

**MINUTES**  
**CIVIL RULES ADVISORY COMMITTEE**  
**FEBRUARY 2-3, 2009**

1           The Civil Rules Advisory Committee met in San Francisco on February 2 and 3, 2009, for  
2 a hearing on proposed amendments to Civil Rules 26 and 56, and for a Committee meeting. The  
3 meeting was attended by Judge Mark R. Kravitz, Chair; Judge Michael M. Baylson; Judge Steven  
4 M. Colloton; Professor Steven S. Gensler; Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Peter  
5 D. Keisler, Esq.; Judge John G. Koeltl; Chief Justice Randall T. Shepard; and Judge Vaughn R.  
6 Walker. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus  
7 was present as Associate Reporter. Judge Lee H. Rosenthal, Chair, represented the Standing  
8 Committee. Judge Eugene R. Wedoff attended as liaison from the Bankruptcy Rules Committee.  
9 Laura A. Briggs, Esq., was the court-clerk representative. Peter G. McCabe, John K. Rabiej, James  
10 Ishida, and Jeffrey Barr represented the Administrative Office. Thomas Willging represented the  
11 Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Andrea Kuperman,  
12 Rules Clerk for Judge Rosenthal, attended. Observers included Alfred W. Cortese, Jr., Esq., and  
13 Jeffrey Greenbaum, Esq. (ABA Litigation Section liaison).

*Hearing*

14           The hearing began at 8:30 a.m., February 2, in a Ninth Circuit courtroom. Twenty-four  
15 witnesses testified. The hearing concluded at 4:00 p.m.. A separate summary of the testimony will  
16 be prepared from the transcript and integrated with the summaries of the testimony at earlier  
17 hearings and the summaries of the written comments.  
18

*Meeting*

19           Judge Kravitz began the meeting by noting that the purpose was not to reach final decisions  
20 on any specific questions. Many valuable contributions have been made in the three hearings and  
21 in the written comments that have been submitted. The comment period remains open for another  
22 two weeks, however, and review of the hearing transcripts may underscore the ideas offered. But  
23 it is good to seize the opportunity created by coming together for the hearing to reflect on the broad  
24 questions that were identified in the request for testimony and comments. The Discovery and Rule  
25 56 Subcommittees have work to do in preparing recommendations for the Committee meeting in  
26 April, and will benefit from whatever preliminary guidance may be offered.  
27

*Rule 56: Point-Counterpoint*

28           Judge Kravitz opened the discussion by observing that the “point-counterpoint” procedure  
29 described in proposed Rule 56(c) has provoked an outpouring of comment. Forceful questions have  
30 been raised by judges in districts that have adopted and then abandoned similar procedures, and by  
31 judges with extensive experience both in courts that have similar procedures and in courts that do  
32 not. As often happens in the comment process, the 20 courts that adopted point-counterpoint  
33 practices by local rules have not weighed in. They may believe that there is no point in offering  
34 comments that this procedure has worked well, since publication of the proposal suggests that the  
35 Advisory Committee and Standing Committee are relying on their experience. Acting without  
36 hearing from them might mean giving up on an idea that is better than the picture painted by some  
37 of the comments. And it would be perilous to act without hearing from them in a way that might  
38 require changes in their local practices.  
39

40           Judge Baylson said that the point-counterpoint procedure was recommended after extended  
41 discussion. But the comments that question it have made solid points. The other parts of the  
42 published proposal are valuable, and seem more important than this part. Much good can be  
43 accomplished by going forward with Rule 56 even if the point-counterpoint process is relegated to  
44 honorable mention in the Committee Note. The revised Rule could continue to require “pinpoint”  
45 citations to the record, whether by directing a brief that requires citations or by simply requiring the

46 citations. The rule also could refer to a response brief and a reply brief, and say nothing about local  
47 rules.

48 The discussion opened by these observations continued with a comment that the point-  
49 counterpoint procedure had seemed attractive. But the testimony and comments seem to show that  
50 this procedure can create unreasonable burdens — some litigants inflate the importance of the  
51 statement, disputes about satisfactory implementation of the practice give rise to derivative motion  
52 practice, and judges may not be able to police these problems at reasonable cost to the court and  
53 parties. The Southern District of Indiana rule seems attractive. It requires a statement of undisputed  
54 facts in the movant’s brief, and a responding statement in the nonmovant’s brief; because of page  
55 limits on the briefs, the experience has been much more satisfactory than experience under that  
56 court’s earlier rule that provided for statements and responses as separate papers. The brief  
57 procedure is better integrated than the separate statement procedure.

58 A question was asked as to how the statement of facts and narrative are integrated in the brief  
59 under the practice in the Southern District of Indiana. Ms. Briggs responded that in practice, “all  
60 the facts wind up in the statement.”

61 It was observed that the Local Rule 56.1 statement and counterstatement work very well in  
62 the Southern District of New York. The judge is likely to begin consideration of the motion with  
63 the briefs, looking to the statement and counterstatement only after reading the stories of how the  
64 facts fit into the case. It would be undesirable to write a national rule that requires a statement of  
65 facts as part of the briefs — that would undermine the benefits of the direct point-counterpoint  
66 process. The national rule should not establish a uniform practice that defeats the opportunity to  
67 adopt point-counterpoint local rules. Lawyers do find ways to expand proceedings. The motions,  
68 however, generally do not attack the statement directly. Instead, the motions attack the supporting  
69 affidavits, arguing that the information in the affidavits cannot be produced in a form admissible at  
70 trial. At the same time, it would be a shame to see the other advances embodied in proposed Rule  
71 56 swamped by opposition to the point-counterpoint procedures in subdivision (c).

72 The question of preempting local rules was pursued further. Many districts require a point-  
73 counterpoint procedure much like proposed Rule 56(c). A still greater number require a statement  
74 of facts by the movant, but do not require a point-by-point response. And a plurality of districts do  
75 not require either. It seems fair to assume that many districts prefer their current practices.  
76 Opposition to the point-counterpoint procedure may raise sufficient doubts to defeat it as a national  
77 requirement. But that does not mean that a different practice should be mandated by a national rule  
78 that, in the name of uniformity, prevents local adoption of a point-counterpoint procedure. There  
79 is likely to be significant opposition to any Rule 56 provision that would force uniformity in this  
80 dimension of practice.

81 Another judge observed: “I have point-counterpoint and I don’t want you to take it away  
82 from me.” No one fights “pinpoint citations.” Nor is anyone fighting “deemed admitted” practice,  
83 and that is very important. We protect pro se litigants by telling them they have to make the  
84 counterpoint response. Some courts have local rules prescribing form notices that must be given to  
85 pro se litigants. We should pursue a Rule 56 that does not refer to statements of fact in the rule text,  
86 achieving uniformity in substance without referring to the number of documents comprising the  
87 motion.

88 This discussion opened the question whether the Committee should shape its  
89 recommendations according to its sense of what may prove acceptable in the later stages of the  
90 Enabling Act process. The answer was that the Committee should attempt to draft the best rule it  
91 can, recognizing the advantages of procedures that, because reasonably agreeable, will be readily  
92 enforced by district judges.

93 Further discussion also suggested that the point-counterpoint provisions of proposed Rule  
94 56(c) should be deleted. We cannot be sure, in light of the comments and testimony, that it is the  
95 best practice. Whether or not it is the best practice, it is not so clearly the best practice as to justify  
96 forcing it on reluctant courts. Nor is there a sufficient need for national uniformity to pick one point  
97 on this spectrum and force it on all. There is much in the proposed rule that deserves adoption. It  
98 should be protected by omitting any rule text reference to statements of fact. At the same time, it  
99 is appropriate to preserve principles that people are not fighting about — the “considered  
100 undisputed” provision is an example.

101 A parallel suggestion was that the least satisfactory procedure is one that would require the  
102 judge to scour the record. The parties should be forced to identify the facts and to point to the  
103 materials in the record that support or dispute the facts. There is not as much need to choose  
104 between brief, separate statement, or other mode of presentation.

105 Yet another member suggested that there is a lot of good material even in proposed Rule  
106 56(c). Paragraphs (1) and (2) — the point-counterpoint procedure and the authority to omit it —  
107 should be deleted. The remainder of (c), with some reorganization, can preserve the pinpoint-  
108 citation requirement and other useful procedures. These procedures will be uniform. There is no  
109 need to adopt rule text that notes such matters as point-counterpoint procedure.

110 In a similar vein, it was noted that Rule 56 text should not of itself encourage local rule  
111 experimentation. And that departure by an order in a particular case gives notice to the parties in  
112 a way that local rules sometimes do not. There is a difference between prohibiting and inviting local  
113 rules, especially when there is no apparent correlation to differences in local conditions such as case  
114 loads, local culture, or local state practice. Lawyers and judges are enormously inventive. There  
115 will be local rules. And judges will develop case-specific orders.

116 It was suggested that the Subcommittee might frame a draft that neither adopts nor forbids  
117 point-counterpoint procedure.

118 A counter-suggestion was that perhaps there should be a draft that retains the point-  
119 counterpoint procedure as a model for opting in. Opposition was expressed on the ground that the  
120 model would become a default, inviting all the problems that have been encountered in districts that  
121 have adopted and then abandoned similar procedures. The Committee Note can refer to point-  
122 counterpoint as one way of framing summary-judgment motions; that would leave the districts that  
123 want this procedure free to adopt it, with their own local variations. Of course districts that are  
124 adamantly opposed will not adopt it. But if there is an opt-in model in Rule 56, some judges will  
125 start to impose it, and with it impose added costs on the parties. This procedure does not change the  
126 standard for summary judgment, but it does impose costs.

127 Another member confessed to liking point-counterpoint in practice. At first he was prepared  
128 to force it through as a matter of uniform national practice. But the comments and testimony show  
129 that those who oppose it have genuine and valid reasons. The opposition is more than distaste for  
130 being dictated to. Although he would not change his local point-counterpoint rule, it cannot be said  
131 that this practice is so clearly the best practice that it should be forced on all federal courts.

132 *Rule 56: “Should,” “Must,” “Shall,” or Finesse*

133 The Style Project adopted “should” grant summary judgment to replace “shall.” Proposed  
134 Rule 56 carries forward “should” as the word in place from December 1, 2007. But the comments  
135 and testimony, and discussion at the January Standing Committee meeting, continue to press the  
136 question whether it was wise to replace “shall” with “should.” Many of the comments express a  
137 preference for “shall,” often a strong preference, and view “must” as an alternative inferior to “shall”  
138 but better than “should.” The issue remains very much alive, along with the question whether it is

139 better to finesse the question by omitting any direction to the court. Rather than say that the court  
140 shall, should, or must grant summary judgment, the rule might say simply that a party may move for  
141 summary judgment, asserting that there is no genuine dispute as to any material fact, etc.

142 A first observation was that the Rule 56 proposal is not intended to change the “substantive  
143 law” of summary judgment. The concern with “should” is that it takes a definitive position on an  
144 unsettled issue — what is the nature of “discretion” to deny summary judgment when a party shows  
145 there is no genuine issue and that it is “entitled to judgment as a matter of law.” At best this is a  
146 matter of dispute. The Supreme Court’s opinions are not clear — they include seemingly  
147 inconsistent pronouncements and can be read to go either way. The best way to retain pre-2007 law  
148 is to substitute “must.” Rule 56 uses mandatory language, and the Celotex opinion says that it  
149 “mandates” summary judgment when an appropriate showing is made. “Must” avoids changing  
150 that. To the extent that the Supreme Court has recognized discretion to deny, it has done so in the  
151 context of a rule that, with “shall,” used mandatory language. The same discretion will remain with  
152 “must” as mandatory language. If this discretion is eventually extended, then the Committee should  
153 revisit the reference that the movant is “entitled” to judgment as a matter of law. Beyond that, none  
154 of those offering testimony and comments have urged that summary judgment should be denied  
155 when there is no genuine dispute. And it is better to avoid the alternative that finesses the issue by  
156 removing all mandatory or directive language. The standard has been in the rule since 1938. If we  
157 take it out, there is a real risk that we will be changing the law in ways that we cannot anticipate.  
158 “Must” is better on the assumption that we will not be allowed to say “shall.”

159 It was urged in a similar vein that a lot of case law has developed around “shall.” Care is  
160 required in tinkering with it. With “should,” the Style Project “launched something that people take  
161 as changing the law.”

162 The finessing alternative was offered again. Rule 12 provides a model. It describes grounds  
163 for various motions, but does not direct the court how to rule. But it was suggested again that  
164 removing the familiar direction will open the door for unforeseeable developments. In 1938 Rule  
165 56 directed that “[t]he judgment sought shall be rendered forthwith if [the supporting materials]  
166 show that, except as to the amount of damages, there is no genuine issue as to any material fact and  
167 that the moving party is entitled to a judgment as a matter of law.”

168 The long pedigree of “shall” led to the suggestion that our first choice should be to restore  
169 “shall” to the rule. We should not yield to the impression that the Style Subcommittee conventions  
170 are ironclad and unchangeable no matter what the justification for using “shall.”

171 Reversion to “shall” was offered as an illustration of the challenges that will confront a  
172 Committee Note explanation of each of the several alternatives. The Note might well remain as  
173 published if “should” is retained, leaving it to the Report to the Standing Committee to explain the  
174 decision.

175 A Committee Note explaining a change to “must” will prove trickier. Some explanation  
176 seems called for when the rule text as recommended for adoption departs not only from what was  
177 published but from the text adopted in 2007 with a Committee Note explaining that there is  
178 discretion to deny summary judgment even when the movant shows there is no genuine dispute as  
179 to any material fact. The explanation might be misleading if it stated simply that there is no  
180 discretion. There are many cases stating that there is discretion to deny. A supposed “entitlement”  
181 to summary judgment would be no more than conditional — many cases say that when denial of  
182 summary judgment is followed by trial, the question is the sufficiency of the trial evidence. If there  
183 is sufficient evidence at trial to defeat judgment as a matter of law, the jury verdict stands even  
184 though the summary-judgment record would not have sufficed to defeat judgment as a matter of law.  
185 It should be recognized that a showing sufficient to carry the summary-judgment burden may turn

186 on matters of credibility better left for trial, particularly when inference and credibility  
187 determinations may be interdependent. It might be useful to honor the frequent practice of avoiding  
188 close calls on summary judgment, particularly when partial summary judgment leaves the way open  
189 for trial on issues that will require consideration of substantially the same evidence as bears on the  
190 issues that might be resolved by summary judgment. The relationship between the timing of the  
191 motion and the progress of discovery, including the need for further discovery under present Rule  
192 56(f) as slightly revised in proposed Rule 56(d), might be noted. It might be made clear that “must”  
193 does not entail an obligation to defer trial in order to take the time required to decide a motion filed  
194 too close to trial to support reasoned consideration before trial.

195 A Committee Note explaining some alternative that omits any direction about granting the  
196 motion could present still greater challenges. The effort to say that the new form is intended to carry  
197 forward whatever was meant by “shall,” without offering any direction to the court, could easily be  
198 ignored in the early days and almost certainly would be overlooked in the future.

199 A Committee Note explaining restoration of “shall” could be reasonably straight-forward.  
200 It would note the tide of adverse comments expressing the view that “should” will influence courts  
201 toward a gradual and undesirable expansion of the discretion that has been recognized under “shall.”  
202 It could add that the choice was viewed as a forced choice between “must” and “should,” but express  
203 the view that the unique history of Rule 56, stretching back to the original language adopted in 1938,  
204 cannot reasonably be captured in either word. Restoring “shall” here would not create any  
205 ambiguity for other Civil Rules or any other set of rules, at least if it remains unique.

206 Further support for “shall” was expressed by asking what are the arguments against using  
207 it? Restoring it would provide the best protection against changing practice by a forced choice  
208 between the equally inadequate alternatives, “must” or “should.”

209 It also was noted that many of the comments suggest that “should” is a “thumb on the scale”  
210 pushing for expanded discretion to deny summary judgment, or simply not to rule on the motion.

211 The alternative of dropping all words commanding or directing the court was raised again.  
212 Since the Style Project shifted to the direct voice, several rules say that the court “must” do  
213 something. But, as with Rule 12, it is possible to describe the grounds for a motion without  
214 addressing the court’s action. The Committee Note could say that no change in burdens or standards  
215 is intended. It was responded that a rule without some form of the traditional direction will spur  
216 another round of litigation that seeks to challenge or recreate the standard.

217 The last comment continued by observing that the choice is made difficult by the dictate that  
218 “shall” must never be used. “Shall” is the cleanest way to express the standard that it fostered over  
219 a period of nearly 70 years. If we cannot have that, “must” is the better alternative.

220 Further support was expressed for “shall” as the best alternative. The Committee Note would  
221 retract the 2007 Committee Note. Perhaps the Committee Note should say that the nature and extent  
222 of the discretion to deny a motion that seems to show there is no genuine dispute as to any material  
223 fact remain uncertain and are hotly disputed. The only way to allow natural evolution without  
224 inviting unforeseeable — and therefore unintended — consequences is to go back to the traditional  
225 word.

226 After agreeing that “shall” is the best choice, it was suggested that a way out might be found  
227 by some expression such as “must, unless for good cause shown on the record.” This suggestion  
228 was met by the counter that invoking “good cause” could easily be read to confer greater discretion  
229 than “should.”

230 Yet another member urged that “shall” should be restored. This choice has in fact been  
231 shown to be the best way to achieve the goals of the Style Project. The extensive comments and  
232 testimony on the current proposal have shown that neither “should” nor “must” are capable of  
233 carrying forward the meaning that has accrued to “shall” in Rule 56. This situation is unique within  
234 the Civil Rules. “Shall” should be restored here, without any thought that it should be reconsidered  
235 in other rules. To be sure, the present proposal is not confined by the goals of the Style Project.  
236 Changes in the level of discretion are well within the reach of the ordinary amendment process. But  
237 no one has expressed any desire or intent to change the pre-Style standard, not even at the level of  
238 defining further the discretion to deny summary judgment when the established standard seems to  
239 be satisfied.

240 This discussion concluded by noting that Rule 56 may present a case that falls within another  
241 rule of the Style Project. “Sacred phrases” were carried forward without change, partly for the  
242 reassurance of familiarity but often because any change in expression might change meaning. Had  
243 the comments heard now been stimulated by the Style Project — which provoked very few  
244 comments and only one hearing — the style question could have been fought out then. By  
245 substituting “should” for “shall,” the Style Project may have inadvertently desecrated a sacred  
246 phrase. Reconsideration may be proper in light of the determination that the present project also is  
247 not an appropriate occasion to tinker with the element of discretion that has been recognized but not  
248 defined as the law has evolved.

249 A different point was made to finish the Rule 56 discussion. Even Style Rule 56 refers to  
250 materials that “show” there is no genuine issue. We should think about restoring this word as a  
251 means of ensuring that the new rule does not inadvertently affect the still uncertain definition of the  
252 Rule 56 moving burden after the Celotex decision. The choice may depend on how much of  
253 proposed Rule 56(c) survives — (c)(4) identifies the “Celotex no-evidence” motion, and responses,  
254 “showing” the required things. It might be good to balance these by restoring “show” to 56(a).

255 Discussion of Rule 56 concluded by noting that the Subcommittee will consider alternative  
256 drafts, most likely by conference call early in March. The Subcommittee should have proposals for  
257 consideration at the April Committee meeting. If all goes smoothly, the Committee will be able to  
258 make recommendations to the Standing Committee for consideration at the Standing Committee’s  
259 June meeting.

260 *Rule 26*

261 Professor Marcus opened discussion of the Rule 26 proposals. Although Daniel Girard is the  
262 only Rule 26 Subcommittee member able to attend this hearing and meeting, it will be useful to  
263 review the issues raised by testimony and comments with the Committee. The issues are raised in  
264 the January 27 Memorandum on Pending Issues prepared by Professor Marcus for the Committee.

265 The first and most basic question is whether to carry forward with these proposals. The  
266 proposals respond to pragmatic concerns that have been raised by practicing lawyers, most notably  
267 by the Litigation Section of the American Bar Association. These concerns reflect a judgment,  
268 based on widespread experience, that the extensive inquiries into the evolution of draft reports and  
269 into attorney-expert communications seldom yield any useful information but impose high costs.  
270 They do not necessarily reflect any abstract evaluation of what discovery might fit best in an ideal  
271 world of relationships between adversary counsel and their trial-expert witnesses. From the  
272 beginning, the Committee and Subcommittee have considered the objection that restoring the  
273 discovery limits included in the proposed amendments implies acceptance of unworthy practices that  
274 use experts as advocates rather than true witnesses. This objection has been expressed forcefully  
275 in a comment signed by many law professors, 08-CV-070. Their concern is legitimate. But the  
276 hearings and comments show that the bar in general supports the proposals. The changes wrought

277 by the 1993 amendment of Rule 26(a)(2) and the accompanying Committee Note were not for the  
278 better. So the question: should the proposals be abandoned? By consensus the Committee  
279 determined to proceed with the proposals.

280 A distinct question has been raised as to the possible effects of the proposed amendments on  
281 Daubert determinations of admissibility. One tangential source of information is that the New Jersey  
282 lawyers participating in the New Jersey miniconference unanimously agreed that the New Jersey  
283 discovery rules similar to the Rule 26 proposals are a good thing, but disagreed about the wisdom  
284 of the Daubert approach to expert testimony. No hint there that the discovery rule has had an effect  
285 one way or the other on Daubert determinations. This question could be addressed by adding to the  
286 Committee Note a statement that the discovery rules do not affect Daubert determinations: "These  
287 amendments signal no retreat from the judicial gatekeeping function established by the decision in  
288 *Daubert* \* \* \*." The addition might be placed with the material at line 153 on p. 57 of the  
289 publication book. No one has offered any reason to suppose that Daubert determinations will be  
290 hampered by limiting discovery as the proposals would do. It was agreed that it would be desirable  
291 to consult with Professor Capra, Reporter for the Evidence Rules Committee, about the form any  
292 statement about Daubert might take.

293 Identifying the expert witnesses to be covered by the work-product protection for attorney-  
294 expert communications also has been raised. Several commentators have urged that the protection  
295 should extend to some or all of the witnesses that are not required to give a Rule 26(a)(2)(B) report  
296 — the "disclosure" experts covered by proposed 26(a)(2)(C). These are witnesses not "retained or  
297 specially employed to give expert testimony in the case," and "whose duties as the party's employee  
298 [do not] regularly involve giving expert testimony." The broadest suggestion is to protect  
299 communications with any witness who would be testifying under Evidence Rule 702. It would be  
300 easy to draft the extended protection. Most of the comments, however, have focused on experts who  
301 are employed by a party but do not regularly give expert testimony. It is argued that the lawyer must  
302 be as free to communicate with such expert witnesses as with those retained or specially employed  
303 as experts, or with those regular employees who regularly give expert testimony. It might be  
304 somewhat more difficult to draft provisions extending work-product protection to employee experts,  
305 given the prospect that former employees might well become involved. However that may be, all  
306 of the pre-publication comments and discussion focused on outside experts. There was no  
307 suggestion that discovery of employee experts presented similar problems, and indeed it was  
308 suggested that the relationship between attorney and employee-expert is different from the  
309 relationship with an independent expert.

310 An additional concern was expressed: often employee experts also have fact knowledge apart  
311 from their expert evaluations. It could be difficult in practice to sort through the distinction between  
312 discovery of fact knowledge and discovery aimed at communications in the course of preparing  
313 expert testimony. It was pointed out, however, that extending the protection of proposed Rule  
314 26(b)(4)(C) would not limit in any way discovery as to the employee's fact knowledge. It would  
315 not limit discovery as to the development of the employee's expert opinion, apart from  
316 communications with counsel. And discovery would be freely available as to communications with  
317 counsel as to compensation, facts or data identified by counsel and considered by the expert, and  
318 assumptions that counsel provided and the expert relied upon.

319 Beyond fact discovery, it was noted that several of the commentators sought work-product  
320 protection because of uncertainties as to the reach of attorney-client privilege for communications  
321 with a party's employees. Some states use a "control group" test that limits the number of  
322 employees who come within the privilege. Former employees may or may not be within the  
323 privilege. Employees who have independent counsel present similar issues. It is not clear that the  
324 variability of state privilege law is an important consideration in shaping federal discovery rules.

325 Discussion pointed out that the proposal to extend work-product protection arose from  
326 concern with the complexity and expense of expert-witness discovery that generally yields little  
327 useful information and that impedes the development of expert opinions and testimony. Consensus  
328 was reached as to draft reports or disclosures — all experts are protected. As to communications,  
329 there are risks in attempting to freeze something in the rule as to employees or former employees.  
330 Perhaps some general formulation could be found, giving discretion to the judge in a way that avoids  
331 the need for complex drafting about propositions that are not firmly set. There is a risk of abuse if  
332 we simply protect communications with all employees — an attorney, for example, might seek to  
333 limit discovery by simply asserting that a former employee is an expert witness.

334 A different observation was that the present project was launched to undo the unanticipated  
335 bad effects of the 1993 Committee Note. The proposal seeks to create a protection against the  
336 problem the Note created. If we do not say anything about communications with employee  
337 witnesses, there may be a negative implication that they are not protected by work-product doctrine.  
338 This observation was met by the suggestion that before 1993, it would have been assumed that work-  
339 product protection applies to all attorney-expert communications. The 1993 Committee Note never  
340 purported to change that as to experts not required to make a Rule 26(a)(2)(B) report. But striking  
341 “or other information” from Rule 26(a)(2)(B) has not seemed enough. Still, adding rule text “could  
342 create headaches.” Perhaps the Committee Note could address this topic.

343 A committee member agreed that “it does seem a bit odd to deny protection for an in-house  
344 expert.” But the proposal does a lot; it may not be wise to attempt to do everything. Many  
345 employee experts will be “hybrid” fact and expert-opinion witnesses. There may be too many  
346 permutations to address in rule text. The request for comments did address these questions, but no  
347 specific rule text was proposed. Adding new rule text now might be risky. The three hearings on  
348 the 2008 proposals show that we learn a lot from reactions to specific rule language. It may be wise  
349 to let this possibility go by, waiting to see whether problems we did not hear about during the pre-  
350 publication phase emerge.

351 Another committee member seconded the observation that, at least from a plaintiff’s  
352 perspective, there is a potential for abuse if employee experts are brought within the work-product  
353 protection of proposed Rule 26(b)(4)(C).

354 It was agreed that the Subcommittee will consider the question of non-Report, 26(a)(2)(C)-  
355 disclosure, experts.

356 Another issue raised by many comments is whether the work-product protection for  
357 communications should extend to communications with an expert’s assistants. This question seems  
358 to arise with respect to independent, non-employee experts. An expert may rely on others to do a  
359 lot of the work that supports the opinion. One event, probably common, is that the attorney  
360 communicates with the expert through assistants who act as conduits. The Committee Note could  
361 say that the protection extends to communications through a subordinate as conduit, or made directly  
362 to the expert in the presence of a subordinate. One place for this statement would be on p. 57 of the  
363 publication book, after line 167. A different sort of event, also probably common, is that the  
364 attorney may want to talk with the subordinate as if, in substance, a consulting expert who will not  
365 be testifying at trial. It is not clear how we should deal with this possibility.

366 The distinction between subordinate as conduit and subordinate as consulting expert was  
367 taken up by suggesting that focus on the “conduit” function may be too narrow, an attempt to  
368 squeeze too much into one word. We want to protect communications with the expert’s team. The  
369 attorney is talking to the assistant as an agent of the expert; the situation is akin to the “common  
370 interest” aspect of privilege doctrine.

371 The distinction was reiterated. It is easy to conclude that protection should extend to  
372 communications with an assistant as conduit to the expert. But the lawyer may well talk to the  
373 assistant understanding that the conversation may not go to the expert. The assistant still may be  
374 acting as agent for the expert. The assistant as agent may exercise discretion in deciding what to  
375 report to the “boss expert.” “The idea is to provide wide protection to avoid gymnastics.”

376 Agreeing that it makes sense to protect communications with the expert’s staff, it was asked  
377 how often the question comes up? “Who notices a deposition of the staff person who has not been  
378 designated as a trial-witness expert”? One witness at the San Antonio hearing said this had  
379 happened, but the situation was not described in sufficient detail to advance understanding of  
380 possible problems.

381 It was suggested that the staff-assistant question could be addressed by a simple sentence in  
382 the Committee Note. But it also was noted that Committee Notes should be kept as short as  
383 possible.

384 Another set of issues may be described as “logistical.” Suppose a person has already been  
385 deposed for fact information and then is disclosed as an expert witness: must a party obtain consent  
386 or an order for a second deposition to explore the expert opinion? Would a second deposition count  
387 against the presumptive limit of 10 depositions per side? Draft Committee Note language urging  
388 a reasonable approach to these questions was considered and dropped. It could be restored. But  
389 “anything specific would be too specific.” Should we try to say something? Although good lawyers  
390 have raised this concern, judges will work it out. It is likely that a Committee Note statement would  
391 use quite a few words, and do little more than recommend flexibility. The Committee Note should  
392 not become a practice guide. And even if an attempt were made to identify best practices, it would  
393 be difficult to describe all the appropriate factors.

394 The comment from the Eastern District of New York committee urges reconsideration of an  
395 issue already considered. The Advisory Committee debated a fourth exception that would take  
396 outside the Rule 26(b)(4)(C) work-product protection communications “defining the scope of the  
397 assignment counsel gave to the expert regarding the opinions to be expressed.” This exception was  
398 rejected because it would be difficult to find language that does not expand the exception to a point  
399 that destroys protection for any communication. The wide scope of discovery that remains as to the  
400 origins and development of the opinion, including the three exceptions already built into (b)(4)(C),  
401 seems enough. The Eastern District committee is concerned that as drafted the rule will not permit  
402 the discovery described as permissible in the request for comment, see p. 47 in the publication book.  
403 But the rule text as published does permit this discovery; it is only attorney-expert communications  
404 outside the three exceptions that are protected. And even that protection is defeasible if a party  
405 makes the showing required to defeat work-product protection. This discussion concluded without  
406 anyone suggesting any interest in reconsidering this question.

407 The next-to-final paragraph of the proposed Committee Note notes that Rule 26 focuses only  
408 on discovery, but expresses an expectation “that the same limitations will ordinarily be honored at  
409 trial.” It was agreed that inclusion of this paragraph should be reconsidered. It has been used to  
410 support arguments that Rule 26 is being used to create an evidentiary privilege that under § 2074(b)  
411 can take effect only if enacted by Congress. Professor Capra, Reporter for the Evidence Rules  
412 Committee, believes it unwise to address evidence rulings at trial in a Civil Rules Committee Note.  
413 The Evidence Rules Committee shares that concern in some measure. This paragraph makes it more  
414 difficult to understand that Rule 26 is only a discovery rule, not a privilege rule. Some will argue  
415 to Congress that the Note shows the rules committees are resorting to subterfuge to evade Enabling  
416 Act limits. The expectation stated in the Note, moreover, is not necessary to make the discovery  
417 limits effective. There are practical reasons to avoid at trial the kinds of wasteful behavior found  
418 in depositions — a judge will understand the unimportance of the information being pursued, and

419 a jury will quickly become impatient. In addition, most lawyers will prefer to avoid asking  
420 questions with unknown answers.

421 The discussion of Rule 26 concluded by noting that the Discovery Subcommittee will  
422 consider the testimony and comments and prepare a final proposal — perhaps with some alternatives  
423 — for consideration at the April Advisory Committee meeting.

424 *2010 Conference*

425 Judge Kravitz noted that planning is under way for the conference to be held in 2010. The  
426 conference will consider the basic structure of the notice-pleading/discovery/summary judgment  
427 system created in 1938. Anxiety about discovery of electronically stored information continues to  
428 grow to levels that demand reflection on the system within which discovery operates. This endeavor  
429 will be important even if it does not lead to immediate attempts to revise the basic structure.

430 Judge Koeltl will chair the planning committee. The planning committee includes both some  
431 Advisory Committee members and other members.

432 The Federal Judicial Center is moving forward on pulling together empirical data. Tom  
433 Willging and Emory Lee are designing a new discovery survey. RAND is working on e-discovery.  
434 Other researchers also are gathering empirical information.

435 The planning committee is considering whether to ask a few people to prepare initial “think  
436 pieces,” of modest length, to help focus further planning and stimulate discussion by those who will  
437 be recruited for the panels.

438 The Conference will be held at the Duke Law School, most likely in mid-May. Dean Levi,  
439 former chair of the Advisory Committee and then the Standing Committee, is pleased to host the  
440 conference.

441 *Adjournment*

442 Judge Kravitz noted that the Discovery Subcommittee is reviewing a list of questions that  
443 arise from Rule 45; a progress report may be available for the April meeting.

444 Judge Kravitz thanked Andrea Kuperman for her valuable research in support of Committee  
445 work. He also thanked the Administrative Office staff.

Respectfully submitted

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Edward H. Cooper  
Reporter