imminent danger of collapse and designed repairs to address what he thought were serious structural defects. Thus, the structural engineer started out as an actor or viewer who was brought into the situation by the contractor, not by a lawyer.

Plaintiffs then contacted a law firm, which hired the same structural engineer to assist them on expected litigation as well. The law firm filed a suit claiming that defendant architects (who designed plaintiffs' house) negligently designed the house. The engineer prepared a report for the law firm that was provided to defendants. During his deposition, the structural engineer testified that he probably prepared a draft report but that he never kept drafts because "it just adds up to a lot of paperwork" to keep drafts. He acknowledged that he furnished plaintiffs' law firm

with drafts once or twice, and that changes may have been made in response to lawyer comments to the manner of presentation in the report, but not to the content. Defense counsel asked the structural engineer to search for drafts but he reported back that he had not found any.

The matter might have rested there, but during the deposition of plaintiffs' contractor it turned out that he had one of the structural engineer's drafts. The reason seems to have to do with payments. The structural engineer was originally hired by the contractor, and billed his work on the house to the contractor. Contrary to the law firm's recommendation that they pay the structural engineer directly for his work on the litigation, plaintiffs continued to pay the contractor for all the structural engineer's work (including work on the litigation) and for that reason the contractor had a draft report from the structural engineer, which was submitted in connection with a billing for the litigation work. The contractor then produced the draft at his deposition. But because New Jersey guards against waiver for inadvertent disclosure this production did not waive any applicable protection. It did, however, bring to the fore the issue whether the draft should be produced, and defendants moved for production.

Judge Walsh concluded that the draft should be produced, drawing considerably on federal decisions to reach his conclusion. He noted the disagreements among federal courts on whether core work product provided to expert witnesses is discoverable and endorsed interaction between lawyers and their experts:

> It is common knowledge that attorneys regularly work with their retained experts in preparing expert reports. It is good practice as well. Too much scrutiny of this *collaborative process* serves only to demonize the natural communicative process between an attorney and his or her retained expert. Ultimately, it does little to insure that the expert's opinion has been independently derived.

Id. at 1190 (emphasis added). He also quoted the Third Circuit's views from Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595 (3d Cir. 1984):

> Examination and cross-examination of the expert can be comprehensive and effective on the relevant issue of the basis for an expert's opinion without an inquiry into the lawyer's role in assisting with the formulation of the theory. Even if examination into the lawyer's role is permissible, . . . the marginal value in the revelation on cross-examination that the expert's view may have originated with an attorney's opinion or theory does not warrant overriding the strong public policy against the disclosure of documents constituting the core attorney's work product.

Nonetheless, the judge held that the report in question had to be turned over (id. at 1192):

> Here the facts plainly favor the draft report's production. [The law firm] played no role in the preparation of the draft. The law firm provided no information to the expert at least as far as the record before the court indicates. Even if it had, there is nothing to suggest that [the law firm] had shared any of its "opinion" work product with [the structural engineer]. . . . There is not even evidence that the draft report was produced as a result of collaborative efforts between [the law firm] and [the structural engineer]. There certainly is no dispute between the parties, nor could there be one, about the facts the expert considered, or at least relied upon, for his opinion here. Consequently, the court directs the disclosure of [the structural engineer's] draft report forthwith.

Franklin v. Milner, 375 A.2d 1244 (N.J. Super. 1977), was a medical malpractice action in which both plaintiffs and defendants hired expert medical witnesses to review and express

opinions about what the medical records showed. The parties then exchanged these reports. The discovery issue resulted when plaintiffs asked their medical expert to comment on the report of the defendants' expert, and plaintiff's expert did so in a letter to counsel that contained a number of observations about the expert's strategic views and recommendations. The letter was submitted to the court for in camera review in connection with defendants' demand that it be produced. The court went through the letter sentence by sentence and separated statements that were medical in nature from those that it viewed as legal in nature. For example:

> The last two sentences in the first paragraph on the second page we consider argumentative, nonmedical comments entirely barren of expert opinion and of no evidential competence. They might suggest a line of inquiry for plaintiffs' counsel to pursue during trial, but cannot lead to discoverable evidence.
>
> The last paragraph is Dr. Kanter's estimate of the prospects of concluding the case without a trial. It expresses a legal thought and repeats an observation made in his deposition that credibility is in issue.

Id. at 1248. More generally, the court noted:

> It is common for experts to serve a dual role as prospective witnesses and as consultants to attorneys in preparing a case. In other jurisdictions the work-product protection has been preserved for those communications of an expert made in the capacity of an advisor in preparation for trial, although discovery can be had of the knowledge and opinions about which they are prepared to testify.

Id. at 1252. Because it felt that the doctor's strategic musings were not relevant or likely to lead to admissible evidence, the court held that they were not discoverable.

6C.

C. Notice Pleading: Bell. Atlantic Corp. v. Twombly

The decision in *Bell Atlantic Corp. v. Twombly*, 2007, 127 S.Ct. 1955, needs no introduction. Speculations as to its meaning and long-term impact run rampant. Introducing these questions to the rulemaking world, however, requires some preamble.

The basic question is whether — and, if so, when — to begin crafting formal rules amendments to channel, redirect, modify, or even retract whatever changes in notice pleading flow from the Twombly decision. Discussion at the November Civil Rules Committee meeting led to a consensus that the best approach for the moment is to keep a close watch on the evolution of practice as courts seek to digest and implement the multitude of approaches sketched by the Supreme Court. The close watch might well include empirical studies by the Federal Judicial Center after time has generated sufficient experience to support meaningful study. But a close watch implies that nothing immediate will be done to draft new rule text for consideration.

Further discussion now can be useful for at least two purposes. One is to get a better sense of how others understand Twombly, and how it has had whatever impact it has had in the very short term of its present life. A second purpose is to consider the alternative opportunities that may be available to amend present rule texts. If there are pressing immediate problems that seem likely to endure for some time, and if they can be understood well enough to support effective rulemaking, the Advisory Committee may have been too timid. If the Committee should be launching rules amendments now, it is important to understand that.

Several sets of Advisory Committee materials are provided under the separate tab for the Twombly panel discussion to provide background for the discussion. These materials summarize Advisory Committee consideration of notice pleading issues dating back to 1993, the year of the Leatherman decision, and carrying forward to 2006. These materials reflect almost casually the direct and recurring tie between notice pleading and the Committee's parallel (and ever-continuing) work on discovery. Just as the Twombly opinion emphasizes the direct interdependence of pleading and discovery that has characterized the Civil Rules from the beginning in 1938, so the Committee has continually fretted that the time may have come to reconsider notice pleading, either in particular applications or more generally, to protect against the burdens of discovery on claims that should have been cut off earlier.

Another set of materials is provided in the draft Minutes for the November meeting, reflecting the Advisory Committee's initial encounter with the Twombly decision.

Discussion of these questions will be led by a panel moderated by Professor Stephen B. Burbank, and including the Honorable Anthony J. Scirica, Chief Judge of the Third Circuit Court of Appeals; Gregory Joseph, Esq., of Gregory P. Joseph Law Offices LLC; David M. Bernick, Esq., of Kirkland and Ellis LLP; and Elizabeth J. Cabraser, Esq., of Lieff Cabraser Heimann & Bernstein, LLP

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 8-9, 2007

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

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

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

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

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

44 *April 2007 Minutes*

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

47 *Agenda Items*

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

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

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

67 *June 2007 Standing Committee Meeting*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

226 **Draft Reports**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

361 **Attorney-Expert Communications**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

524 **Expert Work Papers**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

684 **Duration of Protection**

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

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

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

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

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

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

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

712 *Rule 56*

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

723 **Rule 56(a)**

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

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

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

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

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

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

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

746 **Rule 56(b)**

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

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

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

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

762 **Rule 56(c)**

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

772 Committee members supported the rearrangement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

913 **Rule 56(d)**

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

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

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

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

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

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

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

959 **Rule 56(e)**

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

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

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

979 **Rule 56(f)**

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

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

985 **Rule 56(g)**

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

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

1000 It was noted that the Style Project was forced by style conventions to find some substitute
1001 for "shall" in the present rule. Given the established discretion to deny summary judgment, "should"
1002 was the proper approach for the Style Project. But the present project supports substantive
1003 amendment. Substituting "must" for "should" would not violate the decision to leave the summary-
1004 judgment standard unchanged. The standard remains the same. If in the continuing language of the
1005 rule a party is "entitled to judgment as a matter of law" under the unchanged standard, there should
1006 be no discretion to deny.

1007 A counter-example was offered. Gender- and national-origin discrimination claims may be
1008 joined in a single action. The facts bearing on each claim may be almost entirely the same. Even
1009 though the evidence on one theory may seem very thin — for example the national-origin theory —
1010 it may be better to try all theories together to avoid the risk that a partial summary judgment rejecting
1011 the national-origin claim might be reversed and require a new trial.

1012 A more general question asked whether judges often exercise discretion to deny a summary
1013 judgment that is warranted under the summary-judgment standard? One response was that this is
1014 not a real problem in practice. "If a judge wants it to go away the judge will sit on the motion and
1015 the parties may settle." But it also was observed that some lawyers find it frustrating that a court
1016 may refuse to whittle a case down by partial summary judgment. A further frustration occurs when
1017 a summary-judgment motion is decided on the brink of trial. Recognizing these frustrations does
1018 not mean that it is possible to provide an effective response through Rule 56.

1019 Further discussion resolved the issue with 8 straw votes in favor of "should" and 2 for
1020 "must."

1021 A second set of questions arises from the direction that "[a]n order or memorandum granting
1022 summary judgment should state the reasons." Would it be better to say that the court "must" state
1023 reasons for a grant? Should the rule address an order denying summary judgment, either stating that
1024 the order "should" or "must" state the reasons?

1025 The strongest argument for saying that an order granting summary judgment must state the
1026 reasons arises when the judgment disposes of the entire action. There is likely to be an appeal.
1027 Although the court of appeals is obliged to provide de novo review, it is essential to understand the
1028 reasoning of the district judge who first undertook a comprehensive analysis of the record. The rule
1029 could distinguish grants from denials, either omitting denials or saying only that an order denying
1030 summary judgment should state the reasons.

1031 Reasons were offered for not saying that the court must give reasons for a denial. One
1032 example is a determination that the case is close, that sustained work will be required to determine
1033 whether summary judgment is indeed appropriate, and there is a real risk that any summary judgment
1034 will be reversed. Denial in deference to a trial that will produce a definitive answer may be wise.
1035 But little is gained by stating such reasons. This question relates to the question whether the court
1036 should identify specific issues that are genuinely disputed. Identifying disputed issues can help focus
1037 the parties' trial-preparation work, but also may be an investment of the court's time that pays few
1038 dividends. It also was suggested that given de novo review, the prospect that very few denials will
1039 come up on appeal outside official-immunity and similar collateral-order appeals, and general
1040 present practice, nothing more need be said on a denial than that there is a material disputed issue.

1041 It also was suggested that an obligation or strong encouragement to state reasons becomes
1042 more complicated when the court grants summary judgment as to only part of a case, or grants in part
1043 and denies in part.

1044 Straw voting at the end of this discussion produced some double votes. Three members
1045 favored a rule that the court must state reasons both in granting and in denying summary judgment.
1046 Five favored must for a grant and should for a denial. Five also favored should for both grant and
1047 denial.

1048 The question whether the basic statement of summary-judgment authority should be relocated
1049 to become subdivision (a) came back for further consideration. It was suggested that if it comes at
1050 the beginning, this provision is the proper place to refer to "evidence that would be admissible at
1051 trial." But the provision addressing the need to state reasons might better be relocated. Further
1052 support for relocation was offered: it is better to begin with the fundamental proposition in the model
1053 of several other rules, and then flesh out the surrounding procedures and incidents. This should not
1054 be buried in the last quarter of the rule. A rearranged draft will be prepared for consideration by the
1055 Subcommittee.

1056 **Rule 56(h)**

1057 Draft Rule 56(h) recognizes the long-established practice and terminology of "partial
1058 summary judgment." The draft remains open to further wordsmithing here as everywhere else.

1059 Discussion focused on the provision in subdivision (h)(2) for an order stating that a material
1060 fact is not in dispute "and treating the fact as established in the action." Should "established" be
1061 replaced by "accepted"? The response was that "accepted" is not appropriate for a court
1062 determination. "Accepted" is appropriate when addressing the "deemed admitted" consequence of
1063 a failure to respond properly because then there is no actual court determination that the record
1064 shows there is no genuine dispute. (h)(2), in contrast, requires a court determination on the
1065 summary-judgment record. Its language is close to present Rule 56(d) — "the facts so specified shall
1066 be deemed established" — and is drawn directly from Style Rule 56(d)(2) — "must be treated as
1067 established in the action."

1068 **Rule 56(i)**

1069 Style Rule 56(g) provides that the court "must" order payment of the reasonable expenses,
1070 including attorney fees, caused by submitting a Rule 56 affidavit in bad faith or solely for delay. The
1071 court also may hold the offending party in contempt. Draft Rule 56(i) carries these provisions
1072 forward, but reduces the command to permission — the court "may" order these sanctions. The FJC
1073 responded to a request to study the use of Rule 56(g), finding that there are very few motions and
1074 almost no grants. The Subcommittee has thought about simply abolishing this provision as
1075 moribund. Civil Rule 11 and 28 U.S.C. § 1927 may be sufficient deterrents.

1076 Some participants in the November 7 miniconference thought Rule 56(i) should be expanded
1077 beyond bad-faith affidavits. They fear that summary-judgment motions are often made for strategic
1078 purposes of delay or to impose crippling costs on an adversary with few resources for the litigation.
1079 They recognize also that a hopeless response may be filed. The recommended solution is to create
1080 a cost-shifting sanction similar to the sanctions Rule 37 provides for unsuccessfully making or
1081 resisting a discovery motion.

1082 An observer expanded this proposal by suggesting that it is not properly characterized as
1083 cost-bearing or as cost-shifting. It is an attempt to discipline the parties to follow the structure of the
1084 new rule. A motion, response, or reply submitted without reasonable justification would be subject
1085 to a discretionary sanction to compensate the adversary. It would apply to all parties. It would not
1086 be a "lose and pay" rule.

1087 The underlying concerns reflect not only the strategic motion but also the "400-page
1088 statement of uncontested facts."

1089 Competing observations suggested that the proposal goes well beyond the "bad faith"
1090 exception to the "American Rule" that the loser is not responsible for an adversary's attorney fees.
1091 It also goes far beyond Civil Rule 11. It could easily be challenged as at least testing Enabling Act
1092 limits. Rule 37 discovery sanctions rest on failure to comply with the procedural obligations
1093 imposed by other discovery rules. The obligation not to make a strategic Rule 56 motion may not
1094 be as purely procedural. Rule 56 does state a summary-judgment standard, and it does address
1095 premature motions through the provision for further discovery. But translating these provisions into
1096 a procedural obligation that is a suitable foundation for a procedural sanction is not easy. Tort
1097 remedies for abusive litigation are deliberately narrow. Expanding "procedural" remedies may
1098 approach substantive law too closely for comfort.

1099 A more direct response was "thanks, but no thanks." Any such sanction "will never be
1100 applied." Rule 37 was amended in 1970 in an attempt to foster free use of discovery cost-shifting
1101 sanctions, but courts have been reluctant to follow the lead. And after a decade of experience, Rule
1102 11 was modified to reduce the volumes of collateral litigation spawned by the 1983 amendments.

1103 It was determined that draft Rule 56(i) should be retained in the draft form, with the addition
1104 of an explicit direction to give notice and a reasonable time to respond before a sanction order is
1105 entered.

1106 **FJC Study**

1107 Judge Baylson introduced presentation of the most recent phase of the FJC summary-
1108 judgment project by noting that it had been presented at the November 7 miniconference. At the
1109 end of the conference, Professors Burbank and Schneider both focused attention on Table 5. Table
1110 5 suggests that the median time to dispose of summary-judgment motions is significantly longer in
1111 courts with local rules that require, more or less as draft Rule 56(c) would require, counterpoint
1112 statements of fact and supporting citations in motion and response.

1113 Joe Cecil presented the study results. The study looked for possible effects of different local-
1114 rule patterns. Taking the count supplied by the Administrative Office, they categorized 20 districts
1115 as having statement and counterpoint reply rules similar to proposed Rule 56(c). They then
1116 compared those districts to those that require only a formal statement of uncontested facts by the
1117 movant, with supporting citations, and districts that do not require either a formal statement by the
1118 movant or a counterpoint response.

1119 Most of the tables show that there are no meaningful or even suggestive differences in the
1120 rates of filing or granting summary judgment, nor even in terminations of whole cases.

1121 Table 5 shows median time to disposition of 23 weeks in districts that require both statement
1122 and response, 17 weeks in districts that require the statement but not a response, and 14 weeks in
1123 districts that do not require either statement or response. This pattern holds when broken down for
1124 various types of cases. But the pattern does not of itself establish a causal relationship, much less
1125 an explanation for any causal relationship. The districts with a longer time to disposition also have
1126 longer times to disposition across the board; differences in summary-judgment times may or may
1127 not be reflected in the overall disposition times. It may be that the statement-counterpoint-response
1128 districts allow more time for briefing, or take more time for deliberation. Case loads and weighted
1129 case loads also must be taken into account.

1130 It was noted that at least some courts have standing orders that adopt the statement-
1131 counterpoint requirement established by local rule in other districts. The study took account of this
1132 phenomenon by removing from the analysis cases before any judge for whom such a standing order
1133 was identified.

1134 It was asked whether there really is a difference between practice in courts that formally
1135 require a counterpoint response and practice in courts that formally require only a statement of
1136 undisputed facts? Do responses in fact follow the seemingly natural path of counterpoint? The study
1137 may be able to explore actual motions to provide some insight on this question.

1138 Table 12 shows no differences among the three groups in terminations of whole cases by
1139 summary judgments. But there may be a higher rate in employment cases in districts with statement-
1140 counterpoint rules.

1141 The data are not ideal. Several districts, including large districts, have been excluded because
1142 the docket information cannot be unraveled. Further efforts may make it possible to include some
1143 of these districts. But there is no reason to anticipate that inclusion of these districts will change the
1144 pattern.

1145 And a further caution. There is no "scientific" basis for determining what is a significant
1146 difference in a study of this kind. Determination of significance must be a policy judgment.

1147 One observation was that "employment cases" that come to court tend to be weak. There are
1148 strong claims, but those tend to be resolved by administrative processes.

1149 Dr. Cecil agreed that the employment cases "are starting to look different from other cases."
1150 There are many summary-judgment motions. Some of the motions are designed to get some of the
1151 parties out of the case.

1152 A final question asked whether it will be possible to study appellate review differences. The
1153 FJC studied appellate outcomes in some districts 12 years ago. It found reversal rates in summary-
1154 judgment cases that were similar to the rates in other cases. So, it was observed, the decisions
1155 granting summary judgment may be right, as measured by de novo appellate review, as often as other
1156 types of dispositions.

1157 *Class Action Fairness Act Report*

1158 Emery Lee presented the fourth interim report on the Federal Judicial Center study of the
1159 Class Action Fairness Act's impact on federal courts.

1160 The first phase of the study involves collecting data on filings and removals of class actions
1161 from July 1, 2001 through June 30, 2007. The data reveal an increase in both filings and removals
1162 after enactment through June 30, 2006, especially in diversity class actions. The data for July 1,
1163 2006 through June 30, 2007 are being collected to determine whether these trends continue.

1164 Phase 2 will examine what happens in a class action case, and will ask particularly whether
1165 the amount of work has increased. The first part will begin by examining 300 pre-CAFA cases for
1166 all aspects of the work done through appeal; this part cannot yet be completed because some of the
1167 cases remain pending. A sample of post-CAFA cases will be examined for comparison. That step
1168 also cannot be taken yet. The second part of this phase will look at federal-question cases before and
1169 after CAFA, to address the question whether CAFA has created incentives to assert federal claims.
1170 One aspect of the question is whether plaintiffs who earlier would have pleaded only state-law
1171 claims so as to lock the case into state court are now adding federal claims because the case can be
1172 removed under CAFA. A related aspect is to see whether the number of state claims added to
1173 federal-question cases has changed.

1174 Of course the impact of CAFA also involves what is happening in state courts. A big
1175 increase in federal filings and even removals would not seem as significant if there is a parallel
1176 increase in state-court class actions. These data will be very difficult to get — few states collect
1177 them. California data may be available. Figure 1 on p. 5 of the FJC report shows a drop in
1178 California state-court filings in 2004-2005, accompanied by an increase in federal-court filings. The
1179 federal share of all class actions in California increased. This phenomenon may have been caused
1180 by CAFA. There has been a slight diminution in total civil-case filings in California, but there is
1181 nothing yet to indicate that the decrease in class actions is driven by the decrease in overall filings.
1182 The FJC will continue to work closely with California officials. The National Center for State

1183 Courts is interested in these questions; at one point they had funding for a study, but the funding was
1184 withdrawn.

1185 It was noted that California is studying actual court files; "that's a whole lot of effort."
1186 Students from the Hastings College of the Law are participating in the work.

1187 Federal-court studies can begin with CM/ECF, a real help. Previous reports identified a few
1188 particular categories of cases and included others as "other statutory actions." This residual category
1189 is not satisfying. It is possible to recode many of these actions. Many of them are Title 15
1190 consumer-protection actions, such as the Truth in Lending Act. Figure 2 in the report shows the
1191 trend line. The biggest increase was in 2005 — the year CAFA took effect in mid-February.

1192 Remand rates for diversity actions have not shown a big change, from 32.5% pre-CAFA to
1193 27.5% post-CAFA. Even this difference may narrow — some more of the post-CAFA cases may
1194 yet be remanded.

1195 It was noted that many of the early post-CAFA remands involved sorting out actions that
1196 were not removable because they had been commenced in state court before CAFA's effective date.
1197 Data for later periods will help to balance that effect.

1198 In response to an observer's question, it was noted that the FJC study is not seeking to
1199 determine whether plaintiffs are seeking to avoid CAFA removals. But in diversity cases the study
1200 is looking to see where plaintiff class members are from.

1201 *Notice Pleading: Bell Atlantic v. Twombly*

1202 The last half year has generated great excitement about federal pleading standards. The topic
1203 was introduced by a brief recapitulation of recent events.

1204 Notice pleading has held a continuing place on the Committee agenda since the Leatherman
1205 decision in 1993. Throughout this period the Supreme Court has alternated between rulings that
1206 "heightened pleading" can be required only when authorized by statute or court rule and other rulings
1207 that seemed, without using the "heightened pleading" phrase, to exact greater pleading detail than
1208 required to identify the events in suit and a sustainable legal theory. Lower-court decisions generally
1209 came to repeat the "no heightened pleading" formula, but at the same time often seemed to require
1210 greater pleading detail in some kinds of actions than in others. If it is possible to measure degrees
1211 of pleading specificity, the thermometer seemed to register differently.

1212 Last May 21 the Supreme Court decided Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955.
1213 The opinion is rich in phrases describing the demands of a notice pleading sufficient to state a claim
1214 and show that the pleader is entitled to relief. Many of the phrases focus on some level of fact
1215 specificity. Many of them look for sufficient fact context to make the claim "plausible." The Court
1216 explicitly retracted the statement in Conley v. Gibson, 1957, 355 U.S. 41, that a complaint should
1217 not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can
1218 prove no set of facts in support of his claim which would entitle him to relief." Beyond the phrases
1219 of the opinion, the result suggests that at least reasonably detailed fact pleading was contemplated.
1220 The Court, reversing the court of appeals, ruled that the complaint was properly dismissed for failure
1221 to state a claim. There was, however, no doubt that the complaint gave clear notice of the claims.
1222 Neither was there any doubt that the complaint relied on a sustainable legal theory — the Sherman
1223 Act is violated by an "agreement" among four incumbent local exchange carriers to refrain from
1224 entering into competition with each other, and to engage in similar acts to discourage competitive
1225 local exchange carriers from entering. The demand for sufficient facts to first cross the line between

1226 the conclusory and the factual, and to then cross the line "between the factually neutral and the
1227 factually suggestive," seems — despite the Court's disavowal — to exact heightened fact pleading.

1228 The general reach of the Twombly opinion has created uncertainty from the outset. The
1229 Court spent some time decrying the enormous burdens that could be imposed by discovery, and in
1230 doubting the possibility that effective management of staged and focused discovery can be used to
1231 enable a plaintiff to determine, at relatively reasonable cost to the defendants, whether information
1232 exclusively available to the defendants can be used to supply a better preliminary fact showing that
1233 will justify full-scale discovery and litigation. The Court also relied heavily on its own sense of
1234 economically rational behavior in highly concentrated markets. One speculation has been that the
1235 opinion is no broader than antitrust pleading, and may be narrowed specifically to pleading § 1
1236 conspiracy claims.

1237 The narrow interpretation of the Twombly opinion gained some support from the decision
1238 on the certiorari papers in Erickson v. Pardus, 2007, 127 S.Ct. 2197. Reversing dismissal of a
1239 prisoner's complaint claiming injury caused by removal from a Hepatitis C treatment program, the
1240 Court quoted Twombly quoting Conley v. Gibson: "Specific facts are not necessary; the statement
1241 need only '"give the defendant fair notice of what the . . . claim is and the grounds upon which it
1242 rests."'"

1243 A third decision soon after the Twombly and Erickson decisions added an intriguing side
1244 light. In Tellabs, Inc. v. Makor Issues & Rights, Ltd., 2007, 127 S.Ct. 2499, the Court ruled that
1245 heightened pleading requirements do not violate the Seventh Amendment.

1246 Faced with the multifarious and often exacting phrases of the Twombly opinion, lower courts
1247 have struggled to determine whether pleading standards have in fact changed. The sense of struggle
1248 does not imply that changes are unwelcome. There is strong support for the proposition that lower
1249 courts have long applied standards close to the "contextual plausibility" test that can be teased out
1250 of the Twombly opinion. Greater pleading detail is required in cases that threaten to impose massive
1251 pretrial and trial burdens. Greater detail also may be required in facing substantive claims that courts
1252 sense are often misused. Greater detail may be required when appropriate to protect particular
1253 interests that limit the underlying claim — the detailed pleading of defamation claims required by
1254 some courts may be an example. License to do more openly what courts have been doing all along
1255 may prove welcome, once the decisions work the way through to finding clear license.

1256 A small sampling of the literally thousands of citations to the Twombly decision can begin
1257 with Iqbal v. Hasty, 2d Cir.2007, 490 F.3d 143. The opinion examines the "conflicting signals" of
1258 the Twombly opinion and concludes:

1259 [T]he Court is not requiring a universal standard of heightened fact pleading, but is
1260 instead requiring a flexible "plausibility" standard, which obliges a pleader to amplify
1261 a claim with some allegations in those contexts where such amplification is needed
1262 to render the claim plausible.

1263 Other appellate decisions provide interesting insights. The importance of context is
1264 suggested by two examples. One is a decision dealing with a claim of retaliation for complaining
1265 about employment discrimination. The court ruled that although a complaint for discrimination need
1266 only plead the basis of the discrimination — for example, race, age, or gender — a complaint for
1267 retaliation must plead the nature of the plaintiff's protest about discrimination. The plaintiff should
1268 know the nature of the plaintiff's own conduct and should be required to plead it to enable a
1269 determination whether the protest involved matters within the reach of discrimination law. A second
1270 is a decision dealing with a claim that the defendants violated the plaintiff's First Amendment Free

1271 Exercise rights by terminating him from a fieldwork practicum for an advanced social work degree.
1272 Ruling that the plaintiff must plead a sincerely held religious belief, the court also ruled that it
1273 suffices to state that the plaintiff "sincerely" holds a "religious" belief. There is no need to plead
1274 additional facts to support sincerity or to support the religious character of the belief. How else, the
1275 court asked, can a plaintiff assert these matters?

1276 With this introduction, it was suggested that it may be premature to embark on a major
1277 pleading project. The Standing Committee will have a program on pleading in January. They may
1278 provide some sense whether there is anything useful to be done now while the courts are working
1279 toward a new understanding of Rule 8. For that matter, the Supreme Court may render more
1280 opinions.

1281 One judge suggested that although there is no statistical basis for it, there is an impression
1282 that the number of motions to dismiss has increased. Many of the motions seem to request
1283 application of a fact-pleading requirement. And it seems clear that some members of the bar want
1284 more pointed pleading. But there are different views at the bar.

1285 Other judges were not sure whether there has been an increase in motions to dismiss. Of
1286 course Twombly is cited repeatedly in all motions. "Before Twombly courts could rely on context
1287 and plausibility." The Dura Pharmaceuticals decision requiring clear pleading of loss causation is
1288 an illustration. There is a long line of Second Circuit decisions holding antitrust complaints
1289 insufficient, influenced by fear that discovery and other burdens are so great as to coerce settlement.
1290 It remains to be seen whether Twombly will apply only in complex cases that involve expensive
1291 discovery.

1292 A similar view was expressed by another judge. Conley v. Gibson has been the mandatory
1293 citation on motions to dismiss. Now it will be Twombly. It will be fascinating to see, five or ten
1294 years from now, whether the result has been anything more than a change in the boilerplate citation.

1295 It was agreed that renewed interest in pleading is clearly linked to discovery. The greater the
1296 continuing uneasiness about the burdens of discovery in some cases, and the greater the doubts about
1297 the success of continuing discovery rule amendments, the greater the interest in raising pleading
1298 requirements as a preliminary shield.

1299 The very notion of contextual plausibility, moreover, brings back the question of
1300 transsubstantive procedure. The question of substance-specific pleading rules has often been raised
1301 by asking whether the particularized pleading categories in Rule 9 should be increased. Even those
1302 suggestions have encountered doubts about the potential effects on substantive rights. More open-
1303 ended and potentially less disciplined invocation of particularized pleading requirements according
1304 to an individual judge's sense of substantive values seems more troubling still. Come to think of it,
1305 it may be asked whether we have any sense whether Rule 9(b) works well? The Private Securities
1306 Litigation Reform Act raised pleading standards above the general Rule 9(b) fraud-pleading
1307 standards for securities actions; does Rule 9(b) work better in other settings? Why was it limited to
1308 mistake and fraud?

1309 It was noted that Twombly emphasizes both notice and entitlement to relief. Courts develop
1310 their own special tests. The Second Circuit, for example, requires pleading the precise defamatory
1311 statement complained of.

1312 The suggestion that Twombly may be nothing more than an antitrust pleading decision was
1313 renewed. The Court relied on the parallel summary-judgment approach to antitrust cases in the

1314 Matsushita case. The Court relies on its own concepts of economic rationality to measure the
1315 plausibility of claimed conduct.

1316 This suggestion elicited a partly sympathetic response that there is much for the "antitrust
1317 only" view, but that explicitly withdrawing the much-used "no set of facts" test clearly applies to all
1318 cases. A "plausibility" test clearly does not require a determination whether the plaintiff will, or
1319 even can, win. But the pleading standard must be reconsidered across the board.

1320 A specific example was offered. In a big MDL antitrust litigation, the Department of Justice
1321 is willing to share documents with the plaintiffs. But the defendants argue that the plaintiffs must
1322 first draft their pleadings without access to the documents. The linkage of pleading and discovery
1323 in the Twombly opinion will cause trouble even in a case such as this where the discovery will cost
1324 the defendants nothing — they are not the ones that have to produce the documents. Experience with
1325 litigating many 12(b)(6) motions, including through appeals, has shown problems enough under pre-
1326 Twombly pleading standards. It could take 4 or 5 years to reach the point of establishing that the
1327 complaint states a claim. What will lawyers and judges talk about under a "plausibility" test? The
1328 test seems completely subjective, judge-by-judge. It will be as so many Rorschach blots, with self-
1329 same complaints interpreted differently by each viewer. Even now, motions to dismiss commonly
1330 assert that the complaint "does not sufficiently allege * * *." This has almost become a legal
1331 standard. To say that pleading requirements are "contextual" does not much advance the inquiry or
1332 practice.

1333 This example was paralleled by asking whether, under a "contextual plausibility test" — if
1334 that is what emerges from Twombly — it matters who possesses the information needed to plead
1335 with adequate fact specificity?

1336 One example of institutionalized pleading requirements has been "case statements" in actions
1337 under the Racketeer Influenced and Corrupt Organizations Act. Some courts have had local rules
1338 or standing orders requiring these statements. But some courts have abandoned them for fear they
1339 violate notice pleading rules. Perhaps the Twombly case offers renewed authority for this practice.

1340 Employment cases are another category that may provide interesting applications of the
1341 Twombly tests. The courts of appeals have not addressed pleading in these cases in a substantive
1342 way. They arise in infinite variety.

1343 Product-liability cases were offered as another example. Simplified notice pleading seems
1344 to work well for them.

1345 It also was noted that good lawyers have been filing pretty detailed complaints for many
1346 years. They want to tell the story and to frame the issues. It seems likely that the Twombly decision
1347 will have little or no impact in most cases brought by careful lawyers.

1348 This example was used as a basis for asking whether, under a "contextual plausibility test"
1349 — if that is what emerges from Twombly — it matters who possesses the information needed to
1350 plead with adequate fact specificity? The plaintiff, for example, knows her race and gender, and that
1351 she was fired. She may know about a few questionable remarks. But much important information
1352 is in the employer's hands. So can pleading standards be adjusted to require statement of what the
1353 plaintiff can fairly be expected to know, and no more? This question was echoed in the suggestion
1354 that perhaps Twombly will help "sort out who is the lower-cost information provider."

1355 It was observed that if more fact-specific pleading is required, plaintiffs will be required to
1356 front-load the case, as has happened in securities actions after the PSLRA. But once the plaintiff
1357 survives a motion to dismiss, the lawyers presume there is merit to the claim. The result is earlier
1358 and higher settlements. But the value of front-loading the pleadings as an offset to the difficulty of
1359 controlling discovery does not come without cost. The cost is not only on the parties; motions will
1360 put the cost on courts as well. In situations that involve a contest among counsel to become the first
1361 to file and thus to gain advantage in becoming lead counsel, moreover, the ability to front-load
1362 preparation may be undercut by the need to respond promptly with a parallel filing after the most
1363 eager lawyer has filed without much loading at all.

1364 The past was recalled by noting that the Supreme Court seems to march up and down the
1365 specific pleading hill. The FJC did a study of motions to dismiss almost 20 years ago, responding
1366 to this Committee's study of a proposal to abolish the Rule 12(b)(6) motion. The tie to discovery
1367 practice in the Twombly opinion raises a similar empirical question: have judges been more or less
1368 engaged in managing discovery, particularly in targeting initial discovery, in ways that might reduce
1369 the concerns about launching discovery with no more than a complaint identifying the events that
1370 will become the focus of discovery?

1371 The possibility of empirical inquiry was pursued. The FJC might be able to design a study
1372 that will show whether fact pleading has increased. There is a foundation in earlier studies in the
1373 frequency and outcomes of motions in 1975, 1986, 1990, and 2000. That work, at least, can be
1374 updated. The Committee agreed that such work will be enormously helpful if the time comes to
1375 consider amending the rules.

1376 It was suggested that it may be desirable to resurrect the Rule 12(e) proposals that were put
1377 on hold a year ago. Case-specific pleading requirements directed by the judge with an eye to the
1378 needs of effective management of the particular case may be a good substitute for more open-ended
1379 requirements imposed at the initial pleading stage. The concern about inviting boilerplate motions
1380 may be offset by concern that at least for a while the Twombly opinion may encourage reflexive
1381 motions to dismiss. Although the potential uses of present Rule 12(e) have been reduced, revision
1382 may prove worthwhile.

1383 This discussion was extended by noting that there was a time when lawyers were too quick
1384 to file Rule 12(e) motions. Courts in effect told them not to bother — this is a notice-pleading
1385 system. Lawyers took the message to heart. Another lawyer agreed that "Rule 12(e) is no use."
1386 There seemed to be a similar lesson on Rule 12(b)(6) — be really careful; a losing motion is a bad
1387 way to start a case. The Twombly opinion is seen by practitioners as an invitation. CLE seminars
1388 are springing up. Practitioners will reinvigorate motions practice. And we have yet to see what
1389 courts will do.

1390 Discussion of the vistas opened by the Twombly opinion concluded with general agreement
1391 that the Committee should not immediately move into more aggressive action on its pleading
1392 projects.

1393 *James Duff Report*

1394 James Duff, Director of the Administrative Office of the United States Courts, met with the
1395 Committee to discuss its ongoing work and pending legislation. Judges Kravitz and Rosenthal
1396 expressed appreciation for the support the Administrative Office has provided for the work of the
1397 rules committees. Special appreciation was expressed for the outstanding work of the Rules
1398 Committee Support Office, and particularly the work and support provided by Peter McCabe, John
1399 Rabiej, James Ishida, and Jeffrey Barr.

1400 *Rule 68*

1401 The Committee was reminded that proposals to "put teeth" into the Rule 68 offer-of-
1402 judgment provisions continue to arrive "in the mail box" at rather regular intervals. Rule 68 was
1403 studied, and revisions were published for comment, in the 1980s. These proposals may have been
1404 the origin of the warnings that one proposal or another will generate a firestorm of protest. They did.
1405 Rule 68 was studied again in the 1990s in response to an elegant "capped benefit-of-the-judgment"
1406 proposal advanced by Judge Schwarzer. The FJC undertook a study of Rule 68 practice to support
1407 the work. That undertaking led to an increasingly complicated draft and eventually to abandonment
1408 of the project without publishing any proposal. Last year the Second Circuit published an opinion
1409 explicitly inviting revision of Rule 68 to address the problems presented by cases that involve
1410 specific relief. Recent empirical work investigating the use of Rule 68 offers in fee-shifting cases
1411 involving employment discrimination and civil rights has been undertaken by Professors Thomas
1412 A. Eaton and Harold S. Lewis, Jr.. Specific proposals will emerge from their work.

1413 It was noted that Pennsylvania state courts use added interest awards as an incentive to accept
1414 an offer of judgment. It may be possible to rely on enhanced costs or interest awards to make Rule
1415 68 more effective without intruding on the traditional attorney-fee rules that apply outside the realm
1416 of statutory fee shifting.

1417 It was agreed that Rule 68 can remain on the agenda for possible future consideration.

1418 *Other Topics*

1419 The major topics on the current agenda are those discussed at this meeting — expert-witness
1420 discovery and summary judgment. They are well advanced in the Committee's initial process.
1421 There soon will be room in the agenda for active consideration of new topics. That does not mean
1422 that something must be found to occupy all available energies. Recent years have been the occasion
1423 for many important projects, and it is useful to give the bar a rest. Concern with the wave of changes
1424 led to an explicit decision to not publish any proposals in August 2006; barring some emergency,
1425 no new amendments are in the pipeline to take effect on December 1, 2008. It is not essential to
1426 have something to take effect on December 1, 2011. But most projects require at least three years
1427 from start to effective date, and many require more. It is not too early to be asking about possible
1428 new topics.

1429 One possibility might be to revisit the simplified procedure project that was opened and then
1430 put aside a few years ago. The proposal was not shaped as a distinctive practice for pro se cases.
1431 Although the procedure would be simplified for cases brought within the rules, understanding would
1432 not be easier — the simplified procedures could be understood only as simplification of the general
1433 procedures. Various concerns led to the decision to defer further work. One was reports of
1434 experience in courts that have established multiple "tracks" by local rules. Few if any lawyers seem
1435 willing to believe that their "federal cases" really are simple cases calling for simplified procedures.
1436 And some observers were worried that judges might somehow direct attention away from more
1437 complex cases in order to tend to the simplified cases.

1438 An observer reported that the ABA has a task force examining the great variations in pretrial
1439 order forms used across the country. Some forms exact such great detail as to amount almost to a
1440 first trial on paper, a true ordeal. Great expense may be entailed. At the same time, settlement may
1441 be promoted because the preparation requires the lawyers to take a close look at the cases.

1442 It was reported that the new privacy rules are about to take effect, spurring a review of
1443 Administrative Office forms for consistency. Some forms call for filing information that is
1444 inconsistent with the privacy rules — requirements for social security numbers are the most common problems. Various privacy issues may come back to the rules committees.

Respectfully submitted,

Edward H. Cooper
Reporter

7A.

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

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CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

To: **Hon. Lee H. Rosenthal, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Hon. Richard C. Tallman, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

Subject: **Report of the Advisory Committee on Criminal Rules**

Date: **December12, 2007**

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Committee") met on October 1-2, 2007, in Park City, Utah, and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Draft Minutes of that meeting are attached.

This report addresses three action items; it recommends approval for publication and comment of proposed amendments to Rules 5, 12.3, and 21, relating to crime victims. In addition, the Advisory Committee has several information items to bring to the attention of the Standing Committee, including three matters referred or remanded to it by the Standing Committee: a proposal to appoint a crime victims' advocate member to the Advisory Committee, and proposed amendments to Criminal Rule 32(h) and Rule 11 of the Rules Governing § 2254 and § 2255 proceedings.

II. Action Items–Recommendations to Publish Amendments to the Rules

The three amendments recommended for publication reflect the Advisory Committee's continuing focus on the Crime Victims' Rights Act (CVRA), codified as 18 U.S.C. § 3771. The Committee's initial package of CVRA amendments to Rules 1, 12.1, 17, 18, 32, 60, and 61 was approved by the Standing Committee in June 2007 and by the Judicial Conference in September 2007. As noted when the initial amendments were under consideration, the Advisory Committee has classified issues relating to crime victims as a continuing agenda item, recognizing that additional amendments might be appropriate. The Advisory Committee now proposes amendments concerning pretrial release, public order defenses, and transfer of trial.

1. ACTION ITEM–Rule 5. Initial Appearance; Proposed Amendment Requiring Consideration of Victim's Right to be Protected from Defendant in Decision to Retain or Release.

The proposed amendment to Rule 5(d)(3) draws attention to a factor that the courts are now required to consider under both the Bail Reform Act and the Crime Victims' Rights Act when deciding whether to release or detain a defendant. In determining whether a defendant can be released on personal recognizance, unsecured bond, or conditions, the Bail Reform Act requires the court to consider "the safety of any other person or the community." See 18 U.S.C. § 3142(b) & (c). In considering proposed conditions of release, 18 U.S.C. § 3142(g)(4) requires the court to consider "the nature and seriousness of the danger to any person in the community that would be posed by the person's release." Finally, the Crime Victims' Rights Act, 18 U.S.C. § 3771(a)(1), states that victims have the "right to be reasonably protected from the accused." Since Rule 5 now states that the court must detain or release the defendant "as provided by statute" the Committee recognized that it already incorporates these statutory requirements. The Committee concluded, however, that it would be desirable to highlight the victim's right to reasonable protection in the text of Rule 5.

Recommendation — The Advisory Committee recommends that the proposed amendment to Rule 5(d)(3) be published for public comment.

2. ACTION ITEM–Rule 12.3. Notice of Public-Authority Defense; Proposed Amendment Regarding Victim's Address and Telephone Number.

The proposed amendment parallels the amendment to Rule 12.1 concerning alibi defenses, which has been approved by the Judicial Conference. Both are intended to implement the CVRA, which states that victims have the right to be reasonably protected from the accused, and to be treated with respect for their dignity and privacy. See 18 U.S.C. § 3771(a)(1) & (8). The rule provides that a victim's address and telephone number should not automatically be provided to the defense when a public authority defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense but also protects the victim's interests.

In the case of victims who will testify concerning a public authority claim, the same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (b).

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 12.3 be published for public comment.

3. ACTION ITEM–Rule 21. Transfer for Trial; Proposed Amendment Requiring Court to Consider Convenience of Victims.

This amendment requires the court to consider the convenience of victims – as well as the convenience of the parties and witnesses and the interests of justice – in determining whether to transfer all or part of the proceeding to another district for trial under Rule 21(b). The Committee recognizes that the court has substantial discretion to balance any competing interests in determining the appropriate venue. The amendment does not apply to Rule 21(a), which governs transfers for prejudice.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 21 be published for public comment.

III. Information Items

A. Proposal for Victim's Advocate Member on Rules Committee

The Chief Justice received a request that he appoint a permanent victims' advocate member to the Advisory Committee on Criminal Rules. He referred this request to the Standing Committee, which in turn referred the matter to the Advisory Committee. As a preface to its discussion of the issue, the Advisory Committee reviewed the current and ongoing efforts to implement the CVRA. The Federal Judicial Center has undertaken several initiatives to inform judges of the requirements of the CVRA, including the preparation of a pocket guide and a DVD, which should be ready for distribution by the year's end, as well as incorporation of the CVRA into the curriculum of the FJC's school for new federal judges. The Committee was also informed of ongoing studies of the CVRA's implementation being conducted by the Government Accountability Office (GAO) and asked for assistance by commissioning a study to be conducted by the FJC that would better inform the Committee of current practices to recognize the rights of crime victims in the 95 federal districts throughout the country. In addition, Assistant Attorney General Alice Fisher expressed the Department of Justice's interest in advancing victim interests, and she suggested that the Department could meet regularly with members of the victim community before each meeting of the Advisory Committee to ensure that the Department fully understood their concerns. (Moreover, as noted above, the Advisory Committee has now proposed amendments to Rules 1, 5, 12.1, 12.3, 17, 18, 21, 32, 60, and 61, and it received

substantial commentary from members of the victim community in connection with the amendments it published for public comment.)

After discussion, it was the sense of the Advisory Committee that it would be inadvisable to add a permanent victims advocate to the Committee. The rule-making process functions most effectively by collegial decision-making in which all members seek to focus on improving the administration of justice. It would set an adverse precedent to appoint a member specifically to serve as a partisan advocate for a certain set of interests. Moreover, the appointment of such a designated member is not necessary to ensure that the Committee receives the views of victims and advocates who speak for them: all committee meetings are open to the public, and the public is invited and encouraged to provide comments or testimony during the public comment period on published rules. These procedures insure full access to anyone who wishes to express a view.

B. Rule 32(h)

Rule 32(h) presently requires the court to give notice to the parties if it is contemplating a departure from the Guidelines on a ground that has not been identified in either the presentence report or the parties' pleadings. The Committee's initial package of Booker rules included an amendment intended to apply the same notice requirement to grounds under 18 U.S.C. § 3553(a) that had not been previously identified. The Standing Committee raised concerns about the proposed rule, and it asked the Advisory Committee to study the matter further. The Advisory Committee agreed that the proposal had sufficient merit to warrant further consideration, but it has deferred consideration due to developments in both the Supreme Court and the lower courts. After discussion at the October meeting, the Advisory Committee referred the matter to a subcommittee charged with monitoring the developments in the various courts and gathering additional information about the feasibility of providing notice, given the breadth of the statutory factors under § 3553(a) and the possibility that victims will raise new issues at the sentencing hearing.

C. Proposed Amendments to Rule 11 of the Rules Governing § 2254 and § 2255 Proceedings

At its June meeting, the Standing Committee approved publication of a portion of the Advisory Committee's proposed amendments to Rule 11 dealing with certificates of appealability. It deferred consideration, however, of the other aspects of the proposed amendments that governed the manner and timing of seeking reconsideration of motions under sections 2254 and 2255. The Advisory Committee has referred these aspects of its proposal to a subcommittee for further consideration.

D. Indicative Rulings

With the assistance of Professor Catherine Struve (who participated by telephone) the Advisory Committee concluded that it would be desirable to pursue a criminal rule on indicative rulings. The Committee expects to piggyback on the work of the Advisory Committee on Civil Rules in drafting proposed Civil Rule 62.1, including the public comment on that rule.

E. Other Matters

The Advisory Committee has a variety of other rules under consideration, including the following:

- an amendment to Rule 6 allowing the court, for good cause, to receive the return of an indictment by video conference;
- an amendment to Rule 12 requiring the defendant to assert before trial any claim that the indictment fails to state a claim;
- an amendment to Rule 15 that would permit the deposition of a witness outside the defendant's physical presence where it would be impractical or impossible to depose the witness in the defendant's presence; and
- amendments to Rules 32.1 and 46 expressly authorizing the issuance of an arrest warrant or summons when the government seeks to revoke bail or supervised release.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 5. Initial Appearance

1 * * * * *

2 **(d) Procedure in a Felony Case.**

3 * * * * *

4 **(3)** ***Detention or Release.*** The judge must detain or

5 release the defendant as provided by statute or

6 these rules. <u>In making that decision, the judge</u>

7 <u>must consider the right of any victim to be</u>

8 <u>reasonably protected from the defendant.</u>

9 * * * * *

COMMITTEE NOTE

Subdivision (d)(3). This amendment draws attention to a factor that the courts are required to consider under both the Bail Reform Act and the Crime Victims Rights Act. In determining whether a defendant can be released on personal recognizance, unsecured bond, or conditions, the Bail Reform Act requires the court to consider "the safety of any other person or the community." *See* 18 U.S.C. § 3142(b) & (c). In considering proposed conditions of release, 18

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*New material is underlined; matter to be omitted is lined through.

U.S.C. § 3142(g)(4), requires the court to consider "the nature and seriousness of the danger to any person in the community that would be posed by the person's release." In addition, the Crime Victims' Rights Act, 18 U.S.C. § 3771(a)(1), states that victims have the "right to be reasonably protected from the accused."

Rule 12.3. Notice of a Public-Authority Defense

1 * * * * *

2 **(4)** ***Disclosing Witnesses.***

3 * * * * *

4 (C) *Government's Reply.* Within 7 days after
5 receiving the defendant's statement, an
6 attorney for the government must serve on
7 the defendant or the defendant's attorney a
8 written statement of the name~~, address, and~~
9 ~~telephone number~~ of each witness—and the
10 address and telephone number of each
11 witness other than a victim — that the

12 government intends to rely on to oppose the
13 defendant's public-authority defense.
14 (D) *Victim's Address and Telephone Number.* If
15 the government intends to rely on a victim's
16 testimony to oppose the defendant's
17 public-authority defense and the defendant
18 establishes a need for the victim's address and
19 telephone number, the court may:
20 (i) order the government to provide the
21 information in writing to the defendant
22 or the defendant's attorney; or
23 (ii) fashion a reasonable procedure that
24 allows for preparing the defense and
25 also protects the victim's interests.
26 * * * * *
27 **(b) Continuing Duty to Disclose.**

28 **(1)** ***In General.*** Both an attorney for the
29 government and the defendant must promptly
30 disclose in writing to the other party the name
31 of any additional witness — and the~~;~~ address,
32 and telephone number of any additional
33 witness other than a victim — if:
34 **(~~i~~ A)** the disclosing party learns of the
35 witness before or during trial; and
36 **(~~i~~ B)** the witness should have been
37 disclosed under Rule 12.3(a)(4) if
38 the disclosing party had known of
39 the witness earlier.
40 **(2)** ***Address and Telephone Number of an***
41 ***Additional Victim-Witness.*** The address and
42 telephone number of an additional victim —
43 witness must not be disclosed except as provided
44 in Rule 12.3(a)(4)(D).

45 * * * * *

COMMITTEE NOTE

Subdivisions (a) and (b). The amendment implements the Crime Victims' Rights Act, which states that victims have the right to be reasonably protected from the accused, and to be treated with respect for the victim's dignity and privacy. *See* 18 U.S.C. § 3771(a)(1) & (8). The rule provides that a victim's address and telephone number should not automatically be provided to the defense when a public authority defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense, but also protects the victim's interests.

In the case of victims who will testify concerning a public authority claim, the same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (b).

Rule 21. Transfer for Trial

1 * * * * *

2 **(b) For Convenience.** Upon the defendant's motion,

3 the court may transfer the proceeding, or one or

4 more counts, against that defendant to another

5 district for the convenience of the parties, any

6 victim, and the witnesses, and in the interests of

7 justice.

8 * * * * *

COMMITTEE NOTE

Subdivision (b). This amendment requires the court to consider the convenience of victims — as well as the convenience of the parties and witnesses and the interests of justice — in determining whether to transfer all or part of the proceeding to another district for trial. The Committee recognizes that the court has substantial discretion to balance any competing interests.

7B.

ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

October 1-2, 2007
Park City, Utah

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on Criminal Rules (the "committee") met in Park City, Utah, on October 1-2, 2007. All members participated during all or part of the meeting:

Judge Richard C. Tallman, Chair
Judge James P. Jones
Judge John F. Keenan
Judge Donald W. Molloy
Judge Mark L. Wolf
Judge James B. Zagel
Magistrate Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Andrew D. Leipold
Rachel Brill, Esquire
Leo P. Cunningham, Esquire
Thomas P. McNamara, Esquire
Alice S. Fisher, Assistant Attorney General,
Criminal Division, Department of Justice (ex officio)
Professor Sara Sun Beale, Reporter

Representing the Standing Committee were its chair, Judge Lee H. Rosenthal, and its Reporter, Professor Daniel R. Coquillette. Also present were Judge Susan C. Bucklew, former chair of the advisory committee, and Professor Nancy J. King, a former member and now a consultant to the advisory committee. Also supporting the committee were:

Peter G. McCabe, Rules Committee Secretary and Administrative Office
Assistant Director for Judges Programs
John K. Rabiej, Chief of the Rules Committee Support Office at the
Administrative Office
James N. Ishida, Senior Attorney at the Administrative Office
Timothy K. Dole, Attorney Advisor at the Administrative Office
Laural L. Hooper, Senior Research Associate, Federal Judicial Center

Two other officials from the Department's Criminal Division — Jonathan J. Wroblewski, Director of the Office of Policy and Legislation, and Kathleen Felton, Deputy Chief of the Appellate Section — were present. Lisa Rich, Director of Legislative Affairs, United States Sentencing Commission, attended the meeting. Judge Paul G. Cassell, chair of the Criminal Law Committee, was present for part of the meeting. In addition, former committee member Chief

Judge Harvey Bartle III of the Eastern District of Pennsylvania and Appellate Rules Committee Reporter Professor Catherine Struve participated by telephone during parts of the meeting.

A. Chair's Remarks, Introductions, and Administrative Announcements

Judge Tallman welcomed everyone, particularly the new members — Judge Zagel, Judge Molloy, Judge Keenan, and Professor Leipold. Judge Tallman and Judge Rosenthal thanked outgoing chair Judge Bucklew for her nine years of service — six as member plus three as chair.

B. Review and Approval of Minutes

A motion was made to approve the draft minutes of the April 2007 meeting.

The committee unanimously approved the motion.

II. RULE AMENDMENTS IN PROCESS ELSEWHERE

A. Proposed Amendment Approved by the Standing Committee for Publication

Mr. Rabiej reported that the Standing Committee had approved publication of the following proposed rule amendments for notice and public comment. He noted that they were posted on the Judiciary's website and that more than 5,000 hard copies were being printed.

1. Rule 7. The Indictment and Information. The proposed amendment removes reference to forfeiture.

2. Rule 32. Sentencing and Judgment. The proposed amendment requires the government to state in the presentence report whether it is seeking forfeiture.

3. Rule 32.2. Criminal Forfeiture. The proposed amendment makes several changes to the forfeiture process and clarifies that the government's notice of forfeiture need not identify the specific property or money judgment that is subject to forfeiture and should not be designated as a count in an indictment or information.

4. Rule 41. Search and Seizure. The proposed amendment specifies the requirements for a warrant for electronically stored information.

5. Rule 45. Computing and Extending Time. The proposed amendment simplifies the method for computing time.

6. Rules 5.1, 7, 8, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, and 59, and to Rule 8 of the Rules Governing §§ 2254 and 2255 Proceedings. Amendments to these rules are

intended to accommodate the new "days are days" time-computation standard specified in Rule 45.

7. Rule 11 of the Rules Governing §§ 2254 and 2255 Proceedings. The proposed amendments make the requirements concerning certificates of appealability more prominent by adding and consolidating them in the pertinent Rule 11 and also require the judge to grant or deny the certificate at the time a final judgment is issued.

B. Proposed Amendment Approved by the Supreme Court

Professor Beale noted that three rule amendments related to *United States v. Booker*, 543 U.S. 220 (2005), a new privacy rule, and an amendment to Rule 45 had all been approved by the Judicial Conference and the Supreme Court and were set to take effect on December 1, 2007.

1. Rule 11. Pleas. The proposed amendment conforms the rule to the Supreme Court's decision in *Booker* by eliminating the requirement that the court advise a defendant during the plea colloquy what range is anticipated under the Sentencing Guidelines. It will be sufficient to notify the defendant at that time that the ultimate sentence will be determined after taking into consideration the advisory Sentencing Guidelines and the 18 U.S.C. § 3553(a) factors.

2. Rule 32. Sentencing and Judgment. The proposed amendment conforms the rule to *Booker* by clarifying that the court can instruct the probation office to include in the presentence report information relevant to the statutory sentencing factors in 18 U.S.C. § 3553(a).

3. Rule 35. Correcting or Reducing a Sentence. The proposed amendment conforms the rule to *Booker* by deleting subparagraph (B), consistent with *Booker*'s holding that the Sentencing Guidelines are advisory rather than mandatory.

4. Rule 45. Computing and Extending Time. The proposed amendment clarifies how to compute the additional three days that a party is given to respond when service is made by mail, by leaving it with the clerk of court, or by electronic means under Civil Rule 5(b)(2)(B), (C), or (D).

5. Rule 49.1. Privacy Protection For Filings Made with the Court. The proposed new rule implements section 205(c)(3) of the E-Government Act of 2002, which requires the Judiciary to promulgate federal rules "to protect privacy and security concerns relating to electronic filing of documents and [their] public availability."

Mr. McCabe noted that the AO Forms Working Group, chaired by Judge Harvey Schlesinger, had identified a dozen or so forms that required revision to accommodate the privacy rules.

C. Proposed Amendment Approved by the Standing Committee and the Judicial Conference

Mr. Rabiej noted that the following proposed rule amendments, which include those relating to the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, were approved by the Standing Committee in June 2007 and by the Judicial Conference in September 2007, and were about to be forwarded to the Supreme Court.

1. Rule 1. Scope; Definitions. The proposed amendment defines a "victim."

2. Rule 12.1. Notice of Alibi Defense. The proposed amendment provides that a victim's address and telephone number should not automatically be provided to the defense when an alibi defense is raised.

3. Rule 17. Subpoena. The proposed amendment requires judicial approval before service of a post-indictment subpoena seeking personal or confidential victim information from a third party and provides a mechanism for victim notification.

4. Rule 18. Place of Trial. The proposed amendment requires the court to consider the convenience of victims — in addition to the convenience of the defendant and witnesses — in setting the place for trial within the district.

5. Rule 32. Sentencing and Judgment. The proposed amendment deletes definitions of "victim" and "crime of violence or sexual abuse" to conform to other amendments, clarifies when a presentence report must include restitution-related information, clarifies the standard for including victim impact information in a presentence report, and provides that victims have a right "to be reasonably heard" in certain proceedings.

6. Rule 41(b). Search and Seizure. The proposed amendment authorizes magistrate judges to issue warrants for property outside the United States.

7. Rule 60. Victim's Rights. The proposed new rule provides a victim the right to be notified, to attend public proceedings, and to be heard, and sets limits on relief.

8. Rule 61. Conforming Title. The proposed amendment renumbers Rule 60.

At Judge Tallman's request, Professor Coquillette provided a brief primer on the rulemaking process and the committee's role. Professor Coquillette commended Mr. McCabe's

law review article on the nearly 75-year history of the rulemaking process, urging that copies be distributed. He noted that, by enacting the Rules Enabling Act, Congress had delegated an important part of its powers in 1934, creating a common forum for inter-branch cooperation — with significant public input — to produce procedural rules that would supersede all prior federal law. One member suggested that a brochure setting forth the various constitutional, statutory, and prudential constraints on the rules committee might be helpful.

Judge Tallman urged committee members to resist partisanship and to work cooperatively to approve rule amendment proposals that improve court efficiency while respecting all relevant constitutional rights. He emphasized the importance of the committee's work as a collegial deliberative body in seeking to improve the administration of criminal justice through better procedural rules. Judge Rosenthal emphasized how well the existing deliberative process worked. Mr. McCabe noted that reducing the three-year rulemaking timeline by eliminating steps or shortening time limits had been considered on at least two prior occasions, but ultimately rejected as unwise. Mr. Rabiej described the process and underscored the wealth of information available on the Federal Rulemaking website, http://www.uscourts.gov/rules.

III. PROPOSALS FOR COMMITTEE CONSIDERATION

A. Report on June 2007 Meeting of the Standing Committee

Judge Bucklew reported on the Standing Committee's June 2007 meeting. The proposed amendments to Rule 16 had generated the greatest interest. She said that our advisory committee's proposed revision had not been approved due to (1) concerns that it would require government disclosure of exculpatory and impeaching evidence without regard to its materiality and (2) questions whether a need for the change had been sufficiently shown. Then-Deputy Attorney General Paul J. McNulty strongly opposed the proposal at that meeting. Other proposed amendments discussed included the proposed changes to Rule 11 of the rules governing § 2254 and § 2255 proceedings — a part of which was remanded for the advisory committee's consideration (see below) — and the CVRA amendments.

Judge Rosenthal underscored the point that a motion by a Standing Committee member to completely terminate the effort to amend Rule 16 had been rejected. The Standing Committee suggested that if the advisory committee decided to continue studying the Rule 16 amendment proposal that it ask the Federal Judicial Center to research (a) the effect of the recent change to the U.S. Attorneys' Manual and (b) the experience of courts in handling discovery governed by local rules similar to the rejected proposal to amend Rule 16. Ms. Hopper reported that, given the Courtroom Usage Study's current demand on resources, the Federal Judicial Center planned to allow the issue to percolate a bit before commencing the research. One member questioned the delay in studying the impact of local rules. Ms. Fisher said that the Department has been carrying out substantial training of federal prosecutors on the new U.S. Attorneys' Manual changes and was helping the FJC determine how best to capture the data needed for the Center's study.

Judge Bucklew also advised the Standing Committee why our advisory committee had decided not to pursue the proposed amendment to Rule 29 on judgments of acquittal.

B. Proposed Amendments to Rule 11 of the Rules Governing § 2254 and § 2255 Proceedings

The committee discussed the portion of the proposed amendments to Rule 11 of the rules governing § 2254 and § 2255 Proceedings that the Standing Committee had deferred for further consideration. Professor Beale noted that these were part of a three-part package of changes originally proposed by the Department, addressing post-conviction remedies. The advisory committee had earlier rejected proposed new Rule 37, which would have regularized the collateral review of criminal judgments and abolished certain writs of error. The Standing Committee approved only the certificate of appealability part of the proposed amendments.

Professor Beale summarized the pending proposal, which would make Rule 11 the exclusive method to obtain relief in these cases, set a 30-day time limit, limit the types of claims allowed, and prohibit use of Civil Rule 60(b) motions in these cases. A member moved that the committee refer the remaining proposals to amend Rule 11 of the rules governing § 2254 and § 2255 proceedings back to the Writs Subcommittee for further study. Without objection, Judge Tallman referred the matter for further consideration by the Writs Subcommittee and asked Professor King to remain on the subcommittee in her new consulting capacity, Mr. McNamara to chair it, and Judge Keenan to join it. Judge Tallman later asked Justice Edmunds if he would also serve to provide the group with an appellate perspective.

C. Rule 32(h)

The committee discussed the proposed post-*Booker* amendment to Rule 32(h). Professor Beale noted that, as published, the proposal had generated significant public comment. The Standing Committee had declined to approve it and sent it back for further study. There was discussion over whether the committee should wait until the Supreme Court decides *Gall v. United States*, No. 06-7949. The question presented in *Gall* is: "Whether, when determining the 'reasonableness' of a district court sentence under [*Booker*], it is appropriate to require district courts to justify a deviation from the United States Sentencing Guidelines with a finding of extraordinary circumstances." Judge Tallman asked for the sense of the committee and then directed that the Rule 32(h) rule amendment proposal be referred back to a subcommittee on sentencing issues for further study. He appointed Chief Judge Molloy as the group's new chair and asked Judge Wolf to join Justice Edmunds, Ms. Brill, Mr. McNamara, and a representative from the Department of Justice.

D. Rule 15

Ms. Fisher summarized the background of the Department's proposal to amend Rule 15 to permit the deposition of a witness outside the defendant's *physical* presence under certain

circumstances where doing so is impracticable or impossible. Ms. Fisher said the proposed amendment was needed in national security and other cases. The Department had sought to address the Confrontation Clause concerns raised in *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006), and the objections raised by Justice Scalia's in chambers opinion when the Supreme Court rejected a proposed amendment addressing a similar issue a few years ago. One member noted that it was unusual for a rule to refer specifically to "defense witnesses" in subparagraph (c)(3)(B) of the proposed Rule 15 amendment rather than simply to "witnesses." Another suggested that the rule should clarify the burden of proof and who bears it. Based on the committee's comments, Judge Tallman referred the proposal to the Rule 15 Subcommittee, which he asked Judge Keenan to chair; other members to include Professor Leipold, Mr. Cunningham, and a representative from the Department of Justice.

E. Rule 12(b)(3)(B) and Rule 34

The committee discussed the Department's proposed amendment of Rule 12(b) to bar late claims that an indictment fails to state an offense unless raised before trial. Mr. Wroblewski explained that the Department wanted all challenges to be flagged before a jury is empaneled and jeopardy attaches, while the problem can still be fixed. Several members asked what should be done if an indictment is in fact found to be defective after jeopardy attaches. Should an erroneous indictment be sent to the jury? After further discussion, it was decided that the proposed Rule 12(b) amendment should be referred to a small subcommittee for further study. Judge Tallman asked Judge Wolf to chair the group, and asked Mr. McNamara and Professor Leipold to serve as members.

F. Time Computation Project — Statutory Provisions

For the benefit of the new members, Mr. Cunningham described the history of the rules committees' coordinated effort to simplify time computations by adopting a "days are days" counting principle, adjusting the time limits specified in individual rules to take account of the new counting method, and to fix shorter deadlines in multiples of seven days, where feasible. Professor Beale noted that the time-computation rules amendments had been published for public comment. At issue now are the statutory deadlines and statutory time computation rules. Mr. Wroblewski reported that the Department planned shortly to send the rules committees a letter, identifying all U.S. Code provisions that the Department considers critical requiring congressional amendment. Judge Rosenthal noted that, ideally, Congress would pass a statute taking effect at the same time as the revised rules that would make conforming changes to all relevant statutory deadlines as appropriate in light of the new "days are days" principle promulgated in the rules changes. Mr. Rabiej observed that reaching consensus in the Congress on all proposed changes would be challenging. The committee discussed prioritizing the desired legislative changes.

Judge Rosenthal urged members to review the list of proposed changes carefully, warning that relatively few private practitioners were likely to take the time to do so during the public

comment period. One member asked whether the committee had examined the interplay of the revised time deadlines with agency deadlines in asset forfeiture and other matters. Professor Beale agreed that this required scrutiny. Judge Wolf asked that he be sent a document that he could forward to bar presidents and others, with applicable questions and a deadline for their responses. One member recommended posting the proposed changes online for public airing. Professor Coquillette agreed, suggesting that accompanying language be prepared to make clear the substantial improvement that the new time-computation framework represents.

G. Rule Amendments Relating to Crime Victims

After welcoming Judge Paul Cassell to the meeting, Judge Tallman congratulated Judge Jones on his recent appointment as the district judge representative from the Fourth Circuit to the Judicial Conference and asked him to report on the most recent rule amendment being proposed by the CVRA Subcommittee. Judge Jones recounted the history of the effort to implement the Crime Victims' Rights Act in the rules. He noted that the originally published package of proposed rule amendments had generated criticism from both sides. While criminal victims' advocates, including Judge Cassell, contended that the proposals were inadequate, others argued that the proposed changes would improperly tilt the adversarial equilibrium in criminal cases against accused persons. The package of amendments was revised to account for many of the concerns raised during the public comment. A revised version of the original amendment proposals, approved by the Standing Committee in June 2007 and by the Judicial Conference in September 2007, is on its way to the Supreme Court.

Judge Jones explained that the CVRA Subcommittee was now recommending adoption of a set of follow-up amendments in Rules 5, 12.3, and 21. Judge Cassell noted that he had recently announced his resignation from the federal bench, having recognized that his passions on behalf of crime victims were best pursued as an advocate rather than as a judge. Judge Tallman thanked Judge Cassell for his significant service on CVRA-related matters throughout the rulemaking process.

Concern was raised that there were inconsistent references in the proposed rules to "the victim," "any victim," or "a victim"— an issue that will be addressed by the Style Subcommittee. A member suggested placing the proposed Rule 5 amendment in Rule 46 instead, but others suggested that magistrate judges were more likely to find the provision in Rule 5. It was noted that the reference to seven days in Rule 12.3(a)(4)(C) might be affected by the time-computation amendments — which the committee might want to flag during the public comment period with an asterisk. After further discussion, Judge Jones moved to approve the CVRA-related amendments to Rules 5(d)(3), 12.3, and 21.

The committee voted to approve the proposed CVRA-related amendments for publication.

H. Rules 32.1 and 46

Judge Battaglia noted that the committee had first discussed in October 2006 his proposal to amend Rules 32.1 and 46. He explained the background of the proposed rules amendments, which would standardize national practices and expressly authorize issuance of an arrest warrant or summons when the government seeks revocation of bail or supervised release. Following discussion of the proposal, Judge Battaglia moved to send the proposed amendment to the Standing Committee for publication. Professor Beale suggested that the committee could approve the proposed rule amendment now, but wait until the next meeting to give final approval to the committee note and the final language of the amendment suggested by the Style Subcommittee.

A member expressed concern about the mandatory nature of the proposed language, noting that a judge could decide to issue either a summons or a warrant, depending on the circumstances. Ms. Fisher said that the Department did not feel strongly about this issue. Judge Tallman suggested that the rule use "may issue" instead of "must issue" in both proposals. It was noted that a judge could decide to issue a summons or might want to issue an arrest warrant depending on the circumstances. Judge Battaglia accepted the suggestion for amendment. One member questioned the reference to "affidavit," which could be construed as excluding a declaration. Judge Rosenthal reported that, as part of the Civil Rules restyling, the term "affidavit" was used, and suggested that this could be clarified in the note. Mr. Wroblewski pointed out that the reference to Rule 41(c)(2)(B) should now be to Rule 41(d)(2)(B). Professor Beale commented that, even if approved, the proposal would still need to be restyled, all references cross-checked, and a committee note drafted.

The committee voted, with one member dissenting, to send the proposed amendment to the Standing Committee as revised and with an accompanying Committee Note, which would be approved by the committee at a later date.

I. Proposal for Victims' Advocate Member on Rules Committee

Judge Tallman informed the committee that the Chief Justice had referred to the Standing Committee — which in turn had referred the Chief's inquiry to the advisory committee — a request that he appoint to the committee a permanent victims' advocate member. Before discussing that request, Judge Tallman asked Ms. Hooper to report on the FJC's work with the Government Accountability Office (GAO) on CVRA-related issues. Ms. Hooper said that a judges' pocket guide and a DVD on the CVRA and related rules amendment were being prepared, which should be ready for distribution by year's end. Judge Tallman noted that CVRA issues were also being incorporated into the curriculum of the Federal Judicial Center's "new judges school" training program. Ms. Hooper described the GAO study and FJC's meeting with the Executive Office for U.S. Attorneys to determine what victim data are currently available to assist in that effort.

Judge Tallman expressed concern about adding a victims' advocate as a permanent committee member. Judge Cassell suggested that Lewis & Clark Law Professor Douglas Beloof, the head of a national crime victims' advocacy organization, would make an excellent addition to the committee. After additional discussion, Judge Rosenthal said that adding members whose express role was to advance a particular agenda raised institutional concerns and that the rules committees should remain an open forum for those with different experiences coming together to identify solutions to problems in the administration of justice. Ms. Fisher said that the Department had every interest in advancing victims' interests and suggested that perhaps it could meet regularly with representatives from the victims' rights community before each committee meeting to ensure that the Department fully understood their concerns. Based on the members' comments, the committee decided that adding a permanent victims rights member was inadvisable, and would set an adverse precedent to have institutional members appointed to the committee whose sole portfolio is advocacy on behalf of crime victims. He stressed the importance of collegial decision-making by committee members, much like a legislative body, when considering improvements in the rules governing the administration of criminal justice. He observed that staffing the advisory committee with partisans advocating particular interests would undermine its ability to operate effectively in a collegial fashion. He noted that the proceedings of all of the rules committees are open to the public and that public testimony and participation in commenting on proposed rule changes is guaranteed under the Rules Enabling Act to insure full access by anyone who wishes to express a view.

The committee then voted, with one dissent, to recommend against the appointment of a permanent crime victims' advocate member to the committee.

J. Rule 32(i)(1)(A)

The committee resumed its meeting on Tuesday morning with a discussion of the letter sent by Judge Ernest Torres of the District of Rhode Island recommending a change to Rule 32(i)(1)(A). Professor Beale explained that the rule had been amended in 1995 to require courts to "verify that the defendant and the defendant's attorney *have* read and discussed the Presentence Report" — rather than, as the rule had required before 1995, simply to "determine that the defendant and defendant's counsel have had the *opportunity* to read and discuss" it. Judge Torres had suggested that the wording of the rule would create an impasse if a defendant flatly refused to read the Presentence Report.

The district judges on the committee described what they do at sentencing when it becomes apparent that the defendant has not in fact read the report either due to insufficient time, illiteracy, or insufficient fluency in English. Often, they said, they simply invite the defendant to take the time during a brief recess to read the report with the help of their attorney or, if needed, an interpreter. It was suggested that, were a defendant willfully to refuse to read and discuss the report, appellate courts would likely interpret the refusal as a waiver of the defendant's right to read and discuss the report. Based on the comments, the committee concluded that amending

Rule 32(i)(1)(A) was unnecessary. Judge Tallman said that he would write a letter to Judge Torres, explaining the committee's reasons for not pursuing a change to the rule.

K. Rule 32.1(a)(6)

The committee discussed the suggestion of Magistrate Judge Robert B. Collings of the District of Massachusetts that Rule 32.1(a)(6) be amended to clarify the rule's incorporation of 18 U.S.C. § 3143(a). One member recommended pursuing the proposed amendment as a way to simplify the rule and offer clearer guidance to busy judges. Another member questioned whether "clear and convincing" was the correct standard for establishing that "the person will not flee or pose a danger to any other person or to the community." Judge Tallman cautioned that establishing the proper burden of proof sounded substantive and may be inappropriate under the Rules Enabling Act. It was noted that the rule referenced the statute and that invoking the statutory standard is entirely appropriate. Judge Tallman asked the Reporter to investigate the matter further and to prepare a memorandum for the committee's consideration, addressing (a) whether Judge Collings' proposed standard properly reflects the case law and (b) if so, whether there is any impediment to including the standard in the rule. One member suggested that the memorandum might also address whether a separate section is needed on revocation of supervised release. Judge Tallman agreed that this issue should be part of the Reporter's research. Judge Battaglia offered to assist. Mr. Wroblewski offered to contribute a list of relevant statutes.

L. Rule 6(f)

The committee discussed Judge Battaglia's suggestion that Rule 6(f) be amended to allow courts, for good cause, to receive the return of a grand jury indictment by video conference. Professor Beale and Judge Tallman noted that the proposal was particularly important in districts that are geographically large but have few judges, who sometimes have to drive hours to preside over a 10-minute proceeding. One member proposed striking the phrase "in open court" instead, but others suggested that the phrase was a vital safeguard against the ancient practice of secret Star Chambers indictments. Another member suggested that the phrase "for good cause" be changed to "for judicial convenience," but Judge Battaglia warned that doing so might enable video conference to become the default practice. Further study was necessary. Judge Tallman asked Judge Battaglia to chair a subcommittee, whose members would include Professor Leipold and Justice Edmunds, with research assistance by Professor Beale and/or Professor King.

M. Rule 11(b)(1)(M)

Judge Tallman reported that concerns had been raised about the recent post-*Booker* amendment of Rule 11(b)(1)(M) during a recent meeting in Montana of Ninth Circuit chief district judges and clerks that he attended, chaired by Chief Judge Molloy. The amendment, set to take effect on December 1, 2007, requires a court to advise a defendant entering a guilty or nolo contendere plea of the court's obligation, in imposing the sentence, "to calculate the

applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a)." Central District of California Chief Judge Alicemarie H. Stotler and District of Arizona Chief Judge John M. Roll, both former rules committee members, asked how extensively the sentencing process needed to be described during the plea colloquy and whether judges would have to calculate sentencing guidelines at the guilty plea hearing so that they could give notice of "the applicable sentencing-guideline range."

Several members suggested that the language of the amended rule was clear that the court needed only to inform the defendant of the court's future obligations to calculate the advisory sentencing-guideline range at sentencing, not to perform the actual calculation at the guilty plea hearing. The committee decided to wait until after the *Booker* rule amendments take effect on December 1, 2007, and see whether any evidence emerges from the field that the amended rule is causing actual confusion. Judge Tallman suggested that the committee send proposed language addressing the concern to the FJC so it could be included in the District Judges Bench Book.

N. Bail Bond Fairness Act

Judge Tallman noted that legislation had been introduced in Congress at the request of corporate bail bondsmen that would prohibit district judges from forfeiting corporate surety bonds for any reason other than failure to appear. Some courts have forfeited bonds when the defendant violates other conditions of release and is rearrested. The Judicial Conference opposes this legislation. Mr. Wroblewski noted that the Department also opposes it.

O. Indicative Rulings

Professor Struve joined by telephone to describe the indicative-rulings project and to ask whether the committee thought that the Criminal Rules should be amended to parallel the proposed amendments to the Civil and Appellate Rules recently published for public comment. Proposed Civil Rule 62.1 would create a mechanism for an appellate court to remand certain post-judgment motions if the district court were to indicate that it considered the motion meritorious. She noted that indicative rulings have also been used in criminal cases. Judge Tallman said that his circuit often handles this type of situation informally, though clerk-to-clerk communications. Ms. Felton said that the Department of Justice was concerned about the scope of the proposed amendment. Judge Rosenthal suggested that it would be helpful for the rules to clarify the options available in these situations, even if they occur relatively infrequently. After more discussion, the committee decided to study further this proposal.

P. Disclosing Cooperation Agreements

Former committee member Chief Judge Harvey Bartle joined by telephone to report on his court's efforts to address the problem posed by www.whosarat.com and similar websites purporting to identify informants in criminal cases. Judge Bartle described the Eastern District of Pennsylvania's adoption a month ago of a new protocol to address this problem. The protocol was developed with input from the defense bar, the U.S. Attorney, and others. Rather than describing sealed documents on the public docket as "Plea Agreement Entered by Defendant X" or "Memorandum in Support of Reduction in Sentence, they are now described generically as "Plea Agreement," "Sentencing Document," or "Judicial Document." The documents themselves remain publicly available only at the Clerk's Office, but are no longer posted on PACER. Also, the docket does not identify a document as "under seal," because that is often interpreted as indicative of defendant cooperation. Although the new protocol does not solve all problems, Judge Bartle hoped that it would help diminish the threat of witness intimidation.

Professor Beale noted that, in addition to the materials received from Chief Judge Bartle, the agenda book included a memorandum from Judge John R. Tunheim of the District of Minnesota, chair of the Committee on Court Administration and Case Management, opposing the Department's proposal to remove all plea agreements from PACER and limit remote electronic access to court users and participants in the case. The committee concluded that the proposal would not be effective because cooperation agreements would be freely available at the courthouse. The committee sought public comment on other alternative procedures to address this vexing problem. (At its December 4-5 meeting, the committee reviewed the public comments and concluded that courts should be allowed to develop their own procedures to address this issue.)

Judge Tallman asked whether Judge Bartle had been in touch with Judge Tunheim. Judge Bartle said that he was about to write Judge Tunheim asking that the Judicial Conference not adopt any national policy that would bar his court's new protocol. Mr. Wroblewski said that the Department considered this a serious matter and had suggested the program in Judge Bartle's court in a recent letter to Judge Tunheim. He noted that in the Southern District of New York, documents indicating cooperation are never filed, but simply returned to the parties — an option that the Department did not view as ideal. Judge Bartle said that his court had also considered, but rejected, that option. Judge Tallman noted that the practice created a record full of gaping holes, which was problematic on appeal when appellate courts are presented with an incomplete record. Professor Leipold made a plea on behalf of academic researchers for continued public access to all key documents in criminal cases.

There was no further business before the committee. After proposing that the next meeting be held the last week of April 2008, Judge Tallman adjourned the meeting.

8.

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

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RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

TO: **Honorable Lee H. Rosenthal, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Robert L. Hinkle, Chair**
Advisory Committee on Evidence Rules

DATE: **December 1, 2007**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on November 16, 2007, in Washington, D.C. At this meeting the Committee began its long-term project on restyling the Evidence Rules. It also considered the following matters:

1) A possible amendment to Evidence Rule 804(b)(3) to provide a uniform requirement for for establishing corroborating circumstances guaranteeing trustworthiness;

2) developments in the law of confrontation after *Crawford v. Washington,* in order to consider whether any amendments to the Evidence Rules are necessary as a result of that decision; and

3) the necessity of commenting on proposed legislation that would alter the application of Evidence Rule 404(b) in prosecutions involving hate crimes.

None of the above matters require action by the Standing Committee at this time.

Part III of this Report provides a summary of the Committee's projects. A complete discussion of these matters can be found in the draft minutes of the Fall 2007 meeting, attached to this Report.

II. Action Items

No action items.

III. Information Items

A. The Restyling Project

At its Fall 2007 meeting the Committee agreed upon a protocol and a timetable for its project to restyle the Evidence Rules. The Committee also reviewed — on a preliminary basis — some rules that had been restyled by Professor Kimble as draft examples for the Committee's information.

The Committee established a step-by-step process for restyling that is substantially the same as that employed in previous restyling projects. Those steps are: 1) draft by Professor Kimble; 2) comments by the Reporter; 3) response by Professor Kimble and changes to the draft where necessary; 4) expedited review by Advisory Committee members and redraft by Professor Kimble if necessary; 5) review by the Style Subcommittee of the Standing Committee; 6) review by the Advisory Committee; and 7) review by the Standing Committee to determine whether to release the restyled rules for public comment.

The Committee agreed that the Evidence Rules will be divided into three parts, and the process described above will therefore be conducted in three separate stages. The Committee also agreed, however, that the entire package of restyled rules should be submitted for public comment at one time.

The Committee noted that the Civil Rules restyling project proceeded through subcommittees. But the Committee determined that, at least for now, the review of restyled rules would be by the Committee as a whole. The Committee has relatively few members, so that a subcommittee structure may not have provided sufficient members to do the work. Moreover, the scope of the project is substantially smaller than was the Civil Rules project.

The Committee also agreed on a working principle for whether a change is one of "style" (in which event the final determination is made by the Style Subcommittee) or one of "substance" (in which event the final decision is for the Committee). The working definition can be described as follows:

A change is "substantive" if:

1. Under the existing practice in any circuit, it could lead to a different result on a

question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of a certain piece of evidence); or

2. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made (e.g., a change in the time in which an objection must be made, or a change in whether a court must hold a hearing on an admissibility question); or

3. It changes the structure of a rule so as to alter the way in which courts and litigants have thought about, and argued about, questions of admissibility (e.g., merging Rules 104(a) and 104(b) into a single subdivision); or

4. It changes what Professor Kimble has referred to as a "sacred phrase" — "phrases that have become so familiar as to be fixed in cement."

The Committee made several other preliminary determinations on how its restyling would be conducted, including: 1) The Committee would not, at this point, attempt to draft a rule covering definitions; 2) It would place minor substantive changes on a separate track, as did the Civil Rules Committee, and it would determine at a subsequent point when to propose any necessary substantive changes; and 3) the Committee's goal is to have the entire package of style amendments approved for release for public comment in August, 2009.

B. Consideration of Possible Amendment to Evidence Rule 804(b)(3)

The Committee discussed the possibility of an amendment to Evidence Rule 804(b)(3), the exception to the hearsay rule for declarations against interest. In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest for the hearsay to be admissible; but by its terms the Rule imposes no similar requirement on the prosecution. The Committee expressed interest in at least considering an amendment that would extend the corroborating circumstances requirement to all proffered declarations against penal interest.

The possible need for the amendment arose after the Supreme Court's decision in *Whorton v. Bockting*, which held that the Confrontation Clause provides no protection against unreliable hearsay if that hearsay is nontestimonial. Another possible reason for the amendment is that the courts are in dispute about whether the government must provide corroborating circumstances under the existing rule. Finally, courts that do apply the corroborating circumstances requirement to government-offered declarations against interest differ on what "corroborating circumstances" mean. Some courts allow the government to present corroborative evidence that supports the accuracy of the declarant's statement, while other courts demand that the showing must be made exclusively through the circumstances under which the declarant's statement is made.

Committee members expressed interest in proceeding with an amendment to Rule 804(b)(3), reasoning that it would provide an important guarantee of reliability in criminal prosecutions, and that it could rectify confusion and disputes among the courts. But the Committee decided to defer consideration of an amendment, in response to a request from the Department of Justice representative to allow some time for the courts to construe the rule in light the Supreme Court's decisions on the relationship between the right to confrontation and the hearsay exceptions. The Committee agreed to wait until the next meeting to consider the amendment in detail. The Department of Justice representative promised to provide the Committee, before its next meeting, any relevant information that the Department can obtain about the current operation of Rule 804(b)(3) as applied to hearsay offered by the government.

C. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

The Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to cross-examine the declarant. Subsequently the Court in *Davis v. Washington* held that a hearsay statement is not testimonial if the primary motivation for making the statement was for some purpose other than for use in a criminal prosecution. And as discussed above, the Court in *Whorton v. Bockting* held that non-testimonial hearsay is unregulated by the Confrontation Clause.

Crawford and the subsequent case law raises at least the possibility that some of the hearsay exceptions in the Federal Rules of Evidence might be subject to an unconstitutional application in some circumstances. If that possibility becomes a reality, it may become necessary to propose amendments to bring those hearsay exceptions into compliance with constitutional requirements. At its Fall 2007 meeting, however, the Committee unanimously resolved that there is no need to propose any amendment in response to *Crawford* at this time. It is likely that no amendment will be necessary in any event, because the case law is reaching the result that any hearsay statement admissible under a Federal Rules exception is by that fact non-testimonial and therefore admissible under the Confrontation Clause. The admissibility requirements of the Federal Rules hearsay exceptions are being held to screen out "testimonial" hearsay as that term has been construed in *Davis* and by the lower courts. Even if the Federal Rules hearsay exceptions are not coextensive with the Confrontation Clause, an attempt to to codify *Crawford* is unwise at this point, given the rapid development of the case law. The Committee will continue to monitor case law developments under *Crawford* and *Davis*.

D. Consideration of Hate Crimes Legislation

At its Fall 2007 meeting the Committee reviewed hate crime legislation that is pending in both Houses. Both bills contain language that purport to regulate admission of uncharged misconduct in a way that might be difficult to square with Evidence Rule 404(b). The language is identical in both bills, and provides as follows:

(6)(d) Rule of Evidence- In a prosecution for an offense under this section, evidence of expression or associations of the defendant may not be introduced as substantive evidence at trial, unless the evidence specifically relates to that offense. However, nothing in this section affects the rules of evidence governing impeachment of a witness.

Some possible concerns about the statutory language include 1) its distinction between substantive and impeachment evidence — one that is not made so explicitly in the Evidence Rules; 2) the scope of the bar against use of evidence of expression or association, which may conflict with admissibility of such evidence under Rule 404(b); 3) the vagueness of the exception for evidence that "specifically relates" to the offense and the likelihood that the exception will swallow the rule of exclusion; and most importantly 4) the general lack of connection between the statutory language and the language of Rule 404(b), which covers the same ground.

After discussion the Committee decided not to submit any comment to Congress on the evidentiary concerns raised by the legislation. The Committee noted among other things that the legislation does not purport to amend the Federal Rules of Evidence directly, and therefore the Committee would not appear to have a strong justification for commenting on the legislation. Moreover, the effect of the legislation is limited as it applies only in hate crime prosecutions.

IV. Minutes of the Fall 2007 Meeting

The Reporter's draft of the minutes of the Committee's Fall 2007 meeting is attached to this report. These minutes have not yet been approved by the Committee.

Advisory Committee on Evidence Rules

Minutes of the Meeting of November 16, 2007

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on November 16, 2007 in Washington, D.C.

The following members of the Committee were present:

Hon. Robert L. Hinkle, Chair
Hon. Joseph F. Anderson, Jr.
Hon. Joan N. Ericksen.
Hon. Andrew D. Hurwitz
William T. Hangley, Esq.
Marjorie A. Meyers, Esq.,
Jonathan J. Wroblowski, Esq., Department of Justice

Also present were:

Hon. Jerry E. Smith, Former Chair of the Committee
Hon. Lee H. Rosenthal, Chair of the Committee on Rules of Practice and Procedure
Hon. Marilyn L. Huff, Liaison from the Committee on Rules of Practice and Procedure
Hon. Michael M. Baylson, Liaison from the Civil Rules Committee
Hon. John F. Keenan, Liaison from the Criminal Rules Committee
Hon. Kenneth J. Meyers, Liaison from the Bankruptcy Rules Committee
Elizabeth Shapiro, Esq., Department of Justice
Professor Daniel Coquillette, Reporter to the Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Peter McCabe, Esq., Secretary to the Standing Committee on Rules of Practice and Procedure.
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Professor R. Joseph Kimble, Consultant to the Style Subcommittee of the Committee on Rules of Practice and Procedure
Joseph E. Spaniol, Jr., Esq., Consultant to the Style Subcommittee of the Committee on Rules of Practice and Procedure
Timothy Reagan, Esq., Federal Judicial Center
Jeffrey Barr, Esq., Rules Committee Support Office
Timothy Dole, Esq., Rules Committee Support Office

Opening Business

Judge Hinkle welcomed the Committee and its new liaisons, and also noted that the Committee has a new member, Judge Anita Brody. Judge Hinkle asked for and received approval of the minutes of the Spring 2007 Committee meeting.

On behalf of the Committee, Judge Hinkle expressed deep appreciation to Judge Smith, the former Chair, for his exemplary leadership. He noted that under Judge Smith's tenure as Chair, the Committee prepared and obtained approval of important amendments to Rules 404, 408, 606 and 609; and that Judge Smith was instrumental in obtaining approval for Rule 502, which is currently being considered by Congress. Judge Rosenthal noted that Judge Smith's presentations to the Standing Committee were always well-received and appreciated. Judge Smith expressed his thanks and appreciation to the Committee and to the personnel in the Rules Committee Support Office for their stellar efforts.

Judge Hinkle then asked Judge Smith to report on the June meeting of the Standing Committee. Judge Smith reported that the Standing Committee had approved Rule 502, which provides important protection against waiver of attorney-client privilege and work product. Judge Rosenthal was then asked to report on the status of Rule 502 now that it has been referred to Congress. Judge Rosenthal stated that she and others had met with members and staff of the Judiciary Committees of both Houses of Congress; that the Committee members and staff appeared favorably disposed toward the Rule; and that the American Association for Justice (formerly ATLA) had withdrawn all of its objections to the rule, meaning that the proposal appears to be unopposed at this point.

Judge Hinkle next reported on the status of the Committee's report (as directed by Congress) on the "harm-to child" exception to the marital privileges. The Standing Committee and the Judicial Conference approved the report prepared by the Committee, which concluded that it was neither necessary nor desirable to amend the Federal Rules of Evidence to provide for an exception to the marital privileges in cases involving harm to a child. The Committee found that such an exception already existed under federal common law and that codification would raise difficult drafting questions on the scope of the exception.

Finally, Judge Hinkle noted that a Subcommittee of the Standing Committee is investigating whether rules are necessary to regulate the sealing of cases. The Subcommittee is chaired by Judge Hartz and comprised of a representative from each of the Advisory Committees. Judge Ericksen has agreed to serve as the representative from the Evidence Rules Committee.

Restyling Project

At the Spring 2007 meeting, the Committee voted unanimously to begin a project to restyle the Evidence Rules. At the Fall 2007 meeting, the Committee agreed upon a protocol and a

timetable for the restyling project. The Committee also reviewed — on a preliminary basis — some rules that had been restyled by Professor Kimble.

Steps in the Process

After substantial discussion, the Committee agreed that restyling would proceed in the following steps:

1. Professor Kimble prepares a draft of a restyled rule.

2. The Reporter reviews the draft and provides suggestions, specifically with an eye to whether any proposed change is substantive rather than procedural. But the suggestions can go further than just the substantive/procedural distinction.

3. Professor Kimble considers the Reporter's comments and revises the draft if he finds it necessary.

4. This second draft of the rule is sent by email to all members of the Committee for their initial review. Committee members will have a week to respond with any comments on the restyling draft; the focus will be on whether the draft has made substantive changes to the existing rule, but Committee members may also make style suggestions for Professor Kimble to consider.

5. Professor Kimble considers the comments of the whole Committee and makes necessary changes. This draft then goes to the Standing Committee's Subcommittee on Style. The Subcommittee reviews the entire draft, with a focus on the areas of disagreement between Professor Kimble and the Committee/Reporter. In previous projects, many disputes about the propriety of a proposed change were resolved at this step. On occasion, however, the Subcommittee on Style found it appropriate to refer the matter to the Advisory Committee for a final resolution.

6. The Style Subcommittee draft is then referred to the Evidence Rules Committee as a whole. The draft will contain footnotes of the issues unresolved up to this point in the process. Committee members review the draft in the following manner: a) focus first on the footnotes to determine whether the material footnoted raises a question of "substance" rather than "style"; b) then review the draft to determine whether any changes of substance have been overlooked; and c) finally, provide any important style suggestions. One Committee member will be designated to lead the discussion at the Committee meeting. At this stage, the Committee will also receive the views of a representative of the ABA, Professor Steve Saltzburg, as well as the views of its own consultant Professor Broun and the liaisons from other Committees. If, after discussion at the Committee meeting, a "significant minority" of the Evidence Rules Committee believes that a change is substantive, then the wording is not approved. In contrast, the Style Subcommittee of the Standing Committee has the final word on any style suggestions provided by the Advisory Committee.

7. After final determination by the Style Subcommittee of any remaining style questions raised by the Evidence Rules Committee, the restyled rules are then presented to the Standing Committee with the recommendation that they be approved for release for public comment.

The Committee agreed that the Evidence Rules will be split into three parts, and the process described above will therefore be done in three separate stages. The Committee agreed, however, that the entire package of restyled rules will be submitted for public comment at one time. Thus, when the first part of the Rules is approved by the Standing Committee for release for public comment, it will be held until the other parts are approved as well.

In approving the above process, the Committee considered whether subcommittees should be appointed to review assigned rules before review by the Committee as a whole. The Committee determined that subcommittees probably will not be necessary or useful; the Committee has relatively few members and so dividing into subcommittees may not be effective, and the number of rules to be restylized is significantly fewer than in the previous restyling projects in which subcommittees were used.

Working Principles

After discussion, the Committee agreed upon a number of important working principles for restyling the Evidence Rules.

Definition of "Substantive" — The basic rule for the restyling project is that the final word on questions of "style" are for Professor Kimble and the Style Subcommittee of the Standing Committee, while the Evidence Rule can veto a proposed change if it would be "substantive." It is thus critically important to define what makes a change substantive. The Committee agreed to the following working definition of a substantive change:

A change is "substantive" if:

1. Under the existing practice in any circuit, it could lead to a different result on a question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of a certain piece of evidence); or

2. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made (e.g., a change in the time in which an objection must be made, or a change in whether a court must hold a hearing on an admissibility question); or

3. It changes the structure of a rule so as to alter the way in which courts and litigants have thought about, and argued about, questions of admissibility (e.g., merging Rules 104(a) and 104(b) into a single subdivision); or

4. It changes what Professor Kimble has referred to as a "sacred phrase" — "phrases that have become so familiar as to be fixed in cement." Examples in the Evidence Rules include "unfair prejudice" and "truth of the matter asserted."

With respect to the first factor — a change of result in any circuit is substantive — the Committee agreed upon three representative examples:

Example One: Rule 404(a) provides that an accused may introduce a "pertinent" character trait. That is the only place in the Evidence Rules in which the word "pertinent" is used. One of the goals of the restyling project is to use consistent terminology throughout the Rules. Professor Kimble raised the question of whether "pertinent" could be changed to "relevant." But investigation showed that the Second Circuit reads the word "pertinent" differently from "relevant." *See United States v. Han*, 230 F.3d 560, 564 (2d Cir. 2000) ("Federal R. Evid. 404(a)(1) applies a lower threshold of relevancy to character evidence than that applicable to other evidence."). Accordingly the change from "pertinent" to "relevant" would be substantive.

Example Two: The exception for past recollection recorded allows admission of a "memorandum or record" if certain admissibility requirements have been met. One of the reasons for restyling the Evidence Rules is to modernize this type of language to accommodate the use of electronic evidence. If Rule 803(5) is amended to cover a "memorandum or record, in any form", is that a substantive change? The answer would be no, because no court has excluded a record under Rule 803(5) on the ground that it is electronic. So the change would not affect the result on admissibility in any circuit.

Example Three: Rule 1101 provides that the Evidence Rules are applicable to " . . . the United States Claims Court . . ." The name of that court has been changed to the "United States Court of Federal Claims." Implementing that name change in the rule would clearly be one of style and not substance.

New Rule for Definitions — The Committee discussed whether to add a new rule covering definitions as part of restyling. The Criminal Rules Committee added a rule on definitions, but the Civil Rules Committee did not. Committee members were skeptical about a new rule on definitions. They pointed out that some of the Evidence Rules already provide a definition for some terms — most importantly Rule 801, which defines hearsay, and Rule 1001, which defines writings and recordings, original, duplicate, etc. Adding a definition section might require transferring those definitions to that new section, and this would be unduly disruptive. Nor would it be user-friendly, which is the basic reason for restyling. Other members noted the difficulty of determining which terms must be defined, and expressed concern that an attempt to define some of the important terms used in the Evidence Rules might result in substantive changes, as courts might not be in uniform agreement about the meaning of the term. At Professor Kimble's suggestion, however, the Committee decided to leave open the question of a new rule on definitions, in order to see how the style process plays out.

Substantive Issues That Arise During Restyling — Both the Civil and Criminal Rules Committees reported that restyling often uncovered substantive problems with a rule that justified an amendment. Some of these problems were minor and uncontroversial, others were more substantial. The Evidence Rules Committee engaged in a preliminary discussion of how to proceed when such substantive issues are raised during restyling. One possibility is to follow the protocol of the Civil Rules Committee, which proposed amendments on two tracks: Track A involved pure style changes and Track B involved minor noncontroversial substantive changes. [Major substantive changes were left for a later date.] The Committee agreed to return to the question of how to treat minor substantive changes as examples arise during the process.

Timeline

The Committee agreed on the following aspirational timeline for the restyling project:

December / January 2008 – Professors Capra and Kimble draft and comment on Group A Rules; email to Committee members for quick review, and Professor Kimble's consideration of Committee suggestions.

February 2008 – Standing Style Subcommittee reviews **Group A — Rules 101-415.**

April 2008 – Advisory Committee reviews Group A at Spring Committee Meeting.

June 2008 – Standing Committee reviews Group A for publication for comment (but the package is held until the whole is completed).

June 2008 – Professor Kimble completes restyling **Group B — Rules 501-706.**

July 2008 – Professor Capra edits Group B; email to Committee members for quick review, and Professor Kimble's consideration of Committee suggestions.
August 2008 – Standing Style Subcommittee reviews Group B

October 2008 – Advisory Committee reviews Group B at its Fall meeting.

December 2008 – Professor Kimble completes editing **Group C — Rules 801-1103**

January 2009 – Standing Committee reviews Group B for publication (but the package is held until the whole is completed).

January 2009 – Professor Capra edits Group C; email to Committee members for quick review, and Professor Kimble's consideration of Committee suggestions.

February 2009 – Standing Style Subcommittee reviews Group C

April 2009 – Advisory Committee reviews Group C at its Spring meeting.

June 2009 – Standing Committee reviews Group C for publication

August 2009 – Publication of entire set of restyled rules

January 2010 – Hearings

April 2010 – Advisory Committee approves restyled rules

June 2010 – Standing Committee approves rules

September 2010 – Judicial Conference approves rules

April 2011 – Supreme Court approves rules

December 1, 2011 – Rules take effect

Consideration of Individual Rules

For the Fall meeting, Professor Kimble provided a preliminary restyling of Evidence Rules 101-302, and also Rules 404 and 612. These rules were submitted as examples of restyling for the Committee's review and information, and provided helpful perspective on what restyled Evidence Rules might look like. Before the Committee meeting, Professor Kimble's drafts were reviewed by the Reporter, who provided comments that were largely incorporated into the drafts.

The draft restyled rules were reviewed by the Committee and discussed at the meeting. Suggestions were made for changes to most of the draft rules. Some suggestions were substantive; examples included: 1) do not change the phrase "sufficient to support a finding" (in Rule 104(b)) to "enough to support a finding" as the term is a "sacred phrase" commonly used by lawyers and judges; 2) the draft to Rule 103(e), which referred to an "appellate" court recognizing plain error, effectuated a substantive change because trial courts are currently allowed to take notice of their own plain errors. Some suggestions were stylistic; examples included: 1) changing the restyled term "judicially notice" to "take judicial notice"; and 2) deleting a reference to legislative facts in any restyled version of Rule 201. Professor Kimble and the Reporter promised to take these very helpful suggestions into consideration in preparing the next draft, which will be submitted to the Style Subcommittee of the Standing Committee in February 2008.

Possible Amendment to Evidence Rule 804(b)(3)

At its last meeting the Evidence Rules Committee voted to consider the possibility of an amendment to Evidence Rule 804(b)(3), the exception to the hearsay rule for declarations against

interest. In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest for the hearsay to be admissible; but by its terms the Rule imposes no similar requirement on the prosecution. The Committee expressed interest in at least considering an amendment that would extend the corroborating circumstances requirement to all proffered declarations against penal interest.

The possible need for the amendment arose after the Supreme Court's decision in *Whorton v. Bockting*, which held that the Confrontation Clause provides no protection against unreliable hearsay if that hearsay is nontestimonial. If the prosecution has to show only that a declarant made a statement that tended to disserve his interest — i.e., all that is required under the terms of the existing rule — then it might well be that unreliable hearsay could be admitted against an accused. Another possible reason for the amendment is that the courts are in dispute about whether the government must provide corroborating circumstances under the existing rule; some courts read the rule as written and do not impose such a requirement, while others impose the requirement as a necessary guarantee of reliability, even though the rule does not explicitly require it. Finally, courts that do apply the corroborating circumstances requirement to government-offered declarations against interest differ on what "corroborating circumstances" mean. Some courts allow the government to present corroborative evidence that supports the accuracy of the declarant's statement, while other courts demand that the showing must be made exclusively through the circumstances under which the declarant's statement is made.

At the meeting, Committee members expressed interest in proceeding with an amendment to Rule 804(b)(3). Members stated that the rule would provide an important guarantee of reliability in criminal prosecutions, and could rectify confusion and dispute among the courts. But the Department of Justice representative asked the Committee to wait before proposing an amendment. He argued that *Whorton v. Bockting* — the decision which may make an amendment to the rule necessary to protect against unreliable hearsay — was less than a year old. He suggested that the courts be given a chance to construe the rule in light of the new legal landscape. He stated that the Department had no interest in introducing unreliable hearsay against a criminal defendant, but that the precise contours of any amendment should be shaped at least in part by how the courts construe Rule 804(b)(3) and its corroborating circumstances language after *Whorton v. Bockting.*

The Committee agreed to wait until the next meeting to consider the amendment in detail. At that time the Committee will review any new case law to determine whether it is appropriate to proceed on the amendment. The Department of Justice representative promised to provide the Committee, before its next meeting, any relevant information that the Department can obtain about the current operation of Rule 804(b)(3) as applied to hearsay offered by the government.

Crawford v. Washington and the Hearsay Exceptions

The Reporter prepared a report for the Committee on case law developments after *Crawford v. Washington*. The Court in *Crawford* held that if hearsay is "testimonial," its admission against an

accused violates the right to confrontation unless the declarant is available and subject to cross-examination. The Court in *Crawford* declined to define the term "testimonial," but the later case of *Davis v. Washington* provides some guidance on the proper definition of that term: a hearsay statement will be testimonial only if the primary purpose for making the statement is to have it used in a criminal prosecution. Thereafter the Court in *Whorton v. Bockting* held that if hearsay is not testimonial, then its admissibility is governed solely by rules of evidence, and not by the Confrontation Clause. This Supreme Court case law has been reviewed and developed in a large body of lower court case law.

The Reporter noted that most of the case law development after *Davis* has involved one of four complex areas: 1) when is an out-of-court statement offered "not for its truth" and therefore outside the proscription of *Crawford*?; 2) when are records prepared with some anticipation of a prosecution (such as warrants of deportation, toxicology reports, and certificates authenticating business records) testimonial and thus inadmissible unless the preparer of the records is produced to testify?; 3) how should an expert's testimony be treated if the expert has relied on testimonial hearsay?; and 4) does the accused forfeit his confrontation objection if his wrongful act causes the declarant to be unavailable — even if the accused did not act with the intent to prevent the declarant from testifying?

The Reporter noted that the resolution of these questions in the federal cases did not, at this point, justify any amendment to the Evidence Rules. He explained as follows: 1. The scope of the "not-for-truth" analysis is applied under *Crawford* in the same way as it is applied to the federal hearsay rule itself; 2) courts have held that if a record is admissible under the Federal Rules of Evidence, it is by that fact non-testimonial — so under the current case law, there appears to be no risk that one of the federal hearsay exceptions governing records could be used to admit testimonial evidence in violation of *Crawford*; 3) as to expert reliance on testimonial hearsay, Rule 703 already provides that an expert cannot be used as a means to introduce inadmissible hearsay before the jury, so there appears to be no risk that testimonial hearsay can be brought before the jury under the guise of use as the basis of expert testimony; and 4) Rule 804(b)(6) — the forfeiture exception to the hearsay rule — requires the government to show that the accused intended to prevent the declarant from testifying. So whatever the uncertainty is about the elements of forfeiture of a constitutional objection, it will have no effect on federal courts as the standards of Rule 804(b)(6) will still have to be met. [While it might be argued that the forfeiture standards of Rule 804(b)(6) should be *reduced*, such a suggestion is premature, as it must first be made clear that the constitutional standard is so reduced; and there is currently disagreement in the courts about the elements required for forfeiture of a confrontation objection.]

Committee members resolved to continue to monitor case law developments after *Crawford*, and to propose amendments should they become necessary to bring the Federal Rules into compliance with the *Crawford* standards as developed in the federal case law.

Hate Crime Bill and Its Possible Effect on Evidence Rule 404(b)

The Reporter prepared a memorandum for the Committee on hate crime legislation that is pending in both Houses. The hate crime legislation in the House is H.R. 1592: The Local Law Enforcement Hate Crimes Prevention Act of 2007. The Senate bill is S.1105, and is known as the Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007. Both these bills contain language that purport to regulate admission of uncharged misconduct in a way that might be difficult to square with Evidence Rule 404(b). The language is identical in both bills, and provides as follows:

> (6)(d) Rule of Evidence- In a prosecution for an offense under this section, evidence of expression or associations of the defendant may not be introduced as substantive evidence at trial, unless the evidence specifically relates to that offense. However, nothing in this section affects the rules of evidence governing impeachment of a witness.

Some possible concerns about the statutory language include its problematic distinction between substantive and impeachment evidence; the scope of the bar against substantive use of evidence of expression or association; the vagueness of the exception for evidence that "specifically relates" to the offense and the likelihood that the exception will swallow the rule of exclusion; and most importantly the general lack of connection between the statutory language and the language of Rule 404(b), which covers the same ground.

The Committee discussed whether to prepare a letter to Congress addressing the evidentiary concerns raised by the legislation. After discussion, the Committee decided that a letter was not appropriate, for the following reasons: 1) it is unclear whether the legislation is going to be enacted; 2) the legislation does not purport to amend the Federal Rules of Evidence, and therefore the Committee would not appear to have a strong justification for commenting on the legislation; and 3) the effect of the legislation is limited as it applies only in hate crime prosecutions.

The meeting was adjourned on November 16, 2007, with the time and place of the Spring 2008 meeting to be announced.

Respectfully submitted,

Daniel J. Capra
Reporter

9A.

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

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CHAIR

PETER G. McCABE
SECRETARY

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CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

TO: **Hon. Lee H. Rosenthal, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Hon. Laura Taylor Swain, Chair**
Advisory Committee on Bankruptcy Rules

DATE: **December 11, 2007**

RE: **Report of the Advisory Committee on Bankruptcy Rules**

I. Introduction

The Advisory Committee on Bankruptcy Rules met on September 6-7, 2007, in Jackson, Wyoming. The Committee considered a number of issues as more fully set out in the draft of the minutes of that meeting which is attached to this report.

The Committee recommends Standing Committee approval for publication of preliminary drafts of proposed amendments to four Rules.

Information items concerning the status of previously-approved actions relating to the Bankruptcy Rules, a new Forms Modernization project, action taken after the Jackson meeting with respect to means-test forms, and changes in the membership of the Committee are set out following the action items.

II. Action Items

A. Preliminary Draft of Proposed Amendments to Bankruptcy Rules 1007, 1019, 4004, and 7001.

The Advisory Committee recommends that the Standing Committee approve the following draft of proposed amendments to the Bankruptcy Rules for publication for comment.

1. Synopsis of Preliminary Draft of Proposed Amendments to Bankruptcy Rules.

a. **Rule 1007** is amended in subdivision (a) to shorten the time for the debtor to file a list of creditors after the entry of an order for relief in an involuntary case. Subdivision (c) of the rule is amended to extend the time for individual debtors in chapter 7 to file the statement of completion of a course in personal financial management.

b. **Rule 1019** is amended by redesignating subdivision (2) as subdivision (2)(A), and adding a new subdivision (2)(B). Subdivision (2)(B) provides that a new time period to object to a claim of exemption arises when a case is converted to chapter 7 from chapter 11, 12, or 13. The new time period does not arise, however, if the conversion occurs more than one year after the first order confirming a plan, even if the plan was subsequently modified. A new objection period also does not arise if the case was previously pending under chapter 7 and the objection period had expired in the prior chapter 7 case.

c. **Rule 4004** is amended to include a new deadline in subdivision (a) for the filing of motions (rather than complaints) under Rule 7001(b) objecting to a debtor's discharge under §§ 727(a)(8), (a)(9), and 1328(f). Subdivision (c)(1) is amended because of the proposed addition of subdivision (b) to Rule 7001. Subparagraph (c)(1)(B) directs the court not to grant a discharge if a motion or complaint objecting to discharge has been filed unless the objection has been decided in the debtor's favor. Finally, subdivision (c)(4) is added to the rule. It directs the court in chapter 11 and 13 cases to withhold the entry of the discharge if the debtor has not filed with the court a statement of completion of a course concerning personal financial management as required by Rule 1007(b)(7).

d. **Rule 7001** is amended by adding subdivision (b) to the rule, and redesignating the text of the existing rule as subdivision (a). Subdivision (b) and the amendment to subdivision (a)(4) direct that objections to discharge under §§ 727(a)(8), (a)(9), and § 1328(f) be commenced by motion rather than by complaint. This amendment corresponds to the proposed amendment to Rule 4004.

2. *Text of Preliminary Draft of Proposed Amendments to Bankruptcy Rules.*

Rule 1007 Lists, Schedules, Statements, and Other Documents; Time Limits[1]

1 (a) CORPORATE OWNERSHIP STATEMENT,
2 LIST OF CREDITORS AND EQUITY SECURITY
3 HOLDERS, AND OTHER LISTS.
4 * * * * *
5 (2) *Involuntary case.* In an involuntary case, the
6 debtor shall file, within ~~15~~ seven days after entry of the order
7 for relief, a list containing the name and address of each entity
8 included or to be included on Schedules D, E, F, G, and H as
9 prescribed by the Official Forms.
10 * * * * *
11 (c) TIME LIMITS.
12 * * * * *
13 In a chapter 7 case, the debtor shall file the statement required
14 by subdivision (b)(7) within ~~45~~ 60 days after the first date set
15 for the meeting of creditors under §341 of the Code, and in a
16 chapter 11 or 13 case no later than the date when the last
17 payment was made by the debtor as required by the plan or
18 the filing of a motion for a discharge under § 1141(d)(5)(B)

[1] Incorporates amendments approved by the Judicial Conference that are due to take effect on December 1, 2008, if the Supreme Court approves and if Congress takes no action otherwise.

19 or § 1328(b) of the Code.

20 * * * * *

COMMITTEE NOTE

Subdivision (a)(2) is amended to shorten the time for a debtor to file a list of the creditors included on the various schedules filed or to be filed in the case. This list provides the information necessary for the clerk to provide notice of the § 341 meeting of creditors in a timely manner.

Subdivision (c) is amended to provide additional time for individual debtors in chapter 7 to file the statement of completion of a course in personal financial management. This change is made in conjunction with an amendment to Rule 5009 requiring the clerk to provide notice to debtors of the consequences of not filing the statement in a timely manner.

Rule 1019. Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to a Chapter 7 Liquidation Case[2]

1 When a chapter 11, chapter 12, or chapter 13 case has

2 been converted or reconverted to a chapter 7 case:

3 * * * * *

4 (2) *New filing periods.*

5 (A) A new time period for filing a motion

6 under § 707(b) or (c), a claim, a complaint objecting to

7 discharge, or a complaint to obtain a determination of

---

[2] Incorporates amendments approved by the Judicial Conference that are due to take effect on December 1, 2008, if the Supreme Court approves and if Congress takes no action otherwise.

8 dischargeability of any debt shall commence under Rules
9 1017, 3002, 4004, or 4007, but a new time period shall not
10 commence if a chapter 7 case had been converted to a chapter
11 11, 12, or 13 case and thereafter reconverted to a chapter 7
12 case and the time for filing a motion under § 707(b) or (c), a
13 claim, a complaint objecting to discharge, or a complaint to
14 obtain a determination of the dischargeability of any debt, or
15 any extension thereof, expired in the original chapter 7 case.

16 (B) A new time period for filing an objection to a claim
17 of exemptions shall commence under Rule 4003(b) after
18 conversion of a case to chapter 7 unless:

19 (i) the case was converted to chapter 7 more than
20 one year after the entry of the first order confirming a plan
21 under chapter 11, 12, or 13; or

22 (ii) the case was previously pending in chapter 7
23 and the time to object to a claimed exemption had expired in
24 the original chapter 7 case.

25 * * * * *

COMMITTEE NOTE

Subdivision (2) is redesignated as subdivision (2)(A), and a new subdivision (2)(B) is added to the rule. Subdivision (2)(B) provides that a new time period to object to a claim of exemption arises when a case is converted to chapter 7 from chapter 11, 12, or 13. The new time period does not arise, however, if the conversion occurs more than one year after the first order confirming a plan, even if the plan

was subsequently modified. A new objection period also does not arise if the case was previously pending under chapter 7 and the objection period had expired in the prior chapter 7 case.

RULE 4004. Grant or Denial of Discharge[3]

1 (a) TIME FOR ~~FILING COMPLAINT~~ OBJECTING TO
2 DISCHARGE; NOTICE OF TIME FIXED. In a chapter 7
3 ~~liquidation~~ case, a complaint, or a motion under Rule 7001(b),
4 objecting to the debtor's discharge under § 727(a) of the Code
5 shall be filed no later than 60 days after the first date set for
6 the meeting of creditors under § 341(a). In a chapter 11
7 ~~reorganization~~ case, the complaint shall be filed no later than
8 the first date set for the hearing on confirmation. In a chapter
9 13 case, a motion objecting to a debtor's discharge under §
10 1328(f) shall be filed no later than 60 days after the first date
11 set for the meeting of creditors under § 341(a). At least ~~25~~ 28
12 days' notice of the time so fixed shall be given to the United
13 States trustee and all creditors as provided in Rule 2002(f)
14 and (k), and to the trustee and the trustee's attorney.
15 * * * * *
16 (c) GRANT OF DISCHARGE.

[3] Incorporates amendments approved by the Judicial Conference that are due to take effect on December 1, 2008, if the Supreme Court approves and if Congress takes no action otherwise.

17 (1) In a chapter 7 case, on expiration of the ~~time~~

18 times fixed for ~~filing a complaint~~ objecting to discharge and

19 ~~the time fixed~~ for filing a motion to dismiss the case under

20 Rule 1017(e), the court shall forthwith grant the discharge

21 unless:

22 (A) the debtor is not an individual;

23 (B) a complaint, or a motion under Rule

24 7001(b), objecting to the discharge has been filed and not

25 decided in the debtor's favor;

26 (C) the debtor has filed a waiver under §

27 707(a)(10);

28 (D) a motion to dismiss the case under §

29 707 is pending;

30 (E) a motion to extend the time for filing a

31 complaint objecting to the discharge is pending;

32 (F) a motion to extend the time for filing a

33 motion to dismiss the case under Rule 1017(e) is pending;

34 (G) the debtor has not paid in full the filing

35 fee prescribed by 28 U.S.C. § 1930(a) and any other fee

36 prescribed by the Judicial Conference of the United States

37 under 28 U.S.C. § 1930(b) that is payable to the clerk upon

38 the commencement of a case under the Code, unless the

39 court has waived the fees under 28 U.S.C. § 1930(f);

40 (H) the debtor has not filed with the court a
41 statement of completion of a course concerning personal
42 financial management as required by Rule 1007(b)(7);

43 (I) a motion to delay or postpone discharge
44 under § 727(a)(12) is pending;

45 (J) a motion to enlarge the time to file a
46 reaffirmation agreement under Rule 4008(a) is pending;

47 (K) a presumption has arisen under §
48 524(m) that a reaffirmation agreement is an undue
49 hardship; or

50 (L) a motion is pending to delay discharge
51 because the debtor has not filed with the court all tax
52 documents required to be filed under § 521(f).

53 * * * * *

54 <u>(4) In a chapter 11 case in which the debtor is an</u>
55 <u>individual, or in a chapter 13 case, the court shall not grant</u>
56 <u>a discharge if the debtor has not filed any required</u>
57 <u>statement of completion of a course concerning personal</u>
58 <u>financial management under Rule 1007(b)(7).</u>

59 * * * * *

COMMITTEE NOTE

Subdivision (a) is amended to include a new deadline for the filing of motions under Rule 7001(b) objecting to a debtor's discharge under §§ 727(a)(8), (a)(9), and 1328(f). These sections establish time limits on the issuance of discharges in successive bankruptcy cases by the same debtor. The period for providing notice of the deadline is also changed from 25 days to 28 days.

Subdivision (c)(1) is amended because a corresponding amendment to Rule 7001(b) directs certain objections to discharge to be brought by motion rather than by complaint. Subparagraph (c)(1)(B) directs the court not to grant a discharge if a motion or complaint objecting to discharge has been filed unless the objection has been decided in the debtor's favor.

Subdivision (c)(4) is new. It directs the court in chapter 11 and 13 cases to withhold the entry of the discharge if the debtor has not filed with the court a statement of completion of a course concerning personal financial management as required by Rule 1007(b)(7).

RULE 7001. SCOPE OF RULES OF PART VII

1 (a) ADVERSARY PROCEEDINGS. An adversary
2 proceeding is governed by the rules of this Part VII. The
3 following are adversary proceedings:
4 (1) a proceeding to recover money or property, other
5 than a proceeding to compel the debtor to deliver property
6 to the trustee, or a proceeding under § 554(b) or § 725 of
7 the Code, Rule 2017, or Rule 6002;
8 (2) a proceeding to determine the validity, priority,
9 or extent of a lien or other interest in property, other than a

10 proceeding under Rule 4003(d);

11 (3) a proceeding to obtain approval pursuant to §
12 363(h) for the sale of both the interest of the estate and of a
13 co-owner in property;

14 (4) a proceeding to object to or revoke a discharge,
15 <u>except as provided in subdivision (b)</u> ;

16 (5) a proceeding to revoke an order of confirmation
17 of a chapter 11, chapter 12, or chapter 13 plan;

18 (6) a proceeding to determine the dischargeability of
19 a debt,

20 (7) a proceeding to obtain an injunction or other
21 equitable relief, except when a chapter 9, chapter 11,
22 chapter 12, or chapter 13 plan provides for the relief;

23 (8) a proceeding to subordinate any allowed claim
24 or interest, except when a chapter 9, chapter 11, chapter 12,
25 or chapter 13 plan provides for subordination;

26 (9) a proceeding to obtain a declaratory judgment
27 relating to any of the foregoing; or

28 (10) a proceeding to determine a claim or cause of
29 action removed under 28 U.S.C. § 1452.

30 <u>(b) MOTIONS OBJECTING TO DISCHARGE.</u>

31 An objection to discharge under §§ 727(a)(8), (a)(9), or

32 1328(f), is commenced by motion and governed by Rule

33 9014.

COMMITTEE NOTE

Subdivision (b) is added to the rule, and the text of the existing rule is redesignated as subdivision (a). Subdivision (b) and the amendment to subdivision (a)(4) direct that objections to discharge under §§ 727(a)(8), (a)(9), and § 1328(f) be commenced by motion rather than by complaint. Objections to discharge on these grounds typically present issues more easily resolved than other objections to discharge. In appropriate cases, however, the court may, under Rule 9014(c), order that additional provisions of Part VII of the rules apply to these matters.

Other changes are stylistic.

III. Information Items

A. Publication of Proposed Amendments to Bankruptcy Rules and Official Forms

At the June 2007 meeting, the Standing Committee authorized the publication of a preliminary draft of amendments to Bankruptcy Rules 4008, 7052, and 9021 and the preliminary draft of proposed new Bankruptcy Rules 1017.1 and 7058. The Standing Committee also authorized the publication of proposed time computation amendments to Rule 9006 and 38 other Bankruptcy Rules, amendments to Official Form 8, and proposed new Official Form 27. The deadline for the submission of comments on these proposals is February 15, 2008. Thus far, we have received 18 comments on the proposals, most of which addressed the time computation rules. A public hearing on the proposals is scheduled for January 25, 2008.

The Advisory Committee will consider all of the comments submitted on these proposals, whether in writing, or at the public hearing, during its March, 2008 meeting. The Advisory Committee anticipates that it will present these amendments, with appropriate changes, if any, to the Standing Committee at its June, 2007 meeting for approval and transmittal to the Judicial Conference.

B. Revision of Means Test Forms

In a series of email communications and a conference call, the Committee developed revisions of Forms 22A and 22C (relating to the chapter 7 means test, the applicable commitment period under chapter 13, and debtor income and expense calculations) to reflect IRS changes in the governing National and Local Expense Standards. This process, and the resulting proposed revisions, are described in detail in the attached October 31, 2007, memorandum from Judge Swain to Judge Rosenthal.

C. Forms Modernization

At the Jackson meeting, the Committee approved in principle, and authorized the Chair to organize, a subcommittee or other appropriate working group, reporting to the Committee, that will review and propose revisions of the existing Official Bankruptcy Forms to better serve the various constituencies and reflect changes in CM/ECF and other relevant technology, in a manner consistent with applicable policy decisions of the Judicial Conference and its committees.

D. Committee Membership

The Chief Justice has appointed three new members of the Advisory Committee. District Judge David H. Coar of the Northern District of Illinois, Bankruptcy Judge Jeffery P. Hopkins of the Southern District of Ohio, and Chief Bankruptcy Judge Elizabeth L. Perris of the District of Oregon were appointed to three-year terms. They replace District Judge Thomas S. Zilly, former Chair of the Committee, Chief Bankruptcy Judge Mark B. McFeeley of the District of New Mexico, and Bankruptcy Judge Christopher M. Klein of the Central District of California whose terms have expired. The Chief Justice appointed District Judge Laura Taylor Swain of the Southern District of New York as Chair of the Committee.

Attachments: October 31, 2007, Memorandum re Means Test Forms

Draft of Minutes of the Advisory Committee Meeting of September 6-7, 2007

9B.

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

CARL. E. STEWART
APPELLATE RULES

LAURA TAYLOR SWAIN
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

TO: **Hon. Lee H. Rosenthal, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Hon. Laura Taylor Swain, Chair**
Advisory Committee on Bankruptcy Rules

DATE: **October 31, 2007**

RE: **Report of the Advisory Committee on Bankruptcy Rules Recommending Amendments to Official Forms 22A and 22C**

As you will recall, the Standing Committee at its June 2007 meeting approved several revised Official Forms, as recommended by the Advisory Committee. Official Forms 22A and 22C were in the package that the Advisory Committee had submitted for consideration in connection with that meeting. Form 22A reports the information required to implement the "means test" of section 707(b) of the Bankruptcy Code (as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)), under which individual debtors seeking chapter 7 relief may be presumed to be abusing the provisions of chapter 7, and, unless they can overcome the presumption, have their cases dismissed or converted to chapter 13. Form 22C addresses the BAPCPA requirements (1) that a specific definition of "current monthly income" be utilized in determining the disposable income that chapter 13 debtors may be required to pay to unsecured creditors and in determining the "applicable commitment period" for which payments must be made, and (2) that, for debtors whose income is above a defined median, the chapter 7 means test also be used in determining disposable income.

Pursuant to section 707(b)(2)(A)(ii)(I), the means test requires that a debtor's general living expenses be determined by reference to monthly expense amounts specified under the "National Standards and Local Standards . . . issued by the Internal Revenue Service." These standards are described in the Financial Analysis Handbook (§ 5.15.1) of the Internal Revenue Manual. Before BAPCPA, the Manual was an exclusively internal document of the IRS, without the force of law, and the Financial Analysis Handbook provided guidelines for revenue agents negotiating voluntary repayment of delinquent taxes. However, since BAPCPA, the National and Local Standards described in the Manual have been legally binding for purposes of the bankruptcy means test and disposable income calculations.

Shortly before the September 2007 meeting of the Advisory Committee, we learned that the IRS was planning to make certain amendments to the National and Local Standards, effective October 1, 2007, that would affect the operation of Forms 22A and 22C. With the assistance of the Executive Office for United States Trustees and Advisory Committee member Christopher Kohn, Esq., of the Justice Department, we were able to reach an agreement with the IRS that postponed the effective date of the new provisions for bankruptcy purposes until January 1, 2008, while permitting the changes to go into effect as scheduled for internal tax collection purposes. This delay was intended to allow sufficient time for the Advisory Committee, the Standing Committee and the Judicial Conference to formulate and act on further proposed revisions to the affected forms, as well as to permit publishers of print and electronic versions of the forms to have updated products in place in time for the January 1, 2008, effective date.

As recommended by the Advisory Committee and the Standing Committee, Forms 22A and 22C were withdrawn from the consent calendar for the September 2007 meeting of the

Judicial Conference pending such further revisions. Form 22B also was withdrawn, but no further revisions are required of that form.

The IRS changes have necessitated revisions of four areas of the forms. First, the IRS no longer correlates its general National Standard Expenses to income ranges and provides, instead, for such expenses to be correlated only to family size, without regard to income. Accordingly, the revised forms eliminate a box in which the debtor was asked to identify the income range used to determine those expense amounts.

Second, the IRS introduced as a new National Standard, a specific per-person allowance for out-of-pocket health expenses, the amount of which varies depending on whether the individual is age 65 and over, or is under 65. The forms have been amended to provide for this new expense allowance.

Third, the IRS decided to include cell phone expenses within its Local Standard for housing. This required that cell phone expenses be eliminated from another line on the forms that deals with telecommunication expenses not included in the Local Standards.

The fourth area is somewhat more complicated. Formerly, the IRS standards included expense amounts that took into account both vehicle operation and public transportation expenses in a single deduction figure. The amended standards provide separate allowances for public transportation and vehicle operation expenses. The Advisory Committee has revised the form to instruct debtors to utilize the public transportation allowance if they do not operate a car, or to check a different box and enter the applicable vehicle operation allowance if they operate one or more cars. Because it is unclear whether debtors who operate one or more vehicles and also use public transportation are entitled to claim an allowance for public transportation costs as well as the vehicle allowance, the revised Forms 22A and 22C provide an area in the

transportation expense box (lines 22B and 27B in Forms 22A and 22C, respectively) in which debtors who contend that such an additional allowance is available can make such a claim. However, as explained in the Committee Note, the forms do not take a position as to whether such a claim is proper. This same approach has been taken in other, previously approved, areas of the forms in order to allow the courts to decide questionable issues arising under the means test.

The Advisory Committee requests that the Standing Committee approve these additional amendments to Official Forms 22A and 22C and submit those forms, as amended, along with Form 22B, which was approved by the Standing Committee in June 2007, to the Judicial Conference with a recommended effective date of January 1, 2008. (The revisions discussed above are highlighted on the attached copies of Forms 22A and 22C and the Committee Note.)

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 6-7, 2007
Jackson Hole, Wyoming

Draft Minutes

The following members attended the meeting:

District Judge Thomas S. Zilly, Chair
Circuit Judge R. Guy Cole, Jr.
District Judge Irene M. Keeley
District Judge William H. Pauley, III
District Judge Richard A. Schell
District Judge Laura Taylor Swain
Bankruptcy Judge Christopher M. Klein
Bankruptcy Judge Mark B. McFeeley
Bankruptcy Judge Kenneth J. Meyers
Bankruptcy Judge Eugene R. Wedoff
Dean Lawrence Ponoroff
J. Michael Lamberth, Esquire
G. Eric Brunstad, Jr., Esquire
J. Christopher Kohn, Esquire
John Rao, Esquire

The following persons also attended the meeting:

Professor Jeffrey W. Morris, Reporter
District Judge James A. Teilborg, liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
Bankruptcy Judge Jacqueline P. Cox, liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Administration Committee)
District Judge David H. Coar, member elect
Bankruptcy Judge Elizabeth L. Perris, member elect
District Judge Lee H. Rosenthal, chair of the Standing Committee
Peter G. McCabe, secretary of the Standing Committee
Patricia S. Ketchum, advisor to the Committee
Donald F. Walton, Acting Principal Deputy Director, Executive Office for U.S. Trustees (EOUST)
Lisa Tracy, Counsel to the Director, EOUST
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the U.S. Courts (Administrative Office)
James Ishida, Rules Committee Support Office, Administrative Office

James H. Wannamaker, Bankruptcy Judges Division, Administrative Office
Stephen cott Myers, Bankruptcy Judges Division, Administrative Office
Robert J. Niemic, Federal Judicial Center
Phillip S. Corwin, Butera & Andrews

The following summary of matters discussed at the meeting should be read in conjunction with the memoranda and other written materials referred to, all of which are on file in the office of the Secretary of the Standing Committee. Votes and other action taken by the Committee and assignments by the Chair appear in **bold**.

INTRODUCTORY MATTERS

The Chair welcomed the members, members elect, advisers, staff, and guests to the meeting. He introduced Judges Coar and Perris and said that they would begin their terms as members in October. He said that, due to the short notice, the third new member, Judge Jeffery P. Hopkins, was unable to attend. The Chair said that the three new members would replace him, Judge Klein and Judge McFeeley. The Chair also announced that Judge Swain would succeed him as chair starting in October.

1. Approval of minutes of Marco Island meeting of March 29-30, 2007.

The Chair asked for a motion to approve the minutes of the Marco Island meeting held March 29-30, 2007. **A motion to approve the minutes passed without opposition.**

2. Oral reports on meetings of other Rules Committees.

(A) June 2007 meeting of the Committee on Rules of Practice and Procedure.

The Chair said that the Standing Committee approved the rules amendments published in August 2006 as revised by the Advisory Committee at its March meeting. He noted that, after the March meeting, AO staff discovered several minor errors that were changed before the recommended rules and forms changes were presented to the Standing Committee as follows: (i) the introductory sentence in Form 22A was revised to conform to a change in Rule 1007 to read: "In addition to Schedules I and J, this statement must be completed by every individual chapter 7 debtor, whether or not filing jointly. Joint debtors may complete one statement only"; (ii) line 29 on Form 22A was changed to read "total average monthly amount" to be consistent with same statement on line 34 of Form 22C; (iii) the title of new Rule 7058 was changed to "Entering Judgment in an Adversary Proceeding" to distinguish it from Rule 9021; and (iv) on recommendation of the Chief of the Rules Committee Support Office at the AO, the recommended changes to Exhibit D (which are tied to new proposed Rule 1017.1) were deferred until next fall, so that the rule and form could be considered by the Standing Committee at the same time. The Chair said that he approved the above changes as technical amendments after consulting with the Chief of the Rules Committee Support office at the AO.

(B) April 2007 meeting of the Advisory Committee on Appellate Rules.

The Chair said that the Appellate Rules Committee was recommending a new Appellate Rule 12.1 (Indicative Rulings) for publication that might have bankruptcy implications. He explained that the proposed rule would formalize a procedure currently in place in some courts to deal with motions filed in the originating court while an appeal is pending. After an appeal has been docketed and while it remains pending, the originating court cannot grant relief under a motion such as Civil Rule 60(b) without a remand. The court can, however, 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 substantive issue. The new rule provides a procedure for notifying the appellate court of the originating court's action, and for remanding in appropriate circumstances.

(C) June 2007 meeting of the Committee on the Administration of the Bankruptcy System.

Judge Cox said that the Bankruptcy Administration Committee was continuing its review of the EOUST's request for mandatory use of smart forms. She said the Committee was concerned about the level of detail involved in the EOUST request, and explained that it encompassed over 400 discrete data elements from each filing. She further reported that B.A. Committee members would soon attend an EOUST demonstration of how smart forms would work.

(D) April 2007 meeting of the Advisory Committee on Civil Rules.

Judge Wedoff said that the Civil Rules Committee thoroughly discussed rewriting Rule 56 at its last meeting. The purpose of the proposed changes would be to establish a deadline for filing a motion for summary judgment, and to require the movant to identify all material uncontested facts. He said that there was also an extensive discussion regarding sanctions under the proposed rule. Judge Wedoff said he was concerned that the proposed changes would not work well in bankruptcy, and that this Committee might have to consider an approach other than simply adopting the rule by reference, as is done now. Judge Rosenthal, however, said that since the meeting, the Civil Rules Committee had decided to defer consideration of the proposal for a year, and that there would be a mini-conference on the changes before the next civil rules meeting. She anticipated that further changes would be made to the rule prior to proposing it for publication.

(E) April 2007 meeting of the Advisory Committee on Evidence.

Judge Klein reported on the April 2007 meeting of the Advisory Committee on Evidence and referred the Committee to proposed Rule 502 (published in the fall of 2006). He said the rule is designed to provide a uniform set of standards under which parties can determine the consequences of disclosing information covered by attorney-client privilege or work product protection. And he noted that the rule would have to be enacted legislatively.

(F) Bankruptcy CM/ECF Working Group.

Judge McFeeley said that the CM/ECF Working Group met several times since the Committee's last meeting and reported their request that the Committee give them a "heads up" of upcoming changes to forms because the changes affect CM/ECF workflow considerably. He also reminded the Committee that he was ending his term at this meeting, and recommended that his successor liaison also be a member of the Forms Subcommittee.

(G) New items.

The Chair said there would be three oral reports that were not on the agenda: (1), a proposal to honor Judge Duplantier; (2), an announcement about the new reporter; and (3), a report concerning changes to the IRS Internal Revenue Manual and Forms 22A-C.

(1). The Chair asked the Committee to review the proposed memorial resolution honoring Judge Duplantier. He said that the AO would mount the resolution on a plaque and would give it to Judge Duplantier's wife, Sally. A number of members reflected on the many contributions made by Judge Duplantier over the years. A motion was made and passed unanimously to approve the resolution.

(2). The Chair said that Jeff Morris will have served nearly 10 years as Reporter by October 2008 and that he would like to step down soon. The Chair expressed optimism that the Chief Justice would soon select Professor Elizabeth Gibson of the University of North Carolina as the Reporter's eventual replacement. He anticipated that Professor Gibson will act as assistant reporter for the next year and will then replace Professor Morris as Reporter.

Members of the Committee thanked the Reporter for the great job he has done over his tenure, especially in light of the many changes to the Bankruptcy Code due to BAPCPA. And the Reporter said that the job has been great, and he thanked the members for how much time that they had committed over the years.

(3). The Chair announced that within the past few days he had learned that the IRS intended to make changes to the Financial Analysis Handbook (7 5.15.1) portion of the Internal Revenue Manual, (the IRS Manual) that would greatly affect the means test forms. He asked Judge Wedoff to expound.

Judge Wedoff said that one aspect of the IRS proposal would be to create a new category of expenses called "health care," and remove such expenses from the National Standards category. He explained that this could be a problem in bankruptcy because § 707(b) refers only to National and Local standards and does not recognize a "health care" standard in any calculations. (At present, the debtor's actual "health care" costs are included as "other necessary expenses.") In addition, the IRS proposal would end the current practice of correlating national expense standards to both income and family size, and would instead correlate such standard expenses to family size only.

Judge Wedoff said that although he was concerned that the IRS did not consider the bankruptcy implications of its proposal, the real problem was that the proposed changes were scheduled to go into effect in just a few weeks, on October 1, 2007. He said that it would not be possible to make changes to the means-test forms in such a short time frame, and that the forms would be inconsistent with the changes unless the effective date was delayed.

Judge Wedoff said that he had not seen specific changes to the IRS Manual yet, but only an outline of the proposals. But he thought that one possible solution would be if the IRS issued different standards for use in bankruptcy cases.

Christopher Kohn said that he had participated in a conference call with the IRS that morning in which he and Mark Redmiles tried to explain the bankruptcy implications of the proposed changes. He said that the call participants were not initially aware of the impact of the changes on bankruptcy law, but that they now appreciated the problem and were looking for solutions that would lessen the impact. He said one proposal discussed was to delay the effective date of the changes for bankruptcy purposes. And he anticipated being asked in a follow-up call tomorrow morning, how much of a delay would be needed to implement any changes for bankruptcy.

Don Walton said that he had listened in on the telephone conference with Christopher Kohn. He thought the tenor of the conversation was a good and he thought that the IRS seems to recognize the problem of breaking "health care" expenses out of the National Standards.

After the telephone conference the following morning, Christopher Kohn reported that the IRS had agreed to defer making the changes effective for bankruptcy purposes for three months, until January 1, 2008. He added that the new "health care" standard would be modified to be incorporated as a National

Standard. Judge Wedoff said that the solution would enable the Committee to come up with revised versions of Form 22 by the end of the year.

The Committee discussed possible procedural mechanisms for approving the IRS-related forms changes. **After discussing several alternatives, the Committee approved a motion recommending withdrawal from the Judicial Conference consent calendar the changes to Forms 22A-C scheduled to go into effect December 1, 2007. It also approved a motion to give the Chair and the Chair's successor the authority to work with the Judicial Conference to develop a mechanism to approve IRS-related changes to Forms 22A-C with a tentative effective date of January 1, 2008.**

Finally, the Chair asked that the minutes reflect the Committees' appreciation of the work done by Judge Wedoff, Don Walton, Mark Redmiles, and Chris Kohn in negotiating with the IRS in this matter.

Action Items

3. Report by the Subcommittee on Attorney Conduct and Health Care.

Judge Schell said the Subcommittee met by teleconference to discuss Comment 06-BK-011 submitted by Bankruptcy Judge Marvin Isgur. In his comment, Judge Isgur suggested amending Rule 2007.2 to require a health care business debtor in a voluntary case to file a motion at the start of the case to seek a determination of whether a patient care ombudsman needs to be appointed.

Judge Schell said that the Subcommittee discussed the proposal and recommends that no action be taken. He noted that the petition already contains a checkbox that the debtor uses to describe itself as a healthcare business. He said that before making its decision, the subcommittee's members had canvassed bankruptcy judges they knew and asked those judges whether they thought a change is needed. Most of the bankruptcy judges did not think it was a problem. In addition, Don Walton told the subcommittee members that the United States trustee was already making motions in appropriate cases. **A motion was made and carried to approve the Subcommittee's recommendation that no action be taken.**

4. Report by the Subcommittee on Consumer Issues.

(A) Proposed amendments to Rules 4004(a) and 7001 with respect to objections to discharge under §§ 727(a)(8) and (9) and 1328(f) based on insufficient lapse of time between a debtor's bankruptcy cases.

The Reporter said the proposed amendments, described at pages 1-3 of the July 25, 2007, memo at Agenda Item 4, are in response to an informal comment from Bankruptcy Judge Neil Olack. He said that the premise behind the proposed changes was the thought that an objection to the debtor's discharge based on information supplied by

the debtor in the bankruptcy petition (i.e. the date of a prior bankruptcy case) did not require all the procedural protections of a full-blown adversary proceeding.

Judge Wedoff said that some change to the rules, such as that proposed by the Subcommittee, would be necessary to create uniformity of practice around the country. In some courts, he said, the clerk's office will withhold the discharge based on the dates of previous cases reported by the debtor in the petition even if no motion or adversary proceeding is filed at all. Other courts require that a motion be filed, and still others require a full-blown adversary proceeding.

The Reporter reviewed the proposed changes as set out at pages 3-5 of the memo. Members made a number of suggestions. One member suggested that there should be no deadline for filing a motion objecting to discharge, as opposed to the 60-day deadline proposed in the amendment to Rule 4004. Another member suggested that a deadline might not be appropriate in chapter 13 cases because § 1328(f) provides that "the court *shall not* grant a discharge ... if the debtor has received a discharge [in a specified time preceding the current case]." Thus, the Court should not grant a discharge, no matter when it learns of a discharge in a prior case. However, other members pointed out that the rules already set deadlines notwithstanding similar language in § 727. After additional discussion, **the Committee approved Rule 7001 and Rule 4004(a) and (c)(1), as set out in the materials at pages 3-5, with the following changes:**

In the committee note to Rule 7001, delete "as is the case for other objections to discharge" at the end of the second sentence, and change "904(c)" at the end of the note to "9014(c);" and in

Rule 4004(a), line 3, add a comma after "complaint" and add ", under Rule 7001(b)" after "or motion;" and in

Rule 4004(c)(1), line 17, add ", or motion under Rule 7001(b)" after "complaint" and at line 21 add a comma after "complaint" and "under Rule 7001(b)" after "or motion."

(B) Proposed amendments to Rules 1007, 4004 and 5009 to provide additional notice to the debtor that the case may be closed without the entry of a discharge if the debtor fails to file the statement of completion of a personal financial management course. The proposal is in response to comments submitted by the National Bankruptcy Conference (Comment 06-BK-018) and the National Association of Consumer Bankruptcy Attorneys (Comment 06-BK-020).

The Reporter said that the Subcommittee recommended changes to Rules 1007, 4004 and 5009 designed to give the debtor additional notice that failing to complete a post-petition educational course and file the required form would result in the case being closed without entry of the discharge. **The Committee approved the proposed changes to the three rules as set forth in the July 25 memo at Agenda Item 4, pages 7 - 11, with the following edits:**

Rule 4004(c)(4), line 51 (page 7), delete the rest of the sentence after "Rule 1007(b)(7)" through line 52;

Rule 5009(b), line 11 (page 10), delete "the" and "a" and add the following after "discharge": "unless the statement is filed within the applicable time limit under Rule 1007(c)."

(C) Proposed amendment to Rule 1019 to allow objections to exemptions for a short time period after conversion of a case to chapter 7. The proposal is in response to comments filed by Bankruptcy Judges Dennis Montali (Comment 06-BK-054) and Paul Mannes to resolve a split in the case law.

The Reporter said that Judges Montali and Mannes suggested rules amendments to address what they see as an unfair opportunity for debtors to obtain the benefit of excessive exemptions. They believe that some debtors played game of "gotcha" by claiming a large exemption while also proposing a substantial repayment to creditors in a Chapter 11, 12, or 13 case. After the time to object to exemptions has passed, the debtor will convert to chapter 7. The judges believe this opportunity for abuse can be foreclosed by creating a new exemptions-objection deadline when a case is converted to another chapter.

The Subcommittee discussed four alternative fixes: alternative 1 -- a new time to object to exemptions is established if the debtor converts a case to chapter 7 within one year of the confirmation of an initial plan; alternative 2 -- a new time period is established to object to exemptions when the debtor converts a case to chapter 7; alternative 3 -- no new time period; and alternative 4 -- parties in interest can object to exemptions in the converted case only upon a showing of cause to allow the objection. Although there were advocates for each approach, the Subcommittee recommended the first alternative as the best balance between preventing possible abuse on the one hand, and providing finality of the objection period on the other hand. The Reporter distributed a handout showing revisions to Rule 1019, which included a new subpart "b" that he said was meant to accomplish alternative 1.

One committee member agreed that there should be a new exemption objection period if a case is converted shortly after filing, but argued that a new period should arise only if conversion occurred within six months of the initial filing, rather than one year. Another member thought there should always be a new time objection period after a conversion, regardless of how long it had been since the initial filing. And a third member argued that no new time period was necessary because creditors already have an opportunity to object when the case is initially filed. Finally, Judge Perris suggested if the change to Rule 1019 is adopted, that the proposed language at lines19 in 20 of the handout could be improved to more clearly indicate when the time period would start.

After further discussion, **the Committee recommended (with one vote against) the changes to Rule 1019 in the handout distributed at the meeting with the following change: delete "confirmation of" at line 20, and replace with "entry of an initial order."**

(D) Possible amendment of the rules to establish a procedure to govern "automatic dismissals" under § 521(i) of the Code. This suggestion was prompted by Comment 06-BK-011, submitted by Bankruptcy Judge Marvin Isgur, and Comment 06-BK-020, submitted by the National Association of Consumer Bankruptcy Attorneys.

The Reporter recapped the issue. Section 521(i) of the Bankruptcy Code requires "automatic dismissal" of the case the 46th day after the petition date if an individual debtor fails to file certain information. Among other things, the debtor must file "copies of all payment advices or other evidence of payment received within 60 days before the date of filing of the petition, by the debtor from any employer." 11 U.S.C. §521(a)(1). The Reporter said that the courts have issued a number of decisions addressing the automatic dismissal cases in which the debtor either did not file any payment advices or filed fewer than all of the payment advices for the 60-day period prior to the filing of the petition. The cases are not uniform.

One group of opinions holds that the language of the statute is unambiguous and must be strictly applied. Under this line of decisions, if the debtor fails to file any of the required materials within the 45-day period, the case is automatically dismissed. Some courts have observed, however, that overly strict interpretation could frustrate the intent of Congress. For example, a debtor could use the 45-day automatic dismissal period offensively in order to get a case dismissed to prevent the case trustee from selling some of the estate's assets. In re Parker, 351 B.R. 790 (Bankr. N.D. Ga. 2006). Other courts have concluded that, if the debtor files the most recent payment advice, and that payment advice sets out the year-to-date figures for the debtor's income, dismissal is not appropriate, even if the debtor has not "technically" complied with the statute.

Because the case law appears to be in flux regarding interpretation of 11 U.S.C. §521(i), the Subcommittee recommends no change to the rules at this time. **After discussion, the Committee approved the Subcommittee's recommendation that no change the rules be made at this time with respect to automatic dismissals under 11 U.S.C. §521(i). The Subcommittee and the Reporter will continue to monitor case law developments in this area.**

5. *Report by the Subcommittee on Business Issues.*

(A) Proposed amendment to Rule 1007(a)(2) to set an earlier deadline for filing the list of creditors in involuntary cases to facilitate timely noticing of the § 341 meeting of creditors in such cases. The proposal is in response to Comment 06-BK-057 submitted by Chief Deputy Clerk Margaret Grammar Gay of the Bankruptcy Court for the District of New Mexico.

The Reporter said that Ms. Gay suggested amending Rule 2003 to set a different deadline for holding the §341 meetings in an involuntary case. As currently written, Rule 2003(a) requires that the §341 meeting be held no fewer than 20 and no more than 40 days after the order for relief. Rule 2002 requires the clerk give at least 20 days notice of

the §341 meeting. Ms. Gay asserts that the delay in receiving the list of creditors in involuntary case makes it difficult to provide timely notice the §341 meeting.

The Reporter said that the Subcommittee considered the suggestion and decided that a better solution would be to amend Rule 1007(a)(2) to shorten from 15 to seven days the time that the involuntary debtor has to file the required list of creditors.

One member thought that the suggested time period was too short because an involuntary debtor's books and records are usually in severe disarray. Other members, however, commented that the same problem exists under the current time period. **After additional discussion, the Committee approved the Subcommittee's recommendation to amend Rule 1007(a)(2) as set forth at Agenda Item 5 with the following change: insert a comma after "final" in line 6 and change "7" to "seven."**

(B) Report on further consideration of possible amendment to Rule 3015(f) to permit post-confirmation objections by taxing authorities to chapter 13 plans. The report reflects consideration of Comment 06-BK-015 submitted by the IRS and the Sense of Congress provision set out in § 716(e)(1) of BAPCPA.

The Reporter explained that, at the Marco Island meeting, the Committee tasked the Subcommittee with determining whether there is a way in which the rules could be amended to further protect the interests of governmental units with respect to post-confirmation tax return issues. He said the Subcommittee discussed the issue extensively, but recommends no change to Rule 3015 because current law and administrative practice provide sufficient protection for governmental units before and after plan confirmation, and because allowing objections to confirmation of a plan that was previously confirmed would introduce substantial uncertainty into the process. **A motion to approve the Subcommittee's recommendation to make no change to Rule 3015 carried without opposition.**

6. *Report by the Subcommittee on Technology and Cross Border Insolvency.*

(A) Proposed amendments to Rules 5009 and 9001 and new Rules 1004.2 and 5012, which were approved at the Seattle meeting and then were withdrawn with a direction to the Subcommittee to consider whether a more extensive set of rules should be adopted for chapter 15 cases.

The Reporter said that the Subcommittee met by teleconference on June 13, 2007. He said it continued its recommendation that there be no comprehensive set of chapter 15 rules at this time. Instead, the Subcommittee was resubmitting the above rules with a few minor changes. He said that Rule 9001 had not been changed since approved in Seattle. With respect to Rules 5009 and 5012, he said that the Subcommittee recommended deleting the "special notice" reference. Finally, he said the Subcommittee recommended a slight change to the version of Rule 1004.2 that was approved in Seattle, and directed the Committee's attention to the version described as "Option one" at the bottom of page

3 of the memo at Agenda Item 6. Instead of asking the filer whether the pending foreign preceding is a "foreign main preceding" or a "foreign non-main preceding" the rule would instead require the filer to simply name the country in which the debtor has the center of its main interests and to list each country in which a foreign proceeding is pending.

After discussion, the Committee voted to approve Rules 5009 and 9001 and new Rules 1004.2 and 5012 as recommended by the Subcommittee with the following changes: in the committee note to Rule 5009 on page 8 of the memo, substitute "court" for "case" in the 6th line. However, the Committee voted to hold the changes in the "bullpen" until the Subcommittee reconsidered proposed changes, described below, to Rule 1018.

(B) Possible amendments to Rule 1018 or Rule 7001(7) regarding whether any action brought seeking injunctive relief under §§ 1519(e) and 1521(e) is governed by Rule 7065. The proposal is in response to Comment 05-BR-037 submitted by the Insolvency Law Committee of the Business Law Section of the State Bar of California.

The Reporter said that the Subcommittee recommended revising Rule 1018 as set forth on pages 13 and 14 of the memo at Agenda Item 6. The purpose of the proposed changes was to make Rule 7065 applicable to actions for injunctive relief brought under §§1519 (e) and 1521 (e). **After discussing the matter, the Committee sent the proposed Rule 1018 revisions back to the Subcommittee to revise the committee note, and to clarify terminology problems outside the Chapter 15 context.**

7. *Report of Subcommittee on Privacy, Public Access, and Appeals.*

(A) Possible amendment to either Rule 8003 or Rule 8005 to better coordinate the process governing appeals of interlocutory orders when the appellant also wishes to obtain a stay of the order pending resolution of the appeal. The proposal was submitted by Bankruptcy Judge Colleen Brown as Comment 06-BK-016.

Judge Pauley described Judge Brown's comment. He said that, when a party seeks leave to appeal an interlocutory order and also seeks a stay of the order pending the resolution of the appeal, the motions are presented to different courts. The bankruptcy court will address the stay issue, and the district court or the BAP will consider the motion for leave to appeal. Judge Brown suggested that amending the rules to consolidate such motions would facilitate the process. If consolidated, both motions could be considered in the first instance by the bankruptcy court, which is more familiar with the case. Judge Brown did not think this change in procedure would diminish the BAP or district court's authority because, even if the bankruptcy court denied the consolidated motion, an appeal of that decision would be available. The Subcommittee recommended against such consolidation because, under 28 U.S.C. §158(a), the motion for leave to appeal an interlocutory order can only granted by the appellate court. **After**

discussion, the Committee agreed with the Subcommittee and recommended no change to the rules.

(B) Proposed amendment to either Rule 9023 or Rule 8002 to respond to a pending amendment to Civil Rule 59 that would extend the time to file motions to amend judgment beyond the appeal deadline in bankruptcy cases.

Judge Pauley explained that in light of a proposed change to Civil Rule 59 that would extend the deadline to file a motion to amend judgment to 30 days, there would be a need to amend either Bankruptcy Rule 9023 (which incorporates Civil Rule 59), or Bankruptcy Rule 8002 (the appeal deadline), so the deadline in the two bankruptcy rules would work together. Currently, both rules have 10-day deadlines (scheduled to go to 14 days as a result of the time amendments). Judge Pauley said that in light of the Committee's decision last meeting in considering the time amendments to keep the appeal deadline in bankruptcy cases short (14 days), that the Subcommittee recommended applying the same 14-day deadline to motions to alter or amend. He said that Subcommittee's recommendation for amending Rule 9023 was set forth as Option 1 on pages 4 and 5 of the memo at Agenda Item 7.

Some committee members argued in favor of the alternative option of expanding the deadlines for both types of motions to 30 days so that they would be consistent with the Civil Rules, and would thereby remove a trap for attorneys that practice in both courts. These members also argued that a short deadline for appeals in bankruptcy cases doesn't really move the appeal along faster, but just gets the appeal *filed* more quickly. And Judge Rosenthal explained that part of the Civil Rules Committee's reasoning in changing Rule 59 to 30 days was that the current 10-day deadline cannot be expanded under the civil rules.

Other committee members said that the shorter period for appeals in bankruptcy cases was appropriate because it moves discrete issues along in the process and, at least with respect to issues that are not appealed, promotes finality.

The Reporter reminded members that the Committee's decision at the last meeting in favor of keeping the shorter appeal period in bankruptcy cases was due in part to historical reasons. Like criminal cases, the appeal period in bankruptcy has always been short, and he thought that there would be considerable resistance from the bar to an expansion of the appeal period to 30 days. And he suggested that, at a minimum, the issue should wait until the Committee had the benefit of comments to the time amendments, currently out for comment, which changed both periods from 10 to 14 days.

Several members agreed that waiting until the time amendment comments came in made sense, but suggested that because the changes to Rules 9023 and 8002 in those amendments were buried among changes to all the rules with time periods, that they might not be noticed. Judge Swain suggested that comments would be more likely if the Committee flagged the issue in a letter sent to major bankruptcy groups, and said that she

would undertake such an effort as incoming Chair. **After further discussion, a motion to table the matter until the next meeting carried 12-1, so that any comments to the time amendments or a special solicitation could be considered.**

(C) Possible amendment to Official Form 10 or Rule 3001 to restrict disclosure of highly personal information contained in the debtor's medical records by advising creditors holding health care claims to submit only the minimally necessary information. The proposal was in response to part of Comment 06-BK-016 submitted by Judge Colleen Brown.

Judge Pauley said that the Subcommittee also considered Judge Brown's suggestion to amend the rules to admonish creditors not to include information of a "highly personal nature" in the attachments submitted in support their claims. He said that the Subcommittee ultimately rejected Judge Brown's suggestion because it was unable to craft language in a rule with enough specificity that the creditor would know what not to do. Also, the Subcommittee thought that at least with respect to medical records, HIPAA regulations might sufficiently cover the matter. The Subcommittee did recommend, however, that the matter be referred to the Forms Subcommittee to consider the possibility of amending either Form 10, or the instructions to that form, to remind creditors of the existence of HIPAA regulations. **After discussion, the Committee referred the matter to the Forms Subcommittee.**

8. *Report of Subcommittee on Forms.*

(A) Revision of proposed Form 27 prior to publication.

The Chair reported that after the Marco Island meeting, the Forms Subcommittee met by teleconference to discuss whether newly proposed Form 27, which was scheduled to be published for comment in August 2007, could be modified before publication to accommodate the requirement of Rule 4008 that the *debtor* explain the difference between total income and expenses on schedules I and J, and the income and expenses reported at the time of reaffirmation. He said that the Subcommittee concluded that by adding a signature line for the debtor on the proposed form, the debtor could comply with the rule without filing an additional, and duplicative, statement. After discussing the matter with the head of the Rules Committee Support Office, the Chair said he had approved publishing Form 27 for comment with the amendments shown at Agenda Item 8 so that the bench, bar, and public would have the benefit of all contemplated changes during the comment period.

(B) Possible refinement of the definition of "creditor" on the back of Official Form 10, the Proof of Claim.

The Chair said that the Subcommittee recommended revising the definition of "creditor" on the back of Form 10 to more closely match the statutory definition found at 11 USC § 506(a). He said that the proposed revision was shown at in the agenda materials. **The Committee approved revision of the definition of "creditor" as**

follows: "The creditor is a person, corporation, or other entity owed a debt by the debtor that arose on or before the date of the bankruptcy filing. See 11 USC §101 (10)." **Upon the recommendation of a member, the Chair referred the proposal back to the Subcommittee and asked the Subcommittee to suggest a similar revision to the definition of "claim" on the same form.**

(C) Proposed revision of Form 16A (Caption Full) to require the filer to provide the debtor's "Employer Identification Number" (if one exists) rather than the "Employer's Identification Number."

The Chair reported that the Subcommittee also recommended correcting a typographical error on Form 16A so that rather than requiring the debtor to report its "Employer's Identification Number," that it instead report its own "Employer Identification Number" (if one exists). The Chair said that after discussing the matter with the head of the Rules Committee Support Office and determining that the change was merely technical and did not require publication, he had approved transmitting the revised form to the Judicial Conference with a recommended effective date of December 1, 2007.

(D) Oral report on the status of the long-range review of the Bankruptcy Forms, including Judge Isgur's proposal (Comment 06-BK-011) to renumber the forms filed at the beginning of consumer cases.

The Chair referred the Committee to the "Forms Modernization Report" in the materials and explained that the Forms Subcommittee met by teleconference on June 18, 2007, and endorsed the idea first presented by Judge Walker that there should be a formal undertaking to review and modernize the bankruptcy forms. During the teleconference, the Subcommittee determined that the project would be long-term, and, because the policy considerations, would likely require input from the AO and other Judicial Conference committees. Accordingly, the Subcommittee recommended that the Committee explore the possibility of setting up a working group that would report back to the Committee.

Peter McCabe endorsed the working group concept because of the policy implications inherent in the project. He said that on one level, the project simply required a review of existing forms with an eye toward simplification, improving clarity, and removing redundant information. And that part of the project clearly came within the purview of this Committee.

Mr. McCabe anticipated, however, that no matter how the forms are reorganized, that much of the information filled in by debtors could, and in the future likely would, be submitted electronically. As a result, he envisioned that the courts would soon become the repository of vast amounts of personal, highly-searchable, detailed information about bankruptcy filers. He said that a policy addressing what the AO and the courts would do with such information, and for distributing such information outside the court family, was currently under consideration by other Judicial Conference committees in connection

with the EOUST's request that Judicial Conference require the mandatory use of so-called "smart" or "data-enabled" forms (i.e., PDF forms with tagged field data). **After additional discussion, the Committee voted to authorize the Chair to take the necessary steps to form the working group with this Committee acting as the lead committee in the project.**

9. *Possible technical amendment to Rule 2016(c) to conform the rule to the amendments to section 110(h) of the Code by BAPCPA.*

The Reporter explained that there was a need for a technical amendment to Bankruptcy Rule 2016(c). He said that as a result of the 2005 amendments to §110 of the Bankruptcy Code, a bankruptcy petition preparer must now file a declaration of compensation together with the petition, rather than within 10 days after filing the petition. He said that the changes made the 10-day filing deadline for the declaration in Rule 2016, and the rule's cross-referenced to §110(h)(1), incorrect. And he moved that the Committee approve the changes proposed at Agenda item 9 to be forwarded without publication at the appropriate time to the Standing Committee for approval and submission to the Judicial Conference and the Supreme Court. **The Committee approved the recommendation.**

(After the meeting, the Style Subcommittee expressed concern Rule 2016 may require an additional amendment. As a result, the Chair deferred the transmission of the proposed amendment and referred it to the Consumer Subcommittee for further consideration.)

Discussion Items

10. *Possible amendment to Rule 1017(e) to address issues identified in Bankruptcy Judge Wesley Steen's opinion in In re Cadwallder, 2007 WL 1864154 (Bankr. S.D. Tex. 2007).*

The Reporter said the Cadwallder case pointed out a statutory ambiguity with §704(b), which gives the United States Trustee "not later than10 days after the date of the first meeting of creditors" to file the presumption of abuse statement, and 30 more days to file a motion to dismiss in the case. The Report said that the statute was ambiguous because it does not provide any guidance as to whether the initial 10 days begins to run on the first day the §314 meeting is held, or when the meeting is concluded.

In Cadwallder, Judge Steen ultimately concluded that § 704(b) does not set a deadline for the U.S. Trustee at all, but merely sets forth a duty. He suggested to the Committee, however, that as currently drafted, Rule 1017(e) could be read to assume that there is a § 704(b) deadline and that such deadline is always earlier than the 60-day deadline established by Rule 1017(e). He thought that clarity could better be achieved by removing any reference to § 704(b) from the rule.

The Reporter said that he did not think a change to the rule was appropriate at this time. He said that the reason Rule 1017(e) explicitly sets deadlines "except as otherwise provided in § 704(b)(2)," is to avoid the appearance of a conflict between the rule and the

statute. And that although the Cadwallder court concluded § 704(b) did not establish a deadline for the U.S. Trustee, that other courts have found the opposite. Accordingly, the Reporter recommended that the rule remain unchanged unless a consensus develops in the case law in support of the Cadwallder holding. **After discussion, the Committee approved the Reporter's recommendation to make no change to Rule 1017(e) at this time.**

Information Items

The Committee was reminded that the next meeting was scheduled for March 27-28, 2008, at The Inn at Perry Cabin in St. Michaels, MD.

Before closing the meeting, the Chair made several comments. He thanked the Committee on behalf of himself and Judges Klein and McFeeley, all who were rotating off. He said it has been a fascinating and rewarding eight years. He asked that the minutes reflect his gratitude to the Administrative Office staff, including, among others, Jim Wannamaker, Scott Myers, James Ishida, and John Rabiej.

The Chair also reminded the members that, in spite of the rash of rules and forms changes in response to BAPCPA, the rules-making process is normally a deliberative process and that the Committee should take its time to consider changes. He added that rules and forms should be changed only infrequently and that, even when improvements might seem warranted, there should be a bias toward giving existing formulations precedential value.

Finally, Judge Rosenthal, as Chair of the Standing Committee, asked that the minutes reflect the appreciation of the Standing Committee for all of the work performed by this Committee in response to the enactment of BAPCPA, and of Judge Zilly leadership in particular.

Respectfully submitted,

Stephen cott Myers

10.

JAMES C. DUFF
Director

JILL C. SAYENGA
Deputy Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

CATHY A. McCARTHY
Deputy Associate Director

Office of Management,
Planning and Assessment

November 7, 2007

MEMORANDUM

To: Judicial Conference Rules Advisory Committees
Committee on Codes of Conduct
Committee on Financial Disclosure
Committee on International Judicial Relations

From: Cathy A. McCarthy

RE: REPORT OF THE LONG-RANGE PLANNING MEETING **(INFORMATION)**

Please find attached a report of the long-range planning meeting of Judicial Conference committee chairs on September 17, 2007.

At its August 14-15, 2007 meeting, the Judicial Conference's Executive Committee agreed to begin a discussion with the committee chairs about the possibility of considering improvements to the long-range planning process. At the September long-range planning meeting, participants discussed challenges facing the judiciary over the next ten years and how the planning process might be improved.

As a first step in considering changes and improvements, the Executive Committee asked for an assessment of the 1995 *Long Range Plan for the Federal Courts*—what has been achieved by the judiciary in following its recommendations, which recommendations remain unfulfilled, and what trends or developments have not occurred as forecast in the *Plan*.

When the plan was approved, many Judicial Conference committees were assigned the responsibility for implementing the *Long Range Plan's* recommendations and implementation strategies. These committees have been asked to review the plan's

recommendations and implementation strategies relating to their areas of jurisdiction, and provide input on the status of implementation.

Your committee was not assigned responsibility in 1995 for implementing specific *Long Range Plan* recommendations. Your committee is, however, welcome to comment on any of its recommendations and implementation strategies. A complete list is included as Attachment 2. In particular, you may want to review recommendations 49, 51, 69, 70, and 76, which concern broad policy issues that may affect every committee. Please provide any input on the implementation of *Long Range Plan* recommendations and strategies to the Office of Management, Planning and Assessment by January 23, 2008. That office will produce a comprehensive report fro the Executive Committee. Also, any ideas for improving the judiciary's long-range planning process may be provided to the Office of Management, Planning and Assessment.

Attachment 1. Report of the Judicial Conference Committee Chairs' Long-Range Planning Meeting, September 17, 2007.

Attachment 2. Recommendations and Implementation Strategies from the *Long Range Plan for the Federal Courts*.

Judicial Conference Committee Chairs Long-Range Planning Meeting

September 17, 2007

Report

Administrative Office of the United States Courts
Office of Management, Planning and Assessment

SUMMARY REPORT
SEPTEMBER 2007 LONG-RANGE PLANNING MEETING

The September 17, 2007 long-range planning meeting was held in Washington, D.C. It was facilitated by Judge Charles R. Breyer, long-range planning coordinator for the Judicial Conference's Executive Committee.

As proposed by the Executive Committee, Chief Justice John G. Roberts invited all committee chairs to the Judicial Conference session on September 18, 2007, as well as future sessions. The Executive Committee also invited all committee chairs to the long-range planning meeting and other meetings associated with the Judicial Conference session. 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.

Long-Range Planning Process

The focus of the meeting was to assess the Judicial Conference committees' long-range planning process. The Executive Committee is considering whether there should be changes to the planning process, and whether a renewed strategic planning effort is needed. The current planning process has been in place since 1999, when committee chairs assumed a leadership role in planning. To prepare for the discussion, committee chairs were sent a brief description of planning in the federal judiciary, which is included as Appendix B. Appendix B also includes an updated list of cross-cutting and committee strategic goals and issues.

Meeting participants were also provided with the National Academy of Public Administration (NAPA) study, *Budgeting for the U.S. Judiciary: Preparing for the Future*, released in June 2007. Chapter three of the report, "Developing a Planning Process That Will Support the Federal Judiciary's Programs and Budget," recommended that the judiciary:

- Reexamine the expression of the judiciary's mission, vision, and core values set forth in the *Long Range Plan for the Federal Courts*[1] in order to revise or reaffirm them.

[1]The Judicial Conference approved the *Long Range Plan for the Federal Courts* in December 1995.

- Establish an enterprise-wide priority-setting process that supports the judiciary's mission, vision, and core values. NAPA recommended that the process should help shape budget development, but should encompass more than budget issues.

- Ensure that adequate organizational capacity exists to establish the judiciary's planning needs and design and facilitate the planning process.

Judges Provide Views on Planning Process

Chief Judge Thomas F. Hogan, chair of the Executive Committee, could not attend the long-range planning meeting, and asked Judge Lawrence L. Piersol to speak about planning on his behalf.[2] Judge Piersol said that, given new leadership in the judicial branch, now might be a particularly good time to revisit the long-range planning process. He noted that the *Long Range Plan for the Federal Courts* was developed during a time of great growth and change for the judiciary. The *Plan* cites anticipated large increases in the judiciary's workload and sharp increases in the amount of work per judge as threats to the "perception or reality of the federal courts as uniquely competent national courts of limited jurisdiction."[3] Since the adoption of the plan in 1995, there have been changes to jurisdiction, and there has been workload growth in many areas. At the same time, the rate of growth in court workload is slower today than in the past for some types of cases, and the number of judges has not increased as projected.

Judge Piersol referred meeting participants to the section of the *Long Range Plan* that discusses its implementation, and pointed out that an ongoing planning effort was envisioned, as follows:

> [T]he judiciary must not only consider the impact of subsequent events on the specific contents of the plan, but must also revisit the plan's basic premises in view of evolving conditions. In short, there is a continuing need for planning at the national, as well as other, levels in the judicial branch.[4]

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[2]Judge Piersol has participated in the long-range planning process in his current capacity as a member of the Executive Committee, and as a past chair of the Budget Committee's Economy Subcommittee.

[3]*Long Range Plan for the Federal Courts*, p. 13.

[4]*Long Range Plan for the Federal Courts*, p. 142.

Judge Piersol said that long-range planning requires a substantial commitment of time and resources, and noted that the *Long Range Plan* took five years to develop and a committee and staff were dedicated full time to its completion.

Chief Judge Joseph F. Bataillon, chair of the Space and Facilities Committee, recalled that he had facilitated a long-range planning session for the Committee when his term began.[5] He quickly realized, however, that developing a complete planning process for the Committee would be difficult because there was no mechanism for coordinating matters fully that cross committee lines. More importantly, without a judiciary-wide long-range plan, it wasn't possible to align the committee's planning efforts with the judiciary's overall direction, and the benefits of planning at the committee level were limited.

Judge D. Brock Hornby, chair of the Committee on the Judicial Branch,[6] noted the importance of long-range planning to interbranch relations. The judiciary's legislative strategy needs to be linked to a long-range strategy so that judiciary positions on specific issues can be tied to broader principles and values. Because many planning issues affect the work of more than one committee, he advised that the judiciary's long-range planning process should integrate committee efforts to address important issues.

Judge Hornby acknowledged the complexity of planning across committees. He referred to NAPA's suggestion that "the Judicial Conference should lead and have the final say in any initiative to reexamine the concepts expressed in [the *Long Range Plan.*]"[7] Judge Hornby suggested that NAPA might not have fully appreciated that our environment encourages issues to be resolved at the committee level, and the importance of committees in the analysis of issues, the consideration of alternatives, and the development of a consensus on recommended policies. He remarked that it is not so easy for the Judicial Conference to "lead and have the final say."

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[5]At the time, Judge Bataillon was a member of the Committee on Security and Facilities, which was later divided into the Committee on Judicial Security and the Committee on Space and Facilities.

[6]In the past, Judge Hornby has been the chair of the Court Administration and Case Management Committee and a member of the Executive Committee. As an Executive Committee member, Judge Hornby served as the long-range planning coordinator.

[7]*Budgeting for the U.S. Judiciary: Preparing for the Future*, National Academy of Public Administration, June 2007, p. 81.

Small Group Discussions About Long-Range Planning

To provide all participants with an opportunity to discuss possible changes to the judiciary's long-range planning process, participants were divided into six groups. Each was guided by a judge facilitator through a series of discussion questions. Highlights of the small group discussions follow, with additional notes provided in Appendix C.

Discussion on Challenges. The first segment focused on identifying challenges facing the judiciary over the next ten years. A wide range of ideas was generated, and then each group selected one challenge to discuss in depth. Groups selected the following challenges:

- changes in the types of cases that judges handle
- attracting and maintaining diverse and effective judges and staff
- the impact of demographic and workload changes on the allocation of judicial resources
- protecting the independence of the federal judiciary in the constitutional structure
- budget issues involving criminal cases
- controlling costs and improving timeliness in civil and complex criminal cases

Each group then considered how a planning process could help address its selected challenge. The groups discussed these planning questions:

- What outcomes would we like to see?
- What could we do to plan for and achieve these outcomes?
- Who has an interest?

A member of each group reported on its discussions to all participants. Specific approaches to addressing challenges varied, but some common themes emerged. Several groups discussed the importance of studying planning issues before they reach the stage where Judicial Conference action is required. Groups also emphasized the need for coordination, both within the judicial branch and with external stakeholders.

Discussion on the Planning Process. In a second exercise, each group discussed the judiciary's planning process and considered how it might be improved to:

- identify big-picture goals and priorities;
- integrate planning across committees; and
- identify and involve stakeholders.

Most participants agreed that the long-range planning process should change but suggested approaches differed. The following ideas are among the many expressed.

Identifying Big-Picture Goals and Priorities. Participants discussed the advantages and disadvantages of different ways to address broad issues. Many recommended consideration of lessons learned from successful judicial branch processes, including local Civil Justice Reform Act committees and working groups, and the rule-making process. Some judges recommended that more time should be allocated to be spent on the planning process. Others expressed concern that committees are so busy addressing current issues that they do not have the time to devote to long-range planning. Some participants suggested the use of long-range planning experts and facilitators, and consultation with academics and attorneys. Others argued for keeping the effort "small and focused," and recommended against the use of consultants.

Integration of Planning Across Committees. There was general agreement that changes in the planning process should facilitate communication among committees on long-term, big-picture issues. The importance of Judicial Conference committees' involvement in the planning process was widely expressed. There were differing views about whether a separate long-range planning committee would be desirable. Alternatives to a separate committee included the creation of a subgroup of committee chairs or committee members on an "inter-committee" to do long-range planning, and holding periodic "retreat-like" meetings to discuss long-range planning issues.

Stakeholder Involvement. There were a number of suggestions about involving internal and external stakeholders to vet issues, including seeking ideas from individual judges and the public. Ideas included the use of surveys, focus groups, and advisory groups. Participants also suggested reaching out to bench-bar committees, associations, and executive branch agencies.

Consideration of Whether Changes to the Long-Range Planning Process Are Needed

Judge Breyer emphasized that further discussion of these ideas will unfold over time. The Executive Committee has requested an assessment of the 1995 *Long Range Plan for the Federal Courts*—what has been achieved by the judiciary in following its recommendations, which recommendations remain unfulfilled, and what trends or developments have not occurred as forecast in the plan. Committees will be asked to provide input about the status of recommendations within their areas of jurisdiction.

Judge Breyer noted plans to examine other organizations' planning approaches and he asked the group to identify effective strategic planning processes they are familiar with that might be suitable for adaptation. Ideas about the planning process should be sent to Cathy McCarthy at the Administrative Office.

Appendix A: Participants in the September 2007 Long-Range Planning Meeting

Executive Committee
- Hon. Charles R. Breyer, Long-Range Planning Coordinator
- 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. Barbara M. G. Lynn, Incoming Chair

Committee on the Budget
- Hon. Julia Smith Gibbons, Chair
- Hon. Robert C. Broomfield

Committee on Codes of Conduct
- Hon. Gordon J. Quist, Chair

Committee on Court Administration and Case Management
- Hon. John R. Tunheim, Chair

Committee on Criminal Law
- Hon. Paul G. Cassell, Chair

Committee on Defender Services
- Hon. John Gleeson, Chair

Committee on Federal-State Jurisdiction
- Hon. Howard D. McKibben, Chair

Committee on Financial Disclosure
- Hon. Ortrie D. Smith, Chair

Committee on Information Technology
- Hon. Thomas I. Vanaskie, Chair

Committee on International Judicial Relations
- Hon. Robert H. Henry, Chair

Committee on the Judicial Branch
- Hon. D. Brock Hornby, Chair

Committee on Judicial Resources
- Hon. W. Royal Furgeson, Jr., Chair
- Hon. George Z. Singal, Incoming Chair

Committee on Judicial Security
- Hon. David Bryan Sentelle, Chair

Committee on the Administration of the Magistrate Judges System
- Hon. Dennis M. Cavanaugh, Chair

Committee on Rules of Practice and Procedure
- Hon. Lee H. Rosenthal, Chair

Advisory Committee on Appellate Rules
- Hon. Carl E. Stewart, Chair

Advisory Committee on Bankruptcy Rules
- Hon. Thomas S. Zilly, Chair

Advisory Committee on Civil Rules
Hon. Mark R. Kravitz, Chair

Advisory Committee on Criminal Rules
Hon. Richard C. Tallman, Incoming Chair

Advisory Committee on Evidence Rules
Hon. Robert L. Hinkle, Incoming Chair

Committee on Space and Facilities
Hon. Joseph F. Bataillon, Chair

Hon. Barbara J. Rothstein
Director, Federal Judicial Center

Hon. A. Thomas Small
Bankruptcy Judge Observer, Judicial Conference of the United States

Hon. John M. Roper
Magistrate Judge Observer, Judicial Conference of the United States

Administrative Office Staff:

Cathy A. McCarthy
Brian Lynch
Carolyn M. Peake

Staff Recorders for Breakout Sessions:

Wendy Jennis
Melanie Gilbert
Robert Lowney
Terry A. Cain
James C. Oleson
Carolyn Peake

Appendix B: Long-Range Planning in the Federal Judiciary

Most organizations engage in long-range planning at various levels. At the "enterprise" level, the purpose of long-range planning is to make decisions that deliberately guide the organization. Long-range planning is an ongoing process to communicate values and principles, set goals, and establish priorities.

Planning approaches differ—and there are variations in the use of terms such as goals, objectives, and strategies—but planning processes typically include these elements:

- expression of the organization's mission, vision, core values and/or guiding principles
- ongoing identification and analysis of trends and issues that affect the organization and the accomplishment of its objectives
- identification and prioritization of strategic directions, objectives, and specific initiatives
- mechanisms to link plans with management and budget decisions, update plans, monitor progress, and evaluate results.

The Judicial Conference's Long-Range Planning Process

In 1990, the Federal Courts Study Committee, a high-level panel appointed by Chief Justice William H. Rehnquist at the urging of Congress, recommended that the judiciary establish a permanent capacity for long-range planning. That same year, Chief Justice Rehnquist created a Judicial Conference Committee on Long Range Planning.

The Long Range Planning Committee embarked on a process to consider 25 years' worth of recommendations and proposals about the judicial branch. It sought broad input within and outside the judiciary. The Committee also sponsored a series of research projects. It coordinated the development of a long-range plan with other Judicial Conference committees.

In September 1995, the Judicial Conference approved a *Long Range Plan for the Federal Courts*. The plan articulates the vision, mission, and core values of the judiciary. It includes a comprehensive set of recommendations regarding judicial federalism, court structure, the adjudication process, judicial branch governance, resources, and the

relationship between the judiciary and society. The plan contains 93 recommendations, many of which also describe implementation strategies. The recommendations are a mix of statements of general principle, long-term objectives, and specific initiatives.

In the twelve years since the adoption of the *Long Range Plan*, most of the *Plan's* recommendations and implementation strategies either have been adopted or are reflected in the judiciary's current policies and practices. The *Plan* contains comprehensive statements of Judicial Conference policy on a broad range of topics, and it continues to be cited by Judicial Conference committees and others to provide context for the analysis of current issues.

Following the Judicial Conference's approval of the *Long Range Plan for the Federal Courts* in September 1995, Chief Justice Rehnquist abolished the Long Range Planning Committee. He determined that the judiciary's planning efforts would be primarily committee-based, with coordination through the Executive Committee. The chairs of committees with long-range planning responsibilities[8] designated a liaison member to report on the committee's implementation of the *Long Range Plan*, and to promote and continue planning within the committee. The planning liaisons met as a group three times from 1997-1999.

Changes were made in 1999 to enhance the long-range planning process and integrate planning and budgeting, while still retaining the responsibility for long-range planning in individual committees. Committee chairs assumed a leadership role for planning in their committees, and the Executive Committee decided that long-range planning meetings of committee chairs would occur twice each year on the day before the Judicial Conference to discuss crosscutting planning issues. A member of the Executive Committee serves as planning coordinator and presides over the long-range planning meetings.

The Administrative Office began producing long-range budget estimates and workload forecasts to inform the planning and budgeting processes. A discussion on the long-range budget outlook is part of every March meeting, and other budget-related topics are addressed regularly. Discussion about projected long-term budget shortfalls led to the development of the *Cost-Containment Strategy for the Federal Judiciary*. Other crosscutting topics discussed at planning meetings have included trends in how cases are

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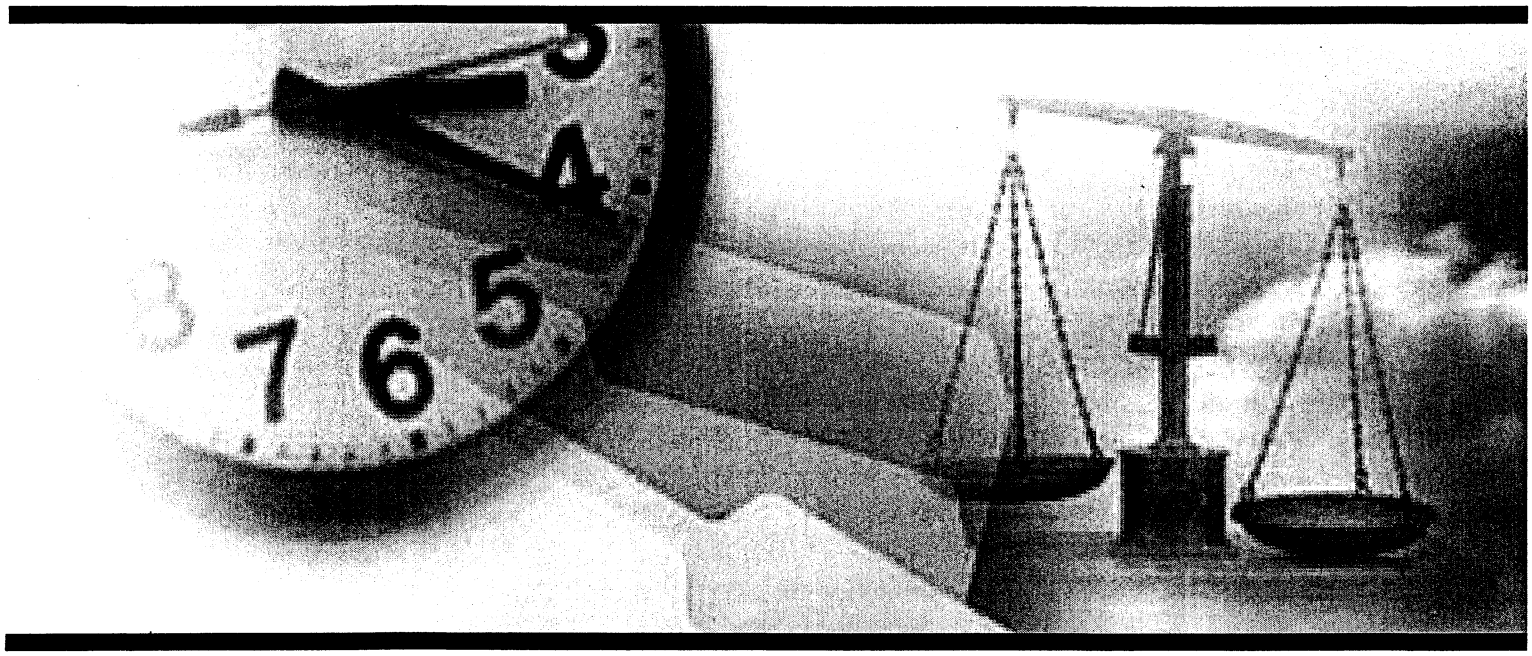
[8]In the past, certain Judicial Conference committees were determined to have planning responsibilities. Over time, the designation has become less meaningful, and descriptions of the judiciary's planning process often refer to "committees attending planning meetings" rather than those with planning responsibilities. In September 2007, all Judicial Conference committee chairs were invited to attend the Judicial Conference meeting and participate in long-range planning meetings.

disposed and the decline in trials, the future impact of technology on the courts, and the future number of senior judges.

Long-range planning meetings were designed for discussion rather than decision-making, and the group of chairs does not make recommendations to the Judicial Conference. As a group, the chairs were not expected to produce a plan. The discussions of strategic issues at planning meetings are intended to influence the work of individual committees, and long-range planning meeting reports are distributed to the committees. Over time, individual committees' planning activities have evolved, with some engaged in more formal planning than others.

Periodically, each committee develops a list of strategic issues or goals. These are compiled in a single report that also includes judiciary-wide issues and goals endorsed by the group. The latest report on *Strategic Planning Goals and Issues* is attached.

Attachment



Strategic Planning Goals and Issues:

Committees of the Judicial Conference of the United States

September 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

- Maintaining internal controls and oversight systems to ensure congressional and public confidence in the judiciary
- Supporting AO efforts to identify and analyze critical long-range trends, issues and developments affecting 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

Defender Services Program 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

- Evaluating the efficiency and effectiveness of magistrate judge utilization
- Promoting utilization practices whose efficiency and effectiveness enable courts to obtain the greatest benefit from their magistrate judges
- 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 and other support services for magistrate judges
- Ensuring that magistrate judge positions continue to be authorized as and where they are shown to be needed
- Supporting efforts to ensure that compensation, benefits, and other conditions of employment remain sufficient to attract highly qualified individuals to seek, and remain in, magistrate judge positions
- Promoting actions courts can take to enhance diversity in the magistrate judge selection process

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:*

- 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

Appendix C: Notes from Small Group Discussions
at the Long-Range Planning Meeting, September 17, 2007

Participants in the long-range planning meeting were divided into six groups to discuss challenges facing the judiciary, and how the planning process might be improved. Summaries of the discussions are included below, based on notes taken by staff.

EXERCISE ONE: CHALLENGES

Table A Responses

What challenges will we face over the next ten years?

- What happens to bankruptcy?
- Declines in high quality, challenging complex case in federal courts
- Reduced trials and consequences
- Continuing decline in trials
- Increased federal jurisdiction to deal with state law issues
- Reallocation of resources as dockets change
- Budget issues
- More efficient use of both active and senior judges
- Increasing complexity of criminal cases (large document cases—many lawyers) with increasing costs
- Growth of pro se cases
- Coordinating technology between court units
- Balancing privacy interests w/ the public's right to know
- The changing face of who becomes a federal judge
- Privacy issues and the internet

Three biggest challenges

1. Privacy
2. Changes in Docket
3. Technology—making it work

Focused Challenge: Changes in Docket

Desired Outcomes:

- Having manageable dockets with complex cases
- Returning to state courts criminal cases that should be handled by states (return to being a court of limited jurisdiction)
- Making federal justice more affordable, accessible, and efficient
- Keeping interesting cases in federal court
- Resolve conflict between privacy and openness
- Reduce fear of courtroom by attorneys

What we could do to plan for and achieve these objectives? Who has an interest?

- What—needs study
- Who—long-range planning committee; should not be just chairs

Table B Responses

What challenges will we face over the next ten years?

Role-Related:

- role of the court regarding ADR
- protection of personnel and courts in an age of terrorism

Finance-Related:

- are there too many courtrooms?
- no money for new courthouses
- dealing with rent/facilities budget with GSA & other agencies
- obtaining appropriations sufficient to meet requirements /tailoring requirements to achievable appropriations

Personnel-Related:

- overwhelmed judges
- better assessing personnel needs in court units
- dealing with salary compression in our senior executives
- inability to attract court executives
- maintaining adequate management personnel
- attracting and maintaining a diverse and efficient workforce

Infrastructure-Related:

- wise use of IT within the courts
- meeting infrastructure needs

Focused Challenge: Personnel-Related

Desired Outcomes:

- Change salary structure - use Executive Branch model
  - Deal with salary compression
  - Establish bonus system
  - Eliminate caps on pay
- Retain and recruit qualified staff
- Identify staffing needs (IT, HR, Finance, Managers, Operational staff)
- Pro-Active Committee and staff efforts to predict and resolve needs in a cooperative fashion; multiple committees could contribute
- Dealing with geographic cost-of-living issues
- Need better predictors of workplace needs and skills (i.e. IT skills)

Related Issues:

- Difficult to plan long-range, regarding caseload and types of cases
- Staffing has not grown consistent with workload growth because of fear of lack of sufficient sustainable appropriations
- Some things you can plan for, some you can't (i.e. expanded federal jurisdiction)
- Percentage of unpublished opinions increased because of staffing shortfalls
- What does the judiciary need in a compensation package to retain qualified employees?
- Cost-containment has impacted personnel
- Difficulty in finding talented, devoted, loyal employees
- Difficult to offer long-range job stability

Table C Responses

What challenges will we face over the next ten years?

- Disaster reaction—telecommuting
- Budget deficits
- Federalism

- Maintaining public confidence
- Public perception of judges
- Maintaining public confidence
- Decreasing civil caseload—more & more to ADR because of expense of lawsuits and risk of verdicts
- Growing separation from practicing bar:
  1) Civil lawyers infrequently come to court (ECF, ADR, Summary Judgment)
  2) Criminal lawyers mostly Assistant US Attorneys and federal defenders; and they mostly appear for rule 11s (pleas) and sentencing
- Continued federalization of state crimes and civil claims
- Adequate appropriations
- Jurisdictional restraint (by Congress)
- Judicial salary increase
- Reallocation of judicial resources
- Talent loss due to salary constraints
- Aging judges? Don't know: demographic question . . . as life expectancy grows
- Integration of technologies—case management, evidence, accounting, etc.

Focused Challenge: Allocation of judicial resources, given changes in demographics and caseloads

- Long-term concern: As caseloads decline, Senators may need to give up judgeships in their states. (Has it ever happened? Likely it will never happen)
- Key Issues: What is the impact? Where would we sit? Sudden developments make it difficult to control. Expensive. Use modular courtrooms (e.g., military bases). How to implement.

Desired Outcome: Flexibility to have resources match needs

What Can We Do?

- Planning Issue—need to identify constraints and forecast caseloads

Table D Responses

What challenges will we face over the next ten years?

- Maintaining the quality of the judiciary—meeting the demands for better training and support

- Ensuring the place of an independent federal judiciary in the constitutional structure
- Ensuring the independence of the federal judiciary - the need to be proactive
- Improving the education and understanding of the public on the role of the courts
- Coping with the exodus of senior judges
- The need to make the system less costly—improving efficiencies. The tension between private and public courts.
- Personnel—the need to recruit and retain highly qualified court staff—particularly in management positions
- The need to keep up with advances in technology and finding the balance between technology resources and the human element
- The changing roles of Article III and Article I Judges—the use of magistrate judges, etc.

Focused Challenge: Ensuring and protecting the place of an independent federal judiciary in the constitutional structure by creating a higher level of public understanding about the role and operation of federal courts

Desired Outcome: A better understanding and appreciation of the federal court system.

What Can We Do?

- Establish effective outreach programs focused on the general public, colleges and secondary schools, media and businesses
- Judges need to be proactive and get out of chambers—speeches, etc. to bring a higher level of awareness and understanding of the origin, roles, and operation of the federal court system

Table E Responses

What challenges will we face over the next ten years?

- Space (and corresponding issues of cost and inaccessibility) of pretrial detainees
- Increasing costs associated with CJA vouchers (and ability to pay a competitive rate to panel attorneys, thereby assuring adequate representation), standardizing qualifications and quality
- Negotiating operationally with DOJ on issues: discovery responsibilities, timely death penalty declinations
- Role of crime victims (in what is essentially a two-party system)

- Lack of filled district judgeships (and collateral effects on magistrate judges and other court actors)
- How to educate and explain the work of the federal courts to the legislative branch and the general public
- Judiciary may need to think about "sacred cow" cost drivers: e.g., courthouse space and law books

Focused Challenge: Budget and Criminal Justice

- There is tremendous variation in the cost and scope of CJA vouchers (driven, at least in part, by the variety of specialized services and vendors that are employed); these high costs could, in part, be driven by the concern that if attorneys do not contract with experts, they could face claims of ineffective assistance of counsel.
- Megacases: a small fraction of defender's cases consume a significant proportion of the defender budget—case budgeting may help ameliorate this problem.
- Pilot projects about case budgeting are being explored.
- Judges should coordinate the handling of cases—emphasis on stewardship and budgeting—highlighting the tension between judicial independence and accountability.
- If guidelines are all that are proffered, may be ignored.
- Possibility of using institutional defenders (e.g., legal aid society) to represent clients instead of panel attorneys where conflicts prevent one defenders office from doing so? Can firewalls be used in large offices to avoid conflicts and maximize efficiencies?
- Coordinated operational meetings between judiciary and DOJ may help resolve some of these criminal justice problems.
- The Executive Committee meets two times per year with the Attorney General, but this meeting is too high-level to allow decision-makers to roll up their sleeves and do operational work—interstitial meetings between, for example, committee chairs and the chief of the criminal division would allow practical work to be achieved, e.g., issues of pretrial detention (detainees in Montana are 400 miles from courthouse), timely death penalty declinations, and discovery protocols.
- Educational component for judges (especially important in death penalty cases).

Table F Responses

What challenges will we face over the next ten years?

- Increasing pressure from Congress to control dispositions
- Incorporating developments in information technology

- Building courthouses
- To make sure that an individual's right to trial by jury is not taken over by the increasing coercive nature of pleas and sentence penalties for exercising trial right
- Retaining and attracting quality judges
- Retaining public trust
- To keep judicial processes cost-effective, efficient and fair to ensure that we are not supplanted by private mediation services
- Controlling the costs and time to disposition in the civil and complex criminal cases to avoid loss of confidence in the system and search for alternatives to the system
- Resisting efforts (including from within the court system) to reduce our workload
- Providing cost-effective dispute resolution
- Maintenance of Anglo-American judicial values (access, providing due process)
- Resources (salaries for personnel as well as judges)
- Keeping pace with technology

Focused Challenge: Controlling the costs and time to disposition in the civil and complex criminal cases to avoid loss of confidence in the system and search for alternatives to the system

Desired Outcome: High-quality, fair, efficient, accessible system—keep costs down (including excessive litigant costs)

What Can We Do?

- Examine pretrial/discovery processes and procedures—is it working smoothly, efficiently?
- Encourage active judicial management of pretrial processes
- Recognize and involve multiple stakeholders, i.e. judges, bar, litigants
- Eliminate barriers, e.g. cost and complexity

EXERCISE TWO: PLANNING

Table A Responses

In what ways can we identify big-picture goals and priorities?

- Use long-range planning professionals
- Educate process participants on what long-range planning is
- Survey stakeholders in advance
- Use focus groups
- Consult with people from outside judiciary for goals and priorities (academics and attorneys)
- Allocate time to be spent on process

In what ways can we integrate planning across committees?

- Include chairs in focus groups
- Long-range group should be in regular contact with chairs
- Farm out issues to particular committees

In what ways can we identify and involve stakeholders in the long-range planning?

- Make sure to listen to other entities (e.g., ABA, ACTL, DOJ, NACDL); find out what those entities are doing on the subject

Table B Responses

- Must first identify stakeholders: who does this? AO? Committees?
- Big-picture goals have been identified, but not articulated and available to courts, stakeholders (Congress, etc.)
- Competing priorities
- Must have transparency in decision-making
- Stakeholders (i.e. unit executives) should be involved in decision-making
- Do we really need to do this? Is there really a problem? The Committee system doesn't seem to be broken and is working well. Director and Deputy are so new, this should not be a priority for them.
- This could be difficult because the judiciary doesn't have a true "board of directors." The Executive Committee is not the board of directors.

- Problem that each Judicial Conference committee has different stakeholders.
- Committee's plates are so full with operational issues, who has the time to do this big picture planning?
- A need exists to identify "big picture" issues—line committees can't do this because they are in the trenches of the day-to-day issues.
- Don't repeat 1995 with a long range planning committee and consultants and AO staff to work for that committee.
- Perhaps best thing to do is have an off-site meeting with a facilitator with all committee chairs (and 1-2 staff each) to talk about long range planning. In 2-3 years, have a meeting like this. Then, have chairs do a similar meeting about 5 years later.

Table C Responses

In what ways can we identify big-picture goals and priorities?

- Ask lawyers, customers, businesses, public, unions:
  - What they say will help us set priorities
  - Need to go ask users of systems
  - Need to understand dynamics of how decisions are made
- The current process is not planning.

In what ways can we integrate planning across committees?

- Have a plan and disseminate to all for implementation
  - Long-range planning committee
  - Does the current Chief Justice subscribe to planning?
  - Top-down is too difficult and too slow

In what ways can we identify and involve stakeholders in the long-range planning?

- Need a subgroup to focus on executive-level view
- Have Chief Justice endorse planning
- Choose overlapping committees to try to come up with a draft
- Use questionnaires to get information from customers
- Keep it small and focused.

Table D Responses

In what ways can we identify big-picture goals and priorities?

- Develop a broad strategic vision—the larger view.
- Involve all stakeholders early—use a "ground-up" approach to fully vet issues and develop consensus.
- Improve communications among judges, Judicial Conference committees, court staff, AO.
- Create more planning opportunities—such as retreats with the LRP group. Use professional long range planning experts as facilitators.

Table E Responses

- How to coordinate with Executive Branch
- Deputize committee chairs to act on behalf of Conference
- Must be operational, not ceremonial, meetings to achieve tangible goals.
- Influenced by personalities involved, time availability; participants must have authority to make decisions
- Importance of cross-committee collaboration
- Cautiousness of overstepping jurisdiction
- Chair-to-chair communication most helpful (can mitigate staff conflict)
- AO and Executive Committee can coordinate, ensuring that courts speak with one voice

Table F Responses

In what ways can we identify big-picture goals and priorities?

- Committee chairs form an "inter-committee" committee to do long-range planning
- Work up through the committees since that is where the expertise is
- Better use of committee members and advisory groups
- Consider lessons learned from the CJRA district-based committees/working groups—some continue to be active
- Create/promote/use bench-bar committees and working groups
- Invite public interest group participation—ensure balance among interests
- Make it easier to capture good ideas from individual judges
- Use an internal process and staff—contractors/consultants are not worth it because they don't understand the branch

In what ways can we identify and involve stakeholders?

- Through the committee process
- At the local court level in working groups
- Through the formal comment process

Recommendations and Implementation Strategies from the *Long Range Plan for the Federal Courts*

LRP Chapter and Subhead	Committee(s)	Recommendation
Judicial Federalism Defining and Maintaining a Limited Federal Jurisdiction	Federal-State Jurisdiction (civil) Criminal Law (criminal)	RECOMMENDATION 1: Congress should be encouraged to conserve the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism. Civil and criminal jurisdiction should be assigned to the federal courts only to further clearly defined and justified national interests, leaving to the state courts the responsibility for adjudicating all other matters.
Criminal Proceedings	Criminal Law	RECOMMENDATION 2: In principle, criminal activity should be prosecuted in a federal court only in those instances in which state court prosecution is not appropriate or where federal interests are paramount. Congress should be encouraged to allocate criminal jurisdiction to the federal courts only in relation to the following five types of offenses: (a) The proscribed activity constitutes an offense against the federal government itself or against its agents, or against interests unquestionably associated with a national government; or the Congress has evinced a clear preference for uniform federal control over this activity. (b) The proscribed activity involves substantial multistate or international aspects. (c) The proscribed activity, even if focused within a single state, involves a complex commercial or institutional enterprise most effectively prosecuted by use of federal resources or expertise. When the states have obtained sufficient resources and expertise to adequately control this type of crime, this criterion should be reconsidered. (d) The proscribed activity involves serious, high-level, or widespread state or local government corruption, thereby tending to undermine public confidence in the effectiveness of local prosecutors and judicial systems to deal with the matter. (e) The proscribed activity, because it raises highly sensitive issues in the local community, is perceived as being more objectively prosecuted within the federal system.

LRP Chapter and Subhead	Committee(s)	Recommendation
Judicial Federalism Criminal Proceedings	Criminal Law	RECOMMENDATION 3: Congress should be encouraged to review existing federal criminal statutes with the goal of eliminating provisions no longer serving an essential federal purpose. More broadly, a thorough revision of the federal criminal code should be undertaken so that it conforms to the principles set forth in Recommendation 2 above. In addition, Congress should be encouraged to consider use of "sunset" provisions to require periodic reevaluation of the purpose and need for any new federal offenses that may be created.
	Criminal Law	RECOMMENDATION 4: Congress and the executive branch should be encouraged to undertake cooperative efforts with the states to develop a policy to determine whether offenses should be prosecuted in the federal or state systems.
	Criminal Law	4a There should be an increase in federal resources allocated to state criminal justice systems for prosecution of matters now handled by federal prosecutors because of lack of state resources.
	Criminal Law	4b The practice of cross-designating both federal and state prosecutors to gain efficiencies of prosecution should be increased.
	Criminal Law	4c State courts should be authorized to adjudicate certain federal crimes for which there currently is no statutory grant of concurrent jurisdiction.

LRP Chapter and Subhead	Committee(s)	Recommendation
Judicial Federalism Criminal Proceedings	Criminal Law	RECOMMENDATION 5: The executive branch should be encouraged to develop standards on which the Justice Department will base the promulgation of prosecutorial guidelines. Specifically, standards should be considered-(a) that are consistent with sound jurisdictional boundaries for federal criminal prosecution as described in Recommendation 2; and(b) under which the potential for harsher federal sentencing policies and greater capacity in the federal prisons would be insufficient grounds, by themselves, to warrant prosecution under a federal, rather than a state, criminal statute.
Civil Proceedings	Federal-State Jurisdiction	RECOMMENDATION 6: Congress should be encouraged to exercise restraint in the enactment of new statutes that assign civil jurisdiction to the federal courts and should do so only to further clearly defined and justified federal interests. Federal court jurisdiction should extend only to civil matters that-(a) arise under the United States Constitution; (b) deserve adjudication in a federal judicial forum because the issues presented cannot be dealt with satisfactorily at the state level and involve either (1) a strong need for uniformity or (2) paramount federal interests; (c) involve the foreign relations of the United States; (d) involve the federal government, federal officials, or agencies as plaintiffs or defendants; (e) involve disputes between or among the states; or (f) affect substantial interstate or international disputes.

LRP Chapter and Subhead	Committee(s)	Recommendation
Judicial Federalism Civil Proceedings	Federal-State Jurisdiction	RECOMMENDATION 7: Congress should be encouraged to seek reduction in the number of federal court proceedings in which jurisdiction is based on diversity of citizenship through the following measures: (a) eliminating diversity jurisdiction for cases in which the plaintiff is a citizen of the state in which the federal district court is located; and (b) otherwise limiting diversity jurisdiction by (1) amending the statutes conferring original and removal jurisdiction on the district courts in diversity actions to require that parties invoking diversity jurisdiction plead specific facts showing that the jurisdictional amount-in-controversy requirement has been satisfied; (2) raising the amount-in-controversy level and indexing the new floor amount to the rate of inflation; and/or (3) amending the statutory specification of the jurisdictional amount to exclude punitive damages from the calculation of the amount in controversy.
	Federal-State Jurisdiction	RECOMMENDATION 8: The states should be encouraged to adopt certification procedures, where they do not currently exist, under which federal courts (both trial and appellate) could submit novel or difficult state law questions to state supreme courts.
	Federal-State Jurisdiction	RECOMMENDATION 9: Congress and the agencies concerned should be encouraged to take measures to broaden and strengthen the administrative hearing and review process for disputes assigned to agency jurisdiction, and to facilitate mediation and resolution of disputes at the agency level.

LRP Chapter and Subhead	Committee(s)	Recommendation
Judicial Federalism Civil Proceedings	Federal-State Jurisdiction	9a Legislation should be requested to improve the adjudicative process for Social Security disability claims by establishing a new mechanism for administrative review of ALJ decisions and limiting the scope of appellate review in the Article III courts.
	Federal-State Jurisdiction	9b Legislative and other measures should be pursued to give agencies the requisite authority and resources to review and, where possible, achieve final resolution of disputes within their jurisdiction.
	Federal-State Jurisdiction	RECOMMENDATION 10: Where constitutionally permissible, Congress should be encouraged to assign to administrative agencies or Article I courts the initial responsibility for adjudicating those categories of federal benefit or regulatory cases that typically involve intensive fact-finding.
	Federal-State Jurisdiction	RECOMMENDATION 11: Congress should be encouraged to enact legislation to- (a) generally prohibit agencies from adopting a policy of non-acquiescence to the precedent established in a particular federal circuit; and (b) require agencies to demonstrate special circumstances for relitigating an issue in an additional circuit when a uniform precedent has been established already in multiple courts of appeals.

LRP Chapter and Subhead	Committee(s)	Recommendation
Judicial Federalism Civil Proceedings	Federal-State Jurisdiction	RECOMMENDATION 12: Congress should be encouraged to refrain from providing federal district court jurisdiction over disputes that primarily raise questions of state law or involve workplace injuries where the state courts have substantial experience. Existing federal jurisdiction in these matters should be eliminated in favor of dispute-resolution or compensation mechanisms available under state law.
	Federal-State Jurisdiction	12a Congress should be encouraged to eliminate federal court jurisdiction over work-related personal injury actions, such as that provided by the Federal Employers' Liability Act and the Jones Act, where the states have proven effective in resolving worker compensation disputes in other industries and occupations.
	Federal-State Jurisdiction	12b The jurisdiction of the federal courts to adjudicate routine claims for benefits under ERISA employee welfare benefit plans should be abolished, except when application or interpretation of federal statutory or regulatory requirements are at issue.
	Federal-State Jurisdiction	12c Any new cooperative federal-state program to establish national standards for employee benefits (e.g., health care) should designate state courts as the primary forum for review of benefit denial claims. However, any such program should include establishment of an administrative remedial process that must be exhausted before a state court action may be filed.

LRP Chapter and Subhead	Committee(s)	Recommendation
Judicial Federalism Impact of Legislation	Federal-State Jurisdiction	RECOMMENDATION 13: When legislation is considered that may affect the federal courts directly or indirectly, Congress should be encouraged to take into account the judicial impact of the proposed legislation, including the increased caseload and resulting costs for the federal courts.
	Federal-State Jurisdiction	RECOMMENDATION 14: In considering measures that would shift jurisdiction away from the federal courts or provide new jurisdiction through the establishment of concurrent jurisdiction, Congress should also be encouraged to consider and address the impact of the proposed legislation on the states. Specifically, it should be urged to (a) consult with state authorities and state judicial leaders in defining any new limits on federal jurisdiction; and (b) provide federal financial and other assistance to state justice systems to permit them to handle the increased workload that would result from the reduction or elimination of existing federal court jurisdiction or the creation of new concurrent jurisdiction.
Growth of Article III Judiciary	Judicial Resources	RECOMMENDATION 15: The growth of the Article III judiciary should be carefully controlled so that the creation of new judgeships, while not subject to a numerical ceiling, is limited to that number necessary to exercise federal court jurisdiction.
	Federal-State Jurisdiction (civil) Criminal Law (criminal)	15a The limited jurisdiction of the federal courts should be preserved as described in Recommendations 1 through 12.

LRP Chapter and Subhead	Committee(s)	Recommendation
Judicial Federalism Growth of Article III Judiciary	Judicial Resources	15b The Judicial Conference should employ up-to-date, comprehensive methods to evaluate judgeship needs.
	Federal-State Jurisdiction (jurisdictional issues) Court Administration and Case Management (operational improvements)	15c The need for additional judgeships should be reduced through control of federal court caseloads as described in this plan (including the appropriate reallocation of cases to state courts and other forums), and by operational improvements in the courts that increase efficiency without sacrificing either quality in the judicial work product or access to the remedies available only in a federal forum.
Structure Courts of Appeal	Federal-State Jurisdiction	RECOMMENDATION 16: The federal appellate function should be performed primarily in: (a) a generalist court of appeals established in each regional judicial circuit; and (b) a Court of Appeals for the Federal Circuit with nationwide jurisdiction in certain subject-matter areas.
Circuit Size and Workload	Court Administration and Case Management	RECOMMENDATION 17: Each court of appeals should comprise a number of judges sufficient to maintain access to and excellence of federal appellate justice. Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload.

LRP Chapter and Subhead	Committee(s)	Recommendation
Structure Circuit Size and Workload	Court Administration and Case Management	RECOMMENDATION 18: To the extent practicable, workload should be equalized among judges of the courts of appeals nationally.
Resolution of Intercircuit Conflicts	Federal-State Jurisdiction	RECOMMENDATION 19: The United States Supreme Court should continue to be the sole arbiter of conflicting precedents among the courts of appeals.
Review of Administrative Proceedings	Federal-State Jurisdiction	RECOMMENDATION 20: In general, the actions of administrative agencies and decisions of Article I courts should be reviewable directly in the regional courts of appeals. For those cases in which the initial forum for judicial review is the district court, further review in the court of appeals should be available only on a discretionary basis except with respect to constitutional matters and questions of statutory or regulatory interpretation.
Appeals in Bankruptcy Cases	Bankruptcy Administration	RECOMMENDATION 21: The existing mechanism for review of dispositive orders of bankruptcy judges should be studied to determine what appellate structure will ensure prompt, inexpensive resolution of bankruptcy cases and foster coherent, consistent development of bankruptcy precedents.

LRP Chapter and Subhead	Committee(s)	Recommendation
Structure Appeals in Bankruptcy Cases	Bankruptcy Administration	RECOMMENDATION 22: Pending completion of the study of bankruptcy appellate structure recommended above, the dispositive orders of bankruptcy judges should be reviewable directly in the court of appeals in those cases where the district court or bankruptcy appellate panel (BAP) certifies that such review is needed immediately to establish legal principles on which subsequent proceedings in the case may depend.
Appeals of Magistrate Judge Decisions	Magistrate Judges	RECOMMENDATION 23: Where parties to a civil action have consented to the case-dispositive authority of a magistrate judge, judgments entered in such actions should be reviewable only in the courts of appeals, and not by a district judge.
District Courts	Federal-State Jurisdiction (court structure) Court Administration and Case Management (judges' residency and other issues)	RECOMMENDATION 24: Except in certain limited contexts (i.e., bankruptcy proceedings, international trade matters, and claims against the federal government), the primary trial forum for disputes committed to federal jurisdiction should be a generalist district court whose judges are affiliated with, and required to reside in, the court's general geographic region, and whose facilities are reasonably accessible to litigants, jurors, witnesses, and other participants in the judicial process.
District Alignment	Court Administration and Case Management	RECOMMENDATION 25: The judicial districts should continue to be allocated among and within the states so that each district comprises a single state or part of a state.

LRP Chapter and Subhead	Committee(s)	Recommendation
Structure District Alignment	Court Administration and Case Management	RECOMMENDATION 26: The impact of district alignment on access to the courts and efficient judicial administration should be studied periodically. Any such study should examine the functional and administrative costs and benefits which merger or division of districts would produce.
Bankruptcy Courts	Bankruptcy Administration	RECOMMENDATION 27: Each district court should continue to include a bankruptcy court consisting of fixed-term judges with expertise in the field of bankruptcy law.
Adjudication	Bankruptcy Administration	27a The bankruptcy court should exercise the original jurisdiction of the district court in bankruptcy matters to the extent constitutionally and statutorily permissible.
	Bankruptcy Administration	27b Congress should be encouraged to clarify the authority of the bankruptcy courts. For example, legislation should be enacted that expressly recognizes the civil contempt power of bankruptcy judges and also affords them limited jurisdiction to hold litigants or counsel criminally liable for misbehavior, disobedience, or resistance to a lawful order.
Rules of Practice and Procedure	Rules of Practice and Procedure	RECOMMENDATION 28: Rules of practice, procedure, and evidence for the federal courts should be adopted and, as needed, revised to promote simplicity in procedure, fairness in administration, and a just, speedy, and inexpensive determination of litigation.

LRP Chapter and Subhead	Committee(s)	Recommendation
Adjudication Rules of Practice and Procedure	Rules of Practice and Procedure	28a Rules should be developed exclusively in accordance with the time-tested and orderly process established by the Rules Enabling Act.
	Rules of Practice and Procedure	28b The national rules should strive for greater uniformity of practice and procedure, but individual courts should be permitted limited flexibility to account for differing local circumstances and to experiment with innovative procedures.
	Rules of Practice and Procedure	28c In developing rules, the Judicial Conference and the individual courts should seek significant participation by the interested public and representatives of the bar, including members of the federal and state benches.
Sentencing in Criminal Cases	Criminal Law	RECOMMENDATION 29: The Judicial Conference should continue and strengthen efforts to express judicial concerns about sentencing policy.
	Criminal Law	RECOMMENDATION 30: The legal standards for criminal sentencing should encourage both uniformity of practice and attention to individual circumstances.

LRP Chapter and Subhead	Committee(s)	Recommendation
Adjudication Sentencing in Criminal Cases	Criminal Law	30a Congress should be encouraged not to prescribe mandatory minimum sentences.
	Criminal Law	30b The United States Sentencing Commission should be encouraged to develop sentencing guidelines that-(1) afford sentencing judges the ability to impose more alternatives to imprisonment; (2) encourage departures from guideline levels where factual differences should appropriately be taken into account; and (3) enable sentencing judges to consider within the guideline scheme a greater number of offender characteristics.
	Criminal Law	RECOMMENDATION 31: A well supported and managed system of highly competent probation and pretrial services officers should be maintained in the interest of public safety and as a necessary source of accurate, adequate information for judges who make sentencing and pretrial release decisions.
The Jury System	Court Administration and Case Management	RECOMMENDATION 32: In the interests of promoting justice and fairness, all aspects of the administration and operation of the jury system-grand juries, criminal, petit, and civil-should continue to be studied and improved.
Pro Se Litigation	Court Administration and Case Management	RECOMMENDATION 33: Steps must be taken to confront the growing demands pro se litigation places on the federal courts.

LRP Chapter and Subhead	Committee(s)	Recommendation
Adjudication Pro Se Litigation	Court Administration and Case Management	33a A broad-based study, with participation from within and outside the courts, should be conducted to evaluate the impact of pro se litigation and recommend changes.
	Court Administration and Case Management	33b Alternative avenues for pro se prisoner litigation should be explored.
	Court Administration and Case Management	33c The courts should develop workable standards for addressing the substantive and procedural problems presented by pro se prisoner litigation.
	Court Administration and Case Management	33d The district courts should make more effective use of pro se law clerks.
Costs of Litigation	Court Administration and Case Management	RECOMMENDATION 34: The federal court system should continue to study possible shifting of attorneys' fees and other litigation costs in particular categories of cases.

LRP Chapter and Subhead	Committee(s)	Recommendation
Adjudication Case Management in Courts of Appeals	Court Administration and Case Management	RECOMMENDATION 35: The courts of appeals should exchange information on appellate case management.
	Court Administration and Case Management	RECOMMENDATION 36: The federal court system should collect and analyze information on various courts of appeals' case management practices.
	Court Administration and Case Management	RECOMMENDATION 37: The courts of appeals should adopt internal procedures and organizational structures to promote the effective delivery of high-quality appellate justice and to maintain the consistency of circuit law.
	Court Administration and Case Management	37a There should be further development of appellate adjudicative programs, such as the Civil Appeals Management Plan ("CAMP").
	Court Administration and Case Management	37b Innovative management of appeals should continue and be expanded as needed.

LRP Chapter and Subhead	Committee(s)	Recommendation
Adjudication Case Management in Courts of Appeals	Court Administration and Case Management	37c Appellate courts should consider the use of nonjudicial staff and adjunct judicial officers to handle certain routine matters that do not involve the appellate review function reserved to Article III judges.
	Court Administration and Case Management (generally) Information Technology (computerized opinion reporting)	37d Opinions should be restricted to appellate decisions of precedential import. A uniform set of procedures and mechanisms for access to court of appeals opinions, guidelines for publication or distribution, and clear standards for citation should be developed.
	Court Administration and Case Management	37e Internal efforts to maintain the consistency of circuit law should be continued and enhanced.
Case Management in the District Courts	Court Administration and Case Management	RECOMMENDATION 38: The district courts should enhance efforts to manage cases effectively.
	Court Administration and Case Management	RECOMMENDATION 39: District courts should be encouraged to make available a variety of alternative dispute resolution techniques, procedures, and resources to assist in achieving a just, speedy, and inexpensive determination of civil litigation.

LRP Chapter and Subhead	Committee(s)	Recommendation
Governance: Management and Accountability Distribution of Authority	Court Administration and Case Management	RECOMMENDATION 40: In the interests of administrative efficiency, accountable resource utilization, and effective external relations, the present distribution of governance authority among the national, regional (circuit), and individual court levels should be preserved. Governance structures and mechanisms should continue to strike a careful balance among individual judge autonomy, local court initiative and control, and coordination of effort.
	Budget	40a The judicial branch should obtain funding for the operation of the courts solely through appropriations administered by the Administrative Office of the United States Courts and expended under the direction and supervision of the Judicial Conference of the United States. Appropriated funds should not be obtained directly by a circuit council or any other regional or local body.
	Administrative Office Committee	40b The agencies of judicial administration at the national level should continue to decentralize administrative responsibility wherever appropriate, while maintaining sufficient oversight to ensure that courts are accountable for the proper use of the authority vested in them.
Effective Organization and Operation	N/A	RECOMMENDATION 41: The Chief Justice of the United States should remain the head of the federal judicial system, retaining the traditional authority and responsibility of that office in matters of judicial administration.

LRP Chapter and Subhead	Committee(s)	Recommendation
Governance: Management and Accountability Effective Organization and Operation	Executive Committee	RECOMMENDATION 42: Consistent with the authority conferred by Congress, the Judicial Conference of the United States should continue to develop policy and exercise oversight with respect to matters of judicial branch administration in which a unified national approach is necessary and appropriate. The Conference should continue to focus attention on broad-scale policies and critical issues.
	Executive Committee	RECOMMENDATION 43: The leadership role of the Judicial Conference's Executive Committee should be enhanced.
	Executive Committee	43a The Executive Committee should be allowed a more active role in steering the Conference and acting on its behalf.
	Executive Committee	43b Consideration should be given to at least partial reduction in the chair's judicial workload, so as to offset the time required for performance of administrative duties.
	Executive Committee	RECOMMENDATION 44: The Judicial Conference should continue to rely on a broad committee structure for policy development. It should strengthen the committees' ability to provide sound advice and needed information.

LRP Chapter and Subhead	Committee(s)	Recommendation
Governance: Management and Accountability Effective Organization and Operation	Executive Committee	44a Membership in Conference committees should continue to rotate periodically, to provide new and diverse perspectives while at the same time preserving the insight, experience, and legislative contacts that come with long-term committee service.
	Executive Committee	44b The Conference should afford the committee chairs a meaningful role in relevant Conference debates and an opportunity to meet together at least once a year.
	Executive Committee	RECOMMENDATION 45: The number of judges participating in the Judicial Conference and its committees should not increase in proportion to growth in the judiciary overall.
	Executive Committee	RECOMMENDATION 46: The Administrative Office of the United States Courts and the Federal Judicial Center should retain their separate institutional status and respective missions. The officially adopted policies of the Judicial Conference represent the view of the judicial branch on all matters and should be respected as such by the Administrative Office and the Federal Judicial Center when dealing with members of Congress or the executive branch.
	Court Administration and Case Management	RECOMMENDATION 47: The basic organization and authority of governance institutions at the regional and individual court levels should be retained.

LRP Chapter and Subhead	Committee(s)	Recommendation
Governance: Management and Accountability Effective Organization and Operation	Court Administration and Case Management	47a Circuit judicial councils should continue to provide administrative coordination and oversight to all courts within the respective regional circuits.
	Court Administration and Case Management	47b The chief judges of the courts of appeals and district courts should continue to be selected on the basis of seniority subject to statutory limitations on age and tenure.
	Court Administration and Case Management	RECOMMENDATION 48: To assist the governance process and enforce its decisions, the judicial branch should continue to develop and enhance the capabilities of court administrators and managers.
	All committees (within their respective jurisdictions)	RECOMMENDATION 49: All judicial governance institutions should continue to develop and integrate long range planning capabilities into their policy-making processes.
Participation	Court Administration and Case Management	RECOMMENDATION 50: There should be broad, meaningful participation of judges in governance activities at all levels.

LRP Chapter and Subhead	Committee(s)	Recommendation
Governance: Management and Accountability Participation	Executive Committee	50a District judges should be afforded the opportunity to participate effectively in national and regional governance. To that end -- (1) district judge members of the Judicial Conference should be afforded a term of service comparable to the average tenure of chief circuit judges (i.e., five years); and
	Court Administration and Case Management	50a District judges should be afforded the opportunity to participate effectively in national and regional governance. To that end -- (2) each circuit judicial council should have an equal number of district judge and circuit judge members, including the chief circuit judge.
	Executive Committee	50b Senior judges should be afforded a greater opportunity to participate in governance. To that end -- (1) senior judges should be expressly authorized to serve on the Judicial Conference;
	Executive Committee	50b Senior judges should be afforded a greater opportunity to participate in governance. To that end -- (2) senior judges should be authorized to serve on the Board of the Federal Judicial Center;
	Court Administration and Case Management	50b Senior judges should be afforded a greater opportunity to participate in governance. To that end -- (3) senior judges should be authorized to serve on circuit judicial councils; and

LRP Chapter and Subhead	Committee(s)	Recommendation
Governance: Management and Accountability Participation	Court Administration and Case Management	50b Senior judges should be afforded a greater opportunity to participate in governance. To that end -- (4) individual courts should take appropriate steps to include senior judges in local governance mechanisms.
	Executive Committee	50c Non-Article III judges should be afforded the opportunity for meaningful participation in governance. To that end -- (1) the Board of the Federal Judicial Center should include a magistrate judge as well as a bankruptcy judge; and
	Court Administration and Case Management	50c Non-Article III judges should be afforded the opportunity for meaningful participation in governance. To that end -- (2) individual district courts should take appropriate steps to involve bankruptcy judges and magistrate judges in local governance.
Adminstrative Autonomy	All committees (within their respective jurisdictions)	RECOMMENDATION 51: Administration of federal court facilities, programs, or operations should be primarily the responsibility of the judicial branch.
	Space and Facilities Judicial Security Bankruptcy Administration (for bankruptcy estate administration)	51a Administrative oversight and policy-making responsibility for the following programs should reside with the institutions of judicial governance or agencies operating under their supervision: judicial space and facilities program, court and judicial security program; and bankruptcy estate administration (i.e., the U.S. trustee system).

LRP Chapter and Subhead	Committee(s)	Recommendation
Governance: Management and Accountibility Adminstrative Autonomy	Budget	51b Responsibility for developing and presenting to Congress requests for funding of the federal courts and agencies of judicial administration should remain solely within the judicial branch.
Governance: Management and Accountability Accountability	Budget (formulation) Executive Committee (execution)	RECOMMENDATION 52: The judicial branch should continue to develop and enhance a mechanism for effective coordination and review in budget formulation and execution.
	Judicial Conduct and Disability	RECOMMENDATION 53: The existing mechanisms for judicial discipline should be retained. In particular, the impeachment process should continue to be the sole method of removing Article III judges from office.
Resources Obtaining Adequate Resources	Budget	RECOMMENDATION 54: The federal courts should obtain resources adequate to ensure the proper discharge of their constitutional and statutory mandates.
	Budget	RECOMMENDATION 55: Congress, when enacting legislation affecting the federal courts, should be encouraged to appropriate sufficient funds to accommodate the cost to the courts of the impact of new legislation.

LRP Chapter and Subhead	Committee(s)	Recommendation
Resources Obtaining Adequate Resources	Judicial Branch	RECOMMENDATION 56: Federal judges should receive adequate compensation as well as cost-of-living adjustments granted to all other federal employees.
	Judicial Branch	56a Congress should be encouraged to refrain from the current practice of linking judicial and congressional pay raises.
	Judicial Branch	56b Congress should be encouraged to repeal section 140 of Public Law No. 97-92.
	Budget	RECOMMENDATION 57: Congress should be encouraged to include appropriations for the constitutionally mandated functions of federal courts as part of the non-discretionary federal budget.
	Budget	RECOMMENDATION 58: The federal courts, including the bankruptcy courts, should obtain funding primarily through general appropriations.

LRP Chapter and Subhead	Committee(s)	Recommendation
Resources Ensuring Lifetime Service on the Bench	Judicial Branch	RECOMMENDATION 59: Incentives should be created to allow the courts to attract and retain the best-qualified persons as judges and eliminate disincentives to long judicial service. Federal judges should be encouraged to stay on the bench for the lifetime tenure that the Constitution contemplates and guarantees.
	Judicial Branch	RECOMMENDATION 60: Service-year credit toward benefits vesting for service already rendered as federal judicial officers should be awarded to bankruptcy and magistrate judges elevated to the Article III bench.
	Judicial Security	RECOMMENDATION 61: Adequate security protection should be provided for judges and court personnel at all court facilities and when they are away from the courthouse.
	Judicial Security	61a Where necessary, home security systems and portable emergency communications devices should be provided.
	Judicial Security	61b New judges and their families should receive security briefings.

LRP Chapter and Subhead	Committee(s)	Recommendation
Resources Ensuring Lifetime Service on the Bench	Judicial Security	61c Training for judges in security should be made available.
	Judicial Security	61d Judges and probation officers should receive information whenever prisoners are released. The notification should include an assessment of the violent nature of the prisoner and the potential risk he or she poses to judicial branch personnel.
Making Most Effective Use of Judicial Resources	Intercircuit Assignments (Article III judges) Magistrate Judges (magistrate judges) Bankruptcy Administration (bankruptcy judges)	RECOMMENDATION 62: Standards and procedures for the assignment of circuit, district, magistrate, and bankruptcy judges to perform judicial duties in other jurisdictions should be flexible.
	Intercircuit Assignments (Article III judges) Magistrate Judges (magistrate judges) Bankruptcy Administration (bankruptcy judges)	RECOMMENDATION 63: The courts should use senior and recalled judges-a significant portion of federal judge power-as much as needed to achieve the goal of carefully controlled growth.
	Judicial Branch	RECOMMENDATION 64: The value of senior judge status should be recognized, and policies and procedures that affect senior judges should be periodically reviewed, in order to insure that senior judge status is an attractive alternative.

LRP Chapter and Subhead	Committee(s)	Recommendation
Resources Making Most Effective Use of Judicial Resources	Magistrate Judges	RECOMMENDATION 65: Magistrate judges should perform judicial duties to the extent constitutionally permissible and consistent with sound judicial policy. Individual districts should retain flexibility, consistent with the national goal of effective utilization of all magistrate judge resources, to have magistrate judges perform judicial services most needed in light of local conditions and changing caseloads.
	Magistrate Judges	RECOMMENDATION 66: Magistrate judges should be vested with a limited contempt power to punish summarily for misbehavior committed in their presence, and to punish for disobedience or resistance to their lawful orders in civil cases referred to them for disposition with the consent of the parties.
Diminishing the Problem of Judicial Vacancies	Judicial Resources (judgeship and other resource issues) Judicial Branch (interbranch relations)	RECOMMENDATION 67: Attention should be given to the problem of frequent, prolonged judicial vacancies in the federal courts. The executive branch and the Senate should be encouraged to fill vacancies promptly, and the judicial branch should utilize procedures and policies to mitigate the impact of vacancies on the capacity of the courts to conduct judicial business.
	Judicial Resources (judgeship and other resource issues) Judicial Branch (judicial retirement)	67a Delays in filling judicial vacancies should be reduced by encouraging retiring judges and those taking senior status to provide substantial (i.e., six-month or one-year) advance notice of that action.

LRP Chapter and Subhead	Committee(s)	Recommendation
Resources Diminishing the Problem of Judicial Vacancies	Judicial Resources	67b Statistics should be maintained concerning the number, length, and impact of judicial vacancies (including data which relates to judicial emergencies) in each court, and benchmarks or timelines should be created for the nomination and confirmation of all judges. The judicial branch should publicize all vacancies extending beyond these limits, and all data on judicial emergencies, to Congress and the President by means of semi-annual reports.
	Intercircuit Assignments	67c Procedures for the temporary assignment of judges should emphasize the importance of providing assistance to courts with vacant judgeships.
	Court Administration and Case Management	67d Procedures and policies governing the transaction of court business should seek to address special circumstances arising as a result of prolonged judicial vacancies. Among other things, rules governing the number of visiting or senior judges serving on panels in the courts of appeals should be held in abeyance during the existence of vacancies on a court constituting a judicial emergency.
Budget Decentralization	Executive Committee	RECOMMENDATION 68: To match responsibility with authority, the budget execution function should be further decentralized so that each court may control spending of appropriated funds to meet its needs.

LRP Chapter and Subhead	Committee(s)	Recommendation
Resources Technology and Facilities	All Committees (within their respective jurisdictions)	RECOMMENDATION 69: Use of court-related technology should be expanded to improve the ability of the federal courts to provide efficient, fair, and comprehensible service to the public.
	All committees (within their respective jurisdictions)	RECOMMENDATION 70: The courts must remain current with emerging technologies and how they can be employed to improve the administration of justice generally.
	Space and Facilities	RECOMMENDATION 71: The judicial branch should maintain a comprehensive space and facilities program, giving careful attention to economy in a time of austerity.
	Court Administration and Case Management	RECOMMENDATION 72: To achieve economies of scale, eliminate unnecessary duplication, and otherwise improve administrative efficiency and effectiveness, the courts should study alternative methods of organizing and allocating judicial support functions.
	Judicial Resources	RECOMMENDATION 73: To refine both operations and policy, the federal courts should define, structure and, as appropriate, expand their data-collection and information-gathering capacity.

LRP Chapter and Subhead	Committee(s)	Recommendation
Resources Technology and Facilities	Judicial Resources	73a To obtain better data for reporting, policy-making, and planning purposes, the Judicial Conference should establish a steering group to coordinate and define the process. Members of the group should include representatives from all primary data sources, judicial branch users, and outside researchers.
	Judicial Resources	73b This steering group should: (1) Conduct a data needs assessment that includes but is not limited to: courts of appeals, district courts, and bankruptcy courts; magistrate judge reporting; Administrative Office program reporting; research; budgetary impact analysis; and long range planning. (2) Inventory and catalog data collection efforts. Utilize recent surveys conducted by Conference committees and other organizations. (3) Evaluate the ability of current statistical data holdings to support planning and policy. (4) Determine how best to collect and maintain such data. Determine how best to organize and manage such efforts. Determine training requirements. (5) Design the most appropriate single or coordinated network of data bases.
Federal Courts' Workforce of the Future	Judicial Resources	RECOMMENDATION 74: The courts should maintain and foster high-quality judicial support services.
	Judicial Resources	RECOMMENDATION 75: The courts should improve working conditions and arrangements for all court support personnel.

LRP Chapter and Subhead	Committee(s)	Recommendation
Resources Federal Courts' Workforce of the Future	All committees (within their respective jurisdictions)	RECOMMENDATION 76: High-quality continuing education for judges should focus on the law, case management (including use of appropriate dispute-resolution processes), and cultural diversity.
	Judicial Resources (personnel issues) Information Technology (technology issues)	RECOMMENDATION 77: All federal court staff should be trained to ensure outstanding service to the public through adopting a "customer service" approach to justice. They should be educated regularly in the use of court technology.
The Federal Courts and Society Equal Justice	Court Administration and Case Management	RECOMMENDATION 78: Since both intentional bias and the appearance of bias impede the fair administration of justice and cannot be tolerated in federal courts, federal judges should exert strong leadership to eliminate unfairness and its perception in federal courts.
	Court Administration and Case Management	RECOMMENDATION 79: Federal judges and all court personnel should strive to understand the diverse cultural backgrounds and experiences of the parties, witnesses, and attorneys who appear before them.
	Space and Facilities	RECOMMENDATION 80: Justice should be made fully accessible to individuals with disabilities. Facilities should be constructed or renovated to ensure physical access and to remove attitudinal barriers to providing full and equal justice to those with disabilities.

LRP Chapter and Subhead	Committee(s)	Recommendation
The Federal Courts and Society Equal Justice	Court Administration and Case Management	RECOMMENDATION 81: Court interpreter services should be made available in a wider range of court proceedings in order to make justice more accessible to those who do not speak English and cannot afford to provide these services for themselves.
Keeping Courts Affordable	Court Administration and Case Management	RECOMMENDATION 82: Litigants should pay reasonable filing fees, and certain services above a basic level should be funded by reasonable user fees.
Representation of Criminal Defendants	Defender Services	RECOMMENDATION 83: Federal defender organizations should be established in all judicial districts (or combined districts), where feasible, to provide direct representation to financially eligible criminal defendants and serve as a resource to private defense counsel who provide such representation.
	Defender Services	83a Full-time federal defenders should train and serve as a resource to panel attorneys, thus assuring competence of appointed counsel.
	Defender Services	83b A study should be conducted to determine whether guidelines may be developed to enable federal defender organizations to represent more than one defendant in a multi-defendant case, if such representation is otherwise appropriate.

LRP Chapter and Subhead	Committee(s)	Recommendation
The Federal Courts and Society Representation of Criminal Defendants	Defender Services	83c Federal defender organizations should represent individuals who present more complicated issues or otherwise require more defense resources.
	Defender Services	RECOMMENDATION 84: Highly qualified, fairly compensated, and optimally sized panels of private attorneys should be created to furnish representation in those cases not assigned to a defender organization.
	Defender Services	84a The judiciary should establish local qualification standards, provide better training, and seek improved compensation for panel attorneys.
	Defender Services	84b To improve the quality of representation, adequate funding should be obtained so that the Administrative Office, in coordination with the federal defenders, the Federal Judicial Center, the United States Sentencing Commission, bar associations, and local courts, can provide panel attorneys with the training needed to assure effective assistance of counsel to their clients.
	Defender Services	84c In districts and locations where it is not feasible to establish a federal defender organization, the courts should be encouraged and afforded sufficient funding to establish panel attorney support offices which can provide the needed advice and assistance.

LRP Chapter and Subhead	Committee(s)	Recommendation
The Federal Courts and Society Representation of Criminal Defendants	Defender Services	84d The Judicial Conference should continue its efforts to obtain sufficient funding to permit compensation rates to be adjusted up to the maximum amount authorized by law.
	Defender Services	84e The federal courts should continue to seek authority under the Criminal Justice Act to establish and modify dollar limitations on panel attorney and other compensation.
	Defender Services	84f Adequate funding for the defender services program should be secured by ensuring that the program is efficient and well-managed.
	Defender Services	84g Courts should be discouraged from peremptorily reducing fees to panel attorneys and should strive to create a system that ensures fair compensation to such attorneys.
Ensuring Justice for Those Who Cannot Afford Counsel in Civil Cases	Court Administration and Case Management	RECOMMENDATION 85: Provision of counsel should be increased for civil litigants, and mechanisms, including legal aid societies and similar organizations, for handling indigent and pro se cases in federal courts should be enhanced.

LRP Chapter and Subhead	Committee(s)	Recommendation
The Federal Courts and Society Ensuring Justice for Those Who Cannot Afford Counsel in Civil Cases	Court Administration and Case Management	85a Bar associations should be encouraged to promote pro bono programs to make civil counsel available to assist litigants who otherwise would have to represent themselves in federal courts. Funding sources should be developed for provision of legal assistance by legal aid societies and similar organizations.
	Court Administration and Case Management	85b Law schools should be encouraged to expand legal clinics to provide competent counsel for prisoner claims, and to low and moderate income persons in need of counsel.
	Court Administration and Case Management (access to justice and case management) Rules of Practice and Procedure (local rules)	85c Federal courts should adopt local rules authorizing law students involved in legal clinics to represent - with appropriate supervision - parties in need of counsel in federal courts.
	Court Administration and Case Management (management of pro se litigation) Judicial Resources (statistical system)	85d Special mechanisms should be created to handle pro se cases efficiently. The frequency of pro se filings, and the frequency of repeat filings by particular litigants, should be tracked through the judiciary's statistical system to allow informed assessment of the amount and impact of judge time and court resources devoted to pro se filings.
	Court Administration and Case Management	85e Through the use of centralized staff operating under court supervision, district courts and courts of appeals should continue to screen pro se cases.

LRP Chapter and Subhead	Committee(s)	Recommendation
The Federal Courts and Society Customer Service Orientation	Judicial Branch	RECOMMENDATION 86: The judicial branch should act to enhance understanding of the federal courts and ensure that the fundamentals of the litigation process are understood by all who use it. The federal courts should encourage feedback from the public on how successfully the judicial branch meets public expectations about the administration of justice.
	Judicial Branch	86a Information on using the courts should be provided through community institutions and in formats aimed at an increasingly diverse citizenry.
	Judicial Branch	86b Judicial outreach programs should be brought to educational and community organizations and other public institutions.
	Judicial Branch	86c Relations with the bar and law schools should be maintained and enhanced by participating in legal education and training programs and activities that enlist those institutions in educating the public about the legal system.
	Court Administration and Case Management	86d Press and public access to court proceedings should be presumptively unrestricted, but access should be balanced with the court's primary mission to administer justice.

LRP Chapter and Subhead	Committee(s)	Recommendation
The Federal Courts and Society Customer Service Orientation	Judicial Branch	RECOMMENDATION 87: Public understanding of the nature and significance of the federal judiciary's role in the constitutional order (and the constraints under which the judiciary functions) should be improved.
	Court Administration and Case Management	RECOMMENDATION 88: A comprehensive program should be developed to educate jurors about the role and function of federal courts.
	Judicial Branch	RECOMMENDATION 89: The judiciary should seek public support on specific issues where the objective is approved by the Judicial Conference and where the issue has wide acceptance among the judiciary as a whole.
	Judicial Conduct and Disability	RECOMMENDATION 90: Mechanisms should be established or simplified to receive and address public complaints about improper treatment by judges, attorneys, or court personnel in federal court proceedings and operations.
Communications with Other Branches of Government and the Public	Executive Committee	RECOMMENDATION 91: Positive communication and coordination between the judicial branch and the executive and legislative branches should be enhanced.

LRP Chapter and Subhead	Committee(s)	Recommendation
The Federal Courts and Society Communications with Other Branches of Government and the Public	N/A	91a The Chief Justice should annually deliver an address to the nation regarding the state of the federal judiciary.
	Federal-State Jurisdiction	91b Congress should be encouraged to require the legislative staff of all substantive congressional committees and the Offices of Legislative Counsel in the Senate and the House of Representatives, when reviewing proposed legislation for technical problems, to satisfy to the greatest extent possible a legislative "checklist."
	Executive Committee	91c Judicial branch representatives should continue to hold periodic meetings with Justice Department officials and members of Congress to discuss matters of common interest.
	Executive Committee	91d A permanent National Commission on the Federal Courts should be created, consisting of members from the executive, legislative, and judicial branches of the federal government, and members from the state judiciary and academic world, to study on a continuing basis and to make periodic recommendations regarding a number of issues concerning the federal courts including, but not limited to, their appropriate civil and criminal jurisdiction.
	Judicial Branch	91e All courts of appeals should be encouraged to participate in the pilot project to identify technical deficiencies in statutory law and to inform Congress of same.

LRP Chapter and Subhead	Committee(s)	Recommendation
The Federal Courts and Society Communications with Other Branches of Government and the Public	Federal-State Jurisdiction	RECOMMENDATION 92: The federal and state courts should communicate and cooperate regularly and effectively.
	Judicial Branch	RECOMMENDATION 93: The federal courts should work closely with the bar to enhance the quality of representation, to elicit support for needed improvements in the courts, and to generate better understanding of the special role of the federal courts in the justice system.

11.

Agenda Item XXX
XXX Committee
Winter 2007

SUBJECT: National Academy of Public Administration (NAPA) Study Recommendations

ISSUE: This agenda item information about the study of the judiciary's financial and management processes by the National Academy of Public Administration.

BACKGROUND:
At the direction of Congress[1], the National Academy of Public Administration (NAPA) undertook a study of the Judiciary's budget formulation and execution practices, and cost-containment efforts, and issued its report in June 2007. The report focused on five principal areas: budget formulation, budget execution, planning, measuring performance, and reducing space costs. NAPA's report concludes that "the Judiciary's budget formulation and execution processes reflect sound stewardship of federal funds." Over the course of the study, the NAPA project team was provided with extensive background information on the Judiciary's budget processes and programs, received briefings from Administrative Office staff on subject matters related to the study, met with program chairs of Judicial Conference committees that have budget responsibilities, visited several courts, and met with circuit executives and court advisory groups while they were at the AO for scheduled meetings.

Committee chairs received copies of the NAPA report in September 2007 as background for the long-range planning meeting discussion about enhancements to the judiciary's planning process (see long-range planning agenda item).

DISCUSSION:
The NAPA report is being provided to committees to lay a foundation for future discussions about its observations and recommendations. The Executive Summary is attached and a complete final report is available on the J-Net at
http://jnet/Finance_and_Budget/Appropriations_Outreach/NAPA_Report_Preparing_for_the_Future.html.

Attachment

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[1]Language in the Judiciary's fiscal year 2006 appropriations bill (Public Law No. 109-115) directed that up to $1.0 million from the Administrative Office's budget "shall be made available to the National Academy of Public Administration for a review of the financial and management procedures of the Federal Judiciary."

EXECUTIVE SUMMARY

Although the Judiciary is a separate branch of the federal government, legislative and executive branch actions directly impact the types and volume of cases that come to it. The interdependence of these three branches—executive, legislative, and judicial—is most visible in the appropriations process. The U.S. Office of Management and Budget does not review the Judiciary budget, but cases coming to the "third branch" may change if the president requests funding for more prosecutors, the focus of federal prosecutions shift, or Congress moves a crime from state to federal jurisdiction. When Congress sets the Judiciary's appropriations level, it affects the administration of justice greatly. The Judiciary exerts the greatest influence on congressional decisions through its case for appropriations and the methods used to manage its financial resources.

Appropriators face the challenge of funding the Judiciary at adequate levels. This is challenging given a capped congressional budget process designed to fulfill the missions of the entire federal government and a given appropriation subcommittee's purview.

THE ACADEMY STUDY

Following reorganization of the subcommittees of the House and Senate Committees on Appropriations in 2005, the Judiciary's budget moved from the Senate Subcommittee on Commerce, Justice, State, and Related Agencies to the Subcommittee on Transportation, Treasury, HUD, Judiciary, and Related Agencies. Congress directed the Judiciary to contract with the National Academy of Public Administration (Academy) to examine the Judiciary's budget process and its recent cost-containment initiatives. In discussions with the subcommittee staff, they also asked the Academy to study how the Judiciary's priority-setting process is built into budget requests and how it reports the results of its activities to both Congress and the public. An Academy Panel was established to undertake this effort.

THE FEDERAL FISCAL AND MANAGEMENT ENVIRONMENT

Recently, the Judiciary has fared relatively well in receiving appropriations close to the level requested. A notable exception occurred with the Fiscal Year (FY) 2004 appropriation when it received a double, across-the-board reduction.

A November 2005 Academy Committee report, *Ensuring the Prosperity of America: Addressing the Fiscal Future*, concluded that state budget policies are out of balance. The Panel overseeing this study agrees with that observation. As the federal budget continues to run large deficits notwithstanding a growing economy, there is little reason to believe that underlying pressures on budgets will abate, given such factors as the aging U.S. population and the rapid increase in health care costs. This economic situation may lead to much higher tax burdens, unsustainable levels of public borrowing, or deep reductions in other important activities. This situation could impact and adversely affect the federal Judiciary's budgets.

The Panel wants to use this opportunity to call attention to these conditions that are likely to influence the Judiciary's future. Indeed, it is appropriate that the Judiciary consider the broad federal fiscal environment as it moves to strengthen its planning and budgeting systems. The federal budget is a battle between the parts and the whole in which everything is, in fact, competitive.

DEVELOPING AND MANAGING THE JUDICIARY BUDGET

The Judiciary's annual budget obligations totaled $6.3 billion in FY 2006. Among other items, these funds pay for 1,617 active Article III, bankruptcy, and magistrate judges; 464 senior judges (retired judges who maintain at least a partial caseload); 33,214 staff; and nearly 40 million square feet of space. This report deals primarily with the $4.3 billion in obligations in the Salaries and Expenses (S&E) account, which provides funds for the courts of appeals, district courts, bankruptcy courts, and probation and pretrial services offices.

This Panel believes that the Judiciary's budget formulation and execution reflect sound stewardship of federal funds. Judges and senior staff are intensely involved in developing spending requests and directly managing budgets; the nation's system of justice is well served by their involvement. Yet the Panel is concerned that setting priorities through Judicial Conference committees provides an insufficient locus for leadership debates in order to set comprehensive, long-term goals. This dispersed mechanism adds to the difficulty that the Judicial Conference faces in identifying the resources and authorities needed to reach its goals.

Planning is associated with Budget Committee decisions. However, the Judicial Conference's subject-matter committees, which submit budget requests, already have made individual decisions about their priorities by the time the Budget Committee receives those requests. Because the budget's overall size is fixed, each committee's decisions impact the discretionary resources available to other committees. Further, it is unclear whether the top priorities of each committee are consolidated into a collective and reflective list. That is, the top priority of one committee may be a second or third-level priority for the Judiciary as a whole.

Given staff reductions and operational constraints stemming from the FY 2004 reduction, the Chief Justice directed the Judicial Conference's Executive Committee to examine the Judiciary's long-term fiscal outlook. *Cost-Containment Strategy for the Federal Judiciary: 2005 and Beyond,* released in September 2004, focused on reducing rent costs and concluded that annual budget development had served the Judiciary well when Congress provided adequate increases. At the same time, the report indicated that developing budgets within an annual decision-making process was not conducive to making long-term changes and achieving the lower expenditures necessary in a time of increasingly constrained federal budgets. The Panel agrees with this point.

The Panel also agrees with Budget Committee and long-range planning meeting suggestions that compiling program-based budgets would enable the Budget Committee, Executive Committee, and Judicial Conference to consider the total needs of each program. Doing so not only would help individual committees understand the implications of their investment choices, it also would

help disclose the total cost implications associated with proposed options and decisions and would facilitate setting priorities. In other words, this approach would allow decision makers to better compare the relative costs and benefits of investments in various programs.

A range of factors—caseload, case complexity, and the number of defendants and convicted offenders under judicial supervision among them—influence the Judiciary's budget development process. However, the lack of a regular process to integrate planning and budget processes makes it inevitable that budget deliberations focus on costs and cost-containment rather than systematically setting priorities, determining resource needs, and adjusting funding to achieve the Judiciary's most important goals.

Therefore, the Panel recommends that the Judiciary, when developing and managing the Judiciary budget:

- **Work with appropriate executive branch agencies to determine the impact of their operations on the Judiciary. The goal is to ensure that the judicial and executive branches can explain clearly these impacts to congressional appropriators and outline changing resource needs based on emerging legislative or executive branch priorities. This process could include an annual meeting of senior officials from the Judiciary, U.S. Department of Justice, and U.S. Department of Homeland Security with the concurrence of the Chief Justice.**

- **Integrate the judicial planning and budget processes by having Budget Committee judges and staff work closely with the Executive Committee and related staff. The goal is to ensure that a long-term, comprehensive Judiciary plan guide budget development and that budget requests contain information on the current accomplishments of long-term plan objectives.**

- **Require subject-matter committees to prepare program-based budgets and submit them to the Budget Committee. The Budget Committee would retain its role of weighing tradeoffs, integrating committee requests, and preparing the final budget submission.**

- **Revise Judiciary budget training programs to ensure that judges on committees and senior staff learn to develop resource requests that are related to their program responsibilities rather than as components of, for example, a Judiciary-wide request for more staff.**

The Budget Committee must incorporate the Judiciary's comprehensive priority-setting process into its budget guidance memorandum and review all committee budget proposals for their alignment with goals. Specific goals require accurate cost estimates to report on their achievement. The committee and division may need additional staff support.

The Judiciary's Financial Plan divides the budget into four categories: mandatory, controllable, uncontrollable, and historically fully funded. Spending in the latter two categories is not subject

to a zero-based perspective in budget formulation. The Panel understands that the terms "controllable" and "uncontrollable" refer primarily to determining the allocation of enacted appropriations in a current budget execution year. However, these internal categories have created a sense of fiscal entitlement in some areas of spending; their use may imply that the Judiciary believes that portions of its budget cannot be reduced. By law, some cannot. Congress must fund judges' salaries and the Judiciary must pay for court-ordered drug testing, mental health and drug treatment, and other items when included as a condition for an offender's release. Refocused attention on these spending categories and the extent to which they are used would help the Judiciary develop alternative strategies to accomplish its mission.

Therefore, the Panel recommends that the Judiciary:

- **Reexamine all categories of mandatory, historically fully funded, uncontrollable, controllable court allotments, and controllable centrally managed funds to determine whether more spending will be allocated into the controllable categories. Consider different terms for the resulting budget groups.**

Cost-containment practices related to major construction projects is one area where the Judiciary has begun this process. The smaller the "judicial footprint" in terms of space requirements and the smaller the rent budget, the greater the flexibility within the S&E account.

WORK MEASUREMENT FORMULAS IN BUDGET FORMULATION

The Judiciary, more than many other federal entities, has a great deal of information on the volume of its work and the time it takes to perform its tasks. The data are especially useful in allocating funds as decision makers measure the magnitude of work in the many court units across the nation.

However, the Panel shares the Judiciary's concern that the three-year span in updating its work measurement formulas may produce outdated estimates given rapid technological and other changes. Yet annual updates are problematic given the staff time required. To help with this challenge, the Judiciary has relied on the informed judgment of professional staff to adjust resource requests; such adjustments have tended to be across-the-board. Using this approach occasionally can be useful, but doing so regularly raises questions about the adequacy of budget estimates. Even if the formulas are current, the issue is complicated recognizing that the realities of available resources and tradeoffs inherent in the appropriations process influence the outcome. Thus, the Budget Committee tries to balance the Judiciary's need for staff with what it believes is a credible request to Congress.

The Judiciary does not compare the level of resources actually used to accomplish its work with the level of resources it estimated would be required for a fiscal year. Throughout its research, Academy staff found that unpaid overtime is common in federal courts and that some clerk's offices have reduced their hours due to workload and fiscal pressures. However, these are anecdotes until a system is established to reconcile resources needed, resources expended, and

work accomplished. From October 2003 to October 2004, the Judiciary eliminated 1,350 personnel through reduction-in-force, buy-outs, early-out retirement actions, and not filling 664 vacated positions. Yet Congress has not seen a measured impact. It may seem professional not to highlight backlogs, routine unpaid overtime, or attrition, but this approach creates frustration among court staff and may create an impression among appropriators that there is no adverse impact on justice. This is an unnecessary vulnerability for the Judiciary.

The Judiciary clearly needs to provide data both on the amount of completed work within a given level of resources and on uncompleted work, with a description of the consequences of the latter.

Therefore, the Panel recommends that the Judiciary revise its work measurement system through a three-step process:

1. **Develop a structured feedback loop that compares the estimated work years to the actual work years. Document the amount of work done.**

2. **Document a sample of work not done in the same period and estimate the impact/consequences of not performing the work. The latter may be qualitative, but should be based on systematic documentation and informed judgment by court personnel inside and outside the Judiciary, such as lawyers and their clients.**

3. **Use actual staffing data from the prior year as the starting point for estimating the amount of work that may be done with a given level of resources and the work that will remain undone.**

Information generated by this process would give appropriators a better understanding of what is gained or lost with marginal changes in Judiciary appropriations. In times of scarce resources, Congress may not be able to provide funds, for example, to fully supervise felons on probation or process new bankruptcy cases within a given time period. However, this recommendation would lead to an enhanced understanding of the implications of reduced appropriations, such as fewer probation officer visits or delays in providing information to bankruptcy filers.

DEVELOPING A PLANNING PROCESS THAT SUPPORTS THE FEDERAL JUDICIARY'S PROGRAMS AND BUDGETS

Almost daily, the Judiciary conducts planning to allocate resources fairly and reasonably to operational priorities. Chief judges of courts, court unit executives throughout the nation, and managers in the Administrative Office of the U.S. Courts (AO) look ahead to manage cases, develop new systems, and operate such functions as human resources and information technology.

The semiannual, long-range planning meetings among committee chairs of the Judicial Conference appear to be most closely related to enterprise-wide planning. Based on the Panel's analysis of four years of meeting summaries, it appears these meetings address some tactical

planning process criteria that the Panel discusses in Chapter Three. The number and diversity of judicial personnel involved in these meetings provide a mechanism for communication and collaboration. However, the large number of attendees and the meeting brevity are likely a barrier to effective participation as they do not allow an opportunity to fully address many issues or define the range of different opinions.

The Panel has several observations about the Judiciary's planning efforts:

- The three sets of participants—judicial officers, court support staff, and the AO—do considerable planning, particularly in support of budgeting. Yet they have approached it through various and largely unrelated techniques and activities.

- Although each management process independently addresses many of the Academy Panel's planning criteria, no mechanism exists to coordinate planning activities across the organization.

- Reliance on setting overall organizational policies in committees requires exceptional attention to cross-committee communication and coordination, similar to those required to support and sustain a matrix organization. No mechanism exists to accomplish this.

- Other than space/facilities and Information Technology (IT), planning activities tend to focus on operational topics and short-term perspectives.

- The semiannual planning meetings of Judicial Conference committee chairs provide a potential mechanism to address longer-term issues, although it would be necessary to substantially alter the expectations and conduct of these sessions to accomplish this.

A comprehensive, long-term planning process provides a way to identify enterprise-wide goals and direction toward fulfilling them. In this report, the Panel provides suggestions about steps that the Judiciary could take to develop a more comprehensive planning process. However, its recommendations are deliberately not specific because the Judiciary must develop a process that suits its needs and professional culture.

The Panel recommends that the Judiciary:

- **Reexamine the organization's 1995 expression of its mission, vision, and core values in order to revise or reaffirm them, and do so in a way that provides an opportunity to create a more informed and dedicated group of judges and employees.**

- **Establish an enterprise-wide priority-setting process that supports the organization's mission, vision, and core values and encompasses more than budget issues to help shape budget development.**

- **Ensure that adequate organizational capacity exists to establish the organization's planning needs and design and facilitate the planning process.**

An ongoing priority-setting process and organizational structure authorized by and accountable to the Judicial Conference will make priorities easier to distinguish when making long and short-term budgetary decisions. Given the Judiciary's culture of distributed power and committee-based operations, the Panel assumes that planning-related activities will remain spread throughout the organizational structure. If this is the case, the Panel envisions the Judiciary unit with planning capacity having a coordinating and information sharing role, with oversight by those whom the Chief Justice designates.

The Federal Judicial Center's research activities traditionally have provided a mechanism for judges and staff to explore alternatives and new ideas before applying them on a widespread basis. The Judiciary is fortunate to have this resource; it may want to explore ways the Center's staff or consultants can provide advice and analysis to its priority-setting planning process. The Center's training capabilities certainly will help institutionalize what the Judiciary develops.

ADVISING CONGRESS AND THE PUBLIC ON ACCOMPLISHMENTS

Providing information on an organization's accomplishments is the other component that relates to effective budget presentation and management. The Judiciary publishes many statistical reports, most available online, that show outputs in many forms, including cases filed or terminated by type of court, people under supervision, and offenders receiving substance abuse treatment. The AO director's annual report provides an overview of many activities and describes the results of improvement projects, such as electronic case management, enhanced interpreter services, and juror utilization. Yet as a periodically updated long-term plan or annual operating plans are not available, neither is an integrated report or series of reports on the extent to which goals and objectives are achieved.

A step in this direction is underway in probation and pretrial services, coordinated by that AO directorate. Working with district offices, the directorate has launched a multi-year research effort to develop information on the results of the supervision process, including rearrest and recidivism data.

It is difficult for outside stakeholders to determine how the Judiciary decides which course of action is desirable without clearly established performance targets and priorities to guide them. Congressional committees—oversight and appropriations—are accustomed to the executive branch process of developing a strategic plan, annual performance plans, and annual performance reports. They can see results, comment on achievements, and decide how to document or measure them. The Judiciary has various planning activities underway, and its judges and staff advisory groups regularly assess operations to develop better ways of doing judicial and administrative business. However, relatively few administrative efforts are visible beyond the Judiciary which could lead outside stakeholders to view the Judiciary as proceeding with "business as usual" in most areas.

The Judiciary needs a systematic effort to identify and develop useful information about administrative outcomes that may inform and justify its annual budget request and provide

assessments and documentation about how effectively it uses its resources. This will take a substantial effort, but the Judiciary is not starting from scratch. Its work measurement system offers a wealth of information on how work is done, and it has extensive output data on its work. In addition, Federal Judicial Center research can contribute in terms of what data to measure and how to systematically document results.

'Effective justice' has many aspects, some of which are highly nuanced. Assessing judicial outcomes tempts political and other non-judicial interference in the essential and prized independence of the Judiciary. Consequently, the Panel would expect the Judicial Conference to decide that performance measures should address primarily administrative areas, such as court unit management systems or citizen access to information.

The essential point is that the Judiciary must produce and make available credible information on performance regularly. Absent a mechanism for stating goals and objectives and systematically documenting their achievement, the Judiciary is placed in the difficult position of not being able to justify its needs for a specified level of resources.

Therefore, the Panel recommends that the Judiciary:

- **Continue developing measures for the Probation and Pretrial Services operations.**

- **Select a second area to develop measures and systematic documentation for some court operations. One possible operation is Bankruptcy, where staff actions affect case processing to a greater extent.**

- **Tie data on workload accomplishment, as already documented in several annual publications, to the goals presented in the Judiciary's planning process.**

- **For one or more selected areas, develop indicators of results or outcomes—rather than outputs—similar to those in the District Court Planning Profile. Tie these to the goals and objectives of that area or areas in a model performance report.**

Reporting on results will better demonstrate the value of resources that the Judiciary expends and will place it in a better position to justify its budget requests. Over time, there will be a much more robust base of information about the results that units and programs produce and the effects of resource decisions and reforms on the Judiciary and those who need its services.

GETTING VALUE FOR MONEY SPENT ON RENT

The appropriations subcommittee asked the Academy Panel to provide its perspective on the increasing cost of rent, a particular area of concern that the Judiciary and General Services Administration (GSA) raised. The Judiciary's space inventory consists of courtrooms and

chambers; libraries; clerks and probation/pre-trial service offices; attorney lounges; public spaces; and such specialized spaces as corridors for security needs. By statute, the Judiciary must hold court in 459 locations.

Since 2002, the average annual appropriation for the federal courts has increased 4.7 percent and GSA average annual rent charges have increased 6.2 percent. During this period, the Judiciary's use of space increased by about 3,651,000 square feet, about 15 percent. The Judiciary expects to pay almost $1 billion in rent to GSA in FY 2007. It recognizes that a portion of the increase is due to the increase in space. However, the rent increase greatly constrains the Judiciary's spending budget. After fully funding rent payments consuming almost 22 percent of its S&E budget in FY 2004 and other mandatory expense categories, the Judiciary had to severely reduce the allocation of funds to district and appellate courts. This action led to reductions in non-chambers court staff. Clearly, the impact would have been mitigated had the Judiciary only absorbed a single across-the-board cut in its 2004 appropriations, not the double, across-the-board cut. Although the focus on reducing rent costs led to a more contentious relationship with GSA, new leadership at the AO and GSA has led to recently improved relations.

The Panel agrees that the increased cost of space has a powerful impact on the Judiciary's budget. As early as 1996, the Judiciary recognized that if it did not curtail the growth of space costs it would have to make painful tradeoffs between the cost of space and funds for staff. However, it should not have to accept specific rent bills based on unsound appraisals or problematic estimates that can be documented. Further, the Judiciary should not be responsible for tracking down errors in GSA rental charges or expending staff resources to measure square footage or document other aspects of rent calculations that appear inappropriate or inaccurate.

The Panel senses that the relationship between the Judiciary and GSA is improving. New leaders in both organizations have met and appear committed to achieving a workable solution. However, the issues are not simple or subject to short-term resolution. Therefore, **the Panel recommends that the Judiciary develop a memorandum of understanding (MOU) with GSA to establish a process that is:**

- **collaborative, fact-based, transparent, and non-adversarial and that includes agreed-upon time limits on the analysis and resolution of specific issues**

- **impartial in the methods identified to address and resolve problems and issues regarding facilities design, rent determination, service delivery, and space utilization**

The MOU process should used in lieu of creating statutory independent real property management authority for the Judiciary, unless or until the collaborative process proves infeasible. If that proves to be the case, the Judiciary would be able to seek real property authority. The Panel believes that judges' time is better spent on judicial administration than space management, but it also recognizes that space and facilities management is central to successful judicial administration. The Judicial Conference can revisit this issue if needed.

MOVING FORWARD

The Panel believes that the Judiciary should move forward on all of its recommendations expeditiously. When the Judiciary developed its budget decentralization process in the late 1980s and early 1990s, it created and monitored a pilot program for three years. At the conclusion, it instituted the highly effective program through which individual courts manage their designated budgets—something many executive branch agencies have been unable to accomplish. Through similar pilots and phased implementation processes, the Judiciary more recently has embraced such significant system-wide administrative improvements as the Case Management/Electronic Case Files System and a uniform accounting system. It also has a track record of developing effective new management systems. With the leadership of the Judicial Conference, it can develop a planning and accomplishment reporting system linked to the budget process; devise better ways to balance the needs of its growing workload, which requires more judges and staff and the facilities required to house them; and continue to deliver justice to the public. To the extent that a more robust and integrated system can be put in place, the Judiciary will substantially enhance its ability to justify needed increases to fulfill its primary mission and reduce its vulnerability to arbitrary reductions of resources in the future.

12.

NOTICE PLEADING: THE AGENDA AFTER *TWOMBLY*

Introduction

On May 21, 2007, the Supreme Court decided *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 550 U.S. ___. At the time a jaded academic might have viewed the opinion as simply one more entry in the variegated catalogue of decisions that in alternative sequence deny "heightened pleading" standards outside explicit rule or statute and then seem, surreptitiously, to impose heightened pleading standards. The *Twombly* opinion, indeed, seems to combine both elements. Any temptation to take this view is confounded by the outpouring of lower-court decisions following in *Twombly's* wake. A few months of concentrated attention do not suffice to establish the decision's long-term impact. It would be premature to launch Rule 8 amendments, either for fear that the pleading bar has been raised too high or to secure the bar and perhaps raise it higher still. Barring truly drastic changes, time will be required both to determine what changes have emerged in pleading standards and to evaluate them. As so often, developed practice will provide the surest guide to the need for Rules amendments and, if a need emerges, to the shape of effective amendments. Much of the burden of developing the new practices — if indeed new practices emerge — will fall on the practicing bar. But the pace of the rulemaking process ensures that this burden must be born at least for several years. Delay is not indifference.

If it be accepted that it would not be wise to attempt immediate Rule 8 revision, there are powerful reasons to advance Rule 8 back to a more active place on the Advisory Committee's agenda. If discovery has been on the agenda almost constantly for the last 40 years, notice pleading has been on the agenda for at least 20 years — longer if Rule 11 is included. Concerns about the role of discovery have led repeatedly to thoughts that perhaps the failure to establish a fully satisfactory discovery practice justifies reconsideration of the basic notice pleading part of the package. The Court's invitation to reinterpret present Rule 8 explicitly reflects similar concerns about the role of pleading as a protection against overblown discovery. The immediate response in the lower courts provides assurance that a variety of approaches will be taken, not only in pleading standards as such but also in more assertive efforts to manage the early stages of discovery to facilitate more detailed pleading or summary judgment. If substantial uniformity emerges, there may be no occasion to revise Rule 8 or any other rule. But amendments must at least be considered if disuniformity persists after the initial period of adjustment. Active attention has become important. And it may soon enough be possible to call on the Federal Judicial Center for help in devising empirical studies to help sort through developing practice and its consequences.

Recent Committee History

Pleading practices have been on the agenda for many years. In 1988 the Advisory Committee considered a proposal to abrogate the Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. The defendant would be required to answer on the merits, and then seek dismissal either by a Rule 12(c) motion for judgment on the pleadings or by a Rule 56 motion for summary judgment. An opportunity for "any necessary discovery" would be required before ruling even on a Rule 12(c) motion. The Committee sought research help from the Federal Judicial Center. The result was Willging, "Use of Rule 12(b)(6) in Two Federal District Courts" (Federal Judicial Center 1989). The study found that Rule 12(b)(6) motions were filed in 13% of the cases in the sample. The motions were granted in 6% of the cases; in 5% of the cases the result was dismissal either of the entire action or dismissal as to one or more defendants. In 3% of the cases the result was dismissal of the entire action. The proposal to abrogate Rule 12(b)(6) was later withdrawn.

Pleading standards were again brought to the agenda by discussion at the May 1993 Advisory Committee meeting, and were the subject of occasional discussion over the following years. Rule 15 amendment practice was studied in depth, leading to recently published amendment proposals. Discussion of notice pleading as such in part responded to Supreme Court decisions. More recently pleading has been considered along with discovery and summary judgment. The inquiry was bold enough to extend to the fundamental "package" that sought to subordinate pleading to discovery as a means of developing and exchanging fact information, relying on summary judgment for protection against positions of claim or defense that do not merit trial. The bold inquiry did not lead to bold action. Fundamental reconsideration of notice pleading has been deferred in the hope that less drastic approaches will meet whatever problems may persist. The alternative of developing particular pleading requirements for specific substantive areas also was deferred, despite the implicit invitations in Supreme Court observations that any departures from the notice pleading standard must be provided by statute or court rule. Substance-specific standards will be difficult to develop without a keen appreciation of actual practice needs in any field that might be taken on. There also is a risk that substance-specific standards might encroach on the premise that Enabling Act rules must not abridge, enlarge, or modify any substantive right. Finally, attention turned to proposals to expand the Rule 12(e) motion for a more definite statement. A number of alternative drafts were considered at the September 2006 Committee meeting, focusing on more definite statements that would pave the way for disposition under Rule 12(b), (c), or (f), or that would support pretrial management in more general terms. The discussion reflected a balance between enthusiasm for some means to go beyond the generality of the pleadings and reluctance to add a new opportunity for "roadblock" motions. The conclusion was that these proposals might be further considered by the Rule 56 Subcommittee in conjunction with revision of Rule 56. Immediate Subcommittee action does not seem likely.

Twombly

The Twombly opinion is open to many interpretations. There was no room to doubt what the two Sherman Act conspiracy claims were. Nor was there any room to doubt the sufficiency of the legal theory — an explicit agreement among potential horizontal competitors to refrain from market-extension activities is per se invalid. The plaintiffs, consumers of telephone services, alleged that the four incumbent local exchange carriers had conspired to do two things. One was to adopt terms for dealing with competitive local exchange carriers that effectively defeated the purposes of the 1996 Telecommunications Act by thwarting the entry of new local-exchange competition. The second was to refrain from entering each others' territories by themselves becoming competitive local exchange carriers. The "nature" of the claims, 127 S.Ct. at 1965 n. 3, was clear. The question was instead whether the complaint provided sufficient "grounds" for the claims by pleading "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal conspiracy," 127 S.Ct. at 1965. The link between pleading and discovery was thus forged early in the opinion. The link was further shaped as the opinion progressed. Emphasizing the burdens of discovery in complex antitrust litigation and the difficulties of judicial management, the single most frequently used label — perhaps to become a "test" — looks for "plausibility." An early statement looks for "factual enhancement" that crosses "the line between possibility and plausibility of 'entitlement to relief.'" 127 S.Ct. at 1966.

It is tempting to predict that eventually the Twombly opinion will come to stand for a context-specific test that looks for sufficiently detailed fact allegations to make it plausible to move beyond the bare pleadings into the potentially expensive discovery stage. The effect of context could be measured by a variety of factors that shape expectations of discovery burdens. Lower demonstrations of plausibility might suffice when discovery does not threaten to consume vast resources, while greater detail would be required when discovery seems likely to prove costly. Context also might be shaped, although perhaps not explicitly, by the nature of the substantive claim.

The element of agreement required to establish an antitrust "conspiracy" is confused in theory and may be exquisitely difficult to establish in practice. The structure of many markets enables parallel conduct that might reflect conduct that can be characterized as "agreement," but also might reflect successful independent oligopoly rationalization. An allegation that is easy to allege but costly to discover and difficult to prove may encounter higher plausibility barriers. Simple familiarity with the law and frequent experience with litigation under it also may count — the bare allegation of "negligence" in Form 9 (to become Form 11) suffices because court and counsel know full well how to manage a negligence action. There is strong reason to believe that courts now measure the sufficiency of pleadings by responding to all of these influences, and that adoption of a "plausibility" test will make the process somewhat more open and may encourage more deliberate pursuit of the process.

It is almost as tempting to make a different prediction. The Twombly opinion may come to be seen as specific — specific not to antitrust pleading in general, but specific to the particular problems presented by claims that rest on the agreement component of a § 1 "contract, combination in the form of trust or otherwise, or conspiracy."

Either of these predictions seems reasonable. The complex Twombly opinion, however, invites speculation at least as much as prediction. The catalogue of phrases that can be built out of the opinion is intriguing. One phrase or another can be made to point in almost any direction. A partial catalogue illustrates the possibilities:

> "a conclusory allegation of agreement at some unspecified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement."
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> "The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"
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> "The border in [a court of appeals case] was the line between the conclusory and the factual. Here it lies between the factually neutral and the factually suggestive. Each must be crossed to enter the realm of plausible liability."
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> A case should be disposed of at the point of minimum expenditure by parties and court "when the allegations in the complaint, however true, could not raise a claim of entitlement to relief."
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> Quoting a court of appeals, the costs of federal antitrust litigation "'counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim.'"
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> "Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no '"reasonably founded hope that the [discovery] process will reveal relevant evidence."'"
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> In Conley v. Gibson, the Court said that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." "This 'no set of facts' language can be read

in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read Conley in some such way when formulating its understanding of the proper pleading standard. * * * On such a focused and literal reading * * *, a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." The complaint in this case "does not set forth a single fact in a context that suggests an agreement. * * * It seems fair to say that this approach to pleading would dispense with any showing of '"a reasonably founded hope"' that a plaintiff would be able to make a case." The "no set of facts" language has confused and divided courts and commentators. The Conley complaint in fact amply stated a claim for relief. "[T]his familiar observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. * * * Conley * * * described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival."[1]

"[B]efore proceeding to discovery, a complaint must allege facts suggestive of illegal conduct."

The complaint in Twombly describes parallel conduct and asserts agreement, but the "few stray references" to agreement "are merely legal conclusions resting on the prior allegations." "The pleadings mentioned no specific time, place, or person involved in the alleged conspiracies." Form 9, in alleging negligence, also alleges a specific time and place. The Twombly complaint "furnishes no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place." Nothing in the complaint "invests either the action or inaction alleged with a plausible suggestion of conspiracy." [It is natural for each of the defendants, acting independently, to resist competition from new local carriers; "there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway * * *."]

"[W]e do not apply any 'heightened' pleading standard, nor do we seek to broaden the scope of * * * Rule * * * 9. * * * On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than Rule 8 requires. [Rule] 9(b)-(c). Here, our concern is not that the allegations in the complaint were insufficiently 'particular[ized], * * *; rather, the complaint warranted dismissal because it failed in toto to render plaintiffs' entitlement to relief plausible."

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[1] It may be noted that the Conley opinion did not make up the "no set of facts" test out of whole cloth. The opinion cites earlier appeal decisions. The earliest is Leimer v. State Mut. Life Assur. Co., 8th Cir.1940, 108 F.3d 302. At p. 306, after citing several pre-Civil Rules decisions, describing Rule 8(a)(2) and the Forms, and noting the possibility of testing a complaint by a bill of particulars under the pre-1948 version of Rule 12(e) or by summary judgment, the court said: "[T]here is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim."

> "[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."

Phrases will be picked out from this array and from other parts of the opinion. It is clear that the "no set of facts" hyperbole of the Conley opinion has been abolished. Many statements suggest a requirement that facts be pleaded — if not the "fact pleading" of the Codes, still something more than mere "conclusions." Apparent approval of the barebones allegation of "negligence" indicates that the line between "fact" and "[legal] conclusion" will depend on the context. So the opinion variously refers to "enough fact to raise a reasonable expectation that discovery will reveal evidence"; "factual enhancement" to cross "the line between possibility and plausibility of entitlement to relief"; "facts adequate to show illegality"; the lines between "the conclusory and the factual," and "between the factually neutral and the factually suggestive"; "fact in a context that suggests agreement"; "facts suggestive of illegal conduct"; "merely legal conclusions"; and "not * * * heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."

Beyond the search for some fact component, the opinion distinguishes between the "nature" of the claim and the "grounds." (Remember that Rule 8(a)(1) requires a short and plain statement of the "grounds" for jurisdiction, while (2) does not refer to "grounds" in stating the claim.) The complaint must show that the pleader is entitled to relief — in itself an observation that is easily anchored in 8(a)(2)'s "a short and plain statement of the claim showing that the pleader is entitled to relief." Something must show "an entitlement to relief," also an observation clearly anchored in the rule text. There must be a "reasonable likelihood that the plaintiffs can construct a claim" — an observation that seems to mean that a plaintiff must state a claim and also show a chance of "constructing it." There must be a reasonably founded hope that discovery will reveal "relevant" evidence — this does not seem to look for a prospect that discovery will reveal sufficient evidence, but only relevant evidence. So too of a reasonably founded hope the plaintiff will be able to make a case.

All of this could be reduced to a simple proposition, similar to one of the suggestions made early in the Committee's renewed consideration of notice pleading. Rule 8(a)(2) has it right. It requires not merely a short and plain statement, but a statement "showing that the pleader is entitled to relief." The suggestion was that some innocuous word might be added as a justification for publishing an amended rule with a Committee Note saying "and we really mean it. There must be some showing sufficient to justify moving beyond the pleadings to the next stage. The showing may be adjusted to the apparent costs of proceeding to discovery and other pretrial work, and may be integrated with focused and limited resort to discovery and other pretrial work in a process that requires some initial success in discovery to justify better focused pleading and further discovery." The antitrust context of the Twombly decision is fully consistent with this view.

Erickson (and Tellabs)

The Twombly decision was not the last word on pleading in the October 2006 Term. Two subsequent decisions fill out the picture.

Erickson v. Pardus, 2007, 127 S.Ct. 2197, is more general. The Court granted review and vacated on the certiorari papers. The plaintiff prisoner, proceeding pro se, alleged that he had been improperly withdrawn from treatment for hepatitis C, and alleged that nontreatment caused continued damage to his liver and was endangering his life. The court of appeals affirmed dismissal, finding no more than "conclusory allegations" that suspension of treatment caused harm independent

of the harm that would result from hepatitis C itself. The Supreme Court ruled that the allegations were not "too conclusory" for pleading purposes. The allegation that removal from treatment endangered the plaintiff's life "alone was enough to satisfy Rule 8(a)(2)." Quoting Twombly quoting Conley, the Court said:

> Specific facts are not necessary; the statement need only "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"

The Court went on to note that the claim was "bolstered" by more specific allegations in attachments to the complaint and in later filings. It also noted that a pro se complaint is held to less stringent standards than a formal pleading drafted by a lawyer. In the final paragraph, on the other hand, it observed that the complaint still might be dismissed — that "the proper application of the controlling legal principles to the facts is yet to be determined."

It is often difficult to know just what to make of a summary disposition on the certiorari papers. The potential effect of the Erickson decision could easily be limited by the indulgence extended to pro se pleadings. It also could be limited by the manifest cogency of a claim that suspension of hepatitis C treatment for a minimum period of 18 months may lead to further liver damage and perhaps worse. At the same time, this selective quotation from the Twombly opinion could imply that the Twombly decision is, after all, specific to antitrust cases and perhaps is more specific still, looking only to conspiracy claims founded on parallel behavior. The steadfast denial of "heightened pleading" in the Twombly opinion could provide further support for this interpretation.

Tellabs, Inc. v. Makor Issues & Rights, Ltd., 2007, 127 S.Ct. 2499, is more limited. The Private Securities Litigation Reform Act of 1995 requires that a complaint "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." "The inquiry is inherently comparative." It is not enough that a reasonable inference of "scienter" can be drawn. The pleaded facts satisfy the test "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." This part of the opinion does not speak to pleadings governed by general notice-pleading standards. But another part may be more relevant. The Court ruled that this reading of the statute "does not impinge upon the Seventh Amendment right to jury trial." Here the opinion could be read to say only that when Congress creates a statutory claim — as in the securities laws — Congress "has power to prescribe what must be pleaded to state the claim." For that matter, the Leatherman decision recognized that heightened pleading requirements can be created by court rule, such as Civil Rule 9(b). The statute does not require the plaintiff to plead more than she would be required to prove at trial. (This part of the opinion seems to go further: the plaintiff need only plead facts making the inference of scienter at least as likely as any plausible opposing inference; at trial, the plaintiff must demonstrate that scienter is more likely than not. The pleading test thus falls somewhat short of the directed verdict standard.)

The Courts of Appeals Confront Twombly

Reaction to the Twombly decision has been immediate and universal. Electronic research accounts counted the first thousand cases citing Twombly by early September. No doubt the count will climb past two thousand by the time of the November meeting. The appellate opinions alone counted up rapidly, although perforce in appeals from decisions rendered before Twombly was decided. This pervasive fascination may reflect an eagerness for guidance in notice pleading stemming from long-continued uncertainty as well as the centrality of the Supreme Court and the complexity of the opinion. If a brief period suffices to show the importance of the decision and the range of possibilities it opens up, however, more time will be needed to reach any settled account

of actual consequences. The time has not yet come for an exhaustive accounting of even the appellate decisions. But it is helpful to consider a small set of illustrations drawn from different circuits. The illustrations show that thoughtful proceduralists find that Twombly opens many possible approaches.

The Second Circuit: Iqbal

Pride of place in the early returns belongs to *Iqbal v. Hasty*, 2d Cir.2007, 490 F.3d 143. The appeal was argued in October 2006. The decision was entered on June 14, 2007, barely more than three weeks after the Twombly decision. The court managed, in this brief period, to provide not only a thorough review of the perplexities it found in the Twombly opinion but also a careful application of the standard it found there — a "plausibility" test of pleading.

A brief summary is even more inadequate with respect to the Iqbal decision than with respect to the Twombly case. It is easy to frame the Twombly pleading problem in abstract terms. Not so for Iqbal. "Iqbal is a Muslim Pakistani currently residing in Pakistan." His complaint alleged that two months after he was arrested and placed in the general prison population he was moved to a newly created "Administrative Maximum Housing Unit" for no reason other than designation by the FBI as a person "of high interest" in "investigation into the events of 9/11." In addition to the onerous general terms of confinement, the complaint alleged many acts of individual injury, including beatings, repeated strip and body-cavity searches, inadequate food, interference with prayer, delay in delivering legal mail, and the like. In addition to a wide array of constitutional and statutory claims the complaint presented particularly thorny problems with respect to official immunity and the responsibility of such high officials as the Attorney General and the Director of the FBI for acts playing out in the remote reaches of the Bureau of Prisons hierarchy. In the end, most of the allegations were found sufficient to withstand a motion to dismiss.

The discussion of "pleading requirements" in Iqbal begins with a review of the familiar cases, including those that reject "heightened pleading" requirements. 490 F.3d at 153-155. Then attention turns to Twombly, 490 F.3d at 155-159. The court recognized that a "narrow view" could be taken, limiting the Twombly decision to the specific context of an antitrust conspiracy claim based on nothing more than allegations of parallel conduct in a market structured to facilitate parallelism without agreement. The opinion, however, through "several, not entirely consistent, signals," indicates an intent "to make some alteration in the regime of pure notice pleading that had prevailed in the federal courts ever since Conley v. Gibson."

Judge Newman then quoted many of the phrases in the Twombly opinion that "point toward a new and heightened pleading standard." Disavowal of the "no set of facts" language in Conley v. Gibson was the beginning. (Later, 490 F.3d at 157 n. 7, the opinion notes that this language "has been cited by federal courts at least 10,000 times in a wide variety of contexts.") The Supreme Court discounted the ability of careful case management to weed out failing cases early in the discovery process. The opinion seems to adopt a "plausibility" standard.

On the other hand, there are grounds for limiting the possible reach of the Twombly opinion. The Court explicitly disclaimed "heightened pleading." The Erickson decision is in this same vein. Form 9 (Style Form 11) was noted approvingly, although the Court "took no notice of the total lack of an allegation of the respects in which the defendant is alleged to have been negligent." The emphasis on the burdens of antitrust discovery might imply that special pleading tests apply in antitrust actions. And the Erickson opinion says that a pleading need not include specific facts to satisfy Rule 8(a)(2).

"These conflicting signals create some uncertainty as to the intended scope of the Court's decision." But at least some of the language discussing Rule 8 in general terms "seems to be so integral to the rationale of the Court's parallel conduct holding as to constitute a necessary part of that holding." The conclusion, then, is that

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

Finally, the court expressed some lingering regret that heightened pleading could not be required in cases posing issues of the sort presented to it involving official immunity and "supervisory involvement." It suggested that Civil Rule 12(e) more definite statements might be required; that when a complaint passes the plausibility threshold "some limited and tightly controlled reciprocal discovery" might be used — focusing on interrogatories and requests to admit before depositions — to maintain control; and that summary judgment after carefully targeted discovery may provide important additional protection.

Judge Cabranes concurred, fully joining the opinion but also suggesting that it might be better to develop a pleading system that gives better effect to the purposes of official immunity. 490 F.3d at 178-179.

In some ways the most important lesson of the Iqbal opinion goes beyond the immensely valuable recognition and resolution of the complex details of the Twombly opinion. Application of the plausibility test ascribed to Twombly led the court through many pages of closely reasoned analysis. The task set by this upward adjustment in notice pleading standards will often be onerous. The work may be repaid, both for court and the parties, by reductions in the other work required to dispose of ill-founded claims or defenses without trial. But it will be hard work.

Other Circuit Examples

Seventh Circuit

Soon after the Twombly decision the Seventh Circuit affirmed denial of a motion to dismiss after accepting jurisdiction under § 1292(b). Judge Posner begins the opinion with a description that might seem to foretell reversal: "The complaint is a hideous sprawling mess * * *. We have found it difficult and in many instances impossible to ascertain the nature of the charges. * * * [T]he defendants can hardly be blamed for wanting to strangle the monster in its crib." Many pages are then devoted to the conclusion that the judge should have required greater specification of the acts claimed to violate state law in order to apply the proper standards of federal preemption. At the close, it is suggested that the district court might also want to consider whether any portions of the complaint should be dismissed for failure "to comply with the recent pleading standard announced by the Supreme Court" in Twombly. After noting that the Court had "rejected the hitherto canonical formula of Conley v. Gibson," the opinion concludes on this note: "The present case is not an antitrust case, but the district court will want to determine whether the complaint contains 'enough factual matter (taken as true)' to provide the minimum notice of the plaintiffs' claim that the Court believes a defendant entitled to." In re Ocwen Loan Servicing, LLC Mortgage Servicing Litigation, 7th Cir.2007, 491 F.3d 638, 641, 648-649. This passage implies that the pleading standard has somehow been changed, now requiring "enough factual matter" to give "minimum notice" of the claim.

Two months later Judge Wood wrote an opinion in a case that did not challenge the ruling that the third amended complaint failed to state a claim. The only issue was whether it was an abuse of discretion — it was not — to deny leave to file a fourth amended complaint after more than four years of pleading practice. At the close of the opinion, however, the court quotes Twombly and then describes Erickson as a decision "clarif[ying] that Twombly did not signal a switch to fact-pleading in the federal courts." Erickson teaches that specific facts are not necessary; all that is required is fair notice of what the claim is and the grounds on which it rests. "Taking Erickson and Twombly together, we understand the Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8." Airborne Beepers & Video, Inc. v. AT & T Mobility LLC, 7th.Cir.2007, 499 F.3d 663.

Local 15, International Bhd. of Electrical Workers v. Exelon Corp., 7th Cir.2007, 495 F.3d 779, affirmed dismissal of an action challenging a labor arbitrator's award. Given the tests for reviewing arbitral awards, the result is not surprising. The opinion begins by quoting a 2004 Seventh Circuit opinion quoting the "no set of facts" test, and then adds "But see * * * Twombly"'s statement that this test "is best forgotten." Noting "the liberal notice pleading standard," the opinion leaves matters at that.

EEOC v. Concentra Health Services, Inc., 7th Cir. 2007, 496 F.3d 773, provides many passages praising simplified notice pleading, but affirms dismissal in circumstances calculated to test judicial patience. The first EEOC complaint asserted that the defendant terminated an employee for complaining to top management that the employee's supervisor was giving preferential treatment to another employee who was having an affair with the supervisor. This complaint was dismissed without prejudice because the terminated employee could not reasonably have believed that Title VII is violated simply by giving preferential treatment to an employee because of an affair. The EEOC then filed an amended complaint that deleted the description of the employee's complaint, "undoubtedly * * * to avoid pleading itself out of court." Amendment to delete a self-defeating allegation is permitted. But, as the opinion later makes clear, not favored. As to notice pleading, the court observes that in 2006 it had stated that a complaint can be dismissed only if it would be necessary to contradict the complaint to prevail on the merits. That test is no longer valid in light of Twombly's rejection of the "no set of facts" test that generated these decisions. Under Twombly, "it is not enough for a complaint to avoid foreclosing possible bases for relief; it must actually suggest that the plaintiff has a right to relief" by allegations that rise above the speculative level. Rule 8(a)(2) requires "a minimal level of factual detail, although that level is indeed very minimal." So Twombly quotes Conley v. Gibson for the requirement that the complaint give fair notice of what the claim is and the grounds upon which it rests. This statement captures the mood of notice pleading, but is not a precise test. Requiring detailed facts interferes with the purpose to ensure that claims are decided on the merits in multiple ways. "Most details are more efficiently learned through the flexible discovery process. Swierkiewicz * * *." The court should keep the case moving, not lavish attention on the complaint. "[A] plaintiff might sometimes have a right to relief without knowing every factual detail supporting its right; requiring the plaintiff to plead those unknown details before discovery would improperly deny the plaintiff the opportunity to prove its claim." On the other hand, liberal notice pleading "is less convincingly invoked by a government agency seeking to simply step around a more informative complaint that has been dismissed for failure to state a claim." "Encouraging a plaintiff to plead what few facts can be easily provided and will clearly be helpful serves to expedite resolution by quickly alerting the defendant to basic, critical factual allegations (that is, by providing 'fair notice' of the plaintiff's claim) and, if appropriate, permitting a quick test of the legal sufficiency of those allegations." "A complaint should contain information that one can provide and that is clearly important; the EEOC has removed information that it did provide and that showed that its prior allegations did not state a claim." An allegation that the defendant fired the plaintiff because of race suffices to give notice. But a retaliation complaint

must specify the act that led to the retaliation. This "is only to insist upon easily provided, clearly important facts." And, more generally: "It is rarely proper to draw analogies between complaints alleging different sorts of claims; the type of facts that must be alleged depend [sic] upon the legal contours of the claim." Judge Flaum concurred, arguing — contrary to the majority — that the complaint was sufficient under pre-Twombly Seventh Circuit decisions. "I am unable to share the majority's view that Bell Atlantic left our notice pleading jurisprudence intact." It requires a plaintiff to "plead enough facts to demonstrate a plausible claim."

Eighth Circuit

Gregory v. Dillard's, 8th Cir.2007, 494 F.3d 694, 709-710, is an example of the many cases where Twombly does not seem to have made a difference. The court reverses dismissal of a complaint alleging violation of 42 U.S.C. § 1981 by harassing African-American shoppers in ways that intentionally interfered with their plans to make purchase contracts at a department store and that intentionally denied them the same services as were extended to other purchasers. The central themes are taken from 1995 and 2003 Eighth Circuit decisions: "Particularly in civil rights actions the complaint should be liberally construed." "Great precision is not required of the pleadings." As in Swierkiewicz, the complaint "need not track the precise wording of a § 1981 prima facie case because there is not 'a rigid pleading requirement for discrimination cases.'" As Swierkiewicz quotes Conley, the simplified notice pleading standard requires only fair notice of what the plaintiff's claim is and the grounds upon which it rests. The fact allegations in this case satisfy Twombly because they are more than mere labels and conclusions, more than a formulaic recitation of the elements of a cause of action. "[T]he pleadings, while not particularly detailed, were nevertheless sufficient * * *."

Tenth Circuit

The multiple references to plausibility in the Twombly opinion seem to encourage reliance on "plausibility" as the new definition of notice pleading. A clear illustration is provided in an opinion by Judge Paul Kelly, Jr., Ridge at Red Hawk, L.L.C. v. Schneider, 10th Cir.2007, 493 F.3d 1174. Noting that Twombly has retired Conley's "no set of facts" test that had guided Tenth Circuit decisions, the court quotes two of the Twombly references to plausibility and concludes:

> [T]he mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims.

The questions raised in the Ridge at Red Hawk case did not provide an occasion for illumination of the test that looks for "a reasonable likelihood of mustering factual support" for a claim. Four days later a different panel, of which Judge Kelly was a member, affirmed another dismissal for failure to state a claim. This time, after announcing a search for "'plausibility in th[e] complaint,'" the court suggested that while "the Supreme Court was not clear on the articulation of the proper standard for a Rule 12(b)(6) dismissal," the Twombly and Erickson decisions together "suggest that courts should look to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief." The court went on to say that it would have affirmed under its earlier approach as well as under the new approach. Alvarado v. KOB-TV, L.L.C., C.A.10th, 2007, 493 F.3d 1210, 1215 n. 2. (The pleadings included comprehensive fact allegations, perhaps making it easier to conclude that there was little room to imagine further facts that might constitute a claim.) Combining these approaches, the proposed test may be that some level of specific allegations is needed to establish a reasonable likelihood of mustering factual support. Ten days after that, however, the "plausibility" test was again quoted in text, with a footnote observation that the

Erickson decision shows that specific facts are not needed, but only fair notice of what the claim is and the grounds upon which it rests. TON Services, Inc. v. Qwest Corp., C.A.10th, 2007, 493 F.3d 1225, 1236.

Eleventh Circuit

Judge Carnes wrote the opinion in Watts v. Florida International University, 2007, 495 F.3d 1289; Judge Hills "concur[s] in the opinion" because "the complaint does not affirmatively show that the appellant may not have a case." The opinion is too rich for full description. The plaintiff was dismissed from a practicum for graduate social-work students because he advised a student who had identified herself as Catholic that among the options available for bereavement counseling would be a "church" program. The majority concludes that the complaint stated "a valid First Amendment free exercise of religion claim." To state the claim, the plaintiff must plead both a "religious" belief and that the belief is "sincerely held." Addressing the "sincerity" element first, the court noted that the belief need not be "central" to the religion — courts should not undertake to determine centrality. "With what specificity must sincerity be pleaded?" "How do you plead sincerity of belief? One way is to state that the belief is, in fact, your religious belief." The complaint alleged that the plaintiff "is a Christian. He is not Catholic. [His] religious beliefs include the belief that a patient who professes a religion is entitled to be informed if the counselor is aware of a religious avenue within the patient's religion that will meet the appropriate therapy protocol for the patient. * * * [Terminating the plaintiff] evidences Defendants' intent to compel [the plaintiff] to act contrary to his religious beliefs and constitutes a substantial burden on the exercise of his religious beliefs." This suffices to plead sincerity because termination would not impose a substantial burden if the belief were not sincere. "In Twombly terms, Watts has certainly alleged 'enough factual matter (taken as true) to suggest' that his religious belief was sincerely held, * * * putting forward plausible grounds to infer' that it was sincerely held, * * * and 'identifying facts that are suggesting enough to render [the sincerity of his belief] plausible,' * * *." As to the religious character of the belief, courts must not attempt to determine whether a belief is objectively reasonable. There is no need to plead facts to establish that "belief is of the type that a judge would generally consider to be religious in nature. Watts is not on the hook for our inability to understand his religious system." The question is whether the belief is religious in the plaintiff's own scheme of things. But even if the religious character of a belief must be objectively reasonable, a single statement that a belief is religious is sufficient pleading. "How else does one plead a religious basis or motivation for a belief except by asserting it in a statement in a complaint?" A single statement is enough. The representation that a belief is religious "is all that is necessary to raise the possibility that his belief is a religious one 'above the speculative level.' Twombly * * * We are at a loss to understand how much more he could say in his complaint and still adhere to the Rule 8 model of 'a short and plain statement of the claim.'" There is more — including quotations from Kierkegaard and Samuel Taylor Coleridge. But the point is clear: some things can be pleaded only by conclusory labels. Twombly does not raise a fact pleading requirement for them.

Federal Circuit

The Federal Circuit decision in McZeal v. Sprint Nextel Corp., Fed.Cir., 2007 WL 2683705, applies the "lesser standard" suitable for a pro se plaintiff. Dismissal for failure to state a claim was reversed both as to a patent infringement claim and a trademark infringement claim. Relying on Form 16, the court concluded "that a patentee need only plead facts sufficient to place the alleged infringer on notice as to what he must defend," and "is not required to specifically include each element of the claims of the asserted patent." As to Twombly, the Court's direction to forget the "no set of facts" language in Conley v. Gibson is offset by the Court's favorable quotation of other parts of the Conley opinion. "This does not suggest that Bell Atlantic changed the pleading requirement of * * * Rule * * * 8 as articulated in Conley." n. 4. "By ruling in McZeal's favor, we do not

condone his method of pleading. * * * [W]here pleadings are sufficient, yet it appears almost a certainty to the court that the facts alleged cannot be proved to support a legal claim, a motion to dismiss for failure to state a claim must nevertheless be overruled." Summary judgment is the proper procedure. (Judge Dyk dissented as to the patent infringement claim, reading the complaint to rely on the doctrine of equivalents and urging that Twombly "makes clear that * * * conclusory allegations of infringement under the doctrine of equivalents are insufficient." As to Form 16, "[o]ne can only hope that the rulemaking process will eventually result in eliminating the form, or at least revising it to require allegations specifying which claims are infringed, and the features of the accused device that correspond to the claim limitations.")

Self-Defeating Specificity

Whether for good or bad, encouraging greater fact specificity may lead to complaints that plead the plaintiff out of court. An illustration is provided by the en banc decision in NicSand v. 3M Co., 6th Cir., 2007 WL 3010426. The opinion is written as one affirming dismissal for want of antitrust standing resulting from failure to plead antitrust injury. The failure to plead antitrust injury, however, rested on examining all of the acts claimed to establish an antitrust violation and concluding that they reflected legitimate competitive conduct, not anticompetitive conduct. This sentence appears in the court's reply to the dissent: "The key failing in NicSand's complaint is not that it has too few details but that it has too many." 2007 WL @ * 11.

Details that plead the plaintiff out of court seem a good thing when the plaintiff begins the action knowing all of the facts that may be available to support the claim. An incomplete set of details, however, may present troubling questions. The plaintiff in the NicSand case, for example, seemed to say that multi-year exclusive dealing contracts were insisted upon by the customers contested for between the plaintiff and the defendant. The circumstances, however, suggested that the customers "insisted" upon binding themselves to long commitments because they could win more favorable terms from their only two potential suppliers by giving the commitments in exchange. It is not entirely comforting to dismiss a plaintiff who feels compelled to plead what prove to be self-defeating fact details when there may be other facts that would be self-curing.

Impact on The Scope of Discovery

Rule 26(b)(1) defines the presumptive scope of discovery as "any nonprivileged matter that is relevant to any party's claim or defense." Beyond that point, the court may for good cause order discovery of any matter relevant to the subject matter involved in the action. The 2000 Committee Note explaining adoption of the distinction between "claim or defense" and "subject matter" says there is "no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings." Various observers predicted various reactions to the change. Some hoped that it would encourage more detailed pleading in order to ensure a broad scope for "lawyer-managed" discovery. Some expected that any tendency to specific pleading would be matched by the addition of broad general claims designed for the same purpose. Whatever the effects may have been, it will be important to remember the links between pleading and the scope of discovery in watching the effects of the Twombly decision on pleading practice. Enhanced pleading may have desirable consequences on discovery management by the parties, their lawyers, and the court. To the extent that this happens, continuing concerns about the scope of discovery may be mollified.

APPENDIX

The attached materials sketch the outlines of Advisory Committee consideration of notice pleading from 1993 on. They do not represent any anticipation of the Twombly decision, much less an attempt to draft rules that either codify or modify it. They do sketch the seeming variability of "notice" pleading standards even before Twombly. Some decisions seemed to demand greater fact detail than others, to the extent that it is possible to imagine degrees of fact specificity as between different types of claims. More importantly, they illustrate the difficulty of drafting a flexible approach that calls for more fact pleading in some circumstances than in others. Even after Twombly, it remains difficult to define or even suggest the circumstances that distinguish between cases properly pleaded to give mere notice of the events in suit and those that must be pleaded by providing facts that make the claimed right "plausible."

Particularized Pleading

The pleading questions raised by Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 1993, 113 S.Ct. 1160, were discussed at the May meeting and put on the agenda for the October meeting. The portion of the May meeting minutes relating to these questions is attached.

The Leatherman decision involved two actions asserting that a municipal employer was liable because its law enforcement officers had violated the Fourth Amendment rights of the plaintiff and it had failed to train them to avoid Fourth Amendment violations. The district court dismissed, invoking the "heightened pleading standard" required by the Fifth Circuit in § 1983 actions. The heightened pleading requirement began with decisions requiring pleading "with factual detail and particularity" in actions against officers who likely would plead official immunity, so that the complaint would show arguments defeating immunity. It was later extended to actions asserting municipal liability. The Court of Appeals for the Fifth Circuit affirmed the dismissal. The Supreme Court reversed.

The core of Chief Justice Rehnquist's opinion for a unanimous Court is "that it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules." A plaintiff is not required to set out in detail the facts underlying the claim. Rule 9(b), which requires particularity in pleading fraud or mistake, does not include "any reference to complaints alleging municipal liability under § 1983. Expressio unius est exclusio alterius."

The rationale of the opinion may be slightly clouded by a reservation expressed at the outset. The Court noted that municipalities do not enjoy immunity from suit; the limits on municipal liability are more direct. "We thus have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." On the face of things, this reservation is puzzling. The "expressio unius" theory seems to apply to individual official immunity in the same way that it applies to municipal liability. The answer may be that "expressio unius" interpretation carries only so far; it can be overcome by pressing interests. Municipal corporation defendants do not have pressing interests that justify overriding ordinary pleading doctrine. Individual official defendants may have pressing interests that deserve to be protected by strict pleading requirements that were not contemplated when the Federal Rules were written. Protecting the immunity interests of individual defendants has generated a complicated body of doctrine that justifies appeal before final judgment, see 15A Federal Practice & Procedure: Jurisdiction 2d, § 3914.10. Similar impulses may still justify special pleading doctrine after the Leatherman decision.

At the close of the opinion, the Court observed that Rules 8 and 9 were written before it had recognized grounds for holding municipal corporations liable because of constitutional wrongs by their employees.

> "Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the addedd specificity requirement of Rule 9(b).. But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."

This passage may be a veiled invitation to consider amending the pleading rules. An explicit suggestion for amendment has been made by Chief Judge Harry Lee Hudspeth of the Western District of Texas, who wrote to the Committee that an order for a more definite statement has been a valuable tool in determining whether pro se complaints are supported by any ground for litigation.

Beyond the setting of the Leatherman case, it seems clear that the required level of pleading specificity varies widely among different types of litigation. An exhaustive demonstration of this proposition was provided by Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 1986, 86 Colum. L. Rev. 433. A survey of more recent decisions by Judge Keeton led to the same conclusion: "[S]pecificity requirements are not limited to cases decided under Rule 9(b) or under Admiralty Rules C(2) and E(2)(a). Rather, the 'degree of specificity with which the operative facts must be stated in the pleadings varies depending on the case's context.'" Boston & Maine Corp. v. Town of Hampton, 1st Cir., 1993, 987 F.2d 855, 866.

There is room to debate the desirability of this contextual specificity phenomenon. It may seem a wilful defiance of notice pleading philosophy. It also may seem a desirable reinstatement of the easily ignored requirement of Rule 8(a)(2) that the short and plain statement of the claim "show[] that the pleader is entitled to relief." A requirement that a complaint do more than identify the transaction that gives rise to litigation could support early disposition of actions that proceed on inadequate legal theories or without hope of establishing indispensable facts.

These general questions invite consideration of a range of responses. One response is to do nothing. Doing nothing could be appropriate on either of two opposed points of view, or on a more relaxed conclusion that it is too early to do anything.

One set of arguments for doing nothing would begin with the premise that all heightened pleading requirements are wrong. Pleading should do no more than identify the transaction underlying suit, paving the way for discovery and formal pretrial procedures that establish more reliable means for disposition without trial. There is no need for amendment on this view if the Leatherman decision will, in relatively short order, cause most courts to abandon all explicit and implicit heightened pleading requirements.

The opposing point of view would be that heightened pleading requirements are a good thing, and that courts will continue to impose them without any particular deference to the apparent force of the Leatherman decision. This point of view would be bolstered by the argument that it would be virtually impossible for the rulemaking process to regularize the process by which heightened pleading requirements are enforced. The rulemaking process cannot keep abreast of the intricacies of desirable pleading practice for the ever-changing array of claims that can be brought to federal courts. Detailed rules for specific categories of cases must always be incomplete and must lag far behind the lessons of emerging experience. It is better to rely on the present requirement that a complaint show that the pleader is entitled to relief, allowing courts to tailor this requirement to the circumstances that may make early disposition more appropriate. Some categories of cases, for example, may frequently involve ill-founded claims; such tendencies may vary between different parts of the country, and over time. Discretion to insist on more particular pleading, allowing opportunity to amend to meet perceived deficiencies, may work far better than detailed rulemaking. Many categories of cases, as another example, may threaten to impose exhausting pretrial burdens before it is possible to consider disposition apart from the pleadings. Courts should be empowered to protect themselves and the adversaries by requiring a preliminary assurance that the burdens are justifiable. Yet other categories of cases may involve areas in which special desires to protect against the burdens of litigation contend with the need to enforce rights — the official immunity question put aside in the Leatherman opinion is a good illustration.

If the detailed rule approach is rejected, an alternative approach would be to regularize the process for demanding more helpful pleading. In one form or another, the rules could adopt a modernized form of the antique motion for a bill of particulars. The most obvious means of

following this approach would be amendment of the procedure for demanding a more definite statement. This approach seems the most promising if any rules amendment is to be attempted. The rule could be framed directly in terms of the need to facilitate disposition by pretrial motions. It would not have the appearance of singling out particular categories of apparently disfavored claims for hostile treatment.

Expansion of the more definite statement procedure would provide a clear focus for arguments about the need to expand the role of pleading motions. One range of arguments surely will be that a seemingly neutral procedure will in fact be used to dispose of disfavored claims by artificially elevated pleading requirements. Another will be that augmented pleading demands are inherently undesirable. Rule 12(e) originally provided for bills of particulars. It was amended in 1948 to provide only for a more definite statement, and to limit the occasion for more definite statement to situations in which a responsive pleading is required and cannot reasonably be framed. The purpose of the amendment was to reinforce the basic structure of the rules: the exchange of fact information and identification of the issues should be accomplished through discovery and pretrial conference. Apparent failure to state a claim should be raised by motion under Rule 12(b)(6); if the pleading as framed is sufficient, Rule 12(e) should not be used to require more detailed statements that may make it insufficient. Pretrial disposition should be by summary judgment after opportunity to explore the facts, not on the pleadings. Pleading should not be used to force allegations that can be made only after discovery. More particular statements are seldom appropriate even if a pleading suggests that a particular defense may be available — the absence of allegations of time or writing may suggest a limitations of statute of frauds defense, but that does not of itself make more a more definite statement appropriate. All of these matters, and more, are explored in 5A Federal Practice & Procedure: Civil 2d, §§ 1374-1379.

The wide variety of heightened pleading requirements that have emerged in practice provides the foundation for a response to this history. It may show that the collective wisdom of many judges, growing over time, is better than the abstract passion for minimized pleading. Whatever may have been desirable in 1938 or 1948 is no longer desirable. The burdens imposed by going to pretrial stages beyond pleading continue to grow. As the law keeps growing to regulate more and more human activities in increasingly complex ways, so grows the opportunity to bring lawsuits founded on theories that cannot withstand the light of full statement. Pleading must be restored as a protection against the procedures that help to prepare for trial or summary dispostion.

Some support for these arguments may be found in recent experiences of the Committee. A few years ago it was proposed that the Rule 12(b)(6) motion to dismiss for failure to state a claim be abolished; the Committee did not accept the proposal. More recently, the amendments now pending in Congress encourage more particular pleading in at least two ways. Rule 11 would allow for specific identification of factual allegations as "likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Rule 26(a)(1)(A) and (B) provide for disclosure of information "relevant to disputed facts alleged with particularity in the pleadings." The Rule 26 provisions were informed by extensive testimony at the hearings on disclosure, especially from product liability defense attorneys, asserting that notice pleading often provides little guidance for an adversary attempting to understand the purpose and character of an action.

A final approach might be to amend Rule 8(a)(2) to emphasize the perhaps overlooked requirement that a pleading show that the pleader is entitled to relief. This approach might work best if the purpose of the amendment were left to statement in a Note suggesting that the Leatherman decision may cause some courts to forswear desirable opportunities to dispose of actions on the pleadings.

The Rule 8, 9, and 12 approaches can be illustrated by the following rough drafts.

Rule 8(a)(2)

A pleading * * * shall contain * * * (2) a short and plain statement of the claim in sufficient detail to show~~ing~~ that the pleader is entitled to relief * * *.

NOTE

Rule 8(a)(2) is amended to reinvigorate the requirement that the pleading show that the pleader is entitled to relief. The amount of detail sufficient to show a right to relief will depend on the nature of the action. Heightened pleading requirements often have been exacted in a wide variety of actions, particularly those that promise to involve protracted and expensive pretrial and trial proceedings. Illustrative opinions are gathered in Boston & Maine Corp. v. Town of Hampton, 1st Cir., 1993, 987 F.2d 855. The wisdom of this practice has been proved by its gradual evolution. The lack of clear support for the practice in the text of the rules led to the ruling that heightened pleading requirements could not be required in actions asserting municipal liability under 42 U.S.C. § 1983, see Leatherman v. Tarrant Cty. Narcotics Intelligence & Coord. Unit, 1993, 113 S.Ct. 1160. The Court observed in the Leatherman decision that if heightened pleading requirements are desirable, "that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." It is not feasible or desirable to draft specific pleading requirements for all of the different actions that may come before a federal court. This amendment restores the gradual process of judicial evolution that developed up to the time of the Leatherman decision.

Rule 8(e)(1)

Each averment of a pleading ~~shall~~ must be simple, concise, and direct. No technical forms of pleading or motions are required. The pleading as a whole must be sufficient to support informed decision of a motion under Rule 12(b), (c), (d), or (f).

Note

(The Note would draw from the Note set out for Rule 12(e) below.)

Rule 9

Rule 9(b): "In all averments of fraud, ~~or~~ mistake, or civil rights violation by a public official or public entity, the circumstances constituting fraud, ~~or~~ mistake, or civil rights violation by a public official or public entity ~~shall~~ must be stated with particularity." -or-

[*A pleading of fraud, mistake, or civil rights violation by a public official or entity must be stated with particularity.*] -or-

Rule 9(x, renumbering later subdivisions): An averment of a civil rights violation by a public official must be stated with particularity.

NOTE

Many courts have found it useful to require specific statement of civil rights claims against public officials or against public bodies responsible for official wrongs. In Leatherman v. Tarrant

Cty. Narcotics Intelligence & Coord. Unit, 1993, 113 S.Ct. 1160, the Court held that the relationship between Rules 8 and 9 shows that particular statement can be required only by specific rule provision. This amendment restores the heightened pleading requirements that had evolved in many courts before the Leatherman decision. It does not attempt to define the nature of a claim that may properly be classified as a "civil rights violation by a public official." The classification should be made according to the needs that have informed the evolving practice up to the time of the Leatherman decision.

Rule 12(e)

(e) Motion for More Definite Statement. ~~If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.~~

(1) On motion or on its own, the court may order a more definite statement of a pleading:
   (A) If the pleading is one that requires a responsive pleading and is so vague or ambiguous that a responsive pleading cannot reasonably be required; or
   (B) If a more particular pleading will support informed decision of a motion under subdivisions (b), (c), (d), or (f).
(2) A motion for a more definite statement must point out the deficiencies in the pleading and the details desired.
(3) A more definite statement must be made within the time fixed by the order or, if no time is fixed, within 10 days after notice of the order. If a more definite statement is not made the court may strike the pleading or impose other sanctions.

NOTE

Rule 12(e) is amended to reinvigorate the function of pleading as a method of disposing of actions — or portions of actions — that rest on inadequate legal premises. The structure of these rules places primary reliance on discovery, pretrial conferences, and summary judgment not only to shape a case for trial but also to winnow out matters that ought not go to trial. Pleading is intended primarily to establish the framework for these later proceedings. It is important that cases not be decided on the pleadings before all parties are afforded adequate opportunity to discover the fact information that may be needed to support a clear statement of legal theory. Post-pleading procedures, however, have come to pose increasingly heavy burdens on litigants and courts in more and more cases. Recognizing the nature of these burdens, a host of decisions have developed increasingly detailed pleading requirements for a wide variety of cases. The framework of the present rules requires that such requirements be imposed by a process of moving to challenge the pleading, consideration of often limited allegations, and — if the pleading is inadequate — working through the process of amendment. A more direct procedure is provided by a motion for more definite statement.

The need to expand the role of the motion for more definite statement arises in part from the decision in Leatherman v. Tarrant Cty. Narcotics Intelligence & Coord. Unit, 1993, 113 S.Ct. 1160. The Court ruled that heightened pleading requirements cannot be imposed outside the categories

specifically enumerated in Rule 9. At the same time, it suggested that the appropriate means of establishing such requirements is "by the process of amending the Federal Rules." It is not feasible to establish detailed catalogues of pleading requirements for every legal category that may warrant such requirements, nor to express adequately the nuanced shades of specificity that may be appropriate for different categories. The more definite statement procedure can be used to restore the process of gradual judicial development that, up to the time of the Leatherman decision, was responsible for establishing pleading requirements adapted to the needs of different actions.

Notice Pleading Reconsidered

Pleading and discovery are inseparably joined in the Civil Rules system of "notice pleading." The complaint and answer are designed primarily to set the framework for pretrial litigation, relying on disclosure, discovery, and increasingly on "managerial judging" to inform the parties as to fact, contention, and legal theory. The discovery part of this package, recently joined by disclosure, has provoked such continuing anguish that it has been the subject of constant Advisory Committee study for the last 40 years. At least some segments of the bar continue to be dissatisfied with the disruptions and costs imposed by discovery. Although discovery issues will remain on the agenda, it may be appropriate to explore once again the question whether the notice pleading part of the package should be revised.

The most likely goal of revising the pleading rules would be to strengthen the use of pleadings to dismiss at the outset actions by plaintiffs who cannot even identify in a complaint facts that, if proved, would establish a claim for relief. The argument would be that Rule 11 does not provide adequate protection against actions brought without a solid foundation in both fact and law, in the hope that discovery either will show that there actually is a sustainable claim or, less attractively, in the hope that the prospect of discovery will elicit a settlement offer.

Whether there is any force to the arguments that pleading rules need strengthening depends on experience, not theory. Experience, not theory, also will shape the revisions that might be considered. There may be no general problems, or no sufficient number of problems to believe that any "solution" is possible. Or there may be discrete problems that are better addressed by focused rules than by a general revision of notice pleading. Or there may be some number of significant problems, but no way to improve on wise administration of the current pleading rules, perhaps assisted by occasionally turning a blind eye to some of the more open-ended opinions that seem to deny any role for variable application of particular pleading requirements according to the nature of the litigation.

The immediate question is whether it would be desirable to undertake further study of notice pleading. As with recent discovery and class-action projects, organized bar groups are a likely source of help. Any useful appraisal of current pleading practice will require information drawn from many substantive areas and from courts in all parts of the country. Comparisons to state-court pleading practices also will be helpful. In addition to the familiar national groups that have helped with other projects, it may be particularly useful to seek out state bar groups in states that have distinctive pleading practices. It also may prove possible to enlist the Federal Judicial Center, either for an ambitious study or for something simpler akin to the recent survey of federal judges on Rule 11.

One testing hypothesis can be simply stated, with only brief elaboration. It begins with the belief that pleadings appropriately play different roles in different types of litigation. Form 9 is famous, and for good reason. The simplest pleading suffices for an automobile collision case based on negligence. There is likely to have been a collision, and with that reasonable ground for bringing suit. The law is familiar, the means of investigation and discovery ready to hand, and the need to test the sufficiency of the legal theory almost nonexistent. Many courts, on the other hand, might be less comfortable with a similarly brief allegation that from July 1, 2001 continuing to the present the defendant has contracted, combined, or conspired with others unknown to fix the price of widgets purchased by the plaintiff in violation of § 1 of the Sherman Act. The conclusion of this hypothesis is that courts in fact act on these distinctions, insisting on greater pleading detail in cases that seem to call for it. If the automobile collision occurred in a no-fault state, allegations will be required to bring the suit into the tort system. Different levels of detail will be required in alleging title depending on whether the action is one to compel specific performance with an allegation of marketable title, one to quiet title, one to remove a cloud from title, or one to eject a trespasser. More generally, courts will consider experience with frequent misuse of specific types of claims,

projected complexity in discovery and trial, and — more controversially — whether a particular type of claim should be favored. The burden is on would-be reformers to show that courts could do a better job if given more explicit authority to impose higher pleading standards.

Two Supreme Court decisions provide the texts that cast doubt on the proposition that lower courts can tailor the specificity required by notice pleading to the perceived needs of different types of litigation. The lead decision is Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 1993, 507 U.S. 163, 113 S.Ct. 1160. A 1993 memorandum on the Leatherman decision is attached. The lesson that pleading with particularity can be required only when directed by a specific Civil Rule provision was repeated in Swierkiewicz v. Sorema N.A., 2002, 534 U.S. 506, 122 S.Ct. 992. The Swierkiewicz decision ruled that a complaint claiming employment discrimination need not "plead facts establishing a prima facie case" within the familiar burden-shifting framework. The decision relied in part on the observation that a plaintiff who has direct evidence of discrimination may prevail without proving all the elements of a "prima facie case." Beyond that, the court observed:

> imposing the * * * heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2) * * *. This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. See * * * Leatherman * * *.
>
> Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example * * *. This Court * * * has declined to extend such exceptions to other contexts. * * * Just as Rule 9(b) makes no mention of municipal liability * * *, neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).[1]
>
> Other provisions of the Federal Rules * * * are inextricably linked to Rule 8(a)'s simplified notice pleading standard. * * * Given the Federal Rules' simplified standard for pleading, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 72, 104 S.C.t 2229 * * * (1984). * * * the liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim.

Alongside these decisions lie other Supreme Court decisions that seem to look in a different direction. The first is Crawford-El v. Britton, 1998, 523 U.S. 574, 597-598, 118 S.Ct. 1584, 1596-1597. The claim was that the defendant prison official had punished the plaintiff prisoner for exercising his First Amendment rights by arranging for transfer of the plaintiff's legal materials to the plaintiff's new prison by inappropriately slow means. The claim required showing improper motive. The Court quoted an earlier observation that

> "firm application of the Federal Rules of Civil Procedure is fully warranted" and may lead to the prompt disposition of insubstantial claims. * * * Though we have rejected the Court of Appeals' solution, we are aware of the potential problem that troubled the court. It is therefore appropriate to add a few words on some of the existing procedures available to federal trial judges in handling claims that involve examination of an official's state of mind.

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[1] These requirements are exemplified by the * * * Forms * * *. For example, Form 9 sets forth a complaint for negligence * * *.

> When a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense. It must exercise is discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings. The district judge has two primary options prior to permitting any discovery at all. First, the court may order a reply to the defendant's or a third party's answer under Federal Rule of Civil Procedure 7(a), or grant the defendant's motion for a more definite statement under Rule 12(e). Thus, the court may insist that the plaintiff "put forward specific, nonconclusory factual allegations" that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment. * * * This option exists even if the official chooses not to plead the affirmative defense of qualified immunity."

Christopher v. Harbury, 2002, 536 U.S. 403, 416-418, 122 S.Ct. 2179, 2187-2188, is more difficult to describe. The Court recognized the legal theory underlying a claim that the plaintiff's access to court had been denied by State Department refusal to provide access to information that would have enabled the plaintiff to maintain an action arising from the killing of her husband by Guatemala officials who were trained, paid, and used as informants by the CIA. In order to make out the present claim, the plaintiff must show that if she had been given access to the information she could have successfully maintained an action for relief that cannot any longer be sought:

> Like any other element of an access claim, the underlying cause of action and its lost remedy must be addressed by allegations in the complaint sufficient to give fair notice to a defendant. See generally Swierkiewicz * * *. Although we have no reason here to try to describe pleading standards for the entire spectrum of access claims, this is the place to address a particular risk inherent in backward-looking claims. Characteristically, the action underlying this sort of access claim will not be tried independently, a fact that enhances the natural temptation on the part of plaintiffs to claim too much, by alleging more than might be shown in a full trial focused solely on the details of the predicate action.
>
> Hence the need for care in requiring that the predicate claim be described well enough to apply the "nonfrivolous" test and to show that the "arguable" nature of the underlying claim is more than hope. * * *
>
> The particular facts of this case underscore the need for care on the part of the plaintiff in identifying, and by the court in determining, the claim for relief underlying the access-to-courts plea. The action alleged on the part of all the Government defendants * * * was apparently taken in the conduct of foreign relations by the National Government. Thus, if there is to be judicial enquiry, it will raise concerns for the separation of powers in trenching on matters committed to the other branches. * * * Since the need to resolve such constitutional issues ought to be avoided where possible, * * * the trial court should be in a position as soon as possible in the litigation to know whether a potential constitutional ruling may be obviated because the allegations of denied access fail to state a claim on which relief could be granted.
>
> * * * [T]he complaint should state the underlying claim in accordance with * * * Rule * * * 8(a), just as if it were being independently pursued, and a like plain statement should describe any remedy available under the access claim and presently unique to it.

If it were not for the citation of the Swierkiewicz decision, even a careful reader might be pardoned for thinking these words recognize the role of heightened pleading.

The most recent of the Supreme Court decisions is Dura Pharmaceuticals, Inc. v. Broudo, 2005, 125 S.Ct. 1627, 1634. The ruling on the securities law question was that a fraud plaintiff cannot recover simply by showing that the price on the day of purchase was higher than it would have been but for the fraud; the purchaser must prove "economic loss." The Court concluded that the complaint "failed adequately to allege" proximate cause and economic loss:

> [W]e assume, at least for argument's sake, that neither the [Civil] Rules nor the securities statutes impose any special further requirement in respect to the pleading of proximate causation or economic loss. But, even so, the "short and plain statement" must provide the defendant with "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99 * * * (1957). * * *
>
> [The complaint alleged only that the plaintiffs paid artificially inflated prices, and suffered damages. It did not claim that the share price fell significantly after the truth was known. But an artificially inflated purchase price] is not itself a relevant economic loss. And the complaint nowhere else provides the defendants with notice of what the relevant economic loss might be or of what the causal connection might be between that loss and the misrepresentations * * *.
>
> We concede that ordinary pleading rules are not meant to impose a great burden upon a plaintiff. Swierkiewicz * * *. But it should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind. At the same time, allowing a plaintiff to forgo any indication of the economic loss and proximate cause that the plaintiff has in mind would bring about harm of the very sort the statutes seek to avoid. * * * Such a rule would tend to transform a private securities action into a partial downside insurance policy.

The Court quoted and cited to the legislative history of the Private Securities Litigation Reform Act. Again, the concept of "notice" seems to have taken on an increased level of detail in response to the perceived needs of a particular class of litigation.

Given the directness of the Leatherman and Swierkiewicz pronouncements and the indirectness of the Court's potentially opinions, it should not be surprising that the courts of appeals have generally abandoned the once-familiar theory that heightened pleading could be required in civil rights actions against government officials who are likely to plead official immunity. Judge Posner provided a succinct statement in Thomson v. Washington, 7th Cir.2004, 362 F.3d 969, 970-971:

> [T]he judge wanted the plaintiff to plead enough facts to show that it would be worthwhile to put the defendants to the bother of answering the complaint. That is an understandable approach in light of the burden that prisoners' civil rights litigation places on the district courts, the frivolousness of most of that litigation, and the endeavor of Congress in the Prison Litigation Reform Act to curb the abuse of legal process by prisoners with time on their hands. But it is an approach that the Federal Rules of Civil Procedure and the decisions of the Supreme court and the federal courts of appeals forbid. The federal rules replaced fact pleading with notice pleading. All that the rules require, with a few exceptions inapplicable to this case, such as pleading fraud, * * * is that a complaint state the plaintiff's legal claim, such as, in this case, denial of access to the courts in violation of the due process clause, infliction of cruel and unusual punishment by denying essential medical treatment (Eighth Amendment), and retaliation for seeking to use the legal process to petition for redress of grievances (First Amendment), together with some indication (here

amply supplied) of time and place. * * * Federal judges are forbidden to supplement the federal rules by requiring "heightened" pleading of claims not listed in Rule 9.

Apart from this specific area, it is difficult without intensive and probably impressionistic study to guess at the ways in which notice pleading may, in practice, entail requirements that vary with the specific subject of action. The greater the variability, the less pressing the case will be for undertaking a lengthy study of possible reforms.

A few general observations remain possible. One is that careful lawyers commonly plead far more than needed to withstand a motion to dismiss. One reason is that the pleadings are the first part of the case to come to the judge's attention — it is important to tell a compelling story, or least a persuasive story. Another may be to frame the issues — a detailed complaint may elicit an answer that advances the litigation. Yet another reason may arise from the 2000 amendment that ties the scope of party-controlled discovery to the claims and defenses stated in the pleadings. A plaintiff who wants to ensure broad discovery without venturing into "subject matter" territory may simultaneously plead some claims in broad general terms and other claims in careful detail.

Apart from direct pleading requirements, courts may seek detailed statement by other means. Reconciling these means with general notice pleading practice may prove difficult. Some courts, for example, have adopted standing orders that require a "case statement" in actions under the Racketeer Influenced and Corrupt Organizations Act. These orders stand on shaky ground to the extent that they go beyond the requirements of Rule 9(b); see Wagh v. Metris Direct, Inc., 9th cir.2003, 363 F.3d 821. Even case-specific directions may prove vulnerable. In Wynder v. McMahon, 2d Cir.2004, 360 F.3d 73, 77-79, the court reversed dismissal of the action based on failure to comply with an order that the plaintiff articulate in a logical way his theory of the case and his employment discrimination claim. "Rule 8 would become a dead letter if district courts were permitted to supplement the Rule's requirements through court orders demanding greater specificity or elaboration of legal theories, and then to dismiss the complaint for failure to comply with those orders." If this were allowed, "district courts could impose disparate levels of pleading requirements on different sorts of plaintiffs."

More extreme situations, however, may provoke different responses. Acuna v. Brown & Root Inc., 5th Cir.2000, 200 F.3d 335, affirmed dismissal for failure to comply with a scheduling order that required statement of the individual claims of some 1,600 plaintiffs — a so-called "Lone Pine" order. The injuries "occurr[ed] over a span of up to forty years. Neither the defendants nor the court was on notice from plaintiffs' pleadings as to how many instances of which diseases were being claimed as injuries or which [uranium] facilities were alleged to have caused those injuries. It was within the court's discretion to take steps to manage the complex and potentially very troublesome discovery that the cases would require." Before filing, "[e]ach plaintiff should have had at least some information regarding the nature of his injuries, the circumstances under which he could have been exposed to harmful substances, and the basis for believing that the named defendants were responsible for his injuries."

This preliminary sketch is nothing more than a bloodless introduction to a topic that stirs deep passions. The combination of notice pleading and searching discovery created in 1938 by the Civil Rules has transformed the meaning of the law in many areas. It is not only that real value has been given to substantive principles that would have been more difficult to enforce under earlier procedure. It also is that the substantive law itself has developed in response to the information unearthed by discovery launched from notice-pleaded claims. It will be essential to determine whether the problem of notice pleading is that it is inadequate procedure, not that it has become an essential part of the law-enforcing and lawmaking role of the courts. If courts are managing to muddle along reasonably well, it may be better to defer this project to a day of greater need.

Sketches of Possible Rules Approaches

Several approaches might be taken to depart from the relaxed "notice" pleading now in place. They cannot be ranked in clear order from least to greatest departure. Among the possibilities are these:

(1) Add a verification requirement. This approach would entail substantial revision of Rule 11, particularly the provision in Rule 11(b)(3), added in 1993, that permits allegations "if specifically so identified," that "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery * * *."

(2) Republish present Rule 8(a)(2), with a Committee Note stating that it is time to give meaning to the dead-letter requirement that the short and plain statement show that the pleader is entitled to relief.

(3) Revise Rule 8(a)(2). Three obvious variations would be:

[a] A pleading * * * must contain * * * (2) a short and plain statement of the claim <u>in sufficient detail to</u> show~~ing~~ that the pleader is entitled to relief * * *; or

[b] A pleading * * * must contain * * * (2) a short and plain statement of the <u>facts constituting a</u> claim * * *; or

[c] A pleading * * * must contain * * * (2) a short and plain statement of the claim<u>, stating with particularity facts</u> showing that the pleader is entitled to relief * * *.

(4) Revise [Style] Rule 8(d)(1) by adding a new sentence at the end:

Each allegation must be simple, concise, and direct. No technical form is required. <u>The pleading as a whole must be sufficient to support informed decision of a motion under Rule 12(b), (c), (d), or (f).</u>

(5) Revise Rule 9 by adding a catalogue of claims that must be pleaded with particularity. Many entries in the catalogue could be found by regularizing the tendency of many courts to require heightened pleading of many claims now.

(6) Revive the motion for a bill of particulars by scrapping Style Rule 12(e) and substituting the following:

(1) On motion or on its own, the court may order a more definite statement of a pleading:

(A) If the pleading is one that requires a responsive pleading and is so vague or ambiguous that a party cannot reasonably prepare a response; or

(B) If a more particular pleading will support informed decision of a motion under subdivisions (b), (c), (d), or (f).

(2) A motion for a more definite statement must be made before filing a responsive pleading and must point out the deficiencies in the pleading and the details desired.

(3) If the court orders a more definite statement and the order is not obeyed within 10 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other order that it considers appropriate.

(7) Revise Rule 7 to encourage use of a reply. The most extensive requirement, short of requiring a reply to all new matter in the answer, would be to allow a defendant to impose a reply obligation simply by including in the answer a request for a reply. Short of that, Rule 7 might identify specific circumstances calling for a reply. The narrowest version would focus on specific types of litigation; cases in which the defendant pleads some form of official immunity are a familiar example.

RULE 12(e)

Recent Committee discussions of notice pleading have deferred further consideration of several proposals to address pleading standards directly. For the time being, the first step is to consider whether Rule 12(e) might be amended to facilitate case-specific pleading standards without interfering with the basic goals of notice pleading.

The Rule 12(e) variations set out below respond in different ways to the central concern with notice pleading. The concern is that notice pleading practice has developed to a point that in some cases defeats disposition on the pleadings of cases that should not progress to discovery, unnecessarily expands discovery, postpones disposition by summary judgment, impedes settlement, and generally adds to cost and delay. The first version, carried forward from earlier drafts, focuses on more definite pleading as a means of facilitating decision on the pleadings. The alternatives take a broader view, focusing either on "management" of litigation in general terms or on discovery and perhaps summary judgment.

Any attempt to develop Rule 12(e) will be greeted by protests that the result will be restoration of the bills of particulars that were abandoned within the first decade of the Civil Rules. A more specific objection will be framed in terms that address heightened pleading proposals in general. Open-ended authority to insist on more detailed pleading on a case-by-case basis can be used to raise barriers against disfavored categories of claims or groups of claimants.

Much of the case for developing Rule 12(e) practice draws from the perception that heightened pleading requirements are in fact imposed in many cases today. Examples are described below. Supreme Court directions to the contrary have not defeated practice in the district courts. This experience suggests that in fact there are advantages to be gained by more detailed pleading. Rather than attempt to draft national rules that impose heightened pleading requirements selectively on some number of specific claims in the manner of Rule 9(b), a case-specific approach may work better.

1 **(e) Motion for a More Definite Statement.**

2 **(1)** On motion or on its own, the court may order a more definite statement of a pleading:

3 **(A)** If the pleading is one that requires a responsive pleading and is so vague or
4 ambiguous that a party cannot reasonably prepare a response; or

5 **(B)** If a more particular pleading will support informed decision of a motion
6 under subdivisions (b), (c), (d), or (f).

7 **(2)** A motion for a more definite statement must be made before filing a responsive
8 pleading and must point out the deficiencies in the pleading and the details desired.

9 **(3)** If the court orders a more definite statement and the order is not obeyed within 10
10 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other order that it considers appropriate.

COMMITTEE NOTE

Rule 12(e) is amended to reinvigorate the function of pleading as a method of disposing of actions — or portions of actions — that rest on inadequate legal premises. The structure of these rules places primary reliance on discovery, pretrial conferences, and summary judgment not only to shape a case for trial but also to winnow out matters that ought not go to trial. Pleading is intended

primarily to establish the framework for these later proceedings. It is important that cases not be decided on the pleadings before all parties are afforded adequate opportunity to discover the fact information that may be needed to support a clear statement of legal theory. Post-pleading procedures, however, have come to pose increasingly heavy burdens on litigants and courts in more and more cases. Recognizing the nature of these burdens, a host of decisions have developed increasingly detailed pleading requirements for a wide variety of cases. Within the framework of the present rules such requirements are imposed by a process of moving to challenge the pleading, considering often limited allegations, and — if the pleading is inadequate — working through the amendment process. A more direct procedure is provided by a motion for more definite statement.

The need to expand the role of the motion for more definite statement arises in part from the decision in *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coord. Unit*, 1993, 507 U.S. 163, and decisions that follow it. The Court ruled that heightened pleading requirements cannot be imposed outside the categories specifically enumerated in Rule 9. At the same time, it suggested that the appropriate means of establishing such requirements is "by the process of amending the Federal Rules." It is not feasible to establish detailed catalogues of pleading requirements for every legal category that may warrant such requirements, nor to express adequately the nuanced shades of specificity that may be appropriate for different categories. The more definite statement procedure can be used to restore the process of gradual judicial development that, up to the time of the *Leatherman* decision, was responsible for establishing pleading requirements adapted to the needs of different actions. In the beginning, implementation will proceed largely on a case-specific basis. As experience develops it may prove possible to identify categories of cases in which the parties know what to expect and how to plead without need for motion and response.

Alternative Versions of (1)(B)

First Alternative:

(B) If a more particular pleading will facilitate management of the action [under Rule 16].

Second Alternative:

(B) If a more particular pleading will enable the parties and the court to [better use][control] discovery [and to prepare for summary judgment].

Alternatives That Depart from "More Definite Statement"

The purpose to depart from the limited purposes of present Rule 12(e) could be implemented more aggressively by abandoning the "more definite statement" phrase. The emphasis could be placed directly on particularized pleading:

(e) More Particularized Pleading.

(1) On motion or on its own, the court may order amendment of a pleading to provide sufficient particularity to:

(A) enable a party to prepare a required response [to a pleading that is vague or ambiguous], or

(B) [here any of the variations of (B)]

Particularized Pleading Examples

The suspicion that courts at times insist on pleading detail far beyond the open-ended generality permitted in garden-variety litigation grows out of continuing examples. Two examples suffice for the moment.

One example is provided by describing *Rivera v. Rhode Island*, 1st Cir.2005, 402 F.3d 27. The court affirmed dismissal of an action claiming a substantive due process violation by the failure of police and prosecutors to fulfill promises to protect a 15 year-old murder witness who was murdered by the murderer she had identified. The court assumed that a claim can be stated for a state-created risk if the circumstances shock the conscience. Dismissal was affirmed for failure to plead facts that would show a state-created risk. The complaint set out many facts that were evaluated by the court — a short summary was "identifying and securing Jennifer as a witness, providing her with false assurances of protection upon which she relied, compelling her to act in this capacity as a witness, and * * * issuing a subpoena to her to confront [the murderer] in open court." (The complaint also stated that another child witness was placed in a witness protection program, and that the police and prosecutors were regularly informed about the continuing explicit threats made to the plaintiff's child.) There is no hint that the plaintiff failed because she pleaded too much — that the court would have upheld a complaint that alleged only that the defendants had acted in ways that created the risk of murder and that shocked the conscience. This court wanted explicit allegations in fine detail. It seems likely that most courts would rule in the same way.

A second example is provided in the next volume of the Federal Reporter, *Doe v. Cassel*, 8th Cir.2005, 403 F.3d 987. Suit was brought on behalf of "a mentally challenged eight year-old boy who was in the care and custody of the state-run Cottonwood Residential Facility * * * after falling victim to his father's sexual abuse. While at Cottonwood, John was repeatedly sodomized and sexually molested by other residents of the facility. The named Defendants, individual employees in various positions of authority at Cottonwood, were aware that certain of the other residents were sexual predators, yet placed the young and vulnerable John in an unsafe environment and then failed to adequately supervise the residents and protect John. Because of John's youth, limited cognitive abilities, and his emotional trauma from the attacks, he is unable to provide details of the events or identify how the Defendants' actions allowed the attacks to occur." The Second Amended Complaint named defendants, "but failed to delineate the Defendants by their respective acts or omissions." The district court dismissed the complaint but permitted a Third Amended Complaint that again "failed to delineate [the defendants'] individual acts or omissions." The district court then dismissed for failure to correct the pleading deficiencies and for "undue delay" in naming her expert witness. The court of appeals affirmed. It began by ruling that heightened pleading cannot be required, not even when suing defendants who can plead official immunity. The district court erred to the extent that dismissal rested on a heightened pleading requirement. But dismissal was affirmed for failure "to comply with the * * * reasonable orders to delineate Defendants and identify their respective acts or omissions." "We review dismissal of a complaint under Rule 41(b) for failure to comply with the district court's orders for abuse of discretion." "Doe's failure to articulate factual allegations tied to specific Defendants, well into discovery, was more than a technical pleading deficiency, it denied the Defendants the protection of qualified immunity which is meant to provide both immunity from suit as well as an affirmative defense in response to a suit." (Along the way, the court noted "tools * * * to eliminate meritless claims early in the litigation process," including an "order to the plaintiff to provide a more definitive [sic] statement under Rule 12(e).")

Rule 12(e)

The agenda materials include drafts illustrating the ways in which Rule 12(e) could be expanded to provide more frequent use of orders for more definite pleadings. These drafts represent the current focus of the broader inquiry into notice pleading. A number of more direct alternatives have been put aside for the time being. There is no present disposition to recommend that notice pleading be abandoned or somehow redefined and tightened. Nor is there any enthusiasm for defining more particularized pleading requirements for specific types of cases. At the same time, there is concern that current pleading rules and practices mean that some cases endure longer, at greater cost, than should be. In rejecting ad hoc judicial development of heightened pleading requirements for some cases, the Supreme Court has noted that more demanding pleading standards should be adopted in the rulemaking process. The question remains whether some form of response can be found.

Part of the impetus for the overall pleading inquiries and for this more specific set of proposals is the sense that in practice lower courts often enforce pleading standards higher than general concepts of notice pleading. Persisting desires for more detail may reflect a genuine need that can be better addressed by bringing it out into the open and regularizing it.

The focus of the Rule 12(e) proposals is on developing a tool that is available to the court in cases that may be advanced by more precise initial pleading. There is no thought of going back to the bill of particulars practice that was carried forward in the original 1938 rules and abandoned in 1948. Instead the hope is that there may be a way to use pleading, perhaps in conjunction with focused and limited initial discovery, to identify cases that do not warrant the cost and delay of full discovery and summary-judgment practice. The procedure would provide case-specific authority to raise pleading standards without attempting to impose more demanding standards in all cases and without attempting to define substantive categories to be held to higher standards.

The drafts suggest different approaches. The first would expand the more definite statement to support disposition on the pleadings by motions under Style Rule 12(b), (c), perhaps (d), and (f). This focus on pleading disposition would likely be the least expansive. It would make most sense when the pleader is likely to have access to reliable fact information sufficient to resolve the dispute without need for discovery. It might also work in cases that are susceptible of disposition after limited discovery enables a party to plead confidently the most favorable version of facts it is willing to attempt to prove, but that situation may prove rare.

Other drafts focus more directly on all aspects of pretrial management. One would authorize an order for a more definite statement if that would "facilitate management of the action." A variation would ask whether "a more particular pleading would enable the parties and the court to conduct and manage discovery and to present and resolve dispositive motions." This approach looks for a more complex, and more likely staged, integration of pleading with discovery and summary judgment.

An initial observation was that some such expansion of Rule 12(e) should be encouraged. There are too many cases with enormous waste pretrial activity. The link to case management reflects expanded Rule 16 practices that have evolved since the initial adoption of notice pleading in 1938 and the abolition of bills of particulars in 1948. The integration of pleading and pretrial management could be a good thing.

A specific illustration was offered. The complaint in an action for negligent misrepresentation may be sufficiently definite to support a responsive pleading. It is outside present Rule 12(e). But it is not possible to tell whether there is complete ERISA preemption, supporting federal-question jurisdiction, or only conflict preemption, presenting a defense to a state-law claim that does not support federal-question jurisdiction. The answer will turn on what was said to support the claim.

A judge offered quite a different response. Parties often "throw up roadblocks." Many Rule 12(b)(6) motions are premature summary-judgment motions. Rule 12(e) motions for a more definite statement are an effort at discovery. We should be concerned about creating new opportunities for obstruction. The proposed new tool is unnecessary in almost all cases.

A different response was that any expanded rule should address all pleadings, not only the complaint. The drafts are written that way, recognizing that more definite pleading of an answer, a reply, and other pleadings can be helpful.

A different concern was expressed. Recognizing the merit of some such proposal, the project may be perceived as an effort to deter disfavored claims, "as barring the right to pay $250 and start discovery." Perhaps it would be better to provide for a "contention statement" after preliminary discovery? Present practice produces many cases in which the court does not know what the plaintiff's theory is until the plaintiff replies to a motion for summary judgment. A similar concern was expressed — the idea may be good, but "it sends up red flags."

Yet another judge expressed the same concerns. A pro se case may present a complaint that reads like a book, and is nearly as long. Knowing nothing else, the plaintiff presents a narrative of the sense of grievance. Expanding Rule 12(e) will lead to more motions — too many motions.

Still another judge stated that we should not go back to the bill of particulars. The Northern District of Texas had a local rule, only recently repealed, that barred 12(e) motions seeking information that can be got by discovery. It still has a rule that requires court permission to file more than one summary-judgment motion. The result is to encourage motions to dismiss under Rule 12(b)(6). If Rule 12(e) is expanded, the summary-judgment limit will likewise encourage Rule 12(e) motions.

A lawyer responded to these concerns by doubting the danger that ill-founded motions would be encouraged. Some lawyers, to be sure, like to file motions. But many good lawyers recognize the importance of filing only well-founded motions. The tone set by a mediocre motion is likely to resonate throughout all later stages of the action. The draft that focuses on enabling the court and parties to conduct and manage discovery and to present and resolve dispositive motions is the most attractive. And it should send a message inviting more rigorous initial pleading.

A possible part-way approach through Form 35 was suggested as an alternative. Form 35 could be amended to suggest that the parties' report on the Rule 26(f) conference include pleading issues in addition to the time limit on amendments already noted.

In a different direction, it was asked what would be provided by expanding more definite statement practice that could not be achieved under present rules. In a case presenting inscrutable possibilities of ERISA preemption, for example, focused discovery can be limited to the facts that will support an informed decision on jurisdiction. Case management under Rule 16 may be better than elaborating on pleading practice.

This discussion was summarized by observing that the judges seemed to be reflecting experiences different from the experiences of the lawyers. The lawyers represented careful, thoughtful, desirable practice. They can understand the potential good uses of case-specific pleading orders as means to more efficient identification of the issues, control of discovery, and perhaps resolution by dispositive motion. The judges confront lawyers who do not practice to these standards, and fear misuses that will add to delay and impose burdens on the court that are not sufficiently alleviated by simply denying the ill-founded motions. The many tools available to shape discovery and to manage an action more generally may counsel that nothing be done. The idea still may deserve development, but great care will be required.

Because of the tie between pleading and summary judgment, the Rule 56 Subcommittee was asked to add consideration of the Rule 12(e) proposals to its chores.

Federal Practice

Supreme Court Rewrites Pleading Requirements

Gregory P. Joseph*

In 1957, the Supreme Court ruled that, under the Federal Rules of Civil Procedure, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). On May 21, 2007, the Supreme Court decided that "this famous observation has earned its retirement." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007). In the process, the Court revolutionized pleading rules, introducing twin requirements of fact-based pleading and plausibility.

Bell Atlantic was a complicated antitrust conspiracy action, but the Supreme Court used sweeping language to impose a duty to plead facts pursuant to Rule 8(a)(2) — a duty that it did not confine to the antitrust field. It held that "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.... Factual allegations must be enough to raise a right to relief above the speculative level..., on the assumption that all the allegations in the complaint are true (even if doubtful in fact)...."

Under *Bell Atlantic*, the duty is to furnish factual "allegations plausibly suggesting (not merely consistent with)" an "entitlement to relief." *Bell Atlantic* calls this the "Rule 8 entitlement requirement" — the "threshold requirement of Rule 8(a)(2) that the 'plain statement'

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possess enough heft to 'show that the pleader is entitled to relief.'" A mere-possibility standard does not satisfy the Rule 8 entitlement requirement because a *possibility* of relief is something less than a *plausibility* of relief.

The context of the Supreme Court's opinion is important. *Bell Atlantic* was a complex antitrust class action — a very expensive case to litigate. The Supreme Court cited *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) — its decision in a similarly expensive securities class action — to illuminate the "practical significance of the Rule 8 entitlement requirement." *Bell Atlantic* stressed that "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed."

Bell Atlantic raises a variety of interesting issues.

Information-and-Belief Pleading. It is well-settled that "[p]leading 'upon information and belief' is sufficient to satisfy federal notice pleading under Fed.R.Civ.P. 8(a)." *Elektra Enter. Group v. Santangelo,* 2005 U.S. Dist. LEXIS 30388, at *7 (S.D.N.Y. Nov. 28, 2005). Information-and-belief pleading is not the same after *Bell Atlantic*. The complaint before the Supreme Court contained the allegation that: "Plaintiffs allege upon information and belief that [the Defendants] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another." This was rejected by the Supreme Court as inadequate because it did not satisfy the fact-based pleading and Rule 8 entitlement requirements. Therefore, invocation of the phrase "information and belief," without more, does not satisfy the fact-based pleading and Rule 8 entitlement requirements of *Bell Atlantic*.

In reconciling the tension between information-and-belief pleading and the Rule 8 entitlement requirement, it may be useful to look at the way information-and-belief pleading is addressed in another context in which fact-based pleading is required — namely, decisions under Rule 9(b). In this setting, it is commonly held that, where allegations of fraud are based only on information and belief, the complaint must set forth the source of the information and the reasons for the belief. *See, e.g., Romani v. Shearson Lehman Hutton,* 929 F.2d 875, 878 (1st Cir. 1991) (pre-PSLRA). This case law developed to test whether the allegations furnishing the mandatory "particularity" had a basis in fact. That goal is not dissimilar to that facing a court now obligated to test whether the newly-mandated "plausible entitlement" standard *Bell Atlantic* has been satisfied. It presents an established approach toward determining whether mandatory allegations (be they "particularity" or "plausibility") are sufficiently rooted in fact.

This suggestion highlights the fact that *Bell Atlantic* can fairly be read as moving 8(a) jurisprudence closer to that of Rule 9(b). After *Bell Atlantic*, it is no longer accurate to say — as it was before — that "[s]uch supporting allegations seem to be unnecessary and inconsistent with the philosophy of the federal pleading rules" (5 Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 1224 (Supp. 2007)). Arguably, *Bell Atlantic* is more stringent in its requirements than preexisting 9(b) case law, which relaxed the particularity rule when factual information is peculiarly within the defendant's knowledge or control (*see, e.g., Weiner v. Quaker Oats Co.*, 129 F.3d 310, 319 (3d Cir. 1997)), even though the pleading standard stated in Rule 9(b) is more stringent than that stated in Rule 8(a). Case law will have to sort through the extent to which this eminently practical doctrine survives.

Conspiracy. The issue in *Bell Atlantic* was conspiracy, and the Court ordered dismissal because "nothing contained in the complaint invests either the action or inaction [of the

defendants] with a plausible suggestion of conspiracy." Therefore, it is safe to conclude that any action alleging conspiracy — *e.g.*, RICO, civil rights, civil conspiracy — requires allegations of fact sufficient to satisfy this standard. What would suffice? District Judge Gerard E. Lynch's underlying opinion in *Bell Atlantic*, 313 F.Supp.2d 174 (S.D.N.Y. 2003), dismissed the complaint because plaintiffs failed to plead a "plus factor" that tended to exclude independent self-interested conduct as an explanation for the defendants' behavior — for example, "that the parallel behavior would have been against individual defendants' economic interests absent an agreement, or that defendants possessed a strong common motive to conspire." *Id.* at 179. This is as good starting point as any for alleging a viable conspiracy claim.

Extent of Required Allegations of Fact. The *Bell Atlantic* Court focused on the expense of litigating a massive antitrust class action; relied on its *Dura* decision, which focused on the expense of litigating a massive securities class action; and emphasized the inadequacy of judicial oversight of discovery to rein in discovery costs. Less complicated cases, like the auto accident discussed above, do not present the same issues, either in terms of complexity, expense or the perceived inadequacy of managerial judging. There is little to be gained by requiring the auto accident plaintiff to plead — instead of that "the defendant negligently drove a motor vehicle against the plaintiff" — that "the defendant was speeding and across the center line when he drove a motor vehicle against the plaintiff." The former is as plausible as the latter — discovery will determine who was at fault. Given the new *Bell Atlantic* test, however, and notwithstanding Rule 84, erring on the side of including more rather than fewer facts is the safer course.

Erickson v. Pardus. Just how extensively does *Bell Atlantic* change the law of notice pleading? In a second pleading opinion issued per curiam in a *pro se* prisoner case, *Erickson v. Pardus,* 127 S. Ct. 2197 (2007), the Supreme Court sounded a permissive chord.

In his complaint, the prisoner plaintiff alleged that the physician provided by the prison had "removed [him] from [his] hepatitis C treatment" in violation of Corrections Department protocol, "thus endangering [his] life." He attached to the Complaint grievance forms in which he claimed that he was suffering from "continued damage to [his] liver" as a result of the failure to treat. The Complaint requested damages and an injunction requiring that the Corrections Department treat petitioner for hepatitis C "under the standards of the treatment [protocol] established by [the Department]."

The Supreme Court summarily vacated the Tenth Circuit decision rejecting this allegation. It held that "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'"

There appear to be three primary differences between *Bell Atlantic* and *Erickson.*

First, the Supreme Court stressed the *pro se* status of the plaintiff in *Erickson* — a far cry from the highly sophisticated antitrust counsel in *Bell Atlantic*:

Second, the pleading issue in *Erickson* was harm, not liability. Under Rule 8(a)(2), only "a short and plain statement of the claim showing that the pleader is entitled to relief" is required.

Third, *Erickson* was a simple case, *Bell Atlantic* a complicated antitrust action. What more did the defendants in *Erickson* really need to know? Not much.

Conclusion. One could read *Twombly's* plausibility-in-pleading standard as requiring that the inference alleged in the complaint be *more persuasive* than alternate inferences (*see, e.g.,* 127 S.Ct. at 1966 (allegation insufficient where it "could just as well" give rise to inference of

non-violative conduct) and at *42-*43 (allegation insufficient where "we have an obvious alternative explanation")). But, whatever Rule 8(a)(2) means, it cannot by any means require more than the strict scienter pleading requirement of the PSLRA, and *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 127 S. Ct. 2499 (2007) teaches that the PSLRA is satisfied by an inference of *equal plausibility.*

Consider a securities case alleging § 11, 10b-5 and common law fraud claims (thus, not a class action). The § 11 claim is governed by Rule 8(a)(2) because it doesn't require fraudulent intent, the 10b-5 claim is governed by the strict statutory scienter requirement of the PSLRA, and the common law fraud claim is governed by Rule 9(b). What is the difference in the pleading standards among the three of them? It is not possible to articulate those differences with any assurance.

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*67 ADVANCE SHEET
Robert E. Shapiro
Associate Editor

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WESTLAW LAWPRAC INDEX
JUD--Judicial Management, Process & Selection

Requiescat in Pace

You'd have to be a pretty oblivious litigator not to know that a fixture of contemporary litigation passed away on May 21, 2007. That was the day the U.S. Supreme Court issued its ruling in the case of Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007). In doing so, the Court buried one of the oldest rules of notice pleading. Defense lawyers celebrated. Plaintiffs' lawyers groaned. Civil litigation would never be the same. Conley v. Gibson, 355 U.S. 41 (1957), that old warhorse of motion practice on civil complaints, was no more.

Generations of litigators have been able to recite by heart Conley v. Gibson's bedrock principle of notice pleading: "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim, which would entitle him to relief." Id. at 45-46. According to Justice Souter's opinion for the Court in Twombly, this "no set of facts" language from Conley has been "questioned, criticized and explained away long enough." Time to put it to rest. "After puzzling the profession for 50 years," the Court intoned, "this famous observation has earned its retirement." And so, like some old and long-ridiculed senior counselor of a law firm being updated by its Young Turk partners, the old way of doing things was put out to pasture. And a new regime announced.

What exactly there was about the facts of Twombly that precipitated Conley's retirement is a little hard to fathom. In Twombly, a class of subscribers of local telephone and high-speed Internet services sued various phone companies alleging a price-fixing conspiracy on rates. The complaint in the case alleged there was a "contract, combination and conspiracy" to restrain trade in violation of Section 1 of the Sherman Act. The complaint purported to detail this conspiracy at some length and cited certain of its proof. Among other things, it alleged that an executive of one of the defendant companies had given a speech with a curious statement in it regarding the reasons for certain parallel conduct in the industry. The complaint alleged that this ambiguous statement was evidence of an actual agreement that the companies had reached behind the scenes to collude on prices.

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Because so much of the underlying complaint seemed to rely on allegations of parallel conduct, the district court dismissed the complaint. Parallel conduct does not state a claim for relief under the Sherman Act; there must be an agreement. The Second Circuit reversed. It concluded that the complaint itself did not have to exclude the possibility that the common conduct at issue was "independent self-interested conduct" so long as the defendant phone companies had failed to show that "there is no set of facts that would permit plaintiffs to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." In other words, even though parallel conduct was not sufficient to sustain a cause of action, the plaintiffs did not in their complaint, once having alleged an agreement, have to provide the evidence they would rely upon to prove that the conduct charged was the result of that agreement alleged rather than merely independent decision making.

The Supreme Court in a 7-2 decision reversed. It concluded that the allegations of an agreement, parallel conduct, and other activity suggesting the parallel conduct was not accidental were not enough. Something more would need to be alleged to sustain the complaint. Those allegations needed to show, in the complaint, that it was "plausible" that there was an agreement rather than merely parallel conduct.

Twaddle, said Justice Stevens in dissent. Any way you look at it, the complaint was viable. Under the Conley test, there were certainly facts that could be proved that would entitle the plaintiffs to relief. Indeed, even apart from Conley, the plaintiffs had given notice. The plaintiffs had alleged an agreement. They had alleged conduct consistent with an agreement. And they had provided allegations that tended to show that the conduct was the result of the agreement. What more was necessary? Returning to Conley, it may have been regretted by the defense bar, but it was never in doubt, at least not recently. The Supreme Court had itself cited the precedent at least 16 times in recent years without having questioned it, criticized it, or explained it away. The cases relying on it in the lower courts have, as everyone knows, been legion.

Now, there can be no real quibbling that Justice Stevens was right, that the Court majority was suddenly veering away from the old rules of notice pleading. Certainly under the "no set of facts" approach, what the plaintiffs had alleged certainly passed muster. More generally, the defendants were on notice of what was being alleged, i.e., a conspiracy to fix prices in violation of the Sherman Act. Nor were they left to guess at what kinds of things the plaintiffs would rely upon to prove the claim. Or the relief that was sought. If "notice" pleading means that the defendants were entitled to know what the claim was, they certainly had it. And, going back to Conley, if the question was whether there were any facts the plaintiffs could prove to support such a claim, they could certainly show that the conduct alleged arose from the wrongdoing stated, giving them the right to the relief sought.

Leaving aside the dismissal of the Conley principle for a moment, Justice Souter's rejection of the Twombly complaint is thick with curiosities. Those lawyers old enough to remember the era before the adoption of the Federal ***68** Rules, or who practice in the few states that still require fact pleading, will recognize the kinds of things he said about the allegations that supposedly made them unacceptable. He contended, for example, that the allegation of a "contract, combination or conspiracy" was a "label," "a naked assertion," and "a conclusion." But what's wrong with a conclusion? The answer in a fact-pleading jurisdiction is that it does not contain "facts," though even there some conclusions can be recharacterized as "ultimate facts," passing muster. But regardless of the outcome of disputes in such a jurisdiction, the

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Supreme Court did not profess to be adopting a fact-pleading standard. Notice pleading is still the name of the game.

Then there was the new approach the Court adopted. Rule 8 of the Federal Rules specifies that a complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Here the plaintiffs had alleged a "conspiracy" to fix prices, had described this conduct that was consistent with that agreement (if also consistent with a non-agreement as well), and had made clear the statute that was violated. Why was this not enough to meet Rule 8?

The Supreme Court responded that the complaint had to have "allegations plausibly suggesting (not merely consistent with) agreement." Where is that in Rule 8? According to the Court, the "plain statement" Rule 8 requires for the complaint must have enough "heft" to show an entitlement to relief. But wasn't the claim here plausible in that very way? The evidence cited could be consistent with legal activity. But was it not plausible that it was part of the conspiracy that had in fact been alleged? True, the allegations of parallel conduct could be "factually neutral," as the Court argued, but only when considered apart from the allegation of a conspiracy or agreement. However naked that allegation might be, it was still alleged in the complaint.

In short, whether you rely on first impressions or careful analysis, Twombly seems to change the rules. Justice Souter's denials on this subject, as Justice Stevens pointed out, are simply not credible, particularly in the case of Conley. Anyone who practices often in the federal courts--indeed even those who only seldom do so--in fact, even those who get into federal court once in a blue moon--knows that Conley's "no set of facts rule" was the rule. Perhaps it was puzzling to some. It may have been criticized by others. But those puzzling about it or criticizing it still knew it was the rule. No amount of Supreme Court phrase-making or excuses or rhetorical deflections can change that. Short and simple, Twombly flatly overrules Conley.

And the new rule is a mystery all its own. Given the facts of Twombly, it did not just overrule Conley, it seems to overrule notice pleading itself. If a complaint that alleges that there was an agreement to fix prices, that there was conduct consistent with that agreement, and that there were statements made by the defendants that seemed to confirm that there was such misconduct has not given notice, what has? How much more evidence is enough to make the claim plausible? Moreover, in what sense is a claim that is plausible different from one for which there could be no set of facts proved? In the end, the new rule seems to be that a complaint should not be dismissed unless there is "no set of facts" in the complaint that could give the plaintiff an entitlement to relief. Note, however, that in Twombly there was such a set of facts that if proved might entitle the plaintiffs there to relief.

What a mess. Which leads to that old detective's question, Why did you do it? What was the Supreme Court concerned about? The simplest answer is that it did not like the cause of action alleged in Twombly and wanted to dispose of it ***69** come hell or high water. But if the price of doing so was both hell and high water--the high water of federal courts wandering aimlessly, trying to figure out what the new standard of pleading is, and the hell of thousands of hours of lawyer hours billed in the litigation of it--was it worth it? Or necessary? Should the Supreme Court be overruling time-honored precedents that have been applied in thousands if not tens or even hundreds of thousands of cases solely to achieve a desired result in an individual case? Is that any way to run a court system?

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To be fair, the Supreme Court did state some policy reasons. Most specifically, it quoted the Seventh Circuit's Judge Easterbrook for the proposition that what happens in discovery in a case, by way of cost and stress and inconvenience, is so significant that allowing plaintiffs such easy access to court may not be for the better, Really? When did the Supreme Court come to that conclusion? Yesterday? The subject of discovery abuse, and even the routine demands that ordinary discovery places on litigants in all courts, have been the subject of conversation and much hand wringing for decades. Did the Supreme Court realize just now that something had to be done about it? And even if it did, was this case the right one to use? Or is the plausibility rule the right one to adopt?

Curiously, the Supreme Court cited Judge Easterbrook as a judge who had considerable experience with antitrust law, as if this made him the supreme commentator on the subject before the Court. But Twombly's real significance did not seem to arise from antitrust law. Instead, the decision concerned the pleadings rules. Judge Easterbrook, for all his deserved preeminence, is no greater authority on the pleadings rules than a hundred other judges who have been citing Conley forever, not to mention the Supreme Court justices that adopted the standard to begin with or applied it thereafter. Nor were Judge Easterbrook's comments directed solely at the pleadings rules. Instead he seemed to be lamenting the state of civil litigation generally, including the inability of trial court judges to be able to control discovery on a regular basis.

Rightly so. Complaints about how out of control discovery is are not hard to find in the literature. And in case you didn't notice, it's just gotten a whole lot worse, courtesy of the Internet and e-mail. Anyone who has been involved in big litigation recently knows what a nightmare this is. In the 1970s discovery took a turn for the worse because of the effects of the invention of the Xerox machine. All of a sudden, copies of documents multiplied on a geometric basis, forcing dozens or even hundreds of young lawyers into warehouses to sift through millions and millions of documents. And for every warehouse gang for the producing party, there had to be a warehouse gang for the requesting/receiving party.

Now this has happened again. The ease and availability of e-mail mean that the documents relating to a matter will have increased exponentially again. And the activities involved in retrieving them and sorting them have added to both the burden and the complexity of discovery production. The world wrought by the notice pleading rules and the broad discovery principles embodied in the federal rules is a dismal one for parties and lawyers alike. And the question remains what the next great innovation will be that will make the system groan again. Can it take such another shot?

In short, the problem is a far bigger one than Justice Souter seems to understand. The question is whether a change in the notice pleadings rules--or this change in the pleadings rules--is the right way to fix it. Many other options suggest themselves. One is for judges to take a more active role in the discovery process itself. Perhaps even a revision of the "relevant or reasonably calculated to lead to the discovery of admissible evidence" rule would make some sense. Or maybe the entire system of notice pleading and liberal discovery, whatever its virtues, needs to be rethought. After all, the old ways of pleadings forms and scant discovery were abandoned when they reached the crisis stage. Why not another reexamination now?

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Whatever the answer to these questions, it seems pretty clear that the decision of the Supreme Court in Twombly is not the way to go. What is needed is a careful, straightforward reexamination of the system of notice pleading and liberal discovery, not a decision by the Court to pretend to stick by the old pleadings rules while fundamentally changing them to a standard that seems to conflict with notice pleading and Rule 8, and, by the way, makes no sense whatsoever.

Nor are these the only problems with Twombly. To begin, where does the Supreme Court get off changing the rules in this way? The rules were adopted by Congress. What they mean may have been set by the courts, but Congress has made numerous alterations to the rules since Conley and not once suggested that it was unhappy with that approach. Did the Supreme Court even have the power to make this change?

And even if there is no statutory bar, what about stare decisis? Precedent. Is it appropriate for the Supreme Court to make fundamental changes of this kind in rules of long standing? In a certain sense, Justice Souter seemed to acknowledge this problem by his very dissembling. By suggesting that Conley was a case that was already fraught with uncertainty and criticism, he seemed to be trying to absolve himself from the opprobrium that might attach to a bold recanting of a 50-year-old Supreme Court precedent. Of course, Justice Stevens's barbed response blew his cover.

But let's return to the immediate problem: What really is the new standard? Plausibility? What does that mean? And if we don't know, isn't that a huge problem? Defense lawyers undoubtedly cheered at the promulgation of Twombly reasoning that, whatever else the decision might mean, it at least makes it harder now to file a federal court complaint. But what goes around comes around. However frequently you are on the defense side, you will find yourself someday filing a complaint for a client. Do you know what you have to plead?

Of course the strangest answer of all may be that there will be little change, if any. Some commentators noted that only a week after Twombly the Court decided Erickson v. Pardus, 127 S. Ct. 2197 (2007), in which it seemed to fall back to its old pleading ways. There are many reasons to believe that Erickson does not represent a quick judicial Thermidor. But whether it does or does not, the sense one gets from the Twombly case, with its rejection of the conspiracy allegation and its references to Judge Easterbrook, among other things, may lead the courts to the conclusion that, for the great run of cases, there should be no change at all. Business as usual. Maybe it will be a little easier to dismiss a case that is at the margin, providing ***70** the courts with an excuse for shutting out a seemingly undeserving plaintiff. But even at the margin, the results may be minimal. We shall see. Whatever the case, however, the damage in uncertainty, confusion, higher costs, and the sense one gets of a court system less than straightforward in its methods has already been done.

Judicial Pine Tar

It is difficult for a true baseball fan not to love George Brett, the former Kansas City Royals third baseman, 3,000-hit player, and first ballot Hall-of-Famer. Just ask Judge Evans of the Seventh Circuit. Called upon to decide a dispute between Brett and his brother, on the one hand, and a company that had claimed the Bretts misused its trademark, on the other, Judge Evans began with a many-page paean to Brett and perhaps his most famous baseball moment, the pine tar

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incident. For those of you who are unfamiliar with the latter, you can read about it in exhaustive detail in Central Manufacturing v. Brett, No. 06-2083 (7th Cir., decided July 9, 2007). Essentially, it is the morality play that concerns a winning home run hit by Brett, later nullified by the umpires because he had excess pine tar on his bat, and later reinstated by the higher powers of baseball. Pine tar, by the way, is sticky stuff players are permitted to put on a bat to make it easier to grip but that otherwise has no effect on how well or how far the batter hits a baseball.

Judge Evans's decision is a model of good writing. And irrelevancy. For the question that every person concerned about good judicial decision making would ordinarily ask is, what's Brett's baseball career and the pine tar incident got to do with the case before Judge Evans? And the answer was absolutely nothing. It had no bearing on the case. It had no bearing on anything in the case. It was marvelously entertaining. And absolutely unnecessary.

All in good fun? What's the harm, you might ask? Plenty. First, this little encomium to Brett had to make you wonder whether Judge Evans was being perfectly neutral in his adjudication of the matter. If he was so enthralled with Brett as to have wanted to praise him and his accomplishments so vigorously at the outset of the opinion, how do we know it did not affect his judgment? Even if Judge Evans is too good a judge to let that happen, isn't the impression he left for the unknowing that a justly famous person will get special attention from the court? Is that the impression we want to leave?

Next, there was the basis for this little bit of modern folklore. Judge Evans encourages his readers to look to YouTube for their information about the pine tar incident. Is this the kind of authority we want in a judicial opinion?

Last, but not least, judicial decision making serves a specific purpose. It is not to make for lively reading or an interesting diversion. It is to decide cases in the simplest, clearest, and most straightforward way. Judges are not charged with their responsibilities for our pleasure or theirs. Judging is serious business, not to be diverted or detracted from by the whimsy of the decision-maker. When we treat it as something else, things begin to go wrong, not least the respect for efficiency, fairness, and depth that are so critical to the effectiveness and legitimacy of the legal system. To use it for personal indulgence is the antithesis of the legal craft at its finest.

Judge Evans's digression, however helpful in getting his readers stuck on the decision, clearly had no business being there. No more than Brett's carelessness should it be allowed to distract from the merits of the opinion rendered. But whereas Brett's negligence makes for one of those incidents that makes baseball magical, Judge Evans's self-indulgence cannot similarly justify itself in the grander scheme of things. Indeed, it seems to undermine the integrity and seriousness of the judicial process itself.

Author's Note: A recent column here wrongly attributed the phrase "the punctilio of an honor the most sensitive" to the great Learned Hand. As several astute readers noted, the phrase actually belongs to Justice (then Judge) Benjamin Cardozo, writing for the New York Court of Appeals in Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928). Given how frequently modern jurists fail to match the eloquence and pith of their predecessors, it seems all the greater shame not to have given credit where credit is due. Sorry.

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The Supreme Court, 2006 Term

Leading Cases

II. Federal Jurisdiction and Procedure

A. Civil Procedure

*305 PLEADING STANDARDS

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In 1938, Dean Charles Clark and the other drafters of the Federal Rules of Civil Procedure created the liberal notice pleading standards of Rule 8, [FN1] which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." [FN2] Fifty years ago, the Supreme Court declared in Conley v. Gibson [FN3] that Rule 8 means that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." [FN4] Last Term, in Bell Atlantic Corp. v. Twombly, [FN5] the Supreme Court abandoned Conley's broad interpretation of Rule 8 by holding that a complaint brought under section 1 of the Sherman Act [FN6] alleging "parallel conduct unfavorable to competition" must, in order to survive a Rule 12(b)(6) motion to dismiss, allege "some factual context suggesting agreement, as distinct from identical, independent action." [FN7] The majority, motivated by legitimate concern over the large costs that discovery places on defendants, had good intentions. But a judicial opinion is the wrong forum for enacting a major change to settled interpretations of the Federal Rules. Instead of resolving the case by looking to the Rules' text, their original understanding, and the ***306** Court's precedent interpreting Rule 8, the Court engaged in an ad hoc cost-benefit analysis. Rather than changing procedural rules through decisions in individual cases, judges should leave such alterations to institutions that have the ability to evaluate the costs and benefits of potential changes via empirical analysis.

In 1982, the American Telephone and Telegraph Company (AT&T) entered into a consent decree to settle a Sherman Act suit brought by the United States. [FN8] Under the decree's terms, AT&T divested itself of its local telephone service operations. [FN9] Seven regional Bell operating companies were authorized to act as monopolies for local telephone service within their respective regions. [FN10] More than a decade later, Congress passed the Telecommunications Act of 1996, [FN11] hoping to encourage competition in both local and long-distance telephone service. [FN12] Under the terms of the Act, incumbent local exchange carriers (ILECs) must provide access to competing local exchange carriers (CLECs). [FN13] Despite the law, CLECs have found little success penetrating the local telephone market in the decade since the Act's passage. [FN14]

Alleging that the ILECs conspired to keep CLECs out of the local telephone market, consumers brought a class action against the four major ILECs [FN15] under section 1 of the Sherman Act in the United States District Court for the Southern District of New York. [FN16] Upon the defendants' motion, Judge Lynch dismissed the complaint, [FN17] finding that "simply stating that defendants engaged in parallel conduct, and that this parallelism must have been due to an agreement," did not state a claim for purposes of Rule 12(b)(6). [FN18]

The Second Circuit vacated the district court's judgment. Writing for a unanimous panel, Judge Sack [FN19] observed that, under the Federal Rules, only

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those actions subject to Rule 9's heightened pleading requirements--which do not include antitrust actions [FN20]--must be ***307** pleaded with factual specificity. [FN21] The court rejected Judge Lynch's contention that Second Circuit precedent established more rigorous pleading requirements in antitrust cases. [FN22] Because the allegations in the plaintiffs' complaint were "sufficient to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests,'" the court vacated the district court's dismissal and remanded. [FN23]

The Supreme Court reversed and remanded. Writing for the Court, Justice Souter [FN24] began by noting that, though parallel anticompetitive conduct may serve as evidence of a conspiracy, plaintiffs must ultimately prove that defendants actually agreed not to compete. [FN25] Looking at Rule 8 and several Supreme Court cases interpreting it over the years, Justice Souter derived "general standards" [FN26]: although complaints do not require "detailed factual allegations," they do need "more than labels and conclusions," and "[f]actual allegations must be enough to raise a right to relief above the speculative level." [FN27] Applying these principles, Justice Souter determined that stating a section 1 claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." [FN28] This rule does not involve a probability requirement, but merely "calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." [FN29]

The high cost of discovery in antitrust cases justifies requiring plausibility at the pleading stage, Justice Souter reasoned. [FN30] In the case at hand, discovery would involve examining "reams and gigabytes of business records" relating to many millions of telephone service customers over a seven-year period in order to find "unspecified (if any) instances of antitrust violations." [FN31] Justice Souter argued that a rigorous pleading standard was needed to curb the abuse of discovery, since neither pretrial management nor summary judgment had proven particularly effective. [FN32]

Justice Souter proceeded to examine Conley's broad interpretation of Rule 8. On a "focused and literal reading" of Conley's "no set of facts" language, Justice Souter observed, "a wholly conclusory statement***308** of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." [FN33] Finding that "Conley's 'no set of facts' language ha[d] been questioned, criticized, and explained away" by commentators and later cases, Justice Souter determined that "this famous observation ha[d] earned its retirement." [FN34] What the Court in Conley actually meant was that once a plaintiff has adequately stated a claim, then the claim "may be supported by showing any set of facts consistent with the allegations in the complaint." [FN35] Applying the proper interpretation of Rule 8 to the present case, Justice Souter found that the alleged parallel anticompetitive conduct by the ILECs was suggestive not of a conspiracy, but merely of rational, self-interested behavior on the part of each ILEC. [FN36]

In a final footnote, Justice Souter rejected the contention that the Court was applying a "'heightened' pleading standard" and improperly widening the application of the specific fact pleading requirements in Rule 9. [FN37] The problem in the instant case was not that the alleged facts were insufficiently particularized, but rather that the complaint "failed in toto to render plaintiffs' entitlement to relief plausible." [FN38]

Justice Stevens dissented, [FN39] calling the majority's opinion a "dramatic departure from settled procedural law." [FN40] Justice Stevens argued that the plaintiffs' complaint clearly stated a claim and that the majority could not order the complaint dismissed merely because it found the claim implausible. [FN41]

First, Justice Stevens examined the historical context of the Federal Rules of Civil Procedure. The Rules were drafted to avoid the problems created by the highly technical and complex English pleading rules and the confusing fact/conclusion distinction used in New York's Field Code and other nineteenth-century civil procedure rules. [FN42] Against this historical background, the Federal Rules' liberal pleading standards were intended "not to keep litigants out of court but rather to keep them in." [FN43]

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***309** Looking to Conley, Justice Stevens cited a dozen instances where the Court had cited the "no set of facts" language, [FN44] and he contended that the majority's "opinion [was] the first by any Member of th[e] Court to express any doubt as to the adequacy of the Conley formulation." [FN45] Justice Stevens acknowledged the majority's concerns about discovery's costs, but he argued that the Court's solution was inconsistent with the Federal Rules' underlying philosophy that unmeritorious claims were best weeded out in the pretrial discovery process or at trial itself, not through pleading standards. [FN46]

Examining the facts of the case on the majority's own terms, Justice Stevens found it plausible that the defendants had conspired. [FN47] But more importantly, Justice Stevens thought it unwise to let judges dismiss cases they found implausible based on the pleadings, and "fear[ed] that the unfortunate result of the majority's new pleading rule will be to invite lawyers' debates over economic theory to conclusively resolve antitrust suits in the absence of any evidence." [FN48]

Writing only for himself in the final part of his dissent, Justice Stevens contended that the ostensible justification for the majority's ruling--an "interest in protecting antitrust defendants . . . from the burdens of pretrial discovery"--could not possibly explain the decision, given the vast wealth of the defendants. [FN49] Justice Stevens argued that the real motivation for the Court's decision was "a lack of confidence in the ability of trial judges to control discovery, buttressed by appellate judges' independent appraisal of the plausibility of profoundly serious factual allegations." [FN50]

Justice Stevens was half right. The majority's view runs counter to the text of the Rules, Supreme Court precedent, and the historical purpose of notice pleading. But what drove the majority's opinion was not a lack of faith in trial judges' abilities to manage discovery; rather, it was a lack of confidence in the Federal Rules' system of discovery itself. The Court's concern over the very real problems with discovery is admirable. Yet its method in overturning Conley is troubling. The Court relied on an ad hoc cost-benefit analysis that failed to account for all of the effects that the new plausibility requirement might have on civil litigation. Twombly demonstrates that major procedural changes should not be accomplished through judicial opinions, which are inevitably focused on the facts of individual cases and in ***310** which Justices rarely have before them the empirical data necessary to evaluate new procedural innovations. If the Court was convinced that heightened pleading is the solution to the problems with discovery, the Court could have used Twombly to suggest that the Judicial Conference's Advisory Committee on Civil Rules study whether a heightened pleading standard would prove socially beneficial, perhaps leading to an amendment of the Federal Rules. But the Court should not have ventured outside its expertise by sub silentio amending the Rules through reinterpretation.

Although it is at present hard to say how big of an effect Twombly will ultimately have on pleading practice, [FN51] it seems clear that Justice ***311** Stevens has the better of the purely interpretive argument at stake in the case. The text of the Rules does not justify the Court's holding. Rule 9 creates clear exceptions to the rule that facts do not need to be pleaded with any specificity; thus, the actions to which Rule 9 is inapplicable must not require particularized pleading of facts. [FN52] Bolstering this argument is the Rules' Form 9, which offers the following example of a complete claim to relief that would comport with Rule 8's requirements: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway." [FN53] The example contains no further details about the alleged negligence, nor any facts that render the allegation particularly "plausible"-- it simply states that the unlawful act occurred. Form 9 appears to be "a wholly conclusory statement of claim," which under Twombly would not meet the requirements of Rule 8. [FN54] But such a result is impossible because, according to Rule 84, the forms "are sufficient under the rules." [FN55]

Nor does precedent justify the Court's holding. In Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, [FN56] the Court held that, unless the Federal Rules were amended, "federal courts and litigants must rely on summary judgment and control of

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discovery to weed out unmeritorious claims." [FN57] Just five years before Twombly, the Court in, Swierkiewicz v. Sorema N.A., [FN58] explicitly rejected the notion that a complaint must seem plausible to survive a motion to dismiss: "Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits." [FN59]

The Court's holding also does not square with the history of the Federal Rules. The Rules' drafters hoped to avoid the problems with ***312** both the English common law pleading rules [FN60] and the overly technical Field Code; [FN61] they sought to ensure that cases were decided on their merits, not based on the technicalities of pleading. [FN62] As a judge on the Second Circuit, Charles Clark interpreted Rule 8 to permit an "inartistically" drawn complaint to survive a Rule 12(b)(6) motion because it was clear from the complaint what claim the plaintiff was alleging. [FN63] Later, then-Chief Judge Clark emphasized that pleadings under the Federal Rules "do not require detail. [They] require a general statement." [FN64]

Given Twombly's conflict with text, precedent, and historical sources, it seems clear that the Court was motivated by other considerations. In particular, the Court seemed motivated by a desire to increase efficiency by allowing judges to dismiss the cases in which discovery seems least likely to be fruitful. [FN65] There is clearly merit to the Court's concern. Discovery is widely believed to be a major problem with the American civil justice system. [FN66] It can be extraordinarily expensive [FN67] and is frequently abused by aggressive litigators.***313** [FN68] Defendants attempt to thwart plaintiffs by burying them in documents; [FN69] plaintiffs abuse interrogatory requests to go on "fishing expeditions" and to pressure defendants to settle possibly unmeritorious claims. [FN70] Making matters worse, courts have little ability to distinguish legitimate uses of the discovery process from abuses. [FN71]

There is also merit to the Court's unstated assumption that procedural rules should ultimately be normatively evaluated under a social welfare calculus. [FN72] While Justice Stevens thought it significant that antitrust defendants "are some of the wealthiest corporations in our economy," [FN73] this consideration is irrelevant to an evaluation of the discovery system. Even if they are borne by wealthy corporations, the costs of discovery are social costs that should be avoided if discovery as it exists does not create a correspondingly greater social benefit.

Yet even if procedural rules should be normatively evaluated according to their costs and benefits, it does not follow that judges should perform the normative analysis in deciding cases. On the contrary, a judicial opinion is simply the wrong forum for engaging in a consequentialist revision of procedural rules. The Court's institutional competence lies in interpreting legal sources, not in speculating about the real-world consequences of its rulings. [FN74] Unlike the Advisory Committee on Civil Rules, which can commission empirical research [FN75] into the costs and benefits of heightened pleading, the Court can rely only on the facts of the case before it and the Justices' own intuitions. In Twombly, the Court assumed that a heightened pleading standard was a desirable solution to discovery's problems, but it did not marshal***314** any evidence that a plausibility requirement would improve social welfare. Rather, the Court proceeded on a hunch. It is especially troubling that the Court encouraged judges to dismiss cases based on their own perceptions of plausibility, which, at the pleading stage, may represent little more than the judge's own uninformed biases and predispositions. But given that the Court's decision was premised on the Justices' confidence in their ability to intuit the empirical effects of the new pleading standard, it is perhaps unsurprising that the standard is itself premised on faith in judges' abilities to intuit how meritorious claims are before seeing any evidence.

There is no doubt that a heightened pleading standard will reduce the costs that discovery imposes generally, because fewer complaints will survive Rule 12(b)(6) motions and reach the discovery phase. Yet the heightened standard might result in the dismissal of some complaints that would be highly socially beneficial if successful. Consider Twombly itself. Discovery would undoubtedly have been very expensive. But if the allegations in the complaint were true, the costs of discovery would pale in comparison to the potentially massive social cost of the defendants' anticompetitive practices. [FN76] If so, the Court did

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society a great disservice by dismissing the complaint. Of course, the claim in Twombly might have lacked merit; but even if the Court's new pleading standard weeds out numerous meritless claims, it might still be detrimental to social welfare if it results in the dismissal of valid claims whose benefits would exceed the costs of meritless claims.

Nor did the Court consider the fact that heightened pleading standards increase the cost of litigation for all plaintiffs, not merely those filing meritless claims. After Twombly, lawyers will have to spend more time obtaining facts and drafting complaints in order to ensure survival of a motion to dismiss. While the high costs of discovery in cases like Twombly are particularly salient, [FN77] it is not clear that they are ultimately greater than the large number of small costs that heightened pleading requirements impose on plaintiffs throughout the system.

Professor Stephen Burbank has criticized the Supreme Court for approving amendments to the Federal Rules without adequate empirical investigation of their costs and benefits. [FN78] Twombly represents an even greater failure by the Court to think seriously about the procedural***315** changes it approved. The Court could have, and should have, left the decision to implement heightened pleading in the hands of institutions equipped to make legislative-type policy judgments [FN79]--either the Judicial Conference or Congress, which has the ultimate authority to establish the rules of federal civil procedure. [FN80]

The Court may be correct that requiring plausibility of complaints is the solution to discovery's problems. But the Court had very little reason to be sure that it was applying the correct remedy to a perceived sickness in the civil justice system. Twombly demonstrates the dangers of uncautious, consequentialist judging. Perhaps a new set of reformers should rewrite the Federal Rules in light of what we now know about the failings of discovery. But the Court, which has a limited ability to rigorously consider the impact of procedural innovations, should stick to interpreting the Federal Rules using traditional methods of legal interpretation. If so, the Court will, at the very least, be sure it is not making things worse.

[FN1]. Richard L. Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 Colum. L. Rev. 433, 433 (1986).

[FN2]. Fed. R. Civ. P. 8(a)(2).

[FN3]. 355 U.S. 41 (1957).

[FN4]. Id. at 45-46.

[FN5]. 127 S. Ct. 1955 (2007).

[FN6]. 15 U.S.C. §1 (2000 & Supp. IV 2004).

[FN7]. Twombly, 127 S. Ct. at 1961.

[FN8]. Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174, 176 (S.D.N.Y. 2003).

[FN9]. Id.

[FN10]. Id.

[FN11]. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

[FN12]. Twombly, 313 F. Supp. 2d at 177.

[FN13]. Id.

[FN14]. Id. at 178.

[FN15]. Since the consent decree broke up AT&T's monopoly, the seven Bell operating companies have been consolidated into four service providers: Verizon Communications, Inc. (formerly Bell Atlantic Corporation), SBC Communications, Inc., Qwest Communications International, Inc., and BellSouth Corporation. Twombly, 127 S. Ct. at 1962 n.1.

[FN16]. Twombly, 313 F. Supp. 2d at 176-77.

[FN17]. Id. at 189.

[FN18]. Id. at 180.

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[FN19]. Judges Raggi and Hall joined Judge Sack's opinion.

[FN20]. See Fed. R. Civ. P. 9(b) (requiring fact-specific pleading for "all averments of fraud or mistake").

[FN21]. Twombly v. Bell Atl. Corp., 425 F.3d 99, 107 (2d Cir. 2005).

[FN22]. Id. at 108-09.

[FN23]. Id. at 118-19 (omission in original) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

[FN24]. Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Breyer, and Alito joined Justice Souter's opinion.

[FN25]. Twombly, 127 S. Ct. at 1964.

[FN26]. Id. at 1965.

[FN27]. Id. at 1964-65.

[FN28]. Id. at 1965.

[FN29]. Id.

[FN30]. Id. at 1967.

[FN31]. Id.

[FN32]. See id.

[FN33]. Id. at 1968 (alteration in original) (quoting Conley v. Gibson, 355 U.S. 41, 45 (1957)).

[FN34]. Id. at 1969.

[FN35]. Id.

[FN36]. Id. at 1971.

[FN37]. Id. at 1973 n.14.

[FN38]. Id.

[FN39]. Justice Ginsburg joined all but the final part of Justice Stevens's dissent.

[FN40]. Twombly, 127 S. Ct. at 1975 (Stevens, J., dissenting).

[FN41]. See id.

[FN42]. Id. at 1975-76.

[FN43]. Id. at 1976.

[FN44]. Id. at 1978 n.4.

[FN45]. Id. at 1978.

[FN46]. Id. at 1983.

[FN47]. Id. at 1985-86.

[FN48]. Id. at 1988.

[FN49]. Id. at 1989.

[FN50]. Id.

[FN51]. Some scholars view Twombly as primarily an antitrust case. See, e.g., Posting of Mike O'Shea to Concurring Opinions, http://www.concurringopinions.com/archives/2007/06/how_cautionary_1.html (June 6, 2007, 6:47 PM). If so, Twombly may do little to change the law. See Scott Dodson, Pleading Standards After Bell Atlantic Corp. v. Twombly, 93 Va. L. Rev. In Brief 121, 123 (2007), http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf (observing that Twombly is "perhaps unremarkable from an antitrust perspective"); Posting of Einer Elhauge to The Volokh Conspiracy, http://volokh.com/archives/archive_2007_05_20-2007_05_26.shtml#1179785703 (May 21, 2007, 6:15 PM) (arguing that Twombly is "quite insignificant" because it merely ratified what was already common practice in the lower courts). Several years before Twombly, Professor Christopher Fairman wrote that many lower courts were already requiring heightened pleading in section1 claims. See Christopher M. Fairman, The Myth of Notice Pleading, 45 Ariz. L. Rev. 987, 1014-15 (2003). More than

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twenty years ago, Professor Richard Marcus observed that lower courts had revived fact pleading in conspiracy cases generally. See Marcus, supra note 1, at 450. Notwithstanding the appellate panel's decision in Twombly, the Second Circuit had previously affirmed dismissals of antitrust conspiracy complaints that failed to allege sufficient facts. See, e.g., Heart Disease Research Found. v. Gen. Motors Corp., 463 F.2d 98, 100 (2d Cir. 1972).

Other scholars, however, argue that Twombly's significance extends to civil actions generally, and consider the ruling a drastic departure from previous pleading practice. See Dodson, supra, at 124 (reading Twombly as holding "that mere notice pleading is dead for all cases and causes of action"); Posting of Michael Dorf to Dorf on Law, http://michaeldorf.org/2007/05/end-of-notice-pleading.html (May 24, 2007, 7:35 AM) (predicting that Twombly, if not limited to the antitrust context, will "likely do great damage in the lower courts"). Professor Michael Dorf argues that the final footnote of Justice Souter's opinion, which denied creating a heightened pleading standard, is "simply false." Posting of Michael Dorf to Dorf on Law, supra. This conclusion is supported by the fact that Twombly interpreted Rule 8, which applies to all civil actions except for the few governed by Rule 9's special pleading requirements. See Fed. R. Civ. P. 9(b). It is possible, however, that even viewed as a broad civil procedure opinion, Twombly is not as significant as Professor Dorf and others believe. Just as the majority and dissent in Twombly disagreed about the extent to which Conley's "no set of facts" formulation had been followed, scholars disagree about the extent to which the federal system is, in practice, a notice pleading regime. Professor Fairman announced before Twombly that notice pleading had become a "myth," Fairman, supra, at 988, and Professor Marcus declared in 1986 that notice pleading was a "chimera," Marcus, supra note 1, at 451.

Some commentators contend that Erickson v. Pardus, 127 S. Ct. 2197 (2007) (per curiam), which the Supreme Court decided shortly after deciding Twombly, limits Twombly's impact. Erickson, citing Twombly, held that the Tenth Circuit, in affirming the dismissal of a prisoner's 42 U.S.C. §1983 claim for failure to allege sufficient facts, had "depart[ed] in so stark a manner from the pleading standard mandated by the Federal Rules" that a summary reversal was necessary. Id. at 2198. Several commentators have argued that Erickson shows that Twombly should be read less expansively than some have suggested. See, e.g., Posting of Mike O'Shea, supra. But see Posting of Scott Dodson to Civil Procedure Prof Blog, http://lawprofessors.typepad.com/civpro/2007/06/dodson_on_erick.html (June 12, 2007).

[FN52]. See Leatherman v. Tarrant County Narcotics Intel. & Coordination Unit, 507 U.S. 163, 168 (1993) (citing the expressio unius maxim to support the proposition that civil actions other than those to which Rule 9(b) applies do not need to be pleaded with particularity).

[FN53]. Fed. R. Civ. P. Form 9.

[FN54]. See Twombly, 127 S. Ct. at 1968.

[FN55]. Fed. R. Civ. P. 84. Professor Randy Picker interprets Form 9 similarly, arguing that "Form 9 tells the plaintiff to plead the facts that she can know before she undertakes discovery." Posting of Randy Picker to The University of Chicago Law School Faculty Blog, http://uchicagolaw.typepad.com/faculty/2006/11/reading_twombly.html (Nov. 28, 2006, 9:46 AM).

[FN56]. 507 U.S. 163.

[FN57]. Id. at 168-69.

[FN58]. 534 U.S. 506 (2002).

[FN59]. Id. at 515 (emphasis added); see also id. ("[I]t may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)) (internal quotation mark omitted)).

[FN60]. According to Professor Lawrence Friedman, "English common-law pleading was an elaborate contest of lawyerly arts, and winning a case did not always depend on who was in the right or who had the law on their side. The winner might be the better pleader." Lawrence M. Friedman, A History of American Law 96 (3d ed. 2005).

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[FN61]. Dean Clark argued that the Field Code's requirement that plaintiffs plead material facts had been unsuccessful because "the codifiers and the courts failed to appreciate that the difference between statements of fact and statements of law is almost entirely one of degree only." Charles E. Clark, History, Systems, and Functions of Pleading, 11 Va. L. Rev. 517, 534 (1924).

[FN62]. See Charles E. Clark, Pleading Under the Federal Rules, 12 Wyo. L.J. 177, 186-87 (1957).

[FN63]. See Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944).

[FN64]. Clark, supra note 63, at 181; see also Charles E. Clark, The New Federal Rules of Civil Procedure: The Last Phase--Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure, 23 A.B.A. J. 976, 977 (1937) ("There is certainly no longer reason to force the pleadings to take the place of proof, and to require other ideas than simple concise statements, free from the requirement of technical detail.").

[FN65]. See Twombly, 127 S. Ct. at 1966-67; Posting of Randy Picker to The University of Chicago Law School Faculty Blog, http://uchicagolaw.typepad.com/faculty/2007/05/closing_the_doo.html (May 21, 2007, 4:45 PM) ("It is the fear of discovery run amok that drives the majority opinion...."). The Court was almost certainly influenced by law and economics ideas. See Twombly, 127 S. Ct. at 1966 (citing Asahi Glass Co. v. Pentech Pharms., Inc., 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (Posner, J., sitting by designation) (arguing for a plausibility pleading standard in patent antitrust cases because of their "inevitably costly and protracted discovery phase[s]")).

[FN66]. For example, in 1989 Judge Frank Easterbrook noted that the vast majority of federal judges were concerned about discovery's problems. Frank H. Easterbrook, Discovery as Abuse, 69 B.U. L. Rev. 635, 636 (1989). Judge Paul Niemeyer, as Chair of the Advisory Committee on Civil Rules, concluded that, while discovery "work[s] effectively and efficiently in...'routine' cases," it is perceived as "unnecessarily expensive and burdensome" in cases in which lawyers use it actively. Paul V. Niemeyer, Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?, 39 B.C. L. Rev. 517, 523 (1998).

[FN67]. One study of nearly 1000 civil cases involving some discovery expenses found discovery responsible for, on average, half of the total cost of litigation. See Thomas E. Willging et al., Fed. Judicial Ctr., Discovery and Disclosure Practice, Problems, and Proposals for Change 15 (1997).

[FN68]. See, e.g., Easterbrook, supra note 67, at 636; see also Wayne D. Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 Vand. L. Rev. 1295, 1299 (1978).

[FN69]. W. Bradley Wendel, Rediscovering Discovery Ethics, 79 Marq. L. Rev. 895, 901 (1996).

[FN70]. Brazil, supra note 69, at 1322. The drafters of the Federal Rules were at least somewhat aware of this potential problem. See Edson R. Sunderland, Scope and Method of Discovery Before Trial, 42 Yale L.J. 863, 871 (1933) (noting courts' rejection of the argument that "unrestricted discovery would permit one to go on a 'fishing expedition' to ascertain his adversary's testimony" (quoting In re Abeles, 12 Kan. 451, 453 (1874))); see also Stephen N. Subrin, Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules, 39 B.C. L. Rev. 691 (1998).

[FN71]. See Easterbrook, supra note 67, at 638-39.

[FN72]. See Louis Kaplow & Steven Shavell, Fairness Versus Welfare, 114 Harv. L. Rev. 961, 1164-86 (2001).

[FN73]. Twombly, 127 S. Ct. at 1989.

[FN74]. See Jonathan Molot, Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles, 90 Va. L. Rev. 1753, 1793 n.161 (2004) ("In our constitutional structure, judges arguably should not make the legislative-type policy judgments that their institutional position renders them ill-equipped to make.").

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[FN75]. See, e.g., Thomas E. Willging et al., Fed. Judicial Ctr., Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 3 (1996).

[FN76]. See Richard A. Posner, Natural Monopoly and Its Regulation, 21 Stan. L. Rev. 548, 552 n.6 (1969) (explaining how monopoly pricing creates deadweight loss).

[FN77]. Cf. Cass R. Sunstein, The Availability Heuristic and Cross-Cultural Risk Perception, 57 Ala. L. Rev. 75, 87-92 (2005) (explaining how risks that are more available, or familiar, will appear greater, regardless of their actual magnitude in relation to less available risks).

[FN78]. Stephen B. Burbank, Ignorance and Procedural Law Reform: A Call for a Moratorium, 59 Brook. L. Rev. 841 (1993).

[FN79]. See Molot, supra note 75, at 1792-93.

[FN80]. See 28 U.S.C. §§2074-2075 (2000).
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